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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 JAN -9 PM 12:08

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  
Nonprofit Corporation,  
*Respondents.*

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APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

**INTRODUCTION..... 1**

**ARGUMENT ..... 2**

**A. In a Site-Specific Rezone Decision, Legislatively  
Established Criteria Constrain the City Council’s  
Discretion.....2**

**B. The Woodinville Hearing Examiner Weighed the  
Credibility of Witnesses.....5**

**C. The Growth Management Act Indirectly Regulates Local  
Land Use Decisions Through Comprehensive Plans and  
Development Regulations, Both of Which Must Comply  
with the GMA.....6**

**D. WMC 21.04.080(1)(a) Prohibits Development with  
Densities less than R-4 if Adequate Services Can Be  
Provided.....12**

**E. The R-1 Zone is Not Appropriate for Phoenix’s Property.14**

**F. Phoenix Has Satisfied the Changed Circumstances  
Criterion.....16**

**G. There is a Demonstrated Need for the Phoenix Rezones....17**

**H. The Proposed Rezones are Consistent with the Public  
Health, Safety and Welfare. ....19**

**I. The Phoenix Proposals Are Compatible with Surrounding  
Development. ....22**

**J. Finding #6 is Unlawful.....23**

**K. The City’s Zoning Code Prohibits Phoenix from  
Developing its Property at R-1 Densities. ....24**

**CONCLUSION ..... 25**

**TABLE OF AUTHORITIES**

**Cases**

*Bjarnsen v. Kitsap County*, 78 Wn.App. 840, 899 P.2d 1290 (1995)..... 17

*Christenson v. Grant County Hosp.* 152 Wn.2d 299, 96 P.3d 957 (2004). 8

*Gold Star Resorts v. Futurewise*, 140 Wn.App. 378, 166 P.3d 178 (2007)  
..... 10

*Henderson v. Kittitas County*, 124 Wn.App. 747, 100 P.2d 842 (2004) .....  
..... 3, 19

*Hensley v. Woodinville*, CPSGMHB Case No. 96-3-0031, FDO (1997) ... 9

*Hernandez v. City of Hanford*, 41 Cal.4<sup>th</sup> 279, 159 P.3d 33 (2007) ..... 18

*J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn.App. 920, 180 P.3d  
848 (2008)..... 6, 18

*Pentagram v. Seattle*, 28 Wn.App. 219, 622 P.2d 892 (1981)..... 23

*Peste v. Mason County*, 133 Wn.App. 456, 136 P.3d 140 (2006) ..... 10

*State v. Gary, J.E.*, 99 Wn.App. 258, 991 P.2d 1220 (2000)..... 7

*Teed v. King County*, 36 Wn.App. 635, 677 P.2d 179 (1984) ..... 2

*Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005)..... 9

*Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4  
P.3d 123 (2000) ..... 4

*Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007)..... 4, 8

**Statutes and Ordinances**

RCW 36.70A.030 (7)..... 4

RCW 36.70C..... 1

RCW 36.70C.140..... 5

WMC 21.04.020..... 13, 14

WMC 20.06.020.B..... 25

WMC 21.04.080(1)(a) ..... passim

WMC 21.04.080(2)(a) ..... 14, 15

WMC 21.04.080(2)(b) ..... 16

WMC 21.44.070..... 23

## INTRODUCTION

In its opening brief, Phoenix demonstrated that the City of Woodinville failed to follow its own code requirements and planning policies when it denied the Wood Trails and Montevallo rezone applications. Under the review standards of the Land Use Petition Act (“LUPA”), RCW 36.70C, the City’s decision must be reversed.

In response, the City takes two tacks. First, it resurrects outdated land use cases decided before the adoption of LUPA and cites them for the now incorrect proposition that its decision should be affirmed unless it was “arbitrary, unreasonable or irrational.” City Brief at pp. 11-12. This standard of review has been specifically rejected for site-specific rezones since the advent of LUPA.

Second, the City seeks to convince the Court that Phoenix failed to demonstrate how its project complies with the City’s criteria for rezoning property. As demonstrated in Phoenix’s opening brief and this reply, however, Phoenix has more than amply demonstrated its compliance with each and every City criterion for rezone approval.

Concerned Neighbors of Wellington (“CNW”) has also submitted a response brief. That brief reiterates the City’s legal arguments, and summarizes some of the factual contentions made by CNW. In the course of replying to the City’s brief, Phoenix will reply to CNW’s brief as well,

as necessary.

## ARGUMENT

In their response briefs, the City and CNW make eleven arguments in defense of the Council's land use decision. Phoenix will address each in turn.

