FILED

AUG 24 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

No. ~~277950-III~~
40104-4-II

Brad Chinn ,

Respondent

v.

City of Spokane, Et al

Appellant

OPENING BRIEF
OF
APPELLANT WEST CENTRAL DEVELOPMENT LLC

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I. INTRODUCTION

This matter comes before the Court on an appeal of the Spokane County Superior Court's decision reversing the City of Spokane City Council's decision to approve an application by Petitioner West Central Development LLC (hereinafter "West Central Development") to rezone approximately 45,000 square feet of land from Office-35 (O-35) to Office Retail-150 (OR-150).

The subject property is located directly west of the Spokane County Courthouse complex, along the north side of Broadway Avenue, within the City of Spokane. The Courthouse complex is zoned Community Business (CB-150), with a height limitation of 150 feet. For the subject property, West Central Development sought a rezone from O-35 to OR-150, which would allow an increase in building height from 35 feet to 150 feet and would also allow retail uses and services up to a maximum of 10% of the building's floor area.

The rezone request was denied by the City's Hearing Examiner, who concluded that the rezone did not comply with the City's Comprehensive Plan. The Hearing Examiner's decision contradicted the recommendations of both the City Planning Staff and the West Central Neighborhood Council to approve the rezone.

West Central Development appealed the Hearing Examiner's decision to the Spokane City Council. The City Council conducted a closed-record appeal hearing and subsequently reversed the Hearing Examiner and remanded the application to the Hearing Examiner for further processing consistent with their decision. The City Council specifically found that the Hearing Examiner erroneously interpreted and applied Land Use Policy 1.5 contained in the City's Comprehensive Plan. Because the City Council stated that its decision was a final decision for appeal purposes under RCW 36.70C (Land Use Petition Act), an appeal was filed in Spokane County Superior Court by Respondent Brad Chinn.

Because of Mr. Chinn's position (at the time of the appeal) as a Court Commissioner in Spokane County District Court, a visiting Superior Court judge was sought to hear the appeal. The case was assigned to Judge Rebecca Baker, who is a judge for Ferry, Stevens and Pend Oreille counties.

Following oral argument, Judge Baker issued a written Decision on Land Use Petition on December 30, 2008 ("Superior Court Decision"), reversing the City Council's decision (to approve the rezone) and re-instating the Hearing Examiner's decision (to deny the rezone).

II. ASSIGNMENTS OF ERROR

A. Assignments 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 CASE

A. Summary of Rezone Application

On April 20, 2007, West Central Development filed an application to rezone approximately 45,000 square feet of land from Office-35 (O-35) to Office Retail-150 (OR-150). *Administrative Record*, Sec. 1, pg. 46.[1]

The proposal includes an office building and a parking structure. AR, Sec. 1, pg. 9. The upper floors would include office and residential uses and the lower levels would include a grocery store and a daycare center as well as other retail and service uses. *Id.*

The application made its way through a lengthy and involved local meeting process and was scrutinized by the City's Planning Staff as well as numerous other entities. CP,102. This process resulted in the City's Planning Staff issuing findings and a recommendation of approval of the rezone application. *Id*; AR, Sec. 1, pgs. 40-45. The West Central Neighborhood Council also recommended approval of the rezone. AR, Sec. 1, pg. 179.

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1 The Administrative Record of the City Council will be annotated hereafter as AR____. The certified appeal record filed with the Superior Court by the City pursuant to RCW 36.70C.110 was identified by West Central Development in its Designation of Clerk's Papers. The Index of Clerk's Papers did not assign page numbers to the appeal record. West Central has identified references to the appeal record in the same manner as the Superior Court in order to maintain consistency.

B. Summary of Difference Between O-35 and OR-150 Zones

The Spokane Municipal Code has both an O zoning classification and OR zoning classification. SMC 17C.120.020; CP 115. Both are intended to implement property that is designated Office on the City's Comprehensive Plan. AR, Sec. 1, pg. 42. The subject property is designated Office on the Comprehensive Plan. AR, Sec. 1, pg. 40.

There are only two differences between an O-35 zone and the OR-150 zone. The first is building height. The "35" denotes a maximum building height of thirty-five feet and the "150" denotes a maximum building height of one hundred-fifty feet. SMC 17C.120.220.

The other difference between the "O" and "OR" zone is that the OR zone allows a ***very limited*** retail component: hence the inclusion of "retail" in the zoning name. Specifically, the OR-150 zone limits any retail use to ***no more than 10%*** of the total square footage of the building. SMC 17C.120.110; AR Sec 1, pg. 35. The retail uses are intended to be accessory and supportive of the office uses within the building. AR, Sec. 1, pg. 42.

