

FILED

AUG 24 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. ~~277950-III~~

40104-5-II

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Brad Chinn ,

Respondent

v.

City of Spokane, Et al

Appellant

CITY OF SPOKANE'S OPENING BRIEF

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I. INTRODUCTION.

COMES NOW, Appellant City of Spokane, by and through its attorneys, Howard F. Delaney, City Attorney, and Michael J. Piccolo, Assistant City Attorney, and submits its Opening Brief in support of the appeal of the Superior Court's December 30, 2008 Decision on Land Use Petition.

II. ASSIGNMENT OF ERROR.

A. ASSIGNMENT OF ERROR.

Assignment of Error Number 1.

The Superior Court erred in reversing the City Council's decision and finding that the City failed to address whether a change from "office" to "office retail" was consistent with Land Use Policy 1.5 of the Comprehensive Plan.

Assignment of Error Number 2.

The Superior Court erred in reversing the City Council's decision and finding that West Central Development's rezone application for office/retail would create a precedent for future rezones in violation of the City's Comprehensive Plan.

Assignment of Error Number 3.

The Superior Court erred when it found that neither the staff nor the City Council analyzed the impact of new “retail” use.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS.

1. Was the City Council’s decision to reverse the Hearing Examiner and approve West Central Development’s rezone application to include retail in an office/retail zone an erroneous interpretation or application of the law?

2. Was the City Council’s finding that approval of West Central Development’s rezone application will not create a precedent in violation of the City’s Comprehensive Plan an erroneous interpretation or application of the law?

III. STATEMENT OF THE CASE.

On April 20, 2007, Appellant West Central Development, LLC, filed a rezone application seeking a change from O-35 (Office use with a 35 foot height limitation) to OR-150 (Office/Retail use with a one hundred fifty foot height limitation). Administrative Record (AR) Sec. 1, p. 46-

60.¹ The OR-150 use classification limits the retail use to no more than ten percent of the total square footage exclusive of parking areas. SMC 17C.120.110(6)(a).

On November 15, 2007, the rezone application proceeded to a hearing before the City's Hearing Examiner. AR Sec. 1, p. 16-39. On November 30, 2007, the Hearing Examiner issued a decision in which he determined that he could not approve this application because he could not find that the application was consistent with the City's Comprehensive Plan. CP 19 - 25. Compliance with the Comprehensive Plan is one of the criteria in determining whether or not a zone change application should be approved. SMC 17G.060.170(C)(2).

On December 13, 2007, West Central Development appealed the Hearing Examiner's decision to the City Council. AR Sec. 1, p. 1-7. After a closed record appeal hearing on April 7, 2008, the City Council reversed the Hearing Examiner's decision in a written decision filed on

¹ The Administrative Record filed with the Superior Court by the City pursuant to RCW 36.70C.110 and as identified by West Central Development in its Designation of Clerk's Papers will be annotated hereafter as AR ____.

May 5, 2008. The City Council remanded the rezone application to the Hearing Examiner with the direction to process the application consistent with the City Council's decision. CP 15 -18. The City Council's reversal of the Hearing Examiner's decision was based upon the Council's determination that the Hearing Examiner's interpretation of the City Comprehensive Plan was an error of law pursuant to the standard of review for appeals to the City Council set forth in SMC 17G.050.350.

On May 19, 2008, Respondent Brad Chinn filed his Land Use Petition and Complaint for Declaratory Judgment and Relief in Spokane County Superior Court. CP 1-27. On December 30, 2008, the Superior Court issued its Decision on Land Use Petition in which the Court concluded in part that the City Council was correct in reversing the Hearing Examiner based upon the City Council's interpretation of the Comprehensive Plan in regards to the height change from 35 feet to 150 feet. The Court concluded that, in itself, the rezone from Office-35 to Office-150 is not inconsistent with the Comprehensive Plan because the property is already

within an existing “Office” zone. CP 117. The Court reversed the City Council’s decision in part and reinstated the Hearing Examiner’s decision in regards to the inclusion of retail use as part of the rezone. CP 121-122. Finally, the Court also reversed the City Council’s decision as it pertained to the issue of whether allowing the rezone would have a precedent setting effect. CP 122-124. Only the last two issues are subject to this appeal.

