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No. 84296-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 63242-6-I)

PHOENIX DEVELOPMENT, INC., a Washington corporation, and G&S
SUNDQUIST THIRD FAMILY LIMITED PARTNERSHIP, a
Washington limited partnership

Appellants.

vs.

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 OF AMICI CURIAE

The undersigned Amici are the Washington State Association of Municipal Attorneys (WSAMA) and the Association of Washington Cities (AWC), respectively. WSAMA is a professional organization comprised of attorneys who, by election, appointment or contract, provide legal representation for cities and towns within the State of Washington. The vast majority of municipal attorneys practicing in Washington State are WSAMA members. AWC is a nonprofit corporation that represents the interests of Washington cities towns before the State Legislature, the executive branch and various regulatory agencies. Although participation is entirely voluntary, AWC's membership consistently includes every city and town within the state.

Both WSAMA and AWC (collectively, "Amici") are keenly interested in legal issues affecting Washington cities. Of particular concern to both organizations are statutory amendments and/or judicial decisions which abridge or otherwise alter the traditional powers and roles of municipalities and their elected officials. The Court of Appeals decision at issue in the above-captioned matter implicates—and potentially transforms—one of the most significant functions of local government: the municipal zoning power. In its Answer to Petition for Review, Phoenix Development

contends that the enactment of the Land Use Petition Act in 1995 substantively changed several decades of Washington zoning under which local legislative bodies enjoyed broad discretion in deciding whether or not to rezone property. This issue is of significant concern to Amici and should be addressed by the Supreme Court.

B. STATEMENT OF CASE

Amici incorporate the Statements of the Case set forth in the Petitions for Review filed by Petitioners City of Woodinville and the Concerned Neighbors of Wellington, respectively. It is also appropriate to emphasize that the Woodinville City Council concluded, as a matter of local policy, that R-4 zoning was inappropriate for Phoenix's properties. The numerous reasons underlying this determination were set forth by the council in 27 detailed findings of fact. The council concluded, among other reasons, that the proposed rezones were 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." *Op.* at 12.¹ The council further concluded that there was no demonstrated need for the proposed rezones, that the rezones were inconsistent with significant

¹ 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.

comprehensive plan policies, and that they did not bear a substantial relationship to public health, safety, morals, or welfare. *Op.* at 6.

Both of these determinations reflected the City Council's exercise of policy discretion that has traditionally been inherent in the local legislative body's role, and to which Washington courts have, until the Court of Appeals' *Phoenix* decision, largely deferred.

C. ARGUMENT

Rule of Appellate Procedure 13.4(b)(4) provides that the Supreme Court should grant review of a Court of Appeals decision "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Review of the instant case is clearly warranted under this standard.

The *Phoenix* appeal involves a question of enormous public interest—i.e., whether a local legislative body may be judicially compelled to grant a site-specific rezone. This in turn implicates a corollary, and equally significant, issue of first impression: The extent to which the Land Use Petition Act altered the substantive legal standards governing judicial review of rezone denials. Both questions involve critically important issues of land use and municipal law, the ultimate resolution of which will have wide-reaching consequences for cities and towns (as well as landowners,

developers and courts) throughout Washington State. The need for definitive Supreme Court guidance on these points is critical.

1. Supreme Court Review Is Necessary to Clarify Whether Courts May Compel Local Legislative Bodies To Grant Rezone Proposals in the Post-LUPA Era.

The core issue implicated by the instant appeal is ultimately a separation of powers question: i.e., may a reviewing court *force* a city council to grant a requested site-specific rezone? Washington caselaw has traditionally answered this question in the negative. A lengthy body of precedent dating from at least the 1950s emphatically holds that courts must defer to the policy discretion of local legislative bodies in this context.² Courts simply lack the power to amend zoning ordinances, and thus cannot compel a city council to grant a proposed rezone against the council's will. *Teed v. King County*, 36 Wn. App. 635, 644-45, 677 P.2d 179 (1984).