### **A. In a Site-Specific Rezone Decision, Legislatively Established Criteria Constrain the City Council's Discretion.**

The City devotes pp. 11-19 of its brief to a discussion of "standards and procedures governing zoning law."

In this section of its brief, the City states the wrong test for judicial review of a site-specific rezone decision. The City cites *Teed v. King County*, 36 Wn.App. 635, 677 P.2d 179 (1984), for the proposition that a site-specific rezone decision cannot be reversed, "absent a clear showing of arbitrary, unreasonable, irrational or unlawful zoning action or inaction." City Brief at pp. 11-12. The City consistently refers to its decision as being "a discretionary legislative act." City Brief at p. 15. The City claims its City Council "has discretion to choose, in its legislative capacity, the zoning classification that would best suit the community." City Brief at p. 16.

It is not surprising that the City wants this Court to view the decision as a legislative act, rather than as a quasi-judicial land use

decision. The City asks this Court to simply grant deference, to afford discretion, and thereby avoid scrutiny of its decision. But Washington law is clear that a site-specific rezone is not a legislative act, even though it may be accomplished by ordinance or resolution.

The case law cited by the City in support of its position is outdated. The adoption of LUPA in 1995 changed the standard of review applicable to site-specific rezone decisions. As stated by the Court of Appeals in *Henderson v. Kittitas County*, 124 Wn.App. 747, 752, n. 2, 100 P.2d 842 (2004), “[t]o 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).”

In particular, a site-specific rezone request is quasi-judicial, **not** legislative. Under current law, a site specific rezone is expressly determined to be a “project permit.” RCW 36.70B.020(4) (“... site specific rezone ... is a project permit”). As a project permit, site specific rezone applications are treated in Washington as other land use permit applications and are subject to review under LUPA. RCW 36.70C.020 (1)(a) (LUPA applies to review of project permits). As held by the Washington Supreme Court:

Challenges to a decision concerning a site-specific rezone should be brought by means of a LUPA petition in superior court.

*Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 179 n.1, 4 P.3d 123 (2000).

The City attempts to support its “legislative act” argument by pointing out that to accomplish a rezone, the City Council must enact an ordinance. Of course, an ordinance is typically viewed as a legislative action. However, RCW 36.70A.030(7) expressly rejects this contention:

A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

See also *Wenatchee Sportsmen*, 141 Wn.2d at 178. In short, Washington recognizes that site-specific rezone decisions are not legislative actions, but are quasi-judicial decisions on a project permit application and therefore are subject to review under LUPA.

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.**

*J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn.App. 920, 931, 180 P.3d 848, 853 (2008) (emphasis added). *Accord, Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007).

The law is accordingly clear that the City’s decision in this case

was quasi-judicial, not legislative. The City is constrained by existing legislative policy in making its decision. The City's decision will be reviewed under the substantial evidence standard, and its conclusions of law de novo.

Under those standards, Phoenix is entitled to a reversal of the City's decision. RCW 36.70C.140.

**B. The Woodinville Hearing Examiner Weighed the Credibility of Witnesses.**

At pp. 18-19, the City argues that (a) the Hearing Examiner made a recommendation in this matter, not a decision; and (b) the City Council "retained broad latitude to accept or deny the... zoning map amendments."

As to the first contention, Phoenix agrees. Under Woodinville City Ordinance, the Hearing Examiner is directed to conduct a public hearing and to make a recommendation to the Council on the proposal. WMC 17.07.030 and 21.42.110(2).

By the same token, it was the Hearing Examiner, not the City Council, who heard the live testimony of witnesses, and was able to gauge the extent of their credibility and expertise. The Hearing Examiner's findings and conclusions in this case, that the proposal complies with all applicable City criteria for rezone approval, was consistent with City staff's recommendations and the professional planning and engineering

consultants upon whom the City relies for advice. The City Council's rejection of the recommendations of its experienced Hearing Examiner and its professional planning staff raises a significant question as to the lawfulness of the Council's decision. An in-depth review of the evidentiary record taken as a whole, as set forth in the Phoenix opening brief, confirms that the Council, when it denied the Phoenix proposal, acted in disregard of the facts as well as the law, and appeared to submit instead to strong neighborhood opposition.

As to the second contention, the City, as explained above, is wrong. The City Council does not have "broad latitude" to accept or deny rezones. Instead, the City 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 decision-maker's discretion." *J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn.App. 920, 931, 180 P.3d 848 (2008).

