

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

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STATE OF WASHINGTON

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.

PHOENIX DEVELOPMENT'S ANSWER TO PETITIONS FOR
REVIEW

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I. IDENTITY OF PARTIES ANSWERING PETITIONS

This answer is filed by Appellants Phoenix Development, Inc. and G&S Sundquist Third Family Limited Partnership (collectively, “Phoenix”).

II. COURT OF APPEALS DECISION

The Court of Appeals decision which Petitioners City of Woodinville and Concerned Neighbors of Wellington want reviewed is attached to their respective petitions. *Phoenix Development, Inc. v. City of Woodinville*, No 62167-0-I, 2009 Wash.App. LEXIS 2684 (Wn.App. Div. I, Nov. 2, 2009).

III. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

Restatement of City of Woodinville issues:

1. Did the Court of Appeals correctly hold that a site-specific rezone request is a quasi-judicial decision that a city council must evaluate under legislatively established criteria, including the comprehensive plan policies and other development regulations, which constrain the council’s discretion?
2. Is the Court of Appeals decision consistent with applicable judicial precedent?

Restatement of Concerned Neighbors of Wellington issues:

1. Did the Court of Appeals apply the correct standard of review to Phoenix's challenge to the sufficiency of the evidence?

2. Is there substantial public interest in reviewing whether the Court of Appeals correctly concluded that there was no substantial evidence supporting the City Council's findings and conclusions that the Phoenix rezones should be denied?

IV. STATEMENT OF THE CASE

Phoenix has proposed to develop two low-density residential subdivisions – Wood Trails and Montevallo – in Woodinville, Washington (“City”). Each subdivision will result in 66 new single family homes, at a density of R-4 (four dwelling units per acre). Slip Op. at 3-4; WMC 21.04.080.

When Woodinville was incorporated in 1995, it adopted a Comprehensive Plan under the Growth Management Act (“GMA”). Its Plan designated approximately 50% of its residentially zoned land at a density of one unit per acre. For a city within the “urban growth area” of King County, the one unit per acre residential zoning was viewed as extremely low density. That extremely low density designation was appealed to the Growth Management Hearings Board (“GMHB”), which ultimately held, in *Hensley v. Woodinville*, CPSGMHB Case No. 96-3-0031, FDO at 9-10 (February 25, 1997) (“*Hensley I*”), that the City's Plan

was unlawful. The Board stated that the City may not “perpetuate an inefficient pattern of one-acre lots,” and added that “[f]or the Board to conclude otherwise would sanction the inappropriate conversion of undeveloped land into sprawling low-density [one-acre] development, which would effectively thwart long-term urban development within the City’s boundaries...” The Board did not, however, impose upon the City any “bright line” urban density requirement. Rather, the Board remanded the Plan to the City to bring it into compliance with GMA. *Hensley I*; Slip Op. at 15-16.

The City did not appeal the *Hensley I* decision. Instead, the City Council chose to comply with *Hensley I* by allowing sprawling one-acre development only when adequate services such as city water and sewer are not available. Where services are available, higher densities of at least R-4 would be required. Accordingly, the City amended its development regulations to provide that:

Developments with densities less than R-4 are allowed only if adequate services cannot be provided.

WMC 21.04.080 (1)(a) (emphasis added). The Comprehensive Plan was also amended to delete policy LU-3.6. Slip Op. at 16.

In reliance on the City’s revised Comprehensive Plan, and WMC 21.04.080 (1)(a), Phoenix applied for two zoning map amendments to re-designate the Wood Trails and the Montevallo sites from “Low Density

Residential R-1” to “Low Density Residential R-4.” After a lengthy, three-year review process, the City’s professional staff and the City’s Hearing Examiner recommended approval of the Wood Trails and Montevallo proposals. However, significant community opposition arose. The neighborhood opposition desires to keep the one-unit per acre density. The Council, ultimately, did not follow the recommendations of its professional staff. Instead it overrode those recommendations and denied the rezone requests. Slip Op. at 3-9.

Phoenix appealed the Council’s action, first to the Superior Court, and then to the Court of Appeals. Phoenix contended that the Council’s action was an erroneous application of the law, was not supported by substantial evidence, and was a clearly erroneous application of the law to the facts.

The Court of Appeals reversed the Council’s denial of the rezones and remanded for reconsideration of Phoenix’s preliminary plat applications. The Court of Appeals held as follows:

1. With respect to the standard of review: The denial of a site-specific rezone is a land use decision, the exclusive means for judicial review of such a decision is the Land Use Petition Act, RCW 36.70C, and a court will grant relief only if a petitioner meets its burden of establishing one of the standards set forth in RCW 36.70C.130. Slip Op. at 9-10.

2. A site-specific rezone request is a quasi-judicial decision. By invoking its legislative authority in this case midway through the quasi-judicial proceedings, the council unlawfully adopted a new policy rather than applying existing policies and regulations. Slip Op. at 10-11.

3. An applicant may challenge the denial of a rezone request on the basis that a local jurisdiction did not follow its own development regulations. Slip Op. at 11.

4. The City's development regulations (at WMC 21.04.080) require the city to approve Phoenix's requests to rezone property to R-4 if adequate services are available to the Phoenix property and the requests meet all other rezone criteria. Slip Op. at 26.

5. The council made no factual findings that would support the denial of the rezones on the basis that adequate services cannot be provided, and a conclusion that adequate services cannot be provided is not supported by substantial evidence. Slip Op. at 14-19.

6. The city's finding that the proposed rezones are not needed (one of the applicable rezone criteria) is not supported by substantial evidence. Slip Op. at 19-21.

7. The council's findings do not support its conclusion that the proposals are inconsistent with the comprehensive plan (another applicable rezone criterion), nor does the council's comprehensive plan

conclusion identify any plan goals or policies that are inconsistent with the proposals. Slip Op. at 21-25.

8. Because the proposed rezones further a number of comprehensive plan policies, they therefore bear a substantial relationship to the public health, safety, morals and welfare (another applicable rezone criterion). Slip Op. at 25-26.

9. The proposals are also consistent and compatible with the uses and zoning of the surrounding properties, and the property is practically and physically suited for the uses allowed in the proposed zone classification (also applicable rezone criteria). Slip Op. at 26-27.

10. Because the proposed rezones meet all statutory and common law requirements for rezones, the city's denial of the rezones is reversed and remanded for reconsideration of Phoenix's plat applications. Slip Op. at 27-28.

V. ARGUMENT

A. The Court of Appeals Decision Applied Well-Settled Law Consistent with Sound Public Policy, in its Review of the City's Quasi-Judicial Land Use Decision.

Petitioners City of Woodinville ("City") and Concerned Neighbors of Wellington ("CNW") have each filed a petition for review. They seek discretionary review of a unanimous Court of Appeals decision that terminated review. Pursuant to RAP 13.4(b), Petitioners bear the burden

of demonstrating either that the Court of Appeals decision presents a matter of substantial public interest, or that it conflicts with existing precedent.

[T]he Supreme Court, in passing upon petitions for review, is not operating as a court of error. Rather, it is functioning as the highest policy-making judicial body of the state. It is the ultimate arbiter of the meaning of the state constitution, statutory and regulatory law, and it is responsible for the development of the common law and public policy within its sphere of authority.

The Supreme Court's view in evaluating petitions is global in nature. Consequently, the primary focus of a petition for review should be on why there is a compelling need to have the issue or issues presented decided *generally*. **The significance of the issues must be shown to transcend the particular application of the law in question.**

Washington Appellate Practice Deskbook (2d Ed. 1993) at Section 27.11 (emphasis added).

The Petitioners have not met, and can not meet, their burden. First, the Court of Appeals decision does not present a matter of substantial public interest because it states no new rule of law, but merely applies existing well-established law based on sound public policy established by the Washington State Legislature in 1995. Second, the Court of Appeals decision is fully consistent with existing judicial precedent. In particular, the Court of Appeals decision relies upon and applies the most recent Supreme Court case that addresses site-specific rezone decisions, *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007).

Accordingly, the Petitions for Review should be denied.

B. The Court of Appeals Correctly Held that a Site-Specific Rezone Request is a Quasi-Judicial Decision that a City Council Must Evaluate under Legislatively Established Criteria which Constrain the Council's Discretion.