This traditional discretion is a bedrock principle of the entire local zoning and community planning process. Until the *Phoenix* decision, local legislative bodies were free to rezone property in accordance with their own planning timeframes, capital budgeting priorities and community needs. This process was unconstrained by threats of compulsion from courts, which had

² See, e.g., *State ex rel. Myhre v. City of Spokane*, 70 Wn.2d 207, 210, 422 P.2d 790 (1967); *Bishop v. Houghton*, 69 Wn.2d 786, 792-93, 420 P.2d 368 (1966); *Besselman v. City of Moses Lake*, 46 Wn.2d 279, 280, 280 P.2d 689 (1955); *Teed v. King County*, 36 Wn. App. 635, 643, 677 P.2d 179 (1984).

historically acknowledged that the “wisdom, necessity and policy” of zoning decisions are matters left “exclusively to the legislative body” of each city. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 27, 586 P.2d 860 (1978). For the first time in reported Washington caselaw, however, the Court of Appeals in the present matter reversed—on the substantive merits of the proposal—a city council’s rezone *denial*, effectively ordering the council to adopt an ordinance reclassifying a particular parcel.³ As explained in the City’s Petition for Review, this radical departure from precedent carries significant implications for local governments. *Petition for Review at 11-12*.

2. The Supreme Court Has Not Addressed Whether LUPA Alters the Substantive Standards for Judicial Review of Rezone Denials.

An important adjunct to the above issue concerns the extent to which the Land Use Petition Act, Chapter 36.70C RCW, changed the substantive standard by which courts must review local decisions denying rezone requests. This point is argued strenuously by Phoenix Development, which contends that under LUPA, “the court has explicit authority to reverse the city’s denial” in this context. *Answer to Petitions for Review at 15*. Amici strongly dispute this conclusion. It nevertheless remains an issue of first

³ Cf. *J.L. Stordahl & Sons, Inc. v. Clark County*, 143 Wn. App. 920, 180 P.3d 848 (2008) (reversing municipality’s rezone denial for failure to follow prescribed *procedures*).

impression in Washington, and has never been addressed by the Washington Supreme Court.

LUPA was enacted in 1995 as part of a broader overhaul of the statutory requirements governing the review and approval of local land use projects. *See* Laws of 1995, ch. 347 (“Integration of Growth Management Planning and Environmental Review”). This legislation was the culmination of a lengthy process of study, review and input from affected stakeholders. *See, e.g., Final Report, Governor’s Task Force on Regulatory Reform, Washington State Office of Financial Management, December 20, 1994.* Amicus AWC, along with numerous other organizations, interest groups and individuals, participated in this effort and provided written comment. *Id. at Attachment C.* The thrust of this effort was aimed at streamlining and clarifying the administrative and judicial review of development proposals.

The portions of this enactment that govern judicial review of local land use decisions were ultimately codified as the Land Use Petition Act. *See* Laws of 1995, ch. 347 §§701-15. LUPA contains, *inter alia*, deadlines for commencing a judicial appeal, standards governing the standing of appellants, clarifications regarding the scope of the superior court’s review, and miscellaneous other provisions. *See* Chapter 36.70C RCW. The statute also establishes six separate grounds upon which a reviewing court may grant

relief from a local land use decision. RCW 36.70C.130(1). *See Appendix.* Both Phoenix Development and the Court of Appeals in the instant matter have construed these standards as authorizing courts to substitute their policy judgment regarding the “need” for a proposed rezone for that of the local legislative body, and to reverse a municipality’s decision denying a rezone request—a result clearly prohibited under traditional Washington caselaw. *See, e.g., Teed*, 36 Wn. App. at 643.

This proposition is, however, at best an open question that has never been addressed by the Washington Supreme Court in the 15 years that have lapsed since the LUPA’s enactment. Indeed, several factors support a contrary interpretation. First, it is apparent from both the statutory text and legislative history that the intended function of Chapter 36.70C RCW is entirely procedural rather than substantive. RCW 36.70C.010 provides that “[t]he purpose of this chapter is to reform the *process* for judicial review of land use decisions. . . by establishing uniform, expedited appeal *procedures*. (Emphasis added.) *See appendix.*

The relevant legislative history supports this view. The legislative digests, bill reports and other explanatory materials underlying LUPA all characterized the enactment as primarily a procedural mechanism rather than a substantive change to Washington land use law. *See, e.g., Final Report*,

Governor's Task Force on Regulatory Reform, supra, at 51 (recommending simplification of superior court “*process* for reviewing land use decisions”; House Bill 1724-S.E. Digest (explaining that LUPA “[r]eforms the *process* for judicial review of land use decisions”); House Bill Report ESHB 1724 (characterizing LUPA as “[a] new land use petition *procedure*. . . established for court appeals of land use decisions”) (emphasis added).