IV. STANDARD OF REVIEW.

In an appeal of a land use decision appealed pursuant to the Land Use Petition Act (Chapter 36.70C RCW), the appellate court sits in the same position as the superior court. The Court applies the LUPA standards directly to the administrative record that was before the City Council. The Court reviews the findings of the City Council and does not give deference to the superior court’s findings. *Griffin v. Thurston County*, 165 Wn.2d 50, 54-55, 196 P.3d 41 (2008). The Court’s review of any claim of error of law in the City Council’s interpretation of city ordinances is de novo and must accord deference to the City Council’s expertise.

Pinecrest Homeowners Ass'n v. Cloninger, 151 Wn.2nd 279, 290, 87 P.3d 1176 (2004).

The LUPA standards for granting review set forth in RCW 36.70C.130(1) includes:

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts.

RCW 36.70C.130.

The court may grant relief only if the petitioner, the party seeking relief from the land use decision, has carried the burden of establishing that one of these standards has been met. RCW 36.70C.130.

Questions of law are subject to de novo review in this Court. RCW 36.70C.130(1)(b). The City Council's decision may be reversed only where the City Council's application of the law to the facts is clearly erroneous. A decision is "clearly erroneous" when the reviewing body is "left with the

definite and firm conviction that a mistake has been committed.” *West Hill, LLC v. City of Olympia*, 115 Wn.App. 444, 449, 63 P.3d 160 (2003).

Findings on issues of fact are reviewed under the substantial evidence test. RCW 36.70C.130(1)(c). Evidence is substantial when it is of sufficient quality of evidence in the record to persuade a fair-minded person of the truth or correctness of the decision. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

In the initial appeal to Superior Court, Respondent Brad Chinn assigned errors to the City Council’s decision regarding interpretation of the law pertaining to retail use as well as the Council’s determination that its decision did not set a precedent in violation of the Comprehensive Plan. The question before this Court on appeal is whether the City Council’s decision on these two issues constituted an erroneous interpretation of the law. Issues of height and office use were previously decided by the Superior Court and are not subjects of this appeal.

V. ARGUMENT.

The City Council's decision reversing the Hearing Examiner's decision was not an erroneous interpretation of the law. The Superior Court erred in reversing the City Council's decision in regard to the issues pertaining to retail use and whether the decision established a precedent.

A. The SUPERIOR COURT ERRED IN REVERSING THE CITY COUNCIL'S DECISION AND FINDING THAT THE CITY FAILED TO ADDRESS WHETHER A CHANGE FROM "OFFICE" TO "OFFICE RETAIL" WOULD IMPLEMENT THE COMPREHENSIVE PLAN.

The City of Spokane adopts by reference and incorporates the legal argument set forth by Appellant West Central Development on this issue, as if fully set forth herein.

B. THE SUPERIOR COURT ERRED IN REVERSING THE CITY COUNCIL'S DECISION AND FINDING THAT WEST CENTRAL DEVELOPMENT'S REZONE APPLICATION FOR OFFICE/RETAIL WOULD CREATE A PRECEDENT IN VIOLATION OF THE CITY'S COMPREHENSIVE PLAN.

The City Council's decision regarding the precedential effect of approval of the rezone application was correct and not an erroneous interpretation of the law for several reasons.

1. The Hearing Examiner's original concern that his approval of the rezone application would set a precedent for other zone changes outside of centers and corridor area, the downtown planning area and the core area to Office-150 or Office/Retail-150 was based on the incorrect assumption that approval of the rezone was not compliant with the Comprehensive Plan. CP 24. As noted in the Superior Court's Decision on Land Use Petition, the office use reclassification from 35 feet to 150 feet in height, in itself, is not inconsistent with the Comprehensive Plan because the subject property is already within an existing office zone. CP 117. Since the height reclassification from Office-35 to Office/Retail-150 is compliant with the Comprehensive Plan, any other rezone applications would also be consistent with the Comprehensive Plan.

2. Both the Hearing Examiner and the Superior Court failed to recognize the application of SMC 17G.060.170(C)(5), which is one of the five criteria a rezone application must comply with in order to be approved. SMC 17G.060.170(C)(5) provides that:

The proposal will not have a significant adverse impact on the environment or the surrounding properties, and if necessary conditions can be placed on the proposal to avoid significant effects or interference with the use of neighboring property or the surrounding area, considering the design and intensity of the proposed use.