**C. The Growth Management Act Indirectly Regulates Local Land Use Decisions Through Comprehensive Plans and Development Regulations, Both of Which Must Comply with the GMA.**

At pp. 19-25, the City argues (a) that it is not collaterally estopped from denying the Phoenix rezones; (b) that Growth Management Act

principles are inapplicable in LUPA proceedings; (c) that the urban density standard espoused in *Hensley* has been overruled; and (d) that Phoenix was not entitled to rely on *Hensley* in its rezone applications.

(i) Collateral estoppel.

The City denies that it is collaterally estopped, because, the City contends, in this case there are different issues than were presented in the *Hensley* case. City Brief at pp. 19-22, citing *State v. Gary, J.E.*, 99 Wn.App. 258, 262, 991 P.2d 1220 (2000). However, the issue in *Hensley*, as in this case, is the same – namely whether the City may lawfully perpetuate a pattern of inefficient one-acre lots. The Board held that it may not. The City did not appeal. Instead, the City assured the Board and the public that it would plan for urban densities, by adopting WMC 21.04.080(1)(a), which prohibits development at densities less than four units per acre where services are available. And yet in this case, the City has done exactly what the Board held it may not do, and exactly what it assured the Board that it would not do – it has denied a rezone to allow urban density and it has mandated that any development of the subject properties must be developed in a pattern of inefficient one-acre lots.

Thus, under the doctrine of collateral estoppel, *Hensley* directly determines the outcome of this case. *Christenson v. Grant County Hosp.* 152 Wn.2d 299, 307, 96 P.3d 957 (2004). See Opening Brief at p. 45.

(ii) Growth Management Act Principles.

The City cites *Woods v. Kittitas County, supra*, for the proposition that Growth Management Act principles – including the density standard espoused in *Hensley* – are inapplicable in LUPA proceedings. City Brief at pp. 22-23.

Once again, the City incorrectly characterizes the law. The ruling in *Woods* is to the contrary:

[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.

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 response, the City adopted WMC 21.04.080(1)(a), which complies with the GMA goal to reduce “urban 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 City suggests that Phoenix is making a “collateral attack” on past legislative decisions of the Woodinville City Council. City Brief at p. 1. Nothing could be further from the truth. Indeed, all Phoenix has asked of the City is that it abide by its past legislative decisions. Phoenix’s property provides adequate services. According to the City’s own code, R-4 development densities are required. WMC 21.04.080(1)(a). Had the City approved the rezone in its quasi-judicial decision on this application, it would have complied with its past legislative decisions. The City’s failure to approve the rezone, on the other hand, transgresses those past legislative decisions.

(iii) *Viking Properties* and Urban Density.

The City also cites *Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005), for the proposition that “the urban density standard espoused by *Hensley* has been overruled.” City Brief at pp. 23-24. Accordingly, the City suggests that it may ignore the ruling in *Hensley* despite the fact that it did not appeal it.

The City’s reading of *Viking* is too broad. *Viking* certainly held that Growth Boards may not enact “bright line” urban density standards under the GMA. This is not, however, what the Board in *Hensley* required

of the City of Woodinville. What was required was that the City may not perpetuate an inefficient pattern of one-acre lots, and that the City must provide for urban densities and urban services to comply with the GMA. It was the Woodinville City Council, not the Board, that adopted a legislative policy that development less than four units per acre is prohibited when services are available. WMC 21.04.080(1)(a). And the GMA mandate that cities are required to plan for the reduction of “urban sprawl” remains the law. *Peste v. Mason County*, 133 Wn.App. 456, 463, 136 P.3d 140 (2006). See also Judge Agid’s concurrence in *Gold Star Resorts v. Futurewise*, 140 Wn.App. 378, 401, 166 P.3d 178 (2007), in which she provided guidance on the applicability of *Viking Properties*:

While the Supreme Court in *Viking Properties v. Holm* rejected the Boards’ authority to adopt a “bright line minimum urban density of four dwelling units per acre,” it did not reject the approach the Boards have actually taken in evaluating proposed urban and rural densities in GMA plans. Neither our decision today nor the *Viking* opinion is designed to undercut the Boards’ authority to evaluate GMA plans under the guidelines established by the Act, judicial decisions interpreting the Act and the Boards’ own decisions. Thus, characterizing four units to the acre as “clearly compact urban development that satisfies the low end of the range required by the Act” is not impermissible “public policy” making under the GMA and *Viking*. Similarly, the Boards may recognize that, in order to avoid sprawl as required by the Act, “as a general rule, new 1- and 2.5 acre lots” are prohibited as a residential development pattern in rural areas. Neither is a bright line rule. Rather, they are rebuttable presumptions that serve as guidelines for local jurisdictions seeking to develop plans that comply with the urban and rural density requirements of the Act.

