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No. 62167-0

COURT OF APPEALS,  
DIVISION I,  
OF THE STATE OF WASHINGTON

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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 non-profit corporation, ,

Respondents.

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ANSWER TO BRIEF OF AMICUS CURIAE BUILDING  
INDUSTRY ASSOCIATION OF WASHINGTON

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ORIGINAL

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**A. Summary of Arguments and Issues Raised by BIAW.**

This response is limited to the arguments raised by the BIAW in its amicus brief (“AB”), which included the following: (1) City Officials failed to follow their own rules in making a quasi-judicial rezone decision (AB:2-3); (2) The GMA acknowledges the need for higher density in core areas of each jurisdiction to take advantage of existing infrastructure (AB:3); (3) *J.L. Stordahl & Sons, Inc. v. Clark County*, 143 Wn. App. 920, 180 P.3d 848 (2008) requires that a local jurisdiction grant a rezone application if all the criteria for a rezone are met (AB:4); (4) Predictability of land use decisions is at risk in this case (AB:4); (5) Woodinville argues for “standard-less” site specific rezone decision-making (AB:5); (6) City Council’s decisions fail to account for its own legislatively created factors, including comprehensive plan goals, housing affordability, and the efficient use of residential land and public services (AB:6); (7) The GMA mandates dense urban infill development and to make the use of existing infrastructure (AB:6); (8) City Council cites to nothing in the record supporting its conclusions 2-8 suggesting the rezone proposal be denied because of “deficient public facilities and services” (AB: 7); (9) The GMA and Woodinville’s own Comprehensive Plan and Zoning codes all mandate four (4) dwelling units per acre (AB:7); (10) There is no land

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available for R-4 development in Woodinville because so much land is tied up in R-1 zoning (AB:7); (11) The City Council simply succumbed to neighborhood opposition (AB:8); (12) The City cannot meet GMA population density requirements with R-1 zoning (AB:8); and (13) Under the GMA, nothing more is needed to support the “need” requirement for a rezone so long as an increase in urban density is proposed by the applicant (AB:9).

**B. Arguments in Response.**

1. Woodinville followed all state and local procedural requirements.

The BIAW mistakenly relies upon *Storedahl v. Clark County*.

Unlike the Board of County Commissioners in *Storedahl*, the Woodinville City Council followed all state and local procedural requirements when it denied the rezone requests for the sites of the proposed Montevallo and Wood Trails Plats. The BIAW identifies no procedural errors by the City Council. There is no violation of RCW 36.70B.030(1)(a).

The City Council identified that current R-1 zoning designation on the City’s zoning map is consistent with the City’s comprehensive plan zoning designation for the two sites.<sup>1</sup> The Council further identified that

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<sup>1</sup> See Woodinville’s Brief of Respondent at page 1 and Findings of Fact 3, 4, and 5 of the City Council’s written findings and decision.  
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public facilities (roads, transit, and parks) were deficient in the area of the two sites and no current funding for infrastructure improvements in the R-1 area was available.<sup>2</sup> The Council fully complied with RCW 36.70B.030(2).

The Council also recognized, as required by RCW 36.70B.030(1), that its adopted comprehensive plan and development regulations serve as the foundation for project review, including the review of the rezone applications of Phoenix Development. It recognized that adopted R-1 zoning for the two sites was consistent with the comprehensive plan. It recognized that in its comprehensive planning it identified the City's downtown core for high density mixed-use development and committed funding for infrastructure improvements in that area. Those comprehensive planning and zoning decisions were not timely challenged and cannot be challenged in this proceeding. *Thurston County v. WWGMHB*, 164 Wn.2d 329, 190 P.3d 38 (2008).

The Woodinville City Council also made 27 individual findings of fact supporting its decision, and in doing so adopted by reference some of the findings made by the hearing examiner, but rejected others. The basis

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<sup>2</sup> See Woodinville's Brief of Respondent at page 36 and City Council Finding of Fact 6(c) and 25.  
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cited by Division II for the reversal of the zoning decision in *Storedahl v. Clark County* is not present here.