The City argues that review of the Court of Appeals decision by the Supreme Court is necessary under RAP 13.4(b)(4) because “its public significance is profound.” The public significance of the Court of Appeals decision is profound, the City concludes, because it “fundamentally alters the traditional landscape of zoning law.” City Petition at 5-6.

According to the City, “the traditional landscape of zoning law” provides that “zoning decisions” are “discretionary legislative acts” the necessity of which are left “exclusively to the legislative body” which will not be reversed “absent a clear showing of arbitrary, unreasonable, irrational or unlawful zoning action or inaction.” City Petition at 6-10. In support of this proposition, the City cites seven reported decisions, all of which date from 1990 or earlier.¹

The City is correct that the Court of Appeals did not apply this line of cases in its review of Phoenix’s challenge to the City’s rezone decision.

¹ *Teed v. King County*, 36 Wn.App. 653, 677 P.2d 179 (1984); *Lutz v. City of Longview*, 83 Wn.2d 566, 520 P.2d 1374 (1974); *Southwick, Inc. v. City of Lacey*, 58 Wn.App. 886, 795 P.2d 1712 (1990); *Leonard v. City of Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976); *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 586 P.2d 860 (1978); *State ex rel. Myhre v. City of Spokane*, 70 Wn.2d 207, 422 P.2d 790 (1967); *Besselman v. City of Moses Lake*, 46 Wn.2d 279, 280 p.2d 689 (1955).

Rather, the Court of Appeals held that the City's site-specific rezone decision was a quasi-judicial land use "project permit" decision subject to review under the standards of the Land Use Petition Act, RCW 36.70C ("LUPA"). Slip Op. at 9-10.²

The City is incorrect, however, in its assertion that it is the Court of Appeals decision in this case that has "fundamentally altered" the traditional landscape of zoning law in Washington state. To the extent the traditional landscape of zoning law has recently been altered, it was not the result of the Court of Appeals decision in this case, but the outcome of the decision of the Washington State Legislature in 1995 to reform the process of review of local project permits. See Chapters 36.70B and 36.70C RCW.

² It should be noted that at oral argument before the Court of Appeals, counsel for the City, while maintaining the Council's decision in this case was legislative, nonetheless specifically agreed with the Court of Appeals that the Council's decision should be reviewed pursuant to the Land Use Petition Act standard of review, **not** the arbitrary and capricious standard of review traditionally applied to legislative decisions :

Counsel for City: Under the LUPA standard – I have no question at all that the LUPA standard of review apply to this – apply to this case... As long as they've done what they're supposed to do in terms of there's substantial evidence in the record to support their decision, they've followed their local code, they follow their compre – you know, to the extent that their comprehensive plan needs to be considered, they've – they've done this, they haven't made a decision that is, you know, clearly erroneous, or any one of those other standards, that's – that's – that's the burden of the respondent (sic) in this case...

Verbatim Record of Proceedings, April 17, 2009 at 23-25 (attached as Exhibit A to this Answer).

It is true that, under prior case law, it was necessary to demonstrate that a rezone decision was “arbitrary and capricious” before relief could be awarded. *Englund v. King County*, 67 Wn.App. 701, 705, 839 P.2d 339 (1992). That is, however, no longer the case. The Washington State Legislature changed that standard when it adopted the Land Use Petition Act, Chapter 36.70C. “To obtain relief from a land use decision, it is no longer necessary to show that the decision was arbitrary and capricious. RCW 36.70C.130 (2) (enacted 1995).” *Henderson v. Kittitas County*, 124 Wn.App. 747, 752 n. 2, 100 P.3d 842 (2004). “On review of a superior court’s decision on a land use petition, [the Court of Appeals stands] in the same position as the superior court and [applies] the... standards [set forth in LUPA] to the record created before the board.” *Id.*, 124 Wn.App. at 752.

Indeed, the Court of Appeals in this case did not make new law, but carefully applied current law, relying most extensively on the holding in *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007). See Slip Op. at 9-10 (citing *Woods*).

In *Woods*, the Supreme Court confirmed that the Washington State Legislature, in adopting regulatory reform in 1995, defined a site-specific rezone as a project permit. RCW 36.70B.020(4). As a project permit, it is also a land use decision subject to review under the Land Use Petition Act,

Chapter 36.70C RCW. 162 Wn.2d at 610-611. “In reviewing a proposed land use project, a local government must determine whether the proposed project is consistent ‘with applicable development regulations, or in the absence of applicable regulations, the adopted comprehensive plan.’ RCW 37.70B.030(1).” 162 Wn.2d at 613. Local development regulations, including zoning regulations, “directly constrain individual land use decisions.” Id.

The Supreme Court specifically refers to a site-specific rezone decision as “an administrative decision,” reviewed under the substantial evidence standard and conclusions of law de novo. Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true. 162 Wn.2d at 616.

Following the Supreme Court decision in *Woods*, the Court of Appeals decided *J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn.App. 920, 180 P.3d 848 (2008), and held:

As a quasi-judicial decision, the [decision-maker] must evaluate site-specific rezone requests under legislatively established criteria, including the comprehensive plan policies **and other development regulations, and those criteria constrain the [decision-maker’s] discretion.**

143 Wn. App. at 931 (emphasis added). The Washington Supreme Court denied Clark County's petition for review of the *Storedahl* decision, 164 Wn.2d. 1031, 197 P.3d 1184 (2008).

In this context, it is clear that there is no "substantial public interest" that requires review of the Court of Appeals decision. The Court of Appeals decision merely restates the law that has been in effect since 1995, and is fully consistent with all subsequent judicial pronouncements.

The City, not content with misrepresenting the current state of the law on review of site-specific rezone decisions, goes further, and misrepresents the holding of the Court of Appeals decision. The City contends that the public interest requires review of the Court of Appeals decision because it amounts to a "sea change in Washington land use law that will severely affect cities and counties throughout the state." City Petition at 10-12.

This is because, the City contends, the Court of Appeals "effectively transforms the local rezoning process into a ministerial act." City Petition at 10.

The City's assertion confounds. One reads and rereads the Court of Appeals decision and finds nowhere any suggestion that the local rezoning process is ministerial. To the contrary, the Court of Appeals specifically recognizes that the City exercises discretion in making its

rezone decision. That discretion however is not, as the City would like it to be, unlimited. Because the City's decision is quasi-judicial, its discretion is constrained by existing legislatively established criteria. Slip Op. at 10-11. The City is not allowed to invoke its legislative authority midway through the quasi-judicial process and adopt a new policy. The City's discretion is limited to applying existing policies and regulations. Slip Op. at 10-11.

The Court of Appeals decision neither transforms the local rezoning process into a ministerial act, nor does it amount to a sea change in Washington land use law. Rather, the Court of Appeals decision follows closely the holdings of *Woods* and *J.L. Storedahl*.³ No substantial public interest requires this decision to be reviewed by the Supreme Court.

C. The Court of Appeals Decision is Consistent with Applicable Judicial Precedent.

The City contends also that review is appropriately granted under RAP 13.4(b)(1) and (2) because, the City argues, the Court of Appeals decision conflicts with applicable judicial precedent. City Petition at 12-19.

³ The City chides the Court of Appeals decision for failing to resolve evidentiary issues in a fashion similar to Division Three's recent decision in *Lanzce G. Douglass, Inc. v. City of Spokane*, 154 Wn.App. 408, 225 P.3d 448 (2010). City Petition at 11-12. However, in that case, an appeal of a Hearing Examiner land use decision, Division Three applied the same LUPA substantial evidence standard as was used by the Court of Appeals in this case. 154 Wn.App. at 415-416.

The first body of precedent cited by the City is comprised of those pre-1995 cases also discussed by the City in its Petition at 5-12. See fn. 1, *supra*. These cases stand for the proposition that “[c]ourts simply do not possess the power to amend zoning ordinances or to rezone a zoned area[.]” *Teed v. King County, supra*, 36 Wn.App. at 642-643.

Of course, even prior to 1995, courts had the power to set aside zoning decisions that were arbitrary or capricious. *Englund v. King County, supra*.

And in any event, as pointed out above, the law cited by the City is out of date. The Washington Legislature reformed the process of local land use decision-making in 1995 with the adoption of Chapter 36.70C. At the same time, the Washington Legislature re-defined the standard of review for courts to employ in reviewing local land use decisions, with the adoption of the Land Use Petition Act, Chapter 36.70C.