The City did not appeal the *Hensley* decision, but chose instead to comply with it. It is far too late now, ten years later, to argue that it should not be bound by it.

(iv) *Hensley* and Phoenix's Reliance.

The City argues that Phoenix was unreasonable in relying on the holding in *Hensley* and the express language of WMC 21.04.080(1)(a). The City argues that due to its "discretion" to grant or deny rezones, the outcome of Phoenix's application was "wholly speculative." City Brief at pp. 24-25.

Phoenix respectfully disagrees with the City's contentions.

As to *Hensley*, Phoenix believes that it is fully entitled to expect that a City would comply with an explicit holding issued by the Growth Management Hearings Board in a case in which it was a party and that it did not appeal. When the Board held that it violates GMA for the City to "perpetuate an inefficient pattern of one-acre lots," and that "the inappropriate conversion of undeveloped land into sprawling low-density development" could not be sanctioned, Phoenix believes that it is reasonable to expect that the City will act in accordance with that holding when it acts quasi-judicially on rezone applications. *Hensley, supra*, at 9-10.

As to the language of WMC 21.04.080(1)(a), Phoenix did rely on

its express language. When the City enshrined in its land use code the legislative policy mandate that “Developments with densities less than R-4 are allowed only if adequate services cannot be provided,” Phoenix did indeed understand the City to have adopted a legislative policy mandate that when adequate services can be provided, a minimum R-4 density would be required. The City asserts that Phoenix’s straightforward interpretation of the land use code language is “novel.” However, Phoenix’s interpretation is not only consistent with the plain language of the ordinance, it is also consistent with the understanding of the City’s Hearing Examiner. See HE M Decision at p. 10.

Finally the outcome of a quasi-judicial proceeding should never be “wholly speculative,” as the City contends it is entitled to be. Rather, Phoenix is entitled to expect that the City Council will apply its clearly articulated, established legislative policy to require urban densities when services are provided. That policy “constrains” the City Council’s discretion. *J.L. Storedahl, supra*.

**D. WMC 21.04.080(1)(a) Prohibits Development with Densities less than R-4 if Adequate Services Can Be Provided.**

The City contends that the Council is not required to consider WMC 21.04.080(1)(a) when “making site specific rezone determinations.” City Brief at p. 27.

However, WMC 21.04.080(1)(a) could not be more clear. It states that “Developments with densities less than R-4 are allowed only if adequate services cannot be provided.” It is undisputed that this provision was adopted to comply with the GMA and the *Hensley* decision to assure that urban densities are provided in the City. For the City now to argue to this Court that this provision is essentially meaningless, is at best disingenuous, at worst an indication of bad faith.

Any property owner who reads this provision of the Code would certainly conclude that if he or she wished to develop property where adequate services could be provided, the City would require a minimum R-4 density.

The City brief cites WMC 21.04.020 as support for its contention that WMC 21.04.080(1)(a) is of no legal moment. City Brief at p. 27. However, the very language cited by the City refutes that contention: “The purpose statements for each zone... **shall be used** to guide the application of the zones... to all lands in the City of Woodinville.” WMC 21.04.020 (emphasis added). In other words, it is **mandatory** for the City to consider these provisions in making its rezone decision.

Moreover, this after-the-fact recantation is belied by the City’s own administrative record, which consistently found this provision to embody the City Council’s express legislative policy. See, e.g., M Ex. 40

(EIS) at pp. 3.4-28 through 3.4-30; M Ex. 1 (Staff Report) p. 17; HE M Decision, p. 10.

**E. The R-1 Zone is Not Appropriate for Phoenix's Property.**

The City contends that WMC 21.04.080(2)(a) and (2)(b) justify its denial of Phoenix's site-specific rezone application. City Brief at pp. 30-33. These provisions provide guidelines for when it is appropriate to designate property for R-1 through R-8 densities. As a threshold matter, the R-1 provision (WMC 21.04.080(2)(a)) is irrelevant to this case, because WMC 21.04.080(1)(a) **requires** the Phoenix property to be zoned to at least R-4 density, since adequate services can be provided.

Even in the absence of the mandate of WMC 21.04.080(1)(a) against R-1 zoning on the Phoenix property, these provisions provide no foundation to support the City's decision to deny the Phoenix rezone request.

WMC 21.04.080(2)(a) states that R-1 zoning is appropriate "in well-established subdivisions of the same density." However, the Phoenix properties have not been developed at R-1 densities. They are primarily raw, undeveloped land. This criterion is accordingly inapplicable.

