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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.

AMICI CURIAE BRIEF OF WASHINGTON STATE
ASSOCIATION OF MUNICIPAL ATTORNEYS AND
ASSOCIATION OF WASHINGTON CITIES IN
SUPPORT OF THE PETITION FOR REVIEW OF THE
RESPONDENTS, CITY OF WOODINVILLE AND
CONCERNED NEIGHBORS OF WELLINGTON

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A. IDENTITY AND INTEREST OF AMICI CURIAE

Amici are the Washington State Association of Municipal Attorneys (“WSAMA”) and the Association of Washington Cities (“AWC”), referenced herein collectively as “Amici.” Amici incorporate by reference herein the statement of identity and interest of Amici set forth in the Motion for Leave to Submit Amicus Brief submitted with this brief.

B. INTRODUCTION

Many Washington cases have been cited in the previous briefing identifying city council actions on rezone applications as legislative in nature for purposes of recognizing the significant discretion city councils exercise in making a rezone decision. Here, the statement of the Woodinville City Council (“Council”) that they had made a decision to maintain current zoning “in their legislative capacity” is a statement easily understandable to Washington city and town elected officials: It is a widely accepted recognition of the Council’s statutory responsibility as the local legislative body to make the rezone decision in the interest of the welfare of the general public. Previous Washington cases have recognized that local legislative bodies were created to make the important policy choices from planning documents and development regulations that need to be considered as a whole when making a site-specific rezone decision.

Local legislative officials know they were elected to make such choices and to protect the public welfare, meaning the welfare of the City and its residents.¹

The overriding concern of Amici is that this Court, when addressing the significant issues before it in this appeal, keep in mind the well-developed Washington case law holding that a rezone decision made by an elected city council is a fundamentally legislative act entitled to judicial deference beyond that given to other types of land use decisions which may be delegated by statute to hearing examiners and other subordinate decision-makers. Such deference is essential to the continuance of rezone decisions being based upon the policy choices of local elected officials where comprehensive planning documents allow for choices and the balancing of multiple land use goals and policies.

Even if this Court were to determine that after the enactment of LUPA a site-specific rezone decision should no longer be characterized as legislative in nature, but quasi-judicial for *all* purposes of judicial review, it is still appropriate for Washington courts to give significant deference to the local legislative body's decision and findings of fact, at least to the same extent a lower court's findings are entitled to deference on appeal.

¹ *Save v. Bothell*, 89 Wn.2d 862, 871, 576 P.2d 401 (1978) (quoting with approval from *Associated Home Builders v. Livermore*, 18 Cal. 3d 582, 607, 557 P.2d 473, 487, 135 Cal. Rptr. 41 (1976)).

The three most significant issues to Amici are examined below with the above comments in mind.

C. STATEMENT OF FACTS

Amici adopts the statement of facts made by the City in its Petition for Discretionary Review. Particular attention is drawn to the fact that the future land use map of the Woodinville Comprehensive plan designates a *range* of permissible densities — *i.e.*, R-1 through R-4 zoning — for the area in which the subject properties are located. The subject area is currently zoned R-1. No plan policy or goal specifically calls out for the rezoning of the subject properties to an R-4 zoning designation at any particular time in the future or upon the occurrence of any specific event.

It also bears emphasis that the Woodinville Council concluded, after careful consideration of locally-adopted planning goals and policies, that R-4 zoning was not currently appropriate zoning for Phoenix's properties. The council stated, among other reasons for its decision, that the proposed rezones were currently inappropriate "due to the deficient public facilities and services (other than sewer) in the area where the property is located and the currently ongoing sustainable development study." *Phoenix Dev. Inc. v. City of Woodinville*, 154 Wn. App. 492, 505,

229 P.3d 800 (2009).² The council further concluded that there was no demonstrated current “need” for the proposed rezones as required by Woodinville Municipal Code (WMC) 21.44.070(1). The full text of that section states as follows:

21 .44.070 Zone reclassification.