As of the date of the adoption of Chapters 36.70B and 36.70C RCW in 1995, if a petitioner challenging a site-specific rezone decision establishes one of the six standards for relief as set forth in RCW 36.70.130, the Court “may grant relief.” The scope of the relief granted is set forth in RCW 36.70C.140: “The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings.”

As of 1995, then, the law is clear. If a petitioner challenging the denial of a site-specific rezone decision establishes one of the six standards for relief as set forth in RCW 36.70C.130, the court has explicit authority to reverse the city's denial. The judicial decisions construing this provision in the context of site-specific rezones, *Woods v. Kittitas County* and *J.L. Stordahl & Sons*, are fully consistent with this law, and with the holding of the Court of Appeals decision.

The City also contends that the Supreme Court should review the Court of Appeals decision because it is inconsistent with the holding in *Woods v. Kittitas County* that a site-specific rezone decision may not be challenged on the basis that it is inconsistent with the requirements of the Growth Management Act, RCW 36.70A. City Petition at 17-19. The City argues that the Court of Appeals decision "ignored [the Supreme Court's] *Woods v. Kittitas County* decision by overturning a site-specific rezone determination based upon the City's alleged failure to comply with the GMA." City Petition at 17.

However, once again, the City misrepresents the Court of Appeals decision. The Court of Appeals did not overturn the City's site-specific rezone determination based upon the City's failure to comply with the

GMA.⁴ Rather, the Court of Appeals decision is clear. The Court of Appeals reversed the City's denial purely on the basis of the City's failure to follow its own development regulations:

In sum, WMC 21.04.080 requires that the city approve an otherwise qualified rezone application unless adequate services cannot be provided. The record establishes that adequate services can be provided to the proposed developments. Contrary to the city's contentions, there is a demonstrated need for additional R-4 zoning and the proposals are consistent with the comprehensive plan and bear a substantial relationship to the public health, safety, morals, and welfare. The rezones are also consistent and compatible with uses and zoning of the surrounding properties, and the property is practically and physically suited for the uses allowed in the proposed zone reclassification, as required by WMC 21.44.070. We reverse the city council's denial of the rezones and remand to the city to grant the rezones.

Slip Op. at 26-27.

The City claims that the import of *Woods* is that once a comprehensive plan and zoning regulation has been adopted by a City, the Growth Management Act becomes an irrelevant "paper tiger," and that the City can ignore all Growth Management Act principles in its land use decision-making processes. City Petition at 17-18.

The City incorrectly reads *Woods*. In fact, *Woods* states:

⁴ In its Petition, the City states that "the Court of Appeals repeatedly referred to the GMHB's four-dwelling-units-per-acre 'bright line rule' for urban density." City Petition at 17. This statement is false. The Court of Appeals decision makes no reference whatsoever to the GMHB's four-dwelling-units-per-acre 'bright line rule' for urban density. The Court of Appeals decision does "repeatedly refer," of course to the City of

[T]he GMA indirectly regulates local land use decisions through comprehensive plans and development regulations, **both of which must comply with the GMA.**

162 Wn.2d at 613 (emphasis added).

In this case, the City adopted a comprehensive plan. Its compliance with the GMA was appealed to the Growth Management Hearings Board. The Hearings Board ruled its plan was in violation of the GMA, and held:

[T]he Board cannot construe Goal U-3 to perpetuate an inefficient pattern of one-acre lots. For the Board to conclude otherwise would sanction the inappropriate conversion of undeveloped land into sprawling low-density development...

Hensley v. Woodinville, CPSGMHB Case No. 96-3-0031, FDO (1997) at 9-10. In its order of remand, the Board did not require the City to adopt any particular minimum density. Rather, the Board directed the City to amend its comprehensive plan to comply with the GMA goal which requires urban jurisdictions to reduce sprawl. RCW 36.70A.020(2).

In response, the City adopted WMC 21.04.080(1)(a), which complies with the GMA goal to reduce sprawl by assuring the GMHB, the State, and the public that developments with densities less than R-4 “are allowed only if adequate services cannot be provided.”

The Court of Appeals quite properly considered this legislative history in construing the legislative intent of WMC 21.04.080(1)(a). In

Woodinville’s own zoning regulation, WMC 21.04.080, which requires a minimum urban

light of that legislative history, the Court of Appeals correctly ruled that the City's current argument -- that WMC 21.04.080(1)(a) is of no legal moment in its rezoning review decision -- lacks credibility. Slip Op. at 14-16.

The City also contends that the GMA improperly influenced the Court of Appeals evaluation of the "demonstrated need" rezone criterion. City Petition at 19. An objective review of the Court of Appeals decision, however, makes it clear that the Court of Appeals reviewed the entire record on the demonstrated need issue before determining whether there was substantial evidence supporting the City Council's finding. The Court of Appeals noted the City's stated ability to meet its GMA housing allocation responsibilities through the year 2022; evidence from CNW relating to homes outside of Woodinville available for sale at urban densities; the fact that land zoned R-1 constitutes approximately 30 percent of the area of the city, while available land zoned R-4 constitutes less than 2.7 percent of the city. The Court of Appeals held that "the hearing examiner's conclusion that the city's relative lack of R-4 zoning compared with its abundance of R-1 zoning demonstrates a need for additional single-family zoning at densities that help to further the goals of Woodinville's comprehensive plan and the GMA is supported by the

density of four dwelling units per acre, where adequate services can be provided.

record.” The City Council’s finding that the proposed rezones are not needed, on the other hand, “is not supported by evidence that is substantial when viewed in light of the whole record before the court.” Slip Op. at 19-21. That the goals of Woodinville’s comprehensive plan and the goals of GMA to encourage urban density and discourage urban sprawl are the same is not a coincidence. Woodinville’s comprehensive plan is required to be consistent with the goals of GMA. *Woods v. Kittitas County, supra*, 162 Wn.2d at 613.

In sum, the Court of Appeals decision is fully consistent with applicable legal precedent. The City has failed to meet its burden to demonstrate that the requirements of RAP 13.4(b) have been met. The City’s Petition should be denied.

D. The Court of Appeals Applied the Correct Standard of Review to Phoenix’s Challenge to the Sufficiency of the Evidence.

Concerned Neighbors of Wellington (“CNW”) has filed its own Petition for Review. CNW asserts that the Supreme Court should accept review “to clarify the use and limits of the substantial evidence test.” CNW claims that “[i]t is a matter of substantial public interest as it relates to the very role of the trial and appellate courts interfacing with triers of fact in several areas of the law.” CNW Petition at 19.

CNW begins its argument in support of this claim by reviewing the substantial evidence test. CNW Petition at 5-11. It cites RCW

36.70C.130(1)(c) which states that a court can grant relief if “the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court.” The record and inferences are viewed in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority. *Woods v. Kittitas County*, 162 Wn.2d 597, 617, 174 P.3d 25 (2007).

To the extent CNW in its Petition implies that the Court of Appeals decision is inconsistent with this statement of the substantial evidence test, CNW is wrong. The Court of Appeals decision is fully consistent with this standard.

The Court of Appeals cites the same statute identified by CNW, RCW 36.70C.130(1)(c), for the proposition that under the substantial evidence test a petitioner has the burden of establishing that “the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court.” Slip Op. at 9-10. The Court of Appeals, like CNW, cites *Woods v. Kittitas County* for the proposition that “[w]hen reviewing a challenge to the sufficiency of the evidence under subsection (c), we view facts and inferences in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority, in this case the city and CNW.” Slip Op. at 10.

Since the Court of Appeals cites the same authority and identifies the same substantial evidence test as cited and identified by CNW, there is certainly no “substantial public interest” in having the Court of Appeals decision reviewed on this basis.

E. The Court of Appeals Correctly Held that No Substantial Evidence Supports the City Council’s Denial of the Rezones.

The City Council concluded, as the Court of Appeals observed, that the R-4 zone was not appropriate for Phoenix’s properties for a number of reasons: (1) the deficient public facilities and services in the area where the property is located; (2) the absence of demonstrated need for the proposed rezones; (3) that the rezones were inconsistent with comprehensive plan policies; and (4) that the rezones did not bear a significant relationship to public health, safety, morals, or welfare. Slip Op. at 13-14.