C. Hearing Examiner Decision

The Hearing Examiner raised concerns in his decision related to both the increased height of the building (35 feet to 150 feet) and the

changed use from office only to a combined office zone with retail sales and service. CP 115. He denied West Central Development's application on both grounds. *Id.*

D. Superior Court Decision

The Superior Court's December 30, 2008 decision reversed the City Council's decision and reinstated the Hearing Examiner's decision. CP 125. On the issue of building height, the Superior Court found that the City Council did not commit error when it determined that a height increase to 150 feet was allowed under Land Use Policy 1.5 of the City's Comprehensive Plan. CP 115-117. Thus, the Superior Court effectively reversed the Hearing Examiner on this issue.

With respect to the retail uses, the Superior Court determined that the City Council failed to address "the role that a change from a simple "Office" designation to an "Office Retail" designation would play in the application for the rezone." CP 118. The Superior Court concluded that "neither the Planning Services staff nor the City Council made affirmative findings of fact pertaining to whether the new *retail* use aspect allowed by a rezone to OR-150 would implement the Comprehensive Plan." CP 119. (Emphasis in original).

IV. STANDARD OF REVIEW

This LUPA action is governed by the standards of review set forth in RCW 36.70C.130(1). Like the City Council and Superior Court, this Court limits its review to the record before the City Council. *Pinecrest Homeowners Ass'n v. Cloninger*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004); RCW 36.70C.120. As the party seeking relief from the land use decision, the Petitioner bears the burden of meeting one of the six standards for granting relief set forth in RCW 36.70C.130(1).

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(b)(c)(d).

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). This court's review of any claimed 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. *Isla Verde Int'l Holdings Inc. v. City of Camas,* 146 Wash.2d, 740, 751, 49 P.3d 867; RCW 36.70C.130(1)(b). The City Council is entitled to determine all questions of how its own ordinances and procedures should be interpreted and applied. See *Citizens to Preserve Pioneer Park LLC v. City of Mercer*, 106 Wn.App. 461, 474 24 P.3d 1079 (2001); RCW 36.70C.130(1)(b).

V. ARGUMENT

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" Was Consistent With Land Use Policy 1.5 Of The Comprehensive Plan

The subject property is designated Office on the City's Comprehensive Plan. AR, Sec. 1, pg. 40. The Office land use designation can be implemented by both the O-35 and OR-150 zones: both zones are consistent with the Comprehensive Plan. AR, Sec 1, pgs. 40-44.

In the OR zone, "Retail Sales and Services" are allowed under the following restrictions: (1) when such uses are freestanding, they are

limited to 3,000 square feet of floor area; or (2) when Retail Sales and Service are located in an office building, the Retail Sales and Service may only occupy up to ten percent (10%) of the total floor area. SMC 17C.120.110(6). In other words, the total floor area would consist of 90% office and 10% retail sales and service.

It is very important to note that the OR zone *clearly distinguishes* freestanding retail uses from those that are located within an office building.

1. The City Council's decision to reverse the Hearing Examiner and approve Appellant West Central Development's rezone application to include retail in an office/retail zone was not an erroneous interpretation or application of the law.

At issue in this appeal is Comprehensive Plan Land Use Policy 1.5, which is set forth herein in its entirety:

> Land Use Policy 1.5
>
> *Direct new office uses to centers and corridors designated on the land use plan map.*
>
> **Discussion:** Office use of various types is an important component of a center. Offices provide necessary services and employment opportunities for residents of a center and the surrounding neighborhood. Office use in centers may be in multi-story structures in the core area of the center and transition to low-rise structures at the edge.
>
> To ensure that the market for office use is directed to centers, future office use is generally limited in other areas. The Office designations located outside centers are confined to the boundaries of existing office designations. Office use within these boundaries is allowed outside of a center.

> The Office designation is also located where it continues an existing office development trend and serves as a transitional land use between higher intensity commercial uses on one side of a principal arterial street and a lower density residential area on the opposite side of the street. Arterial frontages that are predominantly developed with single-family residences should not be disrupted with office use. For example, office use is encouraged in areas designated Office along the south side of Francis Avenue between Cannon Street and Market Street to a depth of not more than approximately 140 feet from Francis Avenue.
>
> Drive-through facilities associated with offices such as drive-through banks should be allowed only along a principal arterial street subject to size limitations and design guidelines. Ingress and egress for office use should be from the arterial street. ***Uses such as freestanding sit-down restaurants or retail*** are appropriate only in the office designation located in higher intensity office areas around downtown Spokane in the North Bank and Medical Districts shown in the Downtown Plan.
>
> Residential uses are permitted in the form of single-family homes on individual lots, upper-floor apartments above office, or other higher density residential uses.

