

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

IN THE SUPREME COURT
FOR 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.

**BRIEF AMICUS CURIAE
OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF APPELLANTS PHOENIX
DEVELOPMENT, INC., AND G&S SUNDQUIST
THIRD FAMILY LIMITED PARTNERSHIP**

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INTRODUCTION

A permit application is not an invitation for local government to revise its land use policies. Instead, the government must determine whether the application satisfies the existing criteria set out in its development code. Requiring the government to review permit applications pursuant to its own development regulations is necessary to assure fairness in the land use system, and safeguard against arbitrary and capricious decision-making.

Woodinville, however, insists that its decision to deny Phoenix's site-specific rezone request is solely a matter of legislative policy-making. That argument is wrong. Our legislature has determined that a site-specific rezone request is a permit application, and therefore must be evaluated pursuant to the development code. The Land Use Petition Act (LUPA) requires courts to review such land use decisions for consistency with local approval criteria. *Woods v. Kittitas County*, 162 Wn.2d 597, 603 (2007). This review process is critical to ensuring that property owners' permit applications are evaluated objectively, and not according to the whims of politicians. *Amicus* Pacific Legal Foundation (PLF) respectfully requests that this Court affirm the Court of Appeals' decision reversing Woodinville's denial of Phoenix's site-specific rezone request.

ISSUE ADDRESSED BY AMICUS

Can a city council deny a site-specific rezone request for policy reasons extraneous to the city's own development regulations? Addressing Restatement of Issues Presented for Review No. 1. Phoenix Development's Answer to Pets. for Review 1.

ARGUMENT

Phoenix plans to build two single-family residential subdivisions, known as Wood Trails and Montevallo, in the City of Woodinville, Washington. *Phoenix Dev., Inc. v. City of Woodinville*, 154 Wn. App. 492, 497 (2009). To facilitate these developments, Phoenix requested that the city amend the zoning designation for the Wood Trails and Montevallo properties from R-1, which allows one dwelling unit per acre, to R-4, which allows up to four dwelling units per acre. *Id.* The Woodinville City Council entered findings and conclusions denying Phoenix's rezone request. *Id.* at 500. Purporting to act in its "legislative capacity," the council concluded that the existing R-1 zoning designation was appropriate. *Id.* Phoenix thereafter filed a land use petition under LUPA. *Id.* at 501. The Court of Appeals reversed the city's rezone denial and remanded with instructions to grant the rezone request, holding that a site-specific rezone request is a quasi-judicial land use decision reviewable under LUPA, and that the city council erred by

“engaging in an unlawful legislative procedure during a quasi-judicial decision-making process.” *Id.* at 516.

I

LUPA PRECLUDES WOODINVILLE FROM OPENING UP PERMIT REVIEW TO “LEGISLATIVE” POLICY-MAKING

A. LUPA Requires Courts To Review Land Use Decisions for Consistency with Local Approval Criteria

The crux of Woodinville’s argument is that the Court of Appeals cannot overturn the city council’s decision to deny Phoenix’s site-specific rezone request, because rezoning is a legislative exercise that allows the council to act without regard to the city’s own development regulations. City of Woodinville’s Supplemental Br. 10-12. This is not an accurate statement of the law—Woodinville’s “legislative discretion” argument relies on superseded case law, and is irrelevant. Through LUPA, our legislature determined that courts will review “land use decisions,” regardless of the historical character of those decisions. Thus, this Court has held that denying a site-specific rezone request is a “land use decision” under LUPA, meaning that courts will review such decisions for consistency with local development regulations. *Woods*, 162 Wn.2d at 603, 610; *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 179 n.1 (2000); see RCW 36.70C.020(2)(a) (defining “land use decision” to include “an application for a project

permit”); RCW 36.70B.020 (defining “project permit” to include “site-specific rezones”).

In arguing for what amounts to a standardless rezoning process, Woodinville overlooks significant changes to the law. In 1995, the legislature enacted ESHB 1724, a bill establishing LUPA and implementing special Task Force recommendations for reform. *See* House Bill Report, ESHB 1724 (1995) (“An act relating to implementing the recommendations of the governor’s task force on regulatory reform on integrating growth management planning and environmental review.”). Prior to LUPA, a property owner could challenge a local jurisdiction’s land use decision by petitioning for a writ of certiorari, which is useful only for determining whether an official decision is “illegal or arbitrary and capricious.” *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292-93 (1998); *Post v. City of Tacoma*, 167 Wn.2d 300, 308 (2009).