Woodinville's arguments at pages 25 through 33 of its Brief of Respondent demonstrate that the BIAW's argument that the Woodinville Municipal Code requires that the property be rezoned to R-4 is without merit.

2. Local jurisdictions' decisions on site-specific rezones are inherently discretionary.

Washington courts have repeatedly emphasized that a municipality cannot be judicially forced to rezone property even where a developer has in fact satisfied the rezone criteria established in *Parkridge v. City of Seattle*, 89 Wn.2d 454, 462, 573 P.2d 359 (1978). "The approval or disapproval of a rezone or reclassification of a particular parcel or property is a discretionary legislative act which cannot be compelled . . . ." *Teed v. King County*, 36 Wn. App. 635, 677 P.2d 179 (1984). Because the BIAW's main issue of concern is whether, if all applicable rezone criteria are met, a rezone *must* be granted by the City Council, a more thorough explanation of the City's legislative discretion in approving or disapproving a rezone is provided below.<sup>3</sup>

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<sup>3</sup> See Woodinville's Brief of Respondent at pages 17 and 46.  
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In *Teed*, the court concluded that the superior court lacked authority to issue a writ of mandamus ordering the local legislative body to adopt a rezone ordinance. *Id.* A writ of mandamus may only be issued “to compel the performance of a duty enjoined by law . . . or where there is a clear duty to act.” *Id.* (citing *Burg v. Seattle*, 32 Wn. App. 286, 290, 647 P.2d 517 (1982)). The Teeds contended that once they complied with the County’s conditions for rezone established in King County Motion 4566, the reclassification of their property became a ministerial act, and accordingly, a writ of mandamus was appropriate because the local legislative body had no discretion to act. *Id.* at 643. The court disagreed, stating conclusively that “[t]he approval or disapproval of a rezone or reclassification of a particular parcel or property is a discretionary legislative act which cannot be compelled by a writ of mandamus.” *Id.* (citing *Lillions v. Gibbs*, 47 Wn.2d 629, 289 P.2d 203 (1955); *Besselman v. Moses Lake*, 46 Wn.2d 279, 280 P.2d 689 (1955); *Lund v. Tumwater*, 2 Wn. App. 750, 472 P.2d 550 (1970)). The court relied upon the well-established rule that the vested rights doctrine does not apply to site-specific rezones and that the local legislative body’s decision can only be overturned where arbitrary and capricious.<sup>4</sup> *Id.* at 644.

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<sup>4</sup> Under RCW 36.70C.130(1)(c), the petitioner is no longer required to demonstrate that {KNE723412.DOC;4/00046.050035/}

Similarly, in *Balser Investments, Inc. v. Snohomish County*, 59 Wn. App. 29, 40, 795 P.2d 753 (1990), the County argued that even if the evidence presented by Balser, whose rezone application was denied, showed significant changed circumstances under *Parkridge*, such evidence did not mandate rezoning. The court again agreed, noting that while the *Parkridge* court stated that a showing of substantially changed circumstances was one potential justification for a rezoning action, it certainly did not mandate that a zoning official must grant a rezone if changed circumstances are present. *See also* 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* §4.16 (2d ed. 2004) (“[T]he local legislative body does not have to adopt a rezoning ordinance that is consonant with the hearing examiner’s action; that action is only recommendatory. The legislative body may adopt a different ordinance *or may refuse to adopt any ordinance.*”) (emphasis added).

Both *Teed* and *Balser* are still applicable law, and the adoption of the Land Use Petition Act (LUPA), Chapter 36.70C RCW, in 1995 did not change their substantive lessons — that the City Council’s review of a hearing examiner’s site-specific rezone decision is not ministerial in

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the decision was arbitrary and capricious, but has the burden to prove that the land use  
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nature. The adoption of LUPA has changed (1) the burden of proof that a petitioner must meet in order to obtain relief upon judicial review of the local jurisdiction's decision in RCW 36.70C.130 and (2) the time frame for appeal in RCW 36.70C.040. LUPA does not apply to change the standards by which a local legislative body makes its decisions on rezone requests because LUPA applies only to judicial review of that decision. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002) (finding that LUPA applies to both ministerial and quasi-judicial decisions and assuming, without discussion, that LUPA did not change the nature of the underlying action, in that case, a boundary line adjustment); RCW 36.70C.010 (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.) (emphasis added).

