Supreme Court No.

(Court of Appeals Div. II No. 47900-1-II)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SCHNITZER WEST, LLC, a Washington limited liability company,

Respondent,

v.

CITY OF PUYALLUP, a Washington municipal corporation,

Appellant,

and

NEIL ARTHUR AN LIEROP, and individual, and VAN LIEROP INVESTMENT COMPANY, INC., a Washington company, and VAN LIEROP BULB FARMS, INC., a Washington company,

Additional Parties.

AMICUS CURIAE BRIEF OF BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF RESPONDENT'S PETITION FOR REVIEW

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I. INTRODUCTION

The Land Use Petition Act was enacted by the legislature in 1995 to provide a swift appeal process for final local land use decisions. This Court has previously held that LUPA is the proper channel to appeal a site-specific rezone. *Woods v. Kittitas Cty.*, 162 Wn.2d 597, 610, 174 P.3d 25, 31 (2007). Multiple Court of Appeals Decisions have held the same. *Kittitas Cty. v. Kittitas Cty. Conservation Coal.*, 176 Wn. App. 38, 52, 308 P.3d 745, 751 (2013); *Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 572, 309 P.3d 673, 681, *review denied*, 179 Wn.2d 1015, 318 P.3d 279 (2014) (both cases using identical language to hold that a site-specific rezone authorized by a comprehensive plan is a project permit properly reviewed under LUPA). The only issue in this case, therefore, is to decide whether the action taken by the Puyallup City Council on one owner's property—clearly as a direct result of a majority of the council's dislike for that owner's development proposal—was a site-specific rezone.

The Court of Appeals chose form over substance when it ruled that the council's actions do not constitute a site-specific rezone only because the council did not submit an application to itself to initiate the rezone process. What results, then, is an absurd inequity between the reviewability of site-specific rezones initiated by developers and site-

specific rezones initiated by local governments. The significant difference that allows for unequal treatment of these two effectually identical outcomes, in the opinion of the Court of Appeals, is the presence of a piece of paper requesting a change to the zoning rules affecting one owner's property.

Development proposals are often controversial in Washington, and it is not uncommon for local governments to search for ways to limit the size and scope of projects that would otherwise be allowed under existing development regulations and zoning rules. Amicus BIAW is concerned that the decision by the Court of Appeals allows local governments to target individual properties for zoning changes without following established processes, and without the possibility of appeal. The decision could also chill pre-application discussion between developers and local planners, for fear of local governments rushing to change the rules before the developer applies for a project permit.

This Court should accept review of this case to remedy the error of the Court of Appeals that would allow local governments to "legislate" away the expected and relied upon available land uses of one owner's property on an individual basis without the possibility of appeal.

II. IDENTITY AND INTEREST OF AMICUS CURIAE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

The Building Industry Association of Washington (BIAW) represents over 7,500 member companies who employ nearly 200,000 residents of Washington.

BIAW's members engage in every aspect of residential building—from site development to remodeling. They regularly discuss development plans with local governments to be sure of their rights and responsibilities in connection with site development and construction, and to give local planners the chance to identify concerns and suggest improvements to their plans. The Court of Appeals decision could strain that relationship and chill pre-development discussion.

III. ISSUE OF CONCERN TO AMICUS CURIAE

Does the decision of the Court of Appeals create an unfair standard of what constitutes a site-specific rezone, thereby allowing local governments to initiate what are in effect site-specific rezones without the possibility of appeal under the Land Use Petition Act?

IV. STATEMENT OF THE CASE

BIAW relies on the Statement of the Case found in Respondent Schnitzer West, LLC's Petition for Review.

V. ARGUMENT

I. The City's action, if initiated by any other party, would appropriately and indisputably be termed a site-specific rezone.

The Court of Appeals held that the action taken by the Puyallup City Council to reduce the scope of allowable development on only the property owned by Schnitzer West, LLC (Schnitzer), was not a site-specific rezone because the city did not submit an application to itself to initiate the rezone. *Schnitzer W., LLP v. City of Puyallup*, 196 Wn. App. 434, 443-44, 382 P.3d 744, 749 (2016). This holding requires more from a land use decision than previously held by this Court in order to be considered a site-specific rezone subject to appeal under LUPA. It therefore creates an unjustifiable inequity between the reviewability of citizen- and government-initiated site-specific rezones.