Woodinville dismisses LUPA as nothing more than a minor “procedural statute.” City of Woodinville’s Supplemental Br. 15-16 (“[LUPA] simply made uniform those standards that were historically used by the courts to determine whether an administrative land use decision was arbitrary and capricious or contrary to law in pre-LUPA cases.”). The truth is that LUPA overhauled the old writ-based land use system in Washington,

replacing it with a completely new system in which persons adversely affected by local land use decisions may have courts review those decisions under specific statutory standards for granting relief.¹ *Chelan County v. Nykreim*, 146 Wn.2d 904, 916-17 (2002). Those standards include whether the land use decision is supported by substantial evidence—a judicial determination that can be made only in reference to the local approval criteria that the permit applicant is required to satisfy. RCW 36.70C.130(1)(c). Additionally, LUPA expressly eliminated the old “arbitrary and capricious”

¹ “The court may grant relief only if the party seeking relief has carried the burden of establishing that one of [the following] standards . . . has been met:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(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;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.”

RCW 36.70C.130(1)(a)-(f).

standard for granting relief, making it easier for land use petitioners to obtain redress for land use decisions that are based on considerations beyond the standards set out in the local government's development regulations. RCW 36.70C.130(2); see *Hayes v. City of Seattle*, 131 Wn.2d 706, 744 n.16 (1997) (“With the passage of [LUPA] . . . it now appears even easier for plaintiffs to redress grievances stemming from actions by local jurisdictions.”); *Henderson v. Kittitas County*, 124 Wn. App. 747, 752 n.2 (2004) (“To obtain relief from a land use decision, it is no longer necessary to show that the decision was arbitrary and capricious.”).

LUPA, moreover, authorizes courts to reverse and remand land use decisions for modification or further proceedings within the context of appropriate approval criteria, such as that found in the Woodinville Municipal Code (WMC). RCW 36.70C.140. By authorizing courts to reverse local land use decisions, the legislature clearly intended to provide significant judicial oversight of such decisions, even decisions made by city councils, so long as the decision constitutes a “land use decision.” RCW 36.70C.020(2). Courts are now duty-bound to reverse local land use decisions that violate LUPA standards, making LUPA review an integral component of Washington's land use system.

B. The Court of Appeals Did Not Err in Reviewing Woodinville's Decision Under LUPA

While LUPA represents a sea change in Washington land use law, the actual LUPA review process is rather unremarkable—it is not an “invasion of local land use decisionmaking discretion,” as Woodinville characterizes it. City of Woodinville Supplemental Br. 16. In Phoenix’s case, the Court of Appeals identified several WMC criteria addressing site-specific rezones.² *Phoenix*, 154 Wn. App. at 503-06. The court reviewed the record to determine whether the council’s decision denying Phoenix’s rezone request was supported by substantial evidence showing that Phoenix did not satisfy the appropriate approval criteria. The court determined that the council’s decision was unsupported, and therefore reversed it. *Id.* at 516. Despite Woodinville’s protestations about the Court of Appeals intruding on the city council’s “legislative” prerogative, the Court of Appeals merely reviewed the city council’s rezone denial as required under LUPA. Woodinville might not

² The Court of Appeals identified several regulations, including WMC 21.44.070, which provides that a rezone shall be granted if the applicant demonstrates that the proposal is consistent with the comprehensive plan, that there is a demonstrated need for additional zoning of the type proposed, that the rezone is compatible with uses and zoning of surrounding properties, and that the property is practically and physically suited for the uses allowed in the proposed zone reclassification. *Phoenix*, 154 Wn. App. at 504. The court also identified WMC 21.04.080, which applies to the city’s urban residential zones. *Id.* at 505.

like the court's conclusion, but reviewing the city's rezone denial under LUPA does not constitute error.