A zone reclassification shall be granted only if the applicant demonstrates that the proposal is consistent with the Comprehensive Plan and applicable functional plans at the time the application for such zone reclassification is submitted, and complies with the following criteria:

- (1) There is a demonstrated need for additional zoning as the type proposed.
- (2) The zone reclassification is consistent and compatible with uses and zoning of the surrounding properties.
- (3) The property is practically and physically suited for the uses allowed in the proposed zone reclassification. (Ord. 400 § 20, 2005; Ord. 175 § 1, 1997)

The proposed rezones were inconsistent with significant comprehensive plan policies promoting the goal of the development of higher residential density development in the City’s downtown core, and that therefore, the proposed rezones did not bear a substantial relationship to the public welfare. *Phoenix Dev. Inc.*, 154 Wn. App. at 500.

These determinations reflected the City Council’s exercise of policy discretion that has traditionally been inherent in the local legislative

² The City Council also cited the presence of substandard roads and pedestrian walkways, the absence of any local area parklands and the absence of public transportation serving the area of the proposed rezones. See Finding of Fact 6.c, Appendix A-1.

body's role, and to which Washington courts have, until the Court of Appeals' *Phoenix* decision, largely deferred.

D. ISSUES OF SIGNIFICANT CONCERN TO AMICI

1. Did the Land Use Petition Act, Revised Code of Washington (RCW) Chapter 36.70C RCW ("LUPA")³ providing uniform criteria for reviewing land use decisions, modify or overrule pre-LUPA case law based upon the legal principles that a rezone decision by a local legislative body is a legislative act entitled to judicial deference under separation of power principles, and that the courts were not designed to make policy choices and should not substitute their judgments for legislative bodies that were so designed?

2. Did the decision of the Woodinville City Council ("Council") to maintain the existing R-1 zoning designation for the two parcels, instead of approving the requested R-4 zoning designation, when both designations were available as policy choices under the Woodinville Comprehensive Plan, create new policy rather than apply existing policies to the particular facts acquired from a quasi-judicial hearing process?

3. Did the Court give the Council's interpretation of its own zoning code regulations in WMC 21.04.080(2) (guidelines for residential zoning

³ RCW 36.70C.005 Short Title.

designations) and WMC 21.44.070 (substantive standards for rezoning approval) the deference required by RCW 36.70C.130(1)(b) and Washington case law in rezoning decisions?

E. ARGUMENT

1. With the enactment of LUPA, what changed and did not change in the judicial review of site-specific rezoning decisions.

Pre-LUPA substantive review of a site-specific rezoning decision is concisely described in the following excerpt from Professor Richard Settle in R. Settle, *Washington Land Use and Environmental Law and Practice*, § 2.11(a) (1983):

Traditionally, the courts unwittingly have fostered irresponsible rezones by applying differential standards of substantive review. The courts formalistically have reasoned that the adoption of zoning regulations by a local legislative body, whether originally or by amendment, is a legislative act entitled to judicial deference under separation of powers principles; that the courts were not designed to make such policy choices and should not substitute their judgment for the legislative bodies which were so designed. Thus rezones were endowed with a presumption of validity which challengers had the burden to overcome. Substantive due process and equal protection were satisfied if there was a fairly debatable rational relationship between the rezoning and a permissible police power purpose; as an exercise of legislative discretion, a rezoning would be invalidated only for manifest abuse of discretion - arbitrary and capricious action "without consideration and in disregard of the facts (footnote citations omitted).

In recent years there has been a trend toward more rigorous, substantive requirements for parcel rezones than for original zoning, large area rezones or text amendments. Some courts require that the rezone proponent show a "change of conditions" which justifies modification of the original zoning pattern. A similar but slightly broader standard requires a showing of original mistake or change of conditions." While such substantive standards for parcel rezones generally have been rooted in substantive due process and judicially imposed, they might be established legislatively in state enabling acts and local zoning ordinances. An example of the latter is a "change or mistake" standard contained in a Denver, Colorado, zoning ordinance (footnote citations omitted).

In the above quote, Professor Settle describes a rezone decision, including a site-specific rezone, as being:

- 1) a legislative act;
- 2) entitled to judicial deference under separation of powers principles; and
- 3) a policy choice designed for legislative bodies and not the courts (which should not substitute their judgments).

