

842965

No. 62167-0

IN THE COURT OF APPEALS, DIVISION ONE
FOR THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 MAR 19 AM 11:08

PHOENIX DEVELOPMENT, INC., a Washington
Corporation, and G & S SUNDQUIST THIRD FAMILY
LIMITED PARTNERSHIP, a Washington
limited partnership,

Appellants,

v.

CITY OF WOODINVILLE, A Washington Municipal Corporation, and
CONCERNED NEIGHBORS OF WELLINGTON, a Washington non-
profit corporation,

Respondent.

**BRIEF OF AMICUS CURIAE BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON**

Timothy M. Harris, WSBA No. 29906
Building Industry Association of
Washington
111 21st Ave. SW
Olympia, Washington 98501
(360) 352-7800
timothyh@biaw.com
Attorney for Amicus Curiae

ORIGINAL

I. INTRODUCTION

This case involves a local jurisdiction's failure to follow the letter of the law in making a quasi-judicial determination on a rezone application. The disposition of this case will have an immediate and definitive impact on the residential home building industry in Washington. Developers, home builders, suppliers, lenders, and subcontractors all rely on the predictability of land-use decision-making by city and county officials. These business people have a justifiable expectation that local jurisdictions will follow their own rules in making quasi-judicial rezone decisions.

The home building industry also promotes increased urban infill within growth management areas as a means of meeting future housing needs in an economical and efficient manner. This idea is hardly new or controversial – every jurisdiction with a comprehensive plan acknowledges the need for density in core areas to take advantage of existing infrastructure.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Building Industry Association of Washington (BIAW) is the state's largest trade association, representing over 12,500 members who in turn employ over 350,000 Washingtonians. BIAW members are involved in all aspects of the development, construction, financing, and selling of residential and commercial real estate. BIAW has long defended the private property rights of individuals before courts and the Legislature, and BIAW

members have a substantial interest in predictability and reliability associated with local jurisdictions following the letter of the law. This is one such case because it involves a land development application that went awry because of apparent community concern, and despite clear legislation and facts favoring the proposal.

III. ISSUE OF CONCERN TO AMICUS CURIAE

Of particular concern to BIAW is whether the City of Woodinville (City) failed to follow its own laws in reaching a quasi-judicial determination to overturn the hearing examiner's decision and deny the subject rezone applications.

IV. STATEMENT OF FACTS

Amicus Curie BIAW adopts and incorporates the factual statement set forth in Appellant's Brief at 5-19.

V. ARGUMENT

A. Local jurisdictions are constrained by their own legislative enactments in making quasi-judicial land use decisions.

Well-settled law holds that local jurisdictions must follow the applicable codes, statutes, and regulations when making determinations like a site-specific rezone. *See, e.g., J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn. App. 920, 931 (2008) (“[a]s a quasi-judicial decision, the Board must evaluate site-specific rezone requests under legislatively established criteria, including the comprehensive plan policies and other development

regulations, and those criteria constrain the County's discretion"). Yet, in its response brief, the City amazingly asserts that the outcome of a quasi-judicial rezone is "wholly speculative," Brief of Respondent City of Woodinville at 25, and that the City "has the discretion to deny a rezone, regardless of how well an applicant may demonstrate compliance with the established common law and local rezone criteria." Brief of Respondent City of Woodinville at 9. Such is not the case. A rezone applicant should be able to rely on a reasonable expectation that the City will follow the law. If all the criteria are met, a rezone should be granted, regardless of community opposition. Under *Storedahl*, The City is constrained by those criteria.

Predictability is greatly important to BIAW members, who rely on established government regulations when making substantial economic commitments. In sharp contrast, the City apparently takes the position that it can ignore its written and formally adopted legislative policies in favor of a decision that is "wholly speculative." If this decision is permitted to stand, this precedent will compromise predictability in local government decision making, and will perpetuate arbitrary and capricious decision-making practices. This lack of predictability needlessly increases the cost of housing by driving up the cost of land development.

B. The Standard set forth in *Woods v. Kittitas County* applies to the resolution of this case.

Amicus BIAW urges this Court to reject the City's proposed anarchic, standard-less site-specific rezone decision-making in favor of the clear hierarchical system set forth in the Growth Management Act (GMA) and in *Woods v. Kittitas County*, 162 Wn.2d 597 (2007). First, the GMA indisputably sets forth state-wide planning policy. *See. e.g., 1000 Friends of Washington v. McFarland*, 159 Wash.2d 165, 149 P.3d 616 (2006) ([t]he Growth Management Act (GMA), chapter 36.70A RCW, is a statewide coordinated effort to, among other things, encourage urban planning and development, reduce sprawl, and protect the environment"); In turn, as stated in *Woods*, the comprehensive plan is the central nervous system of the GMA. It receives and processes all relevant information and sends policy signals to shape public and private behavior. Along with the comprehensive plan, the GMA requires counties to adopt development regulations that are "consistent with and implement the comprehensive plan." *Woods*, 162 Wn.2d at 607 (quoting RCW 36.70A.040(3)(d), (4)(d)).