II

LOCAL GOVERNMENTS MUST BASE LAND USE DECISIONS ON THE CRITERIA SET OUT IN THE LOCAL DEVELOPMENT CODE

While LUPA clearly governs this case, Woodinville maintains that rezoning is a fundamentally legislative act, entitling the city to legislative “discretion,” and insulating its decisions from judicial oversight. City of Woodinville’s Supplemental Br. 10-12. But Woodinville fails to acknowledge that evaluating a site-specific rezone request is a quasi-judicial exercise, not a legislative one.³ *J.L. Stordahl & Sons, Inc. v. Clark County*, 143 Wn. App. 920, 931 (2008). As the Court of Appeals correctly stated, this means that the Woodinville City Council must apply “existing law to particular facts rather than [create] new policy” when making a decision on a site-specific rezone application. *Phoenix*, 154 Wn. App. at 503 (citing *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 634-35 (1984)). And this is a critical distinction, which brings to light several reasons why

³ Phoenix’s Supplemental Brief thoroughly covers the evolution of case law on this point, demonstrating that the city council was required to act in a quasi-judicial capacity when reviewing Phoenix’s site-specific rezone application. Phoenix’s Supplemental Br. 5-16.

adopting Woodinville's theory of this case would have grave consequences for the land use system in Washington.

Requiring local government to evaluate permit applications under prescribed criteria promotes fairness in the land use system. In *Twin Bridge Marine Park, LLC v. Department of Ecology*, 162 Wn.2d 825 (2008), this Court explained that Washington strongly favors a policy of shielding permit applicants from changes in law that occur after they have submitted their applications for approval. *Id.* at 843-45. Along the same lines, this Court has held that granting local government unlimited authority to deny permits without respect to pre-established development criteria will harm society. In *West Main Associates v. City of Bellevue*, 106 Wn.2d 47 (1986), this Court held that Bellevue acted unlawfully when it exercised legislative authority for the purpose of preventing West Main Associates from vesting a development proposal. In so holding, the Court stated that, “[s]ociety suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out developments that they begin.” *Id.* at 51; *see also* Joseph R. Grodin, *Are Rules Really Better Than Standards*, 45 *Hastings L.J.* 569, 570 (1994) (explaining that stability, certainty, and predictability are valued because they promote confidence in the rule of law).

Furthermore, Woodinville's argument for policy-making on individual permit applications raises significant constitutional concerns. This Court has held that denying a permit to an applicant who satisfies the applicable approval criteria amounts to a violation of due process. In *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947 (1998), the City of Spokane withheld Mission Springs' grading permit pending a traffic study, even though Mission Springs had satisfied all the requirements for receiving the permit. As Spokane's city attorney wisely advised the city council in that case, a property owner is entitled to have his application considered under the existing development regulations, and any effort to change that scheme unconstitutionally interferes with the applicant's right to use and enjoy his property. *Id.* at 955. A city simply may not withhold land use permission "for reasons extraneous to the satisfaction of lawful ordinance and/or statutory criteria." *Id.* at 952.

Local governments must adhere to the prescribed criteria of their own development regulations. This promotes fairness and finality, fosters predictable growth, and helps avoid due process problems. These values will prevail only if local governments are required to evaluate permit applications pursuant to local development regulations in the first place. Absent that, there can be no assurance that the government will not change its approval

criteria during the course of reviewing the application, thus destroying any expectation of certainty that the permit applicant might have had. Furthermore, allowing for unlimited policy-making authority on permit decisions upsets the plans of builders, bankers, realtors, home buyers, renters, and many others, all of whom expect local governments to evaluate individual permit applications according to established, identifiable criteria. *See generally Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 5 (1992) (concluding that a “body of cogent, workable rules upon which regulators and landowners alike can rely” is essential to resolving land use regulation disputes). Under Woodinville’s theory, however, local permit approval criteria are effectively meaningless, since authorities may simply invoke “discretion” to cover for denials that have more to do with political pressure, or other subjective factors, than with the legal entitlements of property owners. The Court should not endorse such an arbitrary system.

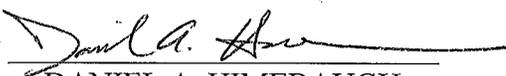
CONCLUSION

For these reasons, the Court of Appeals' decision should be affirmed.

DATED: February 7, 2011.

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

I, Daniel A. Himebaugh, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington 98004. On February 7, 2011, true copies of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS PHOENIX DEVELOPMENT, INC., AND G&S SUNDQUIST THIRD FAMILY LIMITED PARTNERSHIP were placed in envelopes addressed to:

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