Consistent with the above passage from Professor Settle's treatise, this court determined in the pre-LUPA case of *Parkridge v. City of Seattle*, 89 Wn.2d 454, 462, 573 P.2d 359 (1978), that the following rules apply to rezone applications: (1) there is no presumption of validity favoring the action of rezoning; (2) the proponents of the rezone have the burden of proof in demonstrating that conditions have changed since the

original zoning⁴; and (3) the rezone must bear a substantial relationship to the public health, safety, morals, or welfare. These three substantive standards allowed a more intensive substantive review of an approved site-specific rezone. As stated by Professor Settle, the desire by the courts to impose more rigorous standards of substantive review in site-specific or parcel rezone cases grew out of the recognition that, “such rezones tend to be routinely granted.” R. Settle, *Washington Land Use and Environmental Law and Practice*, § 2.11(a) (1983). After LUPA, these three standards for substantive review continue to be recognized by this court. *See Woods v. Kittitas County*, 162 Wn.2d 597, 617, 174 P.3d 25 (2007) (citing *Citizens v. Mount Vernon*, 133 Wn.2d 861, 875, 947 P.2d 1208 (2007)).

As Professor Settle notes, relief from a land use decision in the pre-LUPA era was dependent upon a judicial conclusion that the challenged decision was arbitrary and capricious. This is no longer true. *See RCW 36.70C.130(2)*. Instead, LUPA sets forth standards that could have given courts in the past reason to reach the conclusion that the

⁴The absence of changed conditions is well documented in the Council findings and prior briefing of the City and CNW, and will not be repeated here. Amici would note that the issue of whether the principle adopted by the Supreme Court in *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 370-71, 662 P.2d 816 (1983), that demonstration of changed circumstances is not required if the rezoning is consistent with an adopted comprehensive plan, should apply where the comprehensive plan is not newly adopted or amended and where the plan authorizes the continuance of existing zoning in the area of the subject properties should be addressed by the Supreme Court in this case. *See Tugwell v. Kittitas County*, 90 Wn. App. 1, n.6, 951 P.2d 272 (1997).

decision was arbitrary and capricious. The standards provide a basis for uniform judicial review of site-specific rezone decisions and other project permit land use decisions.

Thus, the major change made by LUPA in the review of a site-specific rezone decision was to give courts the ability to reverse a land use decision without reaching the conclusion that the decision was arbitrary and capricious, a conclusion that exposed the local decision maker to vulnerability to monetary damages or compensation under Chapter 64.40 RCW.

The presumption of the validity of a rezone decision is maintained in the LUPA standards for granting relief. Challengers of a rezone still have the burden of establishing that one of the standards set forth in (a) through (f) of RCW 36.70C.130 have been met. RCW 36.70C.130(1). The presumption of validity of a site-specific rezone decision likewise remains. A site specific rezone requiring the amendment of an existing zoning ordinance is still a legislative act entitled to judicial deference under separation of powers principles. LUPA did nothing to make the courts better suited than local legislative bodies to make such policy choices and did not empower the courts to substitute their judgment for that of the local legislative bodies which were so designed. LUPA preserves the requirement for judicial deference to rezone decisions made

by local legislative bodies under separation of powers principles that are embodied in pre-LUPA Washington case law. RCW 36.70C.130(1)(b).⁵

Since the passage of LUPA, municipalities and courts throughout the state have continued to rely upon the pre-LUPA substantive zoning law and the requirement for deference in RCW 36.70C.130(1)(b) when making and reviewing rezone decisions.

Even if this Court should determine that after LUPA rezone decisions are no longer to be characterized by the courts as legislative in nature, but quasi-judicial for all purposes of judicial review, it is still appropriate for Washington courts to give great deference to the local legislative body's decision to deny a rezone. As long as the local legislative body evaluates the rezone under legislatively established criteria, including the comprehensive plan policies and other development regulations which may constrain discretion (as the Woodinville City Council did in the instant case), the decision is a lawful exercise of authority regardless of whether the legislative body believes it is acting legislatively or as a quasi-judicial decision maker.⁶

2. The City Council's decision not to change the zoning from R-1 to R-4 whether characterized as a legislative or quasi-

⁵ See also RCW 36.70A.3201, where deference is also given to local elected officials in making planning choices in the development of comprehensive plan documents.