This hierarchy of land use planning is echoed in the Woodinville Municipal Code. According to WMC 21.04.080, "the purpose of the Urban Residential zones (R) is to implement Comprehensive Plan goals and policies for housing quality, diversity and affordability and to efficiently use residential land, public services and energy." However, in this case,

Woodinville has made a determination on a rezone that fails to account for its own factors: comprehensive plan goals, housing affordability, and the efficient use of residential land and public services. To put it colloquially, the City has lost the forest for the trees.

C. The City Should not be allowed to ignore GMA mandates to encourage dense urban infill development and to make use of existing infrastructure.

Many BIAW members make their living by carrying out the GMA mandate to develop dense urban infill residential projects. This type of development discourages sprawl and encourages housing affordability by making use of existing infrastructure. The projects at issue in the instant appeal do exactly that – in furtherance of the GMA’s goals. *See Peste v. Mason County*, 133 Wn.App. 456, 463 (2006) (“[t]he GMA’s goals include reducing sprawl, encouraging development in areas already characterized by urban development, preserving open spaces and the environment and encouraging affordable housing”) (citing RCW 36.70A.020); RCW 36.70A.011(1) (stating that counties shall designate a UGA “within which urban growth shall be encouraged”).

Almost all jurisdictions in the Puget Sound area require a minimum of four dwelling units per acre within Urban Growth Areas (UGAs). See, e.g., *Futurewise v. Whatcom County and Gold Star Resorts, Inc.* *Western Board* No. 05-2-0013 (stating that the principle of four dwelling units per

acre for urban growth is a “general rule of thumb”). The same mandate is found in Woodinville’s Comprehensive Plan and zoning code, but has been ignored here.

According to WMC 21.04.080(1)(a), developments with densities less than R-4 are allowed “only if adequate services cannot be provided.” R-4 is even considered “low density residential” in the City’s Comprehensive Plan and law use code. WMC *Id.* Here, the petitioner has established that adequate services are available for R-4 lots. Appellant’s Brief at 25-33: “the Council in conclusions 2-8 suggested the proposal should be denied because of ‘deficient public facilities and services.’ *The Council cites to nothing in the record supporting this conclusion.*” *Id.* at 26. (citing App. Ex. G) (emphasis in original).

Indeed, there is virtually no land available in Woodinville for R-4 densities because much of Woodinville’s land inventory is tied up in less dense zoning. Land zoned R-1 (one home per acre) is a remarkably inefficient land use within an urban growth area, yet Woodinville has amazingly zoned 30% of its land at this density. *See* Hearing Examiner’s Conclusions on Rezone Application, number 2.A. Meeting GMA-mandated density goals within these parameters is nigh impossible. Woodinville must give more than lip service to compliance with the GMA,

which is exactly what it is doing by holding a vast number of lots to R-1 zoning within the UGA.

When a site-specific rezone is requested, from R-1 to R-4 (both considered “low density residential”), the City should not be allowed to succumb to neighborhood opposition, but should be required to fulfill its obligations under GMA and its own codes and approve the rezone. *See Maranatha Mining, Inc. v. Pierce County*, 59 Wn.App. 795, 805 (1990) (stating that community opposition alone cannot be the basis for denial of land use proposals).

BIAW members are concerned that if Woodinville is allowed to perpetuate sprawling densities in this case, the other jurisdictions may follow suit. The result will be that those jurisdictions that do meet their density obligations will bear an unfair share of the burdens created by the GMA, and there will be justifiable increased pressure to expand UGAs and urbanize remaining rural lands. Put simply, local jurisdictions cannot meet population density requirements within UGAs if they are able to set aside large swaths of urban land zoned one residential unit per acre.

D. The GMA's housing and urban density requirements should be sufficient to meet Woodinville's "demonstrated need" criterion.

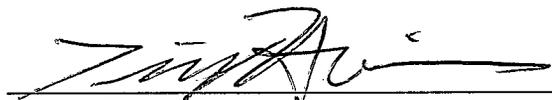
Many jurisdictions in Washington require a rezone proponent to demonstrate a "need" for the proposed rezone as in WMC 21.44.070(1). *See, e.g.*, Bellevue City Code section 20.130.140(a); Lynwood Municipal Code section 21.22.600(b). Unfortunately, there is no case law in Washington to provide any guidance on the interpretation of this term. However, under the City's apparent interpretation of "need," any rezone application may be denied for any arbitrary reason.

Amicus curiae BIAW urges this court to look to the policies of the GMA for guidance in determining whether a "need" has been met. The GMA's goals and mandates contemplate increased densities within UGAs to control sprawl. Accordingly, a rezone that results in increased housing and urban densities in urban areas should be deemed to meet the demonstrated need criterion. Here, there can be no reasonable argument that the subject projects do not address such a need. Both projects create greater density – at a modest four residential units per acre – within a designated urban growth area. Given the large number of lots zoned R-1, the city "needs" greater density to meet the GMA's goals and mandates.

V. CONCLUSION

For the foregoing reasons, amicus curiae BIAW urges the Court of Appeals to overturn the City Council and Superior Court decisions below and reinstate the Hearing Examiner's decision granting a rezone for the subject properties to develop at a reasonable R-4 level.

RESPECTFULLY SUBMITTED this 17thst day of March, 2009.



Timothy M. Harris, WSBA No. 29906
Building Industry Association of
Washington
111 21st Ave. SW
Olympia, Washington 98501
(360) 352-7800
Attorney for Amicus Curiae