Second, it is critical to acknowledge that the pre-LUPA caselaw governing judicial review of rezone denials was framed in terms of the reviewing court’s *authority*. See *Teed*, 36 Wn. App. at 644-45 (“Courts simply do not possess the *power* to amend zoning ordinances or to rezone a zoned area, and they *cannot*. . . intrude upon municipal zoning determinations.”) (citation omitted) (emphasis added); *Besselman*, 46 Wn.2d at 280 (“[t]he city council cannot be compelled to pass a rezoning ordinance, however fair, reasonable, and desirable it may be[.]”). The judiciary simply lacked the power to reverse a local legislative body’s rezone denial in the pre-LUPA era. The extent to which the standards of review codified at RCW 36.70C.130 were intended to abolish this longstanding principle—and to empower courts with substantive authority they previously lacked—is at most uncertain. No reported Washington appellate case has squarely addressed this issue.

Finally, although LUPA clarifies that judicial relief from local land use decisions *generally* no longer requires a showing of arbitrary and capricious conduct, *see* RCW 36.70C.130(2), the statute nowhere indicates that other traditional rezone standards have been similarly abrogated. To the contrary, it is clear that the vitality of at least some traditional, pre-LUPA common law standards governing rezone decisions *does* persist in the post-LUPA era. *See, e.g., Woods v. Kittitas County*, 162 Wn.2d 597, 617-618, 174 P.3d 25 (2007). Review by the Supreme Court is necessary to clarify whether the common law prohibition against judicial compulsion of rezones likewise survived the enactment of LUPA.

3. The Issues Implicated in the *Phoenix* Case Will Continue to Arise Unless They Are Definitely Addressed by the Supreme Court.

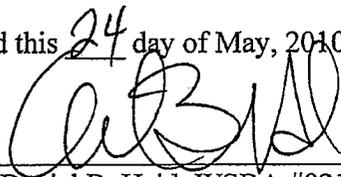
The *Phoenix* decision poses significant concerns to both Amici and the numerous Washington municipalities they represent. If allowed to stand, the court's decision effectively enables courts to usurp the historic, exclusive role of local legislative bodies in rezoning property. And it severely jeopardizes the local planning process by allowing developers to dictate zoning map amendments in disregard of the preferences, policies and timetables established by city and council councils. The threat of coercion will overhang and cloud the entire rezoning process in Washington State.

The *Phoenix* decision ultimately begs more questions than it resolves. The Court of Appeals cited *only* the standards of review codified under LUPA, and failed to acknowledge—much less apply—the lengthy body of precedent holding that courts cannot compel local legislative bodies to rezone property. The continued viability of this precedent is thus uncertain, and the need for definitive resolution of this point—for the benefit of municipalities, landowners, developers and courts — is a matter of significant public importance warranting Supreme Court review pursuant to RAP 13.4(b)(4).

D. CONCLUSION

The issues implicated by the above-captioned matter have potentially severe consequences for the numerous Washington municipalities represented by Amici. The Supreme Court is respectfully requested to grant review pursuant to RAP 13.4(b)(4) and to reverse the Court of Appeals.

Respectfully submitted this ²⁴ day of May, 2010.



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APPENDIX

RCW 36.70C.130 Standards for granting relief — Renewable resource projects within energy overlay zones.

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

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

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

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

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

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

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

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.

(3) Land use decisions made by a local jurisdiction concerning renewable resource projects within a county energy overlay zone are presumed to be reasonable if they are in compliance with the requirements and standards established by local ordinance for that zone. However, for land use decisions concerning wind power generation projects, either:

(a) The local ordinance for that zone is consistent with the department of fish and wildlife's wind power guidelines; or

(b) The local jurisdiction prepared an environmental impact statement under chapter 43.21C RCW on the energy overlay zone; and

(i) The local ordinance for that zone requires project mitigation, as addressed in the environmental impact statement and consistent with local, state, and federal law;

(ii) The local ordinance for that zone requires site specific fish and wildlife and cultural resources analysis; and

(iii) The local jurisdiction has adopted an ordinance that addresses critical areas under chapter 36.70A RCW.

(4) If a local jurisdiction has taken action and adopted local ordinances consistent with subsection (3)(b) of this section, then wind power generation projects permitted consistently with the energy overlay zone are deemed to have adequately addressed their environmental impacts as required under chapter 43.21C RCW. [2009 c 419 § 2; 1995 c 347 § 714.]

RCW 36.70C.010 Purpose.

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review. [1995 c 347 § 702.]