Comprehensive Plan Land Use Policy 1.5 (Emphasis added).

In his decision, the Hearing Examiner discusses the applicability of Land Use Policy LU 1.5 to retail uses, specifically citing to *this portion* of Policy LU 1.5:

> Uses such as freestanding sit-down restaurants or retail are appropriate only in the office designation located in higher intensity office areas around Downtown Spokane and the North Bank and Medical Districts shown on the Downtown Plan.

AR, Sec. 1, pgs. 12-13.

The Hearing Examiner erroneously interpreted the law (Land Use Policy 1.5) by finding that retail uses are only permitted in areas around

Downtown Spokane and the North Bank and Medical District, as follows:

> This site is not within the areas shown in the Downtown Plan. The Downtown Plan does not include the County Courthouse to the east except as an influence area. It does not include this particular site at all. While the site is close to downtown and a half block away from a neighborhood center, it is not within a neighborhood center or within the Downtown Planning Area as the Comprehensive Plan envisions.

AR, Sec 1, pg. 13

The Hearing Examiner committed reversible error by focusing his interpretation on the language related to the Downtown Plan and disregarding the language that relates to ***freestanding*** retail. Land Use Policy 1.5 seeks to limit ***freestanding*** retail uses to certain geographic areas (Downtown, North Bank, etc).

There is no freestanding retail use associated with the West Central Development rezone application; therefore, Land Use Policy 1.5 does not preclude a rezone from O-35 to OR-150 on the subject property because LU 1.5 only applies to ***freestanding*** retail. In the subject application, a grocery store, day-care center, and dry cleaners would be located ***within*** the office building. AR, Sec. 1, pg. 9.

West Central's interpretation of Land Use Policy 1.5 is supported by the development standards contained in the Spokane Municipal Code.

The City has adopted development standards in its Municipal Code for the OR zone that are consistent with Land Use Policy 1.5. Specifically, in the OR zone, "Retail Sales and Services" are allowed under the following restrictions: (1) when such uses are freestanding, they are limited to 3,000 square feet of floor area; or (2) when Retail Sales and Service are located in an office building, the Retail Sales and Service may only occupy up to ten percent (10%) of the total floor area. SMC 17C.120.110(6).

Notably, the SMC does not contain any limitation on the location of retail sales and service in the OR zone. In other words, the OR zone does not limit retail sales and service to areas around the Downtown Plan, the Medical District or North Bank, as the Hearing Examiner suggests. Even assuming Land Use Policy 1.5 operates to restrict retail sales and services to certain geographic areas of the City, the law is very clear that any conflict between a city's Comprehensive Plan and a specific zoning regulation must be resolved in favor of the zoning regulation. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash. 2d. 861, 873, 947 P.2d 1208 (1997). In this case, while Land Use Policy 1.5 may seek to direct retail uses to certain geographic areas of the City, it must yield to the more specific zoning regulation, which does not restrict location.

Furthermore, if the City County had intended to limit Retail Sales

and Services in the OR zone to certain geographic areas, it would have done so when it adopted it's zoning regulations to implement the Comprehensive Plan and Land Use Policy 1.5. It is well known that a city's comprehensive plan and zoning regulations must be consistent. RCW 36.70A.130. In fact, the City's own Comprehensive Plan states in relevant part: "Since zoning is a device to implement the plan, its rules must be consistent with the plan. The decisions about land development are made when the plan is prepared or amended. The zoning code puts these decisions into operation as enforceable rules." City of Spokane Comprehensive Plan, Section 1.3, pg. 8.

In this case, the City Council determined that West Central's rezone was consistent with and implemented the Comprehensive Plan, stating "[t]he City Council also considered the applicable provisions of the City's Comprehensive Plan, particularly LU 1.5" when it rendered its decision. AR, Sec 2, pg. 14. The City Council is the ultimate arbiter of whether a particular action violates its own enacted ordinances. *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App 461 (2001). Therefore, the City Council's decision must be affirmed.

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.

West Central Development hereby adopts by reference the briefing submitted by the City of Spokane on this issue, as if fully set forth herein.

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

As discussed herein, the Superior Court reversed the City Council for two reasons. First, the Superior Court found that the City failed to do an analysis regarding new "retail" use and second, that the City Council failed to address the issue of whether West Central's rezone would set a precedent. The second issue is discussed in Section V(B) above.