With respect to each of these four conclusions, and as required by RCW 36.70C.130, the Court of Appeals reviewed the record to determine whether the Council’s factual findings would support the denial on the basis of that conclusion, and whether substantial evidence in the record supported that conclusion. The Court of Appeals, after engaging in the review required by RCW 36.70C.130, determined that there was no substantial evidence to support these four conclusions. Slip Op. at 14-26.

CNW presents no argument and provides no citation to the record to suggest that the record contains substantial evidence to support any of these conclusions. See CNW Petition at 12-17.

CNW does present argument, however, (although with no citation to the record) to suggest that there is substantial evidence in the record to support a denial of the rezone on two grounds that were **not** identified by the City as a basis for its denial. CNW Petition at 12-17.

WMC 21.44.070(2)

The City Council did not state as a reason for its denial that the Phoenix reclassification failed to meet the criterion of WMC 21.44.070(2), that “the zone classification is consistent with uses and zoning of the surrounding properties.” Indeed, the Staff Report, the Environmental Impact Statement, and the Hearing Examiner all agreed that this criterion **was** met. Montevallo Ex. 40, 3.4-30 – 3.4-32; Wood Trails Ex. 1, p. 24; Montevallo Ex. 1, p. 20; Hearing Examiner Wood Trails Decision, p. 11; Hearing Examiner Montevallo Decision, p. 10.

Nonetheless, CNW asserts that “substantial public interest” requires the Supreme Court to review the Court of Appeals decision, due to the absence of full discussion in the Court of Appeals decision of the Court of Appeals’ review of an issue **not** cited by the City as a basis for its

rezone denial decision. CNW Petition at 11-13. CNW's assertion is far-fetched.

The record fully demonstrates, as found by city staff and the Hearing Examiner (see citations to record set forth above at p. 22), that the proposed zoning classification is in fact consistent with and compatible with the uses and zoning of the surrounding properties. Indeed, it takes little more than common sense to conclude that a low density residential zone classification of R-4, which allows residential uses and low density residential development (as defined in the City's comprehensive plan), is consistent with and compatible with the uses and zoning of the surrounding R-1 properties, which are residential uses zoned for low density residential development (as defined in the City's comprehensive plan).

The Council's Wood Trails Finding 12 and Montevallo Finding 10 add nothing to CNW's argument. See CNW Petition at 12. The Council found that the rezones were "not in character with the surrounding R-1 neighborhoods and properties." That finding, however, cites to **no** evidence in the record that supports it. Nor does CNW, in its Petition at 12-13, cite to any evidence in the record that supports this finding. The Council finding does not serve as the foundation for any conclusion of law adopted by the Council. Nor does the Council even attempt to suggest that

this finding on “character of the neighborhood” is relevant to or even pertains to the very different terms utilized in WMC 21.04.070(2), which refers to “consistency and compatibility with the uses and zoning of the surrounding properties.” Undoubtedly, it is because of this that the Council chose not to identify WMC 21.04.070(2) as a basis to deny the Phoenix rezone requests.

CNW points to no error committed by the Court of Appeals, and certainly identifies no substantial public interest that would require review of this aspect of the decision.

Changed Circumstances

Changed circumstances are one of the three general common law rules applicable to rezone applications. Slip Op. at 12. The City Council, in its conclusions on the Wood Trails and Montevallo rezones, does not include the issue of changed circumstances as one of its reasons supporting denial of the rezone requests. Slip Op. at 13-14.

Nonetheless, CNW argues that Supreme Court review of the Court of Appeals decision is required because “abundant evidence” supports the Council’s “conclusion” that there are not changed circumstances supporting a rezone. CNW Petition at 14-15. There are four reasons why CNW’s argument lacks merit.

First, as noted above, the Council did not include in its Conclusions of Law that absence of changed circumstances required denial of the rezone requests. There is no basis to request Supreme Court review of the Court of Appeals decision related to an issue not even relied on by the City as justification for its denial.

Second, while the Council did purport to make a “finding of fact” on the issue of changed circumstances (Finding 6e), this finding was made in the Council’s “legislative capacity,” midway through a quasi-judicial proceeding, was accordingly unlawful, and therefore not entitled to consideration. Slip Op. at 10-11.

Third, it should be observed that CNW, in its Petition, provides **no** specific citation to **any** of the allegedly “abundant evidence” in the record that it claims supports the Council’s finding. Nor does the Council, in Finding 6(e), cite to any evidence in the record supporting the finding. One would expect that if CNW claimed that there was “abundant evidence,” CNW would point that evidence out to the Supreme Court. Having failed to do so, CNW can not credibly argue that Supreme Court review is justified.

Finally and most significantly, as found by the Court of Appeals, Slip Op. at 10, the law is clear that a rezone that implements policies of the Comprehensive Plan meets any applicable “changed circumstances”

requirement. *SORE v. Snohomish County*, 99 Wn.2d 363, 662 P.2d 816 (1983). See also *Bjarnson v. Kitsap County*, 78 Wn.App. 840, 846, 899 P.2d 1290 (1995) (“where the proposed rezone... implements policies of the comprehensive plan, changed circumstances are not required”).

Indeed, the City, in its Court of Appeals Brief at p. 14, n. 6, cites *Bjarnsen* and agrees that under current case law, proponents of a rezone are no longer required to satisfy the “changed conditions” criterion if the rezone would implement relevant policies of the municipality’s comprehensive plan. The City Council is also on record as agreeing that the Phoenix rezones implement policies of the City’s comprehensive plan. See, e.g., City Council Decision Finding 6(e).

The Court of Appeals conclusion on changed circumstances, Slip Op. at 10, is accordingly fully consistent with applicable law and is not contested by the City itself, the decision-maker in this matter. There is no “substantial public interest” requiring Supreme Court review of this issue.

F. No Substantial Public Interest Requires Supreme Court Review to Clarify the Application of the Substantial Evidence Test.

CNW concludes its petition by contending that the Court of Appeals decision “represents a departure from well settled Washington law regarding the proper role of trial and appellate court review decisions [sic] of fact findings, whether in the land use, administrative review or criminal context.” CNW Petition at 16.

As pointed out above, CNW has simply failed to make its case.

The substantial evidence standard of review CNW commends to the court is the very standard of review cited to and utilized by the Court of Appeals.

CNW chastises the Court of Appeals for having conducted “its own independent review of the record.” CNW Petition at 16. But that, of course, is precisely what is required of the Court on a LUPA appeal:

The... court... shall review the record... The court may grant relief... if the party seeking relief has carried the burden of establishing that one of the standards set forth [below] has been met... (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court...

RCW 36.70C.130.

In particular, CNW scolds the Court of Appeals for having reviewed, and cited to, the City Hearing Examiner decision and the City’s Final Environmental Impact Statement. CNW Petition at 16-17.

It is ironic that CNW opposes the review by the Court of Appeals of the City’s own Final Environmental Impact Statement. Indeed, RCW 37.70B.050 specifically requires local governments to “combine the environmental review process, both procedural and substantive, with the procedure for review of project permits.” In other words, the City was required to consider the facts and conclusions set forth in the FEIS when rendering its decision on the rezone requests. While the Council may have

chosen to refuse to consider the findings and conclusions of its own EIS, it was certainly appropriate for the Court of Appeals, in fulfilling its LUPA obligation to consider the evidence in the record as a whole, to consider those findings and conclusions.

It is equally ironic that CNW questions the review by the Court of Appeals of the findings and conclusions of the City's Hearing Examiner. The City's own zoning code appoints the Examiner to be the hearing officer in matters of site-specific rezone requests, to hear the evidence, and to make recommended findings of fact and conclusions of law. WMC 17.07.030 and 21.42.110(2). It was the Hearing Examiner, not the Council, who heard the live testimony of expert witnesses, and who was therefore best able to weigh their credibility. The Council had a mere written record to review – the same record reviewed by the Court of Appeals.

Nonetheless, as a review of the Court of Appeals decision demonstrates, the Court of Appeals fully understood its obligations under the substantial evidence standard and faithfully executed them. It closely scrutinized each of the conclusions made by the Council, looked to see whether the Council's findings of fact supported those conclusions, and if not, reviewed the record to determine whether the record supported those conclusions. Slip Op. at 14-26.