This Court held in 2007 that "[a] site-specific rezone occurs 'when there are specific parties requesting a classification change for a specific tract.'" *Woods*, 162 Wn.2d at 611 n.7, 174 P.3d at 32 (quoting *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981)). In this case, the Puyallup City Council initiated a significant reduction in the size of warehouse allowed on Schnitzer's property, and only Schnitzer's property.

Neither the Court of Appeals nor the Appellant City of Puyallup has offered a reasonable explanation for why the city council cannot be classified as a "specific party," only concluding that it is not. Pointing out the absence of an application filed by the city council to itself is the only attempt by them to justify the exclusion of the city council from the term, but requiring such an application asks more of this particular land use action than does the test articulated by *Woods*. *Woods* only requires a party to request a zoning change. It says nothing of the formal process for initiating the request. The Court of Appeals and the city both think it absurd that a city council should submit a rezone application to itself. *Schnitzer,* 196 Wn. App. At 442, 382 P.3d at 748; Answer to Petition for Review, at 14. Schnitzer and BIAW agree. The Puyallup Municipal Code allows the council to initiate a site-specific rezone, and does not require the council to submit an application for it. PMC 20.11.005. Instead, it is understood that an action taken to alter zoning standards on one particular property is a site-specific rezone, regardless of how the alteration was initiated. In other words, it is the effect of the action taken, not its form, that determines whether the action constitutes a site-specific rezone.

Examining the city council's action as if it had happened in reverse illustrates the inequity of the Court of Appeals holding. Suppose the original zoning allowed for only a 125,000 sq. ft. warehouse, and

Schnitzer wanted it increased to 470,000 sq. ft. Schnitzer would have requested a change to the zoning standards on its property, and the city would consider the merits of the request according to its prescribed process found in the PMC. The desired change is to the size of warehouse allowed on only the Schnitzer property. According to the Court of Appeals, this situation would qualify as a site-specific rezone subject to LUPA appeal because 1) a specific party, Schnitzer, would have 2) filed an application (made a request) to change the classification 3) of a specific property. So although what actually happened is nearly identical to what this hypothetical describes (a change in the size of a warehouse allowed on one particular property), the city and the Court of Appeals believe that the absence of a piece of paper makes the city's action purely legislative and not subject to LUPA appeal. There is simply no justification for making this distinction when the effects of the action are the same. The City's action is a site-specific rezone subject to review under LUPA.

II. The Court of Appeals opinion sows distrust and chills pre-application communication between developers and local governments.

The decision by the Court of Appeals to carve government-initiated zoning changes out of the definition of a site-specific rezone, merely for want of a tangible application, will enable arbitrary action against individual landowners by local governments. It will also make

developers reluctant to disclose their future plans to local governments. This reluctance will lead to a loss of communication between developers and planners that could otherwise benefit the project and the community.

The unfortunate controversy presented in this case is not an uncommon occurrence in Washington. Controversial projects and local government officials' stance on them often influence local elections, and subsequently affect individual developments. For example, in 2009, a controversial condominium proposal on the isthmus in downtown Olympia led to sweeping changes on the Olympia City Council, and soon thereafter a reversal of the zoning changes made in 2008 to facilitate the project. *See* Janine Gates, *Newly Elected Olympia City Councilmembers Coordinate Coup on Isthmus Issue* (Jan. 5, 2010), http://janineslittlehollywood.blogspot.com/2010/01/newly-elected-olympia-city.html. When the makeup of a city council is so drastically changed in response to zoning changes on one property, LUPA stands as a backstop to elected officials who would arbitrarily and subjectively scratch the development through official action. The Court of Appeals razes that backstop and replaces it with absolute deference to the arbitrary action, so long as it does not begin with a city council submitting an application to itself. It would be reasonable for developers to be wary of the motives of local governments and keep pre-application communication

with them to a minimum in order to reduce the likelihood that their property will be subject to a targeted change in the rules.

VI. CONCLUSION

The Court of Appeals decision conflicts with Supreme Court and Court of Appeals precedent that places review of site-specific rezones under LUPA jurisdiction. The decision's holding that a local government's self-initiated rezone of a specific property owned by one person cannot be classified as a site-specific rezone is an issue of substantial public interest. Developers must be afforded clarity on how to challenge government action that applies only to their property. For these reasons, this Court should accept review of this case under RAP 13.4(1), (2), and (4).

RESPECTFULLY SUBMITTED this 13 day of January, 2017.

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