⁶ There is no dispute here that Woodinville followed all required quasi-judicial procedures.

judicial action, did not create new policy, when both designations are authorized by the Comprehensive Plan.

The City Council's decision to maintain R-1 zoning⁷ for the subject properties did not make new policy.⁸ The decision was a choice based upon existing comprehensive plan policies and goals. The property was zoned R-1 after the City's incorporation and never changed. R-1 remained an authorized zoning designation in the adopted Comprehensive Plan for the larger area in which the subject properties are located. The legislative bodies of all Washington cities and towns retain discretion in deciding rezone applications to determine the appropriate timing of changes in existing zoning considering the greater needs and welfare of the community that they were elected and entrusted by the voters to protect.

If there is a choice to be made between existing zoning compatible with the City's comprehensive plan and a change in zoning that may also be compatible with the comprehensive plan, it is a choice for the local legislative body to make, not for the courts. *See* 83 Am Jur 2d § 543 citing to *City Council of City of Salem v. Wendy's of Western Virginia, Inc.*, 252

⁷ WMC 21.04.010 identifies the symbol R on the zoning map designates residential zoning by base density in dwelling units per acre. The R-1 designation permits single family residential housing units at a maximum density of one dwelling unit per acre.

⁸ *See Phoenix Development v. City of Woodinville*, 154 Wn. App. 492, 503, 229 P.3d 800 (2009)

Va. 12, 471 S.E. 2d 469 (1996). This is true even where the rezoning action under review is characterized as quasi-judicial in nature. *See Board of County Commissioners of Brevard County, v. Snyder*, 627 So.2d 469 (1993) upholding the denial of a rezone application consistent with the county's comprehensive plan in favor of maintaining lower density residential zoning also consistent with the comprehensive plan. The Florida court determined the county board's action was in the nature of a quasi-judicial proceeding, but still deferred to the discretion of the local legislative body.

Here, Woodinville had validly adopted the R-1 zone into its comprehensive plan and identified a range of residential zoning possibilities of R-1 through R-4 zoning for the Montevallo and Wood Trails properties on the City's future zoning map. The Comprehensive Plan allowed for continued use of the pre-existing R-1 zoning designation. Maintaining the current zoning designation was a valid decision for the Council since the current zoning was obviously consistent with the City's plan. *Woods v. Kittitas County*, 162 Wn.2d 597, 621, 174 P.3d 25 (2007).

The majority of jurisdictions across the country characterize rezones as well as refusals to rezone property as legislative acts. *See* 6 Patrick J. Rohan, *Zoning and Land Use Controls*, § 39.02[1]-[2] (1997).

The Court's determination that finding of fact 6⁹ in both the Council's Montevallo and Wood Trails decisions is the product of an unlawful exercise of the Council's legislative authority is contrary to law and public policy behind the separation of powers.¹⁰

The action of the Council in denying the rezone applications involved consideration of criteria requiring the weighing of the impact of the proposed rezones on properties within the larger R-1 zoned area in which the subject properties are located and upon the City's planned development of its downtown core. Orderly growth consistent with the comprehensive plan comes concurrent with the development of roads, transit, parks, and sewer facilities designed to accommodate increased residential density development. The Council made findings that there were no neighborhood parks, the roads were substandard, and there was no available transit to the area — findings all supported in the hearing record. Professor Settle's description of the evolution of substantive criteria in rezone decision-making¹¹ makes clear that the criteria evolved to curb unreasoned approvals, *not* to discourage careful discretionary decision making by local legislative bodies denying rezone requests.

⁹ Finding of Fact 6 is copied in full at Appendix A-1.

¹⁰ *Phoenix Development*, 154 Wn.App. at 503.

¹¹ R. Settle, *Washington Land Use and Environmental Law and Practice*, § 2.11(a) (1983)

3. The Council's written findings show its decisions to maintain current zoning on both parcels of land were made by application of existing policies to the facts in the record before the Council.