The Court of Appeals properly determined that the record does not support the conclusions reached by the City. Slip Op. at 14-26. Even at this date, neither the City nor CNW points to a single specific shred of evidence in the record that supports the Council's conclusions. If there was, as alleged by CNW, "abundant solid evidence" in support of those conclusions, CNW Petition at 18, one would have expected citations to that evidence, "with appropriate references to the record." RAP 13.4(c)(6). CNW's failure to provide such references suggests they do not exist.

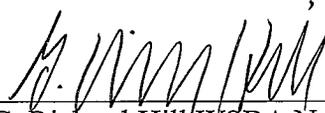
VI. CONCLUSION

Petitioners City and CNW have not met their burden to demonstrate that the Supreme Court should review the Court of Appeals decision in this case. RAP 13.4(b). The Court of Appeals decision is fully consistent with existing judicial precedent. Since that is the case, there are no issues of substantial public interest raised in either Petition that merit determination by the Supreme Court.

DATED this 20th day of April, 2010, at Seattle, Washington.

Respectfully submitted,

McCULLOUGH HILL, P.S.



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APPENDIX A

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PHOENIX DEVELOPMENT, INC., a Washington)
Corporation, and G&S SUNDQUIST THIRD)
FAMILY LIMITED PARTNERSHIP, a Washington)
limited partnership,)
Appellants,)
vs.) No. 62167-0
CITY OF WOODINVILLE, a Washington)
Municipal Corporation, and CONCERNED)
NEIGHBORS OF WELLINGTON, a Washington)
Nonprofit Corporation,)
Respondents.)

VERBATIM RECORD OF PROCEEDINGS
April 17, 2009
Seattle, Washington

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1 BE IT REMEMBERED that on Friday, April
2 17, 2009, at 600 University Street, Seattle, Washington,
3 before The Honorable Anne L. Ellington, J. Robert Leach, and
4 Ann Schindler, the following proceedings were had,
5 electronically recorded, and were subsequently transcribed
6 from audio CD, to wit:
7
8 <<<<<< >>>>>>
9
10 JUDGE LEACH: -- motion has decided to
11 grant each side 15 minutes of oral argument because we have
12 a number of questions. And the respondents will need to
13 decide among themselves how to divide the 15 minutes. And
14 are you ready to proceed? Do you want to reserve any time
15 for rebuttal?
16 MR. HILL: Yes, please, Your Honor.
17 Three minutes.
18 Good morning, Members of the Court. My name is Richard
19 Hill, and I'm counsel for Phoenix Development. In my
20 argument this morning, I will address three issues. I'm
21 available, of course, to answer questions on any other issue
22 that may interest or perplex you.
23 The three issues I intend to address are these: One,
24 what is the relevance of the Growth Management Act to the
25 resolution of this case; two, can adequate services be

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1 provided to the Wood Trails and Montebello sites owned by
2 Phoenix; and three, is there a demonstrated need for R-4
3 zoning in the city of Woodinville.
4 Members of the Court, this case arises out of a
5 proposal by Phoenix Development to develop two subdivisions
6 in the city of Woodinville at R-4 densities. That means
7 four dwelling units to the acre. Why R-4? The reason,
8 Members of the Court, is because of the City's own land use
9 code, which states, quote, "Developments with densities less
10 than R-4 are allowed only if adequate services cannot be
11 provided."
12 JUDGE LEACH: Let me ask you a question
13 about that.
14 MR. HILL: Yes.
15 JUDGE LEACH: If the proponent of this
16 rezone is able to demonstrate that adequate services are
17 available, is it entitled to a rezone to R-4 as a matter of
18 law?
19 MR. HILL: Yes.
20 JUDGE LEACH: Does the city council have
21 any residual discretion whatsoever in making that decision?
22 MR. HILL: No. Indeed, Your Honor, it
23 is our position that if the city council approved a
24 rezone to R -- approved a project at R-1 density, that a
25 neighbor who is a member of Futurewise could appeal that

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1 rezone to this Court and have that project invalidated.
2 JUDGE SCHINDLER: Well, let me -- let me
3 ask you a separate question, because obviously there are two
4 code provisions. There's the -- there are -- that we have
5 to look at. There's the 070 provision related to what you
6 have to show for a rezone. And then there's the 080
7 provision that we're talking about and you just referenced.
8 The city council -- I think the hearing examiner found
9 that the city council had -- still had discretion related to
10 the criteria set forth in 070.
11 MR. HILL: That is -- that was the
12 hearing examiner's position.
13 JUDGE SCHINDLER: And you disagree with
14 it?
15 MR. HILL: (Inaudible) -- Phoenix set
16 forth evidence addressing all of those issues.
17 JUDGE SCHINDLER: Right. So --
18 MR. HILL: And Phoenix does believe that
19 it addresses all of those other issues set forth in 070, for
20 example.
21 JUDGE SCHINDLER: Let me ask you another
22 question. In a typical rezone -- if this were not related
23 to, and connected with, a preliminary plat approval, in a
24 typical rezone, would you -- would the hearing examiner and
25 the city council and the staff be looking at the public

2 (Pages 2 to 5)

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1 facilities that are necessary for preliminary plat approval?
2 MR. HILL: Yes, they would.
3 JUDGE SCHINDLER: And in what context?
4 MR. HILL: In a typical rezone, in the
5 city of Woodinville, for example, unrelated to adequacy of
6 public facilities, most comprehensive plan provisions, as
7 the Court knows, require that development be associated with
8 provision of adequate public facilities. In addition,
9 concurrency requirements in the Growth Management Act also
10 mandate adequacy of certain public facilities before
11 projects can be approved, and a rezone would be one of
12 those.

13 JUDGE LEACH: Would there be a
14 distinction in how those are evaluated between a proposal
15 for a rezone and a preliminary plat application?

16 MR. HILL: There would be a -- there
17 would be a distinction based on the requirements of the
18 particular zoning ordinance.

19 JUDGE LEACH: How about under the
20 particularity of the Woodinville zoning ordinance?

21 MR. HILL: I believe under the
22 particularity of the Woodinville zoning ordinance, both the
23 subdivision approval and, at least in this case, the rezone
24 to R-4 would require adequate public facilities

25 JUDGE SCHINDLER: How do you determine

1 interpreting this code. Perhaps you could address the
2 circumstance that the Growth Management Act contains
3 definitions for both "public services" and "public
4 facilities" and characterizes roads and parks as facilities
5 rather than services and what consequence that is to us.

6 MR. HILL: I'd be happy to do that, Your
7 Honor. And it is an opportunity to segue into the Growth
8 Management Act issue in this case.

9 The City misunderstands Phoenix's argument. Phoenix is
10 not arguing that the City's action should be reversed
11 because it is inconsistent with the policies of GMA. No.
12 Rather, the City's decision should be reversed because it
13 violates the City's own code requirements and planning
14 policies, requirements that define and embrace the anti-
15 sprawl, efficient use of land policies of GMA.

16 What are those City codes and policies that do so?
17 It's in the land use code, and we've already discussed the
18 provision that requires a minimum four dwelling units per
19 acre where adequate services are provided. That same
20 provisions of the land use code mandates that residential
21 land must be used efficiently, promote diversity and
22 affordability. Members of the Court, when 30 percent of the
23 entire city is zoned at R-1 one-acre lot zoning, that is not
24 promoting diversity, affordability, or efficiency.

25 What does the comprehensive plan, the City's

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Page 9

1 that?
2 MR. HILL: The adequacy of public
3 facilities? It's a -- it's a factual argument. It's a
4 factual issue. The -- in this case, for example, as the
5 Court has determined, has reviewed, it was reviewed in great
6 depth with respect to issues of road and concurrency
7 issues -- which are again set forth by city standards -- are
8 addressed with respect to road capacity. Water is either
9 available or it is not available. Sewer is either available
10 or it is not available.

11 JUDGE LEACH: Make any distinction
12 between services and facilities in the analysis?

13 MR. HILL: Neither "services" nor
14 "facilities" are specifically defined terms in the code.
15 "Services" -- it's -- it was Phoenix's understanding
16 throughout this process that "services" related to sewer,
17 water, and utilities. At the city council stage, that was
18 brought in to include additional facilities, such as parks
19 and transit. Even with respect to those, we believe we've
20 met those requirements.