3. The quasi-judicial nature of site-specific rezone decision making does not diminish the authority of the City Council to exercise their sound discretion in deciding whether or not to approve the request.

As stated succinctly in the City's Brief of Respondent, it is not the

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decision was not supported by substantial evidence.  
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City's position that site-specific rezones are not quasi-judicial.<sup>5</sup> *Storedahl v. Clark County* appropriately observed that RCW 36.70B.030(2) requires that the Council must evaluate site-specific rezone requests under legislatively established criteria, including the comprehensive plan policies and other development regulations, and those criteria constrain the Council's discretion. However, as the cases above demonstrate, if substantial evidence exists demonstrating that the Council could also deny the rezone based on the same legislatively established criteria, the Council has discretion to choose, in its legislative capacity, the zoning classification that would best suit the community. Indulging the assertions of the BIAW that the rezone applicant is entitled to a favorable decision if all the rezone criteria are met would be akin to holding that a City Council's decision-making authority with respect to rezones is ministerial and mandatory, which *Teed* squarely rejected. Predictability in land use is, in fact, advanced when a City Council exercises its discretion within the confines of the legislatively-established rezone criteria.<sup>6</sup>

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<sup>5</sup> See Woodinville's Brief of Respondent at 41.

<sup>6</sup> The City of Woodinville argued in its Brief of Respondent that the City Council further correctly applied the legislatively-established rezone criteria of WMC 21.44.070. {KNE723412.DOC;4/00046.050035/}

4. *Woods v. Kittitas County* established that growth management principles are not applicable to the decisional framework for a site-specific rezone.

The Washington State Supreme Court recently rejected attempts to graft growth management policy principles onto the decisional framework for a site-specific rezone proceeding in *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007). The Court reiterated that “a challenge to a site-specific land use decision can only be for violations of the comprehensive plan and/or development regulations[.]” *Id.* at 615.

Here, the BIAW identifies no specific comprehensive plan goal that the City Council purportedly violated in denying Phoenix’s site-specific rezone. Instead, the BIAW chooses to broadly state that the City should not be allowed “to ignore GMA mandates to reduce urban sprawl.” As *Woods* pointed out, however, citation to broad GMA principles is not the appropriate analysis for evaluating the Council’s decision with respect to a rezone application; the appropriate analysis is to ask whether the site-specific rezone complies with *specific* comprehensive plan goals and established development regulations, not some vague GMA policy such as discouraging sprawl and increasing housing affordability.<sup>7</sup> The BIAW

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<sup>7</sup> With respect to the application of specific Comprehensive Plan goals, The City of Woodinville argued in its Respondent’s Brief at page 41 that (1) the site-specific rezone was not needed to meet the City’s planning goals; and (2) the site-specific rezone would, {KNE723412.DOC;4/00046.050035/}

essentially attempts to write these broad GMA principles into Woodinville's development regulations when it states, "a rezone that results in increased housing and urban densities in urban areas should be deemed to meet the 'demonstrated need' criterion," which is established in WMC 21.44.070 as a criterion for zone reclassification. If discouraging sprawl and increasing housing affordability were the only standards by which site-specific rezones were judged, almost all rezone applications calling for increased density would have to be approved. Thus, the BIAW's arguments that the Council's denial of Phoenix's site-specific rezone request violated general principles of the GMA are not precise or legally persuasive under the framework established in *Woods*.