The reasons given to maintain R-1 zoning set forth in the Council's written decisions demonstrate the Council's fulfillment of its statutory role in the making of a site-specific rezone decision. Finding no. 6 in both rezone decisions includes subsections c., d., f., and g., which reference the existing council policy in WMC 21.04.080(2). To the extent this zoning regulation, found in the purpose section of the City's zoning code, constrained the discretion of the Council, the Council's written findings demonstrate the Council gave the regulation due consideration. WMC 21.04.080(2) is cited in findings 6.c., 6.d., and 6.g. of both the Wood Trails and Montevallo proposal decisions. *See* Appendix A-1. The Council applied the policy of the code section to the record facts before it. It appears that the Court of Appeals completely ignored these findings after stating *as a preliminary matter*, that finding of fact 6 in both decisions was an unlawful exercise of the council's legislative authority because the council purported to be acting "in its legislative capacity". Amici is gravely concerned with the impact of this reasoning on the future willingness of reviewing courts to substitute their judgment for the judgment of a city council on review of a site-specific rezone decision.

4. The Court of Appeals erred in substituting its interpretation of WMC 21.04.080(2) for that made by the Council.

The appeals court substituted its interpretation for that of the Council's interpretation of its own 1997 legislative act of passing a zoning text amendment providing that *developments with densities less than R-4 are allowed only if adequate services cannot be provided* and in ignoring the factual findings of the Council in finding 6 relating to the inadequacy of public facilities serving the neighborhood where the properties are located. The Council cited to the lack of built sewer, parks and transit, substandard roadways serving the area.

The court erroneously substituted its interpretation of the zoning text amendment for that of the City Council based upon what it assumed was the council's thought process following *Hensley v. City of Woodinville*, No. 96-3-0031, 1997 WL 123989, 1997 GMHB LEXIS 354 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Feb25, 1997). But if the Council wanted to pass a zoning regulation stating that *all* R-1 zoned land would be rezoned to R-4 when accompanied by development proposals including extension of public sewer, it could have provided for this result directly and clearly in the City's code. Instead, it discussed new R-12 zoning where adequate facilities to support R-4 density existed, and clarified in WMC 21.04.080(2)(b) that site-specific R-4 rezones would not

be appropriate in areas with existing R-1 development due to the incompatibility with existing development and/or environmental sensitivity. *See* Appendix A-1. In finding 6 the Council applied the language of WMC 21.04.080(2) as written to the application before it and to the factual record developed in public hearing. Amici believes that the Court of Appeals' substitution of its interpretation of the regulation for that of the City Council deprives the City Council of the judicial deference to which it is entitled per RCW 36.70C.130(1)(b).

The determination on the question of *need* for the rezone was for the City Council, and not for Phoenix, the hearing examiner, or the Court of Appeals to make.

The appeals court also failed to give the required deference to the Council's interpretation of its own adopted rezone criteria in WMC 21.44.070, *supra*. City staff did not make a recommendation in the staff report as to the need for the rezone because the "demonstrated need" requirement of WMC 21.44.070(1), "ultimately requires an objective judgment by the hearing examiner and city council based upon relevant City plans, policies, goals, and timeframes." *Phoenix Dev. Inc. v. City of Woodinville*, 154 Wn. App. 492, 499, 229 P.3d 800 (2009). The court substituted its judgment for that of the Council on the key policy questions of the need for and the timing for increased residential density on the

subject sites. Questions of need for a rezone and the timing of a rezone, require a balancing between individual rights and the public welfare to be made by the local legislative body and not by the courts. *See* footnote 2, *Fleming v. City of Tacoma*, 81 Wn.2d 292, 295, 502 P.2d 327 (1972). Council findings balancing the overall city planning goals against the R-4 zoning requests cited to by the court at page 508 of its decision demonstrated the potential adverse impacts of the proposed R-4 development on existing city planning policies for use of its capital resources and planned residential growth for the downtown city core. The Court of Appeals did not give the Council's balancing of planning goals and policies the deference required to be given by a reviewing court.