21 JUDGE LEACH: We understand there is a
22 disagreement as to the definition of "services." And you've
23 encouraged us to look at one provision of the Growth
24 Management Act. And perhaps it's a way for you to segue
25 into what we do with the Growth Management Act in

1 comprehensive plan, do about the GMA policies? It defines
2 "urban densities." This isn't what Hensley required the
3 City to do. The City's own comprehensive plan defines
4 "urban densities" at -- as four units to the acre or
5 greater. It requires land use patterns that will reduce the
6 consumption of land and concentrate development. It
7 encourages moderate- and medium-density housing throughout
8 the community, five to 18 dwelling units per acre. That's
9 what the comprehensive plan says.

10 It requires minimum densities for subdivisions to
11 ensure full land use. And in the case of the -- of the
12 Montebello and Wood Trails properties, it specifically
13 designates those properties as low-density residential, one
14 to four dwelling units per acre.

15 The spirit and letter of GMA's policy to reduce sprawl
16 and encourage the efficient use of land are part and parcel
17 of the City's comprehensive plan and regulations. It is
18 because the city council, acting quasi-judicially, refused
19 to act in accordance with those legislatively established
20 policies that its decision must be reversed --

21 JUDGE SCHINDLER: All right.

22 MR. HILL: -- with respect to -- go
23 ahead.

24 JUDGE SCHINDLER: There are two things,
25 and I think you're about ready to say "services." So I

3 (Pages 6 to 9)

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<p style="text-align: right;">Page 10</p> <p>1 think you have to focus on services, and I think you have to 2 focus on need. So the city council found that the -- the 3 developments with R-4 density are inappropriate where the 4 public facilities and services cannot be provided at the 5 time of development. Is that an appropriate finding in the 6 context of a rezone decision here? 7 MR. HILL: It is factually incorrect, 8 number one. And number two, with respect to those 9 facilities, as -- as Judge Leach pointed out, those 10 facilities are not determined to be services under the 11 definition of the Growth Management Act. Now, the Growth 12 Management Act, I agree, under Woods, is not -- is not 13 governing in this case. But the question is: How do you 14 define (inaudible) -- 15 JUDGE LEACH: Is there a reason why we 16 would or would not look to the Growth Management Act to help 17 us understand how those terms are defined? 18 MR. HILL: There is a reason. And I 19 think that reason is set forth in Woods vs. Kittitas County, 20 which clearly talks about the hierarchical development of 21 land use regulations in the state of Washington, starting 22 out with the policies and statutory requirements of Growth 23 Management Act and then setting -- going forth to the 24 comprehensive plan and development regulations which 25 implement those policies and regulations. If there is some</p>	<p style="text-align: right;">Page 12</p> <p>1 think the City's brief amplifies that misunderstanding 2 throughout. 3 JUDGE SCHINDLER: So go ahead with need. 4 MR. HILL: Thank you. With respect to 5 the demonstrated need issue -- and I'm going to talk a little 6 bit about roads, parks, and transit in this context. It's a 7 little bit disagreement, but I'm going to address those 8 issues because Judge Leach raised them. 9 But the question is: Is there a demonstrated need for 10 R-4 zoning in the city? The term is not defined in the code, 11 as -- as you know. In our brief, we identified a number of 12 ways in which additional R-4 zoning was needed in the city, 13 including market demand, the State's adopted public policy 14 to reduce sprawl, sound planning principles, and the holding 15 in Hensley which held that the City may not perpetuate a 16 pattern of one-acre sprawling development. 17 JUDGE LEACH: Is there need if there is 18 sufficient R growth somewhere within the city limits for the 19 city to meet its expected growth (inaudible) -- 20 MR. HILL: I'm glad -- I'm glad you 21 asked that question. The City's response to this 22 demonstrated need argument that we made in our brief, at 23 Page 37, the City stated, "Need is defined by City policy and 24 objectives." "Need is defined by City policy and 25 objectives."</p>
<p style="text-align: right;">Page 11</p> <p>1 ambiguity in those development regulations, undefined terms, 2 it's certainly very appropriate to go to the Growth 3 Management Act to do so. 4 JUDGE LEACH: What deference is the city 5 council entitled in its interpretation of its own code? 6 MR. HILL: The city council is entitled 7 to some deference. That's what the case law states. The 8 city council is entitled to some deference. But as with the 9 Growth Management Hearings Board, interpretation of GMA, 10 some deference is due. But it (inaudible) a legal issue 11 that this Court has an obligation to consider. 12 Shall I address the demonstrated need issue? 13 JUDGE SCHINDLER: Before you do that, in 14 the -- in the capacity -- as they stated in its legislative 15 capacity, the City made a number of findings. And I know 16 you're making an argument about the legislative versus quasi- 17 judicial capacity. Are you also taking the position that 18 all of those findings are improper because they were made in 19 a legislative capacity? 20 MR. HILL: Yes. We are saying that all 21 of those findings are improper because they're made in a 22 legislative capacity. They are not citing anything to the 23 record. There's no citation to the record in any of those 24 findings. The city council basically completely 25 misunderstood its proper role in this proceeding, and I</p>	<p style="text-align: right;">Page 13</p> <p>1 And I would ask the Court to take the City at its word. 2 What are the City's policies and objectives? They are set 3 forth in the land use code: Development less than R-4 is 4 not allowed. Residential land should be used efficiently. 5 Its comprehensive plan, which -- which ensures efficient use 6 of land, concentration of development, medium and moderate 7 density development throughout the city. 8 JUDGE LEACH: Do you want to get into 9 your three minutes or do you want to (inaudible) -- 10 MR. HILL: Let me take one more minute -- 11 JUDGE LEACH: You may. 12 MR. HILL: -- because this is a key 13 issue. 14 In this light, when a full 30 percent of the city is 15 zoned R-1 and only 2.7 percent is zoned R-4, it is not 16 fulfilling these policies to use land efficiently. 17 With respect to the satisfaction of the residential 18 population forecast, what they've done is identified certain 19 areas downtown to take a lot of multifamily. 30 percent of 20 the land is zoned R-1, but there's -- 2.7 percent of the city 21 only is R-4. GMA and their own policies require diversity. 22 And it's important to have one-acre lot -- one-quarter-acre 23 lots that most people can afford as opposed to one -- full 24 one-acre estate-size lots that most people cannot under their 25 own policies. Thank you.</p>

4 (Pages 10 to 13)

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1 JUDGE LEACH: Are you dividing your time
2 or are you going to speak for the full 15 minutes?
3 MR. ARAMBURU: We're going to divide our
4 time in half, if we may. So I think that would be seven and
5 a half for each of us.
6 JUDGE LEACH: Bear with me a minute
7 while I figure out how to get the half in here. It's not
8 apparent to me, so we'll start this when you've talked for 30
9 seconds.
10 MR. ARAMBURU: Okay. Very well. May it
11 please the Court. I'm Richard Aramburu here today
12 representing Concerned Neighbors of Wellington, one of the
13 chief participants in the City's hearings on the rezones at
14 issue here.
15 I'm going to talk about the background in the record
16 and some of the facts that led the council to its very
17 correct decision in denying these rezones. Mr. Rubstello,
18 the -- representing the City, will be addressing many of the
19 legal standards. We've tried to make that -- that division,
20 if we may.
21 This case concerns the denial of two rezones within the
22 city, and a bit of historic context is appropriate here.
23 The neighborhood where these rezones are proposed has been
24 effectively in the same situation, condition, since the
25 1970's. The zoning, the comprehensive plan of the City, has

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1 been largely the same since 1996, when the City adopted that
2 comprehensive plan. There's been no changes and no
3 applications by these appellants to change that zoning.
4 The city council --
5 JUDGE SCHINDLER: And by that, do you
6 mean in the -- in the amendment process? I mean, there was
7 no legislative request to change the zoning? Is that what
8 you're suggesting?
9 MR. ARAMBURU: No request to change the
10 zoning. And under Thurston County vs. the Growth Management
11 Hearings Board, if there is not a request for a change,
12 the -- the decisions of the council made in 1996 on both the
13 zoning code and comprehensive plan are binding unless they're
14 challenged within 60 days. So challenges to the sufficiency
15 or appropriateness of the zoning are not proper in these
16 proceedings.
17 JUDGE LEACH: But we don't understand
18 Phoenix to be making that kind of a challenge. Counsel today
19 said that what their position is, is that the council didn't
20 follow its own code rather than that the denial of the rezone
21 violated the GMA.
22 JUDGE SCHINDLER: And I guess that's the
23 code that was in effect in 2004.
24 MR. ARAMBURU: That's -- that's correct,
25 but --