Furthermore, *Futurewise v. Whatcom County & Gold Star Resorts, Inc.*, WWGMHB Case No. 05-2-0013 (Final Decision and Order, Sept. 20, 2005), is not applicable to the present case under the framework established in *Woods*. In *Futurewise*, Futurewise filed a challenge to Whatcom County's comprehensive plan update because, among other things, the County failed to revise a provision of its comprehensive plan allowing a density of three lots per acre in the urban growth area. The

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in fact, conflict with Comprehensive Plan goals discouraging development ahead of the appropriate public infrastructure needed to support the development and to prioritize growth in downtown Woodinville.

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Board held that while four dwelling units per acre is the general rule of thumb within an urban growth area, it is not an inflexible rule, particularly where environmental factors are present making less density more appropriate. However, as stated clearly in *Woods*, if Phoenix or the BIAW take issue with the current zoned density of the Leota and Wellington neighborhoods as R-1, then the appropriate method of review is to challenge an update to the City's Comprehensive Plan within 60 days of its adoption. *See Woods*, 162 Wn.2d at 614-15. *See also Thurston County*, 164 Wn.2d at 340. As Woodinville's Comprehensive Plan currently allows R-1 density in the Leota and Wellington neighborhoods, challenging R-1 densities as inconsistent with the GMA is not appropriate in the site-specific rezone context.<sup>8</sup>

5. Council Findings Supported by the Record.

The BIAW argues that the City Council cites to nothing in the record supporting its conclusions 2-8 "suggesting" the rezone proposals be denied because of "deficient public facilities and services." This argument is without merit. The City Council's written conclusions were based upon its findings of fact, which findings were in turn based upon substantial evidence in the record. There is no statute or case law which requires the City Council to reference the record evidence supporting each of its

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<sup>8</sup> See also Woodinville's Brief of Respondent at pages 25-26.  
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findings within its written decision. So long as there is substantial evidence within the administrative record to support the findings made by the council, the appellant in a LUPA proceeding cannot meet its burden of proof to demonstrate that the decision is not supported by substantial evidence. *See Swoboda v. Town of La Conner*, 97 Wn. App. 613, 630, 987 P.2d 103 (1999) (hearing examiner's finding of fact was supported by substantial evidence under LUPA where the examiner only referenced generally the testimony of the applicant in the finding of fact itself and the Court of Appeals addressed specific testimony within the record supporting the finding of fact); *see also Isla Verde Intern. Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 133, 990 P.2d 429 (1999) (Factual findings are reviewed under a substantial evidence standard, and substantial evidence exists when the evidence *in the record* is of sufficient quantity to persuade a fair-minded rational person of the truth of the finding.) (emphasis added).

6. The Substantial Documentary Evidence Submitted by the Concerned Citizens of Wellington (CNW) demonstrates the City Council decision was based on substantial evidence and not unsubstantiated neighborhood opposition.

At pages 2-3 of Woodinville's Brief of Respondent, Woodinville addressed the "well-researched and verified oral testimony and documentary evidence submitted by members of CNW and other residents of the neighborhoods throughout the land use proceeding." The Woodinville City Council did not respond to an angry mob. The Council

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responded to disciplined, well-researched documentary evidence produced by a well-educated citizenry. This case exemplifies the value of public participation and demonstrates how citizens can contribute positively to administrative land use proceedings.

**C. Conclusion.**

The decisions of the City Council to deny Phoenix's site-specific rezone requests should be sustained and the appeals dismissed.

Substantial evidence exists in the record supporting the findings and conclusions made by the Woodinville City Council.

RESPECTFULLY SUBMITTED this 6th day of April, 2009.

Respectfully submitted,

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DECLARATION OF SERVICE

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ORIGINAL

N. Kay Richards hereby makes the following declaration: I am now and was at all times material hereto over the age of 18 years. I am not a party to the above-entitled action and am competent to be a witness herein. I certify that I on April 6, 2009, I mailed, via U.S. First Class Mail, a copy of Answer to Brief of Amicus Curiae Building Industry Association of Washington, and this Declaration of Service to the following counsel:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

4/6/09 Seattle, WA  
Date and Place

N. Kay Richards  
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