The Hearing Examiner, having denied the application based upon an incorrect interpretation of the Comprehensive Plan, never utilized the authority granted in SMC 17G.060.170(C)(5) to impose conditions to avoid significant adverse effects or interference with the use of neighboring property or the surrounding area. Implementing the provisions of SMC 17G.060.170(C)(5) and imposing conditions would safeguard against any negative precedent setting effect the Hearing Examiner may have been concerned with.

While the Superior Court's decision minimized the City Council's analysis, the Council's decision elaborated and expanded on the issue of the precedent setting effect by stating that each rezone application from Office-35 to Office/Retail-150 would have its own set of circumstances and surrounding environments in which the Hearing

Examiner could impose necessary conditions to avoid significant effects or interference with the use of neighboring property or the surrounding area. The City Council's decision specifically stated:

The City Council recognizes the Hearing Examiner's concern that granting this rezone could lead to approval of the same type of rezone application for property outside of a center and corridor, the downtown planning area or the core area. The City Council does not consider this decision as setting precedent for all future rezone applications from O-35 to OR-150 given that each application has its own set of circumstances and surrounding environments. All rezone applications must satisfy all five decision criteria of SMC 17G.060.170, including 17G.060.170 C. 5 which provides that "[T]he proposal will not have a significant adverse impact on the environment or the surrounding properties, and if necessary conditions can be placed on the proposal to avoid significant effects or interference with the use of neighboring property or the surrounding area, considering the design and intensity of the proposed use."

CP 16. The precedent setting effect was also noted by the City Council members during the hearing. Council Member Al French stated:

...[W]ith regard to this opening of the floodgates to be able to do this throughout the entire city. Just not supported by the record. One of the things that makes this a change in height justifiable one is the fact that it is adjacent to an

overlay zone next to the courthouse that already allows for 150-foot building height, and in fact that overlay zone is literally across the street from where this zone is, or where the property is.

So there is -- you do not have that condition throughout the City. So the idea that you're going to open up the floodgates is hyperbole about an outcome that just isn't supported by either the record or the facts that lie on the street

AR Sec. III, page 80 – 81.

3. The establishment of a precedent setting decision by the Hearing Examiner, in and of itself, is not prohibited or even discouraged. One would anticipate that decisions would have a precedential value unless the facts or circumstances of a case are so limiting or unique that the decision is only applicable to that circumstance. Furthermore, the establishment or absence of a precedent setting decision is not a criteria for granting a rezone under SMC 17G.060.170(C)(5). A decision that knowingly violates the Comprehensive Plan or the decision criteria would only establish a “dangerous precedent” if the noncompliant decision was known and permitted to exist. As stated above,

approval of a rezone from Office-35 to Office/Retail-150 is compliant with the Comprehensive Plan.

4. The Superior Court's objection to the issue of establishing a precedent appears to be based, in part, upon the Court's preference that the City should exercise a different policy option by amending the Comprehensive Plan by legislative means. CP 123-124. While there is a legislative process for amending the Comprehensive Plan, this is a legislative policy to be determined by the City Council as a legislative body. The City Council must act in its quasi-judicial capacity when presented with a land use appeal. It is inappropriate for the Superior Court to have based its decision on its own view of legislative policy matters.

As demonstrated by above, the City Council's decision is not an erroneous interpretation of the law and is supported by the record.

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C. THE SUPERIOR COURT ERRED WHEN IT FOUND THAT NEITHER the STAFF NOR THE CITY COUNCIL ANALYZED THE IMPACT OF NEW “RETAIL” USE.

The City of Spokane adopts by reference and incorporates the legal argument set forth by Appellant West Central Development on this issue, as if fully set forth herein.

VI. CONCLUSION.

For the City Council’s decision to be reversed, its decision must be determined to have been an erroneous interpretation of the law. As demonstrated by the legal arguments of West Central Development and the City of Spokane, the City Council’s decision was not an erroneous interpretation of the law. The Superior Court’s decision should be reversed and the City Council’s decision should be affirmed.

Respectfully submitted this 24th day of August, 2009.



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Attorney for City of Spokane
Appellant

DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 24th day of August, 2009, I caused a true and correct copy of the foregoing "City of Spokane's Opening Brief," to be delivered to the parties below in the manner noted:

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