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1 JUDGE LEACH: Counsel takes the position
2 that if he shows on behalf of his client that the services
3 would be available at the time of development, his client's
4 entitled to R-4 zoning as a matter of law and the city
5 council has no discretion in that decision. Do you want to
6 controvert that?
7 JUDGE ELLINGTON: (Inaudible), would you
8 prefer your colleague address those issues?
9 MR. ARAMBURU: Well, I think it's
10 appropriate to address whether there was -- there was the
11 substantive evidence to support that. Mr. Hill does, indeed,
12 in answer to your question, make the argument that it is
13 consistent with the existing zoning, but he has to pile on a
14 whole lot of GMA to get there. And that's where the
15 mistake -- that's where he is in error in light of the
16 Woods -- in light of the Woods case.
17 JUDGE SCHINDLER: So I guess what you
18 are going to address is what substantial evidence supports
19 that there are not the services available, number one, and
20 that there's no need?
21 MR. ARAMBURU: What we did -- and I
22 brought the materials up with me, and this is really the
23 basis for our -- for our position in this case: Two
24 volumes, over -- over 2,000 pages of materials which were
25 put together by experts, engineers, geologists, other

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1 persons, to identify and specifically address the terms of
2 the Woodinville code, to address the 070 and the 080 issues.
3 And that was done in a very detailed fascia.
4 This isn't somebody getting up and saying there's too
5 much traffic or that we're concerned about the geologic
6 conditions. Roger Mason, for example, 25 years in
7 transportation engineering, prepared a 19-page report with
8 graphs and other materials which clearly identified that the
9 streets and arterials in the neighborhood were substandard
10 and inadequate to provide the public services and facilities
11 necessary to support this rezone.
12 JUDGE LEACH: But the --
13 MR. ARAMBURU: Detailed information.
14 JUDGE LEACH: The FEIS says that those
15 same deficiencies would be present if the property was
16 developed at R-1 density, doesn't it?
17 MR. ARAMBURU: There are comments in the
18 EIS to -- to discuss those issues, but --
19 JUDGE LEACH: Did Mr. Mason's testimony
20 take exception to that statement within the FEIS?
21 MR. ARAMBURU: It did. And his --
22 JUDGE LEACH: So Mr. Mason's testimony
23 would support a conclusion that the deficiencies in the road
24 system would be aggravated by developing at R-4 levels of
25 density rather than R-1?

5 (Pages 14 to 17)

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1 MR. ARAMBURU: Absolutely. Absolutely.
2 He -- he addressed all of those points within the materials
3 that he -- that he made. And the argument here is over the
4 sufficiency of the evidence. Mr. Hill's arguments are fine
5 as a closing argument perhaps to a jury or perhaps to a
6 judge or perhaps to a city council.
7 But -- but at this point, the standard is, is there
8 sufficient evidence to support what the council did? The
9 council's the decision maker here, not this Court. Under
10 GMA, it is plain that city governments get to decide what the
11 relevant and appropriate levels of development are as long as
12 they stay within their own codes. And here, they have stayed
13 within their own codes.
14 For example, the question of demonstrated need: Part of
15 this material went into great statistical detail about the
16 kinds and types of developments that were being completed
17 within the city and what the situation was with respect to
18 meeting the GMA goals. And the conclusion, not only in our
19 materials, but the conclusion by City staff was, that the
20 City is way ahead of its goals. It has in excess of 477
21 units within the city. There was not a demonstration that
22 there was a need for this kind of development as is clearly
23 stated within the code.
24 JUDGE LEACH: Are you or are your co-
25 counsel going to address why that's the correct legal

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1 standard for determining need?
2 MR. ARAMBURU: I think I'm going to let
3 Mr. Rubstello address that legal standard. But the whole
4 point of the -- the demonstrated need as shown in these
5 materials is that the City wants to embark upon smart growth.
6 It wants to have its facilities and developments in areas
7 where we don't have to be dependent on the automobile, where
8 people don't have to get in their cars to go shopping or to
9 go to parks. That's the kind of smart development. That's
10 not what's going on here in this far corner of the city where
11 none of those -- those facilities are available.
12 So we ask that you affirm the decision of the city
13 council and the superior court.
14 JUDGE LEACH: Thank you.
15 MR. ARAMBURU: Thank you.
16 MR. RUBSTELLO: Good morning. My name is
17 Greg Rubstello, and I'm here representing the City of -- of
18 Woodinville. I first wanted to say that I -- in putting this
19 case in perspective, it's certainly much broader than the
20 argument that Mr. -- Mr. Hill has made that somehow this one
21 provision of the municipal code dictates that the City has to
22 grant a -- a rezone application from R-1 to R-4 if they can
23 prove that there's an adequacy of facilities.
24 JUDGE SCHINDLER: Well, doesn't it --
25 doesn't it create some sort of presumption?

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1 MR. RUBSTELLO: I don't believe so, no,
2 at all.
3 JUDGE SCHINDLER: Why not?
4 MR. RUBSTELLO: Well --
5 JUDGE SCHINDLER: Because the city
6 council adopted that code.
7 MR. RUBSTELLO: Well, yes, they adopted
8 that code. But, one, you're talking about policy language.
9 Two, it does not say any -- in the affirmative that the City
10 will grant an application for R-4 rezone --
11 JUDGE SCHINDLER: No, I agree with that.
12 MR. RUBSTELLO: -- from where you do --
13 it doesn't say -- it doesn't say that at all. In fact, it --
14 JUDGE LEACH: Well, let me ask you a
15 question in that regard. If instead Phoenix had come in with
16 a preliminary plat application asking to develop this
17 property at R-1 density, would it have to affirmatively
18 demonstrate that adequate services could be provided to this
19 property at time of development to get approval of that plat?
20 MR. RUBSTELLO: No.
21 JUDGE LEACH: Why not?
22 MR. RUBSTELLO: Because the code
23 explicitly allows for R-1 development on that property. All
24 the regulatory -- it is on the -- on the City's zoning map --
25 JUDGE LEACH: But you read --

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1 MR. RUBSTELLO: -- as R-1. The code
2 says, if it's R-1, this is what you can do.
3 JUDGE LEACH: You read 080 to allow
4 development at R-1 densities even if the services could be
5 provided?
6 MR. RUBSTELLO: Yes. In fact,
7 Woodinville Municipal Code 21.04.080(2)(a) says, "Use of this
8 zone is appropriate in residential areas designated by the
9 comprehensive plan as follows: The R-1 zone on or adjacent
10 to lands with either area-wide environmental constraints, or
11 in well-established subdivisions of the city of the same
12 density."
13 There's certainly no factual issue in this case that
14 this Wellington Hills neighborhood is a well-established R-1
15 neighborhood, has been so for years, has been zoned that way.
16 And the comprehensive plan goals that the City has adopted --
17 JUDGE LEACH: What do you (inaudible) --
18 MR. RUBSTELLO: -- encourage preservation
19 of that character of that zone.
20 JUDGE LEACH: The code provision that
21 you've just been relying on speaks in terms of well-
22 established subdivisions instead of neighborhoods. Is there
23 any difference between those two words in the analysis?
24 MR. RUBSTELLO: I don't believe so,
25 because the -- the properties that were developed there were

6 (Pages 18 to 21)

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1 developed as small subdivisions. In fact, the Montebello
2 plat, the area where the Montebello plat (inaudible) is an
3 old 1975 subdivision that made -- one, two, three, four --
4 five large lots. As well as the properties adjacent to the
5 area, these properties all came in -- many of them, they
6 were even larger plots that were subdivided into large-lot
7 subdivisions either -- when the city was incorporated in
8 1993 either as part of the county or after its incorporation
9 into the -- into the city. Most -- most of those plats
10 were -- were put in before 1993, when the city -- when the
11 city incorporated.

12 JUDGE SCHINDLER: Would you address the
13 argument that the findings that were made by the City in
14 their legislative capacity were improper?

15 MR. RUBSTELLO: All right. I've
16 addressed that sort of extensively in my belief -- excuse
17 me -- in my brief. But the city council is charged by state
18 statute to make a rezone decision, which has been
19 characterized for years in all the rezone decisions -- and
20 we cited them in our briefing -- as a legislative act, that
21 rezoning is a legislative act. That's why a city council,
22 and not a hearing examiner or a planning body, has to make
23 that decision. And it has to be made by ordinance.