In the Conclusion and Decision of the Superior Court Decision, the court found:

> ***However, since the City provided no analysis as to the effect of the addition of "retail" use to the "office" use entailed in a rezone from "O" to "OR,"*** the hearing examiner's decision is entitled to deference. Specifically, the hearing examiner's reasoning is approved to the effect that he determined that the new retail component inherent in a reclassification from O-35 to OR-150 is a marked departure from the existing zone classification. Thus, the hearing examiner's resulting conclusion that new retail uses, ***being reserved for areas such as the Downtown Plan area only***, would be inconsistent with the

> Comprehensive Plan, specifically Land Use Policy 1.5, should have been affirmed.

CP, 124. (Emphasis added).

The Superior Court erred in two regards. First, the Superior Court's finding is not supported by substantial evidence in the Record. In fact, the Record demonstrates that the Planning Staff specifically considered the additional retail uses in its Staff Report to the Hearing Examiner, as follows:

> A rezone from Office to Office Retail is permitted in areas designated office on the land use plan map of the comprehensive plan that are within the higher intensity office areas around downtown Spokane in the North Bank and Medical Districts show in the Downtown Plan. ***The office retail zone is also applied to sites outside the areas designated for higher intensity office use that are already developed with higher intensity retail and services uses.*** It is intended to be a higher intensity office zone that allows for larger scale office and ***supporting retail and service uses. The size of retail uses is limited to reduce detrimental impacts on nearby residential uses and to assure that the commercial uses are supporting rather than primary uses.***

.....

AR, Sec 1, pg. 42 (Emphasis added).

The Superior Court committed reversible error when it erroneously found that the City did not provide an analysis of the "retail" component.

The Record reflects that the Planning Staff specifically addressed this issue in its report to the Hearing Examiner. Furthermore, the Record reflects that the Trip Distribution Letter that was prepared for the proposed rezone evaluated the traffic impacts that would be generated by the proposal, *including the retail uses*. AR, Sec. 1, pgs. 71-85. The City determined that traffic impacts could be mitigated and a certificate of concurrency was issued for the rezone. AR, Sec. 1, pgs. 69-70. Finally, the Environmental Checklist prepared for the rezone specifically discusses that other uses including a daycare, limited grocery store, dry cleaners or similar facility will be developed. AR, Sec. 1, pg. 121. A Mitigated Determination of Nonsigificance was issued. AR, Sec. 1, pg. 117. It is clear that when viewed in its entirety, there is substantial evidence in the Record which demonstrates that retail uses were considered by not only the City, but other applicable reviewing agencies as well.

The Superior Court committed further error when it erroneously interpreted the law and found that new retail uses are only permitted in areas located in the Downtown Plan. The language cited above in the Staff Report specifically states that "***The office retail zone is also applied to sites outside the areas designated for higher intensity office use that***

are already developed with higher intensity retail and services uses."

AR, Sec 1, pg. 42.

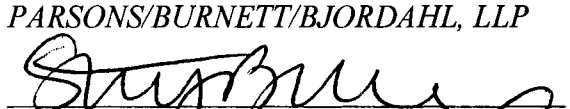
Both the Hearing Examiner and the Superior Court erroneously interpreted the law and committed reversible error. Each erroneously interpreted the law by finding that new retail uses are only allowed in the Downtown Plan area. Therefore, the decision of the City Council must be affirmed.

VI. CONCLUSION

As discussed herein, the City Council's interpretation of Comprehensive Plan Policy 1.5, and its decision to reverse the Hearing Examiner, were not based upon an erroneous interpretation of law; therefore the Superior Court's decision should be reversed and the City Council's decision should be affirmed. Further, the City Council's findings that the rezone application will not have an adverse precedential effect should be affirmed.

Respectfully submitted this 24th day of August, 2009.

PARSONS/BURNETT/BJORDAHL, LLP



Stacy A. Bjordahl, WSBA 32217
Attorneys for West Central Development LLC

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare under penalty of perjury and the laws of the State of Washington that on the 24th day of August, 2009, I caused a true and correct copy of the of the OPENING BRIEF OF PETITIONER WEST CENTRAL DEVELOPMENT LLC, to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following:

Michael J. Piccolo City of Spokane 808 W. Spokane Falls Blvd Spokane WA 99201	☐ US Mail ☒ Hand Delivered ☐ Overnight Mail ☐ Telecopy (Fax)
Lisa Dickinson Dickinson Law Firm PLLC 1320 N. Atlantic St, Suite B Spokane WA 99201	☐ US Mail ☒ Hand Delivered ☐ Overnight Mail ☐ Telecopy (Fax)

EXECUTED on the 24th day of August, 2009 at Spokane, Washington.

By: _____
STACY A. BJORDAHL