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SUPREME COURT NO. 84296-5
COURT OF APPEALS NO. 62167-0-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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 nonprofit corporation,

Respondents.

CITY OF WOODINVILLE'S ANSWER TO
AMICI CURIAE MEMORANDUM

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I. INTRODUCTION

The City of Woodinville (“City”) hereby submits the following answer to the memorandum of *amici curiae* Washington State Association of Municipal Attorneys (“WSAMA”) and Association of Washington Cities (“AWC”). That both *amici* felt compelled to intervene in the above-captioned matter underscores the profound impact of the Court of Appeals decision upon Washington municipalities. The *amici* memorandum also highlights the uncertain interplay between the Land Use Petition Act (“LUPA”) and traditional common law rezone standards, which in turn implicates serious concerns not only for cities and towns, but also for landowners, developers, community groups, land use attorneys and courts throughout the state. The participation of, and arguments raised by, *amici* further demonstrate that the instant case involves issues of substantial public interest warranting Supreme Court review pursuant to RAP 13.4(b)(4).

II. ARGUMENT

A. The Extent to Which LUPA Impacts Traditional Common Law Rezone Standards Is an Issue of Significant Public Importance that Should Be Resolved by the Supreme Court.

The fundamental issue implicated by the Court of Appeals decision concerns whether courts may compel a local legislative body to rezone property. In their memorandum, WSAMA and AWC highlight an

extremely important corollary to this question: Whether this traditional rule survived the Legislature's enactment of LUPA. *Memorandum of Amici Curiae at 5-9*. The ultimate resolution of this issue carries significant implications for a host of affected stakeholders in the local land use process.

Washington courts have historically acknowledged that zoning decisions are the exclusive province of local legislative bodies. *See, e.g., State ex rel. Myhre v. City of Spokane*, 70 Wn.2d 207, 210, 422 P.2d 790 (1967); *Bishop v. Town of Houghton*, 69 Wn.2d 786, 792-93, 420 P.2d 368 (1966); *Besselman v. City of Moses Lake*, 46 Wn.2d 279, 280, 280 P.2d 689 (1955); *Teed v. King County*, 36 Wn. App. 635, 643, 677 P.2d 179 (1984). As *amici* correctly note, this deference is firmly rooted in common law separation of powers considerations: Courts have consistently recognized that they simply lack the authority to compel local elected officials to make policy decisions regarding the grant of a particular rezoning. *Besselman*, 46 Wn.2d at 280; *Teed*, 36 Wn.App. at 644-45. A rezoning is an inherently discretionary policy determination—not a mere ministerial act. *Teed*, 36 Wn. App. at 643.

Whether the enactment of LUPA in 1995 altered this longstanding principle is very significant municipal law issue. The Court of Appeals

simply assumed an affirmative answer to this question and applied the LUPA standards of review to the Woodinville City Council's rezoning denial. *Op. at 9-10*. The court did not acknowledge the *voluminous* pre-LUPA caselaw cited above, much less attempt to reconcile it with the standards codified at RCW 36.70C.130. The Court of Appeals instead apparently presumed, as does Phoenix, *see Answer to Petition for Review at 15*, that LUPA legislatively overruled this historical precedent and vested courts with a power they previously lacked—i.e., the ability to force local legislative bodies to pass a rezoning ordinance. Neither the Court of Appeals nor Phoenix was able to cite any statutory language accomplishing this result, any legislative history supporting this result, or any judicial precedent recognizing this result.

The Court of Appeals decision creates a clear conflict with existing caselaw and injects a pernicious element of uncertainty into the land use appeals process. First, as *amici* explain, neither the text of Chapter 36.70C RCW nor the relevant legislative history suggest any intent to reverse the longstanding principle against judicial compulsion of rezones. *See Memorandum of Amici Curiae at 7-8*. The statute nowhere evinces the Legislature's desire to effect such a radical sea change in substantive zoning law. To the contrary, the available authority indicates that LUPA

was intended to serve as a purely procedural framework for land use appeals by replacing the traditional mechanism for judicial review (i.e., the statutory writ) with the petition process set forth in Chapter 36.70C RCW. See, e.g., *Ward v. Bd. of County Cmm'rs of Skagit County*, 86 Wn.App. 266, 270, 936 P.2d 42 (1997) (“The purpose of LUPA is to reform the *process* for judicial review of land use decisions made by local jurisdictions.”) (emphasis added) (internal punctuation omitted); RCW 36.70C.010; RCW 36.70C.030(1); *Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wn.2d 861, 865 n.1, 947 P.2d 1208 (1997).

Second, the Court of Appeals’ failure to acknowledge and squarely address pre-LUPA zoning precedent effectively circumvented the requisite legal analysis for determining whether a common law principle has been legislatively overruled:

A statute abrogates the common law if the provisions of the statute are so inconsistent with and repugnant to the common law that both cannot simultaneously be in force. . . . It is the general rule of interpretation to assume that the legislature was aware of the established common-law rules applicable to the subject matter of the statute when it was enacted. . . . A statute which is clearly designed as a substitute for the prior common law must be given effect. . . . *However, absent an indication that the Legislature intended to overrule the common law, new legislation will be*

presumed to be consistent with prior judicial decisions.