24 The city council followed a quasi-judicial process.
25 There's no question that they did. We held five nights --

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1 Even under the -- even prior to LUPA --
2 JUDGE LEACH: What's the legal
3 significance from your perspective to labeling this a
4 legislative finding as opposed to just including it as a
5 finding made by a quasi-judicial body?

6 MR. RUBSTELLO: I think the
7 significance -- and probably the reason that it was written
8 that way -- is basing that on the -- on the history of case
9 law in this -- in this state, that this is a legislative --
10 remains a legislative type of decision. Practically, I
11 don't think it -- it's sort of like, Is this a finding? Is
12 this a conclusion? I don't think that it makes that much
13 difference.

14 JUDGE LEACH: Well, there is a --

15 MR. RUBSTELLO: But --
16 JUDGE LEACH: -- difference between
17 those. One we review de novo and one --

18 MR. RUBSTELLO: Sure.
19 JUDGE LEACH: -- we review for
20 substantial evidence.

21 MR. RUBSTELLO: All right. But it's
22 often hard sometimes to differentiate between the two. The
23 council's decision to make a rezone is a legislative
24 decision. The case law says it is. And as long as they've
25 done what they're supposed to do in terms of there's

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1 there was five nights of hearing before a hearing examiner.
2 Evidence was taken. There's no challenge that evidence was
3 improperly taken or admitted or when the council did its
4 closed-record review, that it did anything out of bounds
5 with respect to acting in a quasi-judicial manner.

6 But the decision as to is this -- as a matter of
7 policy, looking at all of our comprehensive plan goals and
8 all of our comprehensive plan policies, is this something
9 that we want to do at this time? Yes, I believe that that
10 is still a legislative decision for the council, but they
11 must follow the quasi-judicial rules, which they did. They
12 may --

13 JUDGE LEACH: Did they follow the quasi-
14 judicial rules in terms of needing evidence to support
15 legislative findings?

16 MR. RUBSTELLO: Absolutely. Absolutely.
17 They're --

18 JUDGE LEACH: And are those legislative
19 findings subject to the same standard of review that other
20 findings in a quasi-judicial proceeding --

21 MR. RUBSTELLO: Oh, certainly.

22 JUDGE LEACH: -- is subject to?

23 MR. RUBSTELLO: Certainly. Under the
24 LUPA standard -- I have no question at all that the LUPA
25 standards of review apply to this -- apply to this case.

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1 substantial evidence in the record to support their decision,
2 they've followed their local code, they follow their
3 compre -- you know, to the extent that their comprehensive
4 plan needs to be considered, they've -- they've done this,
5 they haven't made a decision that is, you know, clearly
6 erroneous, or any one of those other standards, that's --
7 that's -- that's the burden of the respondent in this case
8 to (inaudible) --

9 JUDGE LEACH: Do you have a response
10 that you'd like to share with us as to counsel's position
11 that we look to the GMA to help us define the undefined
12 terms in the City code?

13 MR. RUBSTELLO: Well, I argued in my
14 brief. I don't think you look to the GMA to define
15 (inaudible) --

16 JUDGE SCHINDLER: Where do we look?
17 MR. RUBSTELLO: You look in the -- you
18 look in the City code.

19 JUDGE ELLINGTON: But they're not defined
20 in the City code.

21 MR. RUBSTELLO: Well, then it's the
22 council. This criteria of need, that was the city council
23 in their own legislation.

24 JUDGE LEACH: Well, where would we look
25 to find a definition --

7 (Pages 22 to 25)

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1 MR. RUBSTELLO: Well --	1 of "urban services" when it's not defined in the code.
2 JUDGE LEACH: -- of the word "services"?	2 With respect to that definition of "urban services,"
3 That's something the two of you disagree on.	3 36.7A.030(20), it refers to storm and sanitary sewer.
4 MR. RUBSTELLO: Well, I think that --	4 JUDGE SCHINDLER: We know what it is.
5 that it's -- I argued in my brief that we should look at	5 MR. HILL: Okay. With respect to all
6 other -- at the adopted -- you look at the comprehensive	6 of -- I wanted to respond to Judge Ellington's question.
7 plan and look at the City code that defines the types of	7 With respect to storm and sanitary sewer, we get a
8 services that are looked at associated with development,	8 certificate. With respect to water, we get a certificate.
9 which include transit, which include roads, which include	9 Fire and police, we talk to the fire and police department
10 sewer, water --	10 and we get a letter from them saying that there's adequate
11 JUDGE LEACH: Well, we look at both	11 services available. With respect to transit, there's a --
12 services and --	12 there's a bus stop a mile away: Transit follows density,
13 MR. RUBSTELLO: -- parks, all those types	13 and the way to get transit to that neighborhood is greater
14 of services that the City provides to the public.	14 density.
15 JUDGE LEACH: We look at both services	15 Now I'll move to substantial evidence, unless you have
16 and facilities, can you give us any help in how we	16 a --
17 distinguish between the two?	17 JUDGE SCHINDLER: No.
18 MR. RUBSTELLO: Well, I think "services"	18 MR. HILL: -- question about services.
19 are -- is simply an action word of defining how facilities --	19 Oh, I did want to emphasize on that. In its conclusions --
20 facilities exist to provide services to the public. Roads	20 I guess I won't get to substantial evidence. In its
21 exist so that people have --	21 conclusions, the city council made a distinction. It said
22 JUDGE LEACH: Is the difference between	22 there were inadequate services and facilities. The city
23 a noun and a verb?	23 council made a distinction. Facilities typically refer to
24 MR. RUBSTELLO: Pardon me? I think -- I	24 things like schools, roads, that sort of things. I believe
25 think that's what we're -- I think -- I think that really	25 that services in 080 should be those defined in GMA. Thank
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1 comes down to that.	1 you.
2 JUDGE LEACH: Thank you.	2 JUDGE LEACH: Court will be in recess.
3 MR. RUBSTELLO: I think they're both	3 (End of transcription.)
4 basically the same thing.	4
5 JUDGE LEACH: You have two minutes.	5
6 MR. HILL: Thank you. And in two,	6
7 Members of the Court, I'd like to address two questions.	7
8 One is the issue of "services" versus "facilities." The	8
9 other is substantial evidence. Let me address "services"	9
10 versus "facilities" first.	10
11 I do believe that it's appropriate to refer to the	11
12 Growth Management Act definition of "urban services" when	12
13 you're interpreting "services" in 21.04.080. Why is that?	13
14 "Urban services" are -- are a term that are in the	14
15 development regulation, coming out of the comprehensive plan.	15
16 And the City's comprehensive plan at Chapter 1, Page 1, says	16
17 this: "Woodinville, like other cities and counties in	17
18 Washington, has prepared this comprehensive plan as required	18
19 by the Washington State Growth Management Act as the City's	19
20 guide for future development based on the community's vision	20
21 and values."	21
22 The comprehensive plan comes out of the Growth	22
23 Management Act. The development regulations and the purpose	23
24 statements specifically refer to the comprehensive plan.	24
25 It's therefore appropriate to use the statutory definition	25

8 (Pages 26 to 29)

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<p>1 2 3 COURT OF APPEALS, DIVISION I OF THE STATE OF WASHINGTON 4 5 6 PHOENIX DEVELOPMENT, INC., a Washington) Corporation, and G&S SUNDQUIST THIRD) 7 FAMILY LIMITED PARTNERSHIP, a Washington) limited partnership,) 8 Appellants,) 9 vs.) No. 62167-0 10 CITY OF WOODINVILLE, a Washington) Municipal Corporation, and CONCERNED) 11 NEIGHBORS OF WELLINGTON, a Washington) Nonprofit Corporation,) 12 Respondents.) 13 14 CERTIFICATE 15 16 STATE OF WASHINGTON) 17) ss COUNTY OF PIERCE) 18 I, JOHN M.S. BOTELHO, Certified Court Reporter in the 19 State of Washington, County of Pierce, do hereby certify that the foregoing transcript is a full, true, and accurate 20 transcript of the proceedings and testimony taken in the 21 matter of the above-entitled cause, transcribed from audio CD to the best of my ability. 22 Dated this day of , 2010. 23 24 25</p>	