It is the role of the Council, not the court, to give consideration of the compatibility of the proposed rezone with the City's planning efforts and investments designed to increase residential density in the downtown core of the City. Consideration of the harmony between the proposed development and existing residential development in the neighborhood is best left to local officials elected to protect the public interest and not the court. The public cost and adequacy of public services and facilities essential to service new development are better evaluated by local government than a reviewing court. The need and timing for an increase in the allowed residential density if previously zoned land are matters best

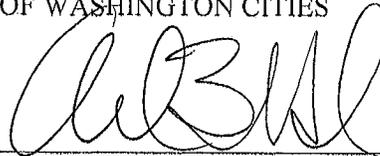
left to the local government with jurisdiction and not the courts. By constraining the Council from exercising its discretionary judgments on whether or not these specific rezone proposals complied with the overall planning objectives in the city's comprehensive plan, were in the public interest at this time, and were needed at this time, the appeals court committed reversible error.

F. CONCLUSION

The decision of the Court of Appeals should be reversed as requested by the City and the Concerned Neighbors of Wellington and the decision of the Superior Court reinstated.

RESPECTFULLY SUBMITTED this 11 day of February, 2011.

AMICI WASHINGTON STATE
ASSOCIATION OF MUNICIPAL
ATTORNEYS AND ASSOCIATION
OF WASHINGTON CITIES



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APPENDIX A-1

developed consistent with its R-1 designation. There is nothing in the record to indicate that the Applicant attempted to develop the property under its current R-1 zoning designation.

4. The R-1 zoning is consistent with the "Low Density Residential" land use designation described in the City's Comprehensive Plan and the land use designation for the area in which the subject site is located on the Future Land Use Map made part of the City's Comprehensive Plan.

5. It is not necessary to rezone the property in order to provide consistency with the City's Comprehensive Plan. Current property zoning is consistent with the City's Comprehensive Plan.

6. In its legislative capacity, the City Council finds that the current zoning designation of R-1 is appropriate. The R-1 designation is appropriately placed upon the property in consideration of:

a. The development history of the area in which the property is located.
b. The maintenance of the existing suburban neighborhood character,
c. The lack of adequate public facilities and services to support the proposed R-4 development, including, but not limited to the substandard arterial roads and pedestrian walkways providing access to and from the subject property, the absence of any City parklands within walking distance of the subject property, and the absence of public transit services servicing the neighborhood area. Developments with R-4 densities are inappropriate in areas of the City where adequate public facilities and services cannot be provided at the time of development. See the statement of purpose in WMC Section 21.04.080(1)(a).

d. Area-wide environmental constraints imposed by steep slopes and erosion hazard areas make R-1 zoning particularly appropriate for the site by minimizing the significant unavoidable adverse impacts of residential development of the property. See the statement of purpose in WMC Section 21.04.080(2)(a) and (b).

e. The absence of any substantial changes in the circumstances from which the original zoning determination was made, including, but not limited to land use patterns, public opinion, established neighborhood character, substandard roadways, the absence of stores, sidewalks, and community parks.¹ Public sewer has not been brought to the property, but the Applicant for the rezone has proposed bringing public sewer to the property in its preliminary plat application. The Applicant would connect to public sewer at locations that have existed and been available for sewer connection since the mid 1990's.

f. Although the proposed rezone is arguably consistent with several policies of the City's Comprehensive Plan, a change in the zoning at the subject site is not needed or necessary to fulfill the City's Comprehensive Plan or to implement the Land Use Element of the Plan.² The Council does not construe its Comprehensive Plan or development regulations as requiring a rezone of this type.

g. The well established R-1 subdivisions of the same R-1 density served by public and private facilities and services inadequate to support the planned R-4 densities. See the statement of purpose in WMC Section 21.04.080(2)(a) and (b).

¹ Although the issue of whether or not there were changed circumstances to support a rezone was in dispute, the Council notes that the Hearing Examiner made no specific finding on this issue.

² Although the issue of whether or not the rezone was needed to fulfill the comprehensive plan was in dispute, the Council notes that the Hearing Examiner made no finding on this issue. The Hearing Examiner found only that the proposed rezone was "generally compliant" with the comprehensive plan.