Ballard Square Condominium Owners Ass'n v. Dynasty Construction Co., 158 Wn.2d 603, 621, 146 P.3d 914 (2006) (Johnson, J., concurring) (emphasis added) (citation and internal punctuation omitted).

The judicial decisions predating LUPA's enactment uniformly held that courts lacked the power to force city and county councils to rezone property. *Myhre*, 70 Wn.2d at 210; *Bishop*, 69 Wn.2d at 792-93; *Besselman*, 46 Wn.2d at 280; *Teed*, 36 Wn.App. at 644-45. The Legislature was presumptively aware of this longstanding precedent when it enacted Chapter 36.70C RCW in 1995. *Ballard*, 158 Wn.2d at 621. As noted above and in the WSAMA/AWC *amici* memorandum, no indication exists that the Legislature intended to overrule these cases.¹ The standards of review codified in LUPA should accordingly "be presumed to be consistent" with these common law rules—i.e., the standards codified at RCW 36.70C.130 govern review of land use decisions generally, but

¹ In contrast, other provisions of Chapter 36.70C RCW *do* clearly indicate the Legislature's intent to significantly alter traditional land use law. For example, RCW 36.70C.030(1) expressly clarifies that "[t]his chapter replaces the writ of certiorari for appeal of land use decisions", effectively abolishing the previous method of appealing local zoning and permit determinations. *Citizens for Mt. Vernon*, 133 Wn.2d at 865 n.1. Likewise, RCW 36.70C.130(2) eliminates the prior common law requirement predicating judicial relief from local land use decisions upon a showing of arbitrary or capricious action. Both of these provisions are expressed in unequivocal, unambiguous terms. Significantly, however, the statute contains no similar statement purporting to alter the traditional common law prohibition against judicial compulsion of rezones.

courts still cannot compel local elected officials to pass a rezoning ordinance. *Id.*

By wholly avoiding this analysis and failing to even acknowledge pre-LUPA rezoning precedent, the Court of Appeals decision sows significant confusion for all future rezone appeals. Did the Court of Appeals ultimately conclude that LUPA abrogated traditional common law zoning principles? Did the court determine that these traditional rules were limited or otherwise overruled by more recent judicial precedent? Was the court's decision based upon factors unique to the instant case? In the face of these unanswered questions, the Court of Appeals' silence is deafening.

Where a clear rule of law has been established by prior judicial decisions, courts

will not—and should not—overrule it *sub silentio*. To do so does an injustice to parties who rely on this court to provide clear rules of law and risks increasing litigation costs and delays to parties who cannot determine from this court's precedent whether a rule of decisional law continues to be valid.

Lunsford v. Saberhagen Holdings, Inc., 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (internal citation omitted). By simply ignoring—rather than squarely addressing—a lengthy body of pre-LUPA zoning caselaw, the

Court of Appeals decision invites precisely this type of expense, uncertainty and delay. The gravity of the underlying legal issue and its potential effect upon land use decision-making throughout our state demands a clear resolution by this Court.

B. The Involvement of *Amici* Demonstrates the Importance of this Case.

The need for Supreme Court review of the instant matter is underscored by the participation and identity of both *amici*. The professional ranks of WSAMA are comprised of the attorneys who advise and represent municipal corporations throughout Washington. *Memorandum of Amici Curiae at 1*. AWC's membership includes every city and town across the state. *Id.* Both *amici* are venerable, highly reputable organizations with an obvious and direct interest in municipal and land use law. The voluntary intervention of these parties in the *Phoenix* appeal speaks volumes about the potential ramifications of the Court of Appeals decision for Washington municipalities.

The participation by, and arguments of, WSAMA and AWC accentuate the City's core position in its petition for review: The Court of Appeals decision represents a sharp departure from longstanding precedent, and, if not reversed, will create significant problems for

municipalities and numerous other stakeholders in the local rezoning process.

The impact upon the cities and towns represented by *amici* will be especially profound. Under the court's holding, one of the most fundamental, discretionary policy functions of local elected officials—the decision to adopt an ordinance amending the municipality's official zoning map—will be effectively usurped by the judiciary. A rezoning decision necessarily involves considerations specific to each local community, including changes in local land use patterns, shifts in local public opinion, and the extent to which a proposed rezone will implement the municipality's comprehensive plan. *See Henderson v. Kittitas County*, 124 Wn. App. 747, 754, 100 P.3d 842 (2004), *review denied*, 154 Wn.2d 1028 (2005). As prior Washington caselaw has consistently recognized, city and county councils are uniquely qualified to make these policy determinations; courts simply are not.

III. CONCLUSION

The City strongly concurs in the arguments raised by *amici*. The WSAMA/AWC memorandum further demonstrates that this case involves issues of substantial public interest that should be determined by the Supreme Court pursuant to RAP 13.4(b)(4). This Court is respectfully

requested to grant review of and reverse the Court of Appeals decision.

RESPECTFULLY SUBMITTED this 21st day of June, 2010.

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N. Kay Richards hereby makes the following declaration pursuant to CR 5(b)(B) and RCW 9A.72.085. I certify that on June 21, 2010, I messengered a copy of City of Woodinville's Answer to Amici Curiae Memorandum and this Declaration of Service to the following counsel:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

6/21/10 Seattle, WA
Date and Place

N. Kay Richards
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