WMC 21.04.080(2)(a) and (b) also state that R-1 zoning is appropriate "on or adjacent to lands with area-wide environmental

constraints,” and that R-4 zoning is appropriate on urban lands that are predominately environmentally unconstrained. The overwhelming weight of evidence in the record, however, proves that these lands are not predominately environmentally unconstrained. See Phoenix Opening Brief at pp. 33-37, including references to City’s Sustainable Development Study (no area-wide environmental constraints preclude development at R-4 densities on Phoenix property). The CNW allegations (CNW Brief at pp. 36-37) of geologic and landslide hazard constraints were debunked by numerous site-specific studies set forth in the City’s EIS and confirmed at the hearing before the Hearing Examiner, who found that “the stability of the site for development has been established by the applicant.” Phoenix Opening Brief at pp. 33-37.

Finally, WMC 21.04.080(2)(b) states that R-4 zoning is appropriate on urban lands that are served by adequate public facilities and services. The adequacy of public facilities and services was fully demonstrated in the administrative record by the City’s EIS and testimony by the City’s and Phoenix’s consultants. See Phoenix Opening Brief at pp. 25-33.

As to roads and sidewalks, the conclusory allegations of CNW project opponent Roger Mason (CNW Brief at pp. 38-40) were thoroughly debunked by the City’s EIS, the City’s Sustainable Development Study

(“transportation issues are not a basis for maintaining R-1 densities”), the City’s Public Works Director, and the City’s Transportation Engineering Consultant. See Phoenix Opening Brief at pp. 26-30.

As to the conclusory allegations of CNW project opponent Roger Mason (CNW Brief at pp. 39-40) on transit, the record discloses that there are two transit routes in the vicinity of the project, and that a park and ride lot is located in the vicinity of the project. Moreover, it is necessary to increase density, not to maintain current sprawling development patterns, in order to encourage transit. See Phoenix Opening Brief at pp. 31-32.

As to parkland, there are three park resources within ½ mile of the Phoenix project, and the City of Woodinville, a relatively small town, offers six neighborhood parks, three community parks, four open space parks, three special use parks, and five linear parks within its boundaries. Regional parks exist in surrounding jurisdictions. See Phoenix Opening Brief at pp. 30-31.

**F. Phoenix Has Satisfied the Changed Circumstances Criterion.**

The City, in its brief at p. 14, n. 6, concedes 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 cites to *Bjarnsen v.*

*Kitsap County*, 78 Wn.App. 840, 899 P.2d 1290 (1995), in support of this proposition. *Bjarnsen* holds: “[W]here the proposed rezone... implements policies of the comprehensive plan, changed circumstances are not required.” 78 Wn. App. at 846.

Here, the City agrees that the Phoenix rezones implement policies of the comprehensive plan. See, e.g., City Council M Decision, Finding 6(e). See also Phoenix Opening Brief at pp. 32-34. Accordingly, under the holding of *Bjarnsen*, demonstration of changed circumstances is not required.

**G. There is a Demonstrated Need for the Phoenix Rezones.**

The City contends that the determination of “need” is a police power determination “to determine where in the City the different densities of residential development should occur...” City Brief at p. 38.

However, the City’s argument is entirely based upon its incorrect classification of the proper decision-making posture of the City Council in this case. Unlike the Hanford City Council in the case cited by the City in support of its proposition, *Hernandez v. City of Hanford*, 41 Cal.4<sup>th</sup> 279, 159 P.3d 33 (2007), the City Council is here not acting as a legislative body implementing the police power. Here, the Council is acting in its quasi-judicial capacity exercising a judicial function. The issue is not “where in the City the different densities of residential development

should occur.” Rather, the issue is whether Phoenix’s site-specific rezone request complies with “legislatively established criteria, including the comprehensive plan policies and other development regulations,” for a site-specific rezone approval. *J.L. Stordahl & Sons, Inc. v. Clark County*, 143 Wn.App. 920, 931, 180 P.3d 848 (2008).

The question of the meaning of “demonstrated need” is therefore not a legislative police power question, then, but a quasi-judicial application of facts to law, reviewed under the clearly erroneous standard.

The City Council’s determination in this case is clearly erroneous. There is a need for R-4 zoning in the City, as the Hearing Examiner found. Only 2.7% of the property in the City is available at R-4 densities. Providing multi-family housing downtown does not satisfy the need for families to have single family detached homes at R-4 densities, much more affordable than estate-sized one-acre lots. As the City’s Sustainable Development study found, there is adequate public infrastructure to accommodate R-4 densities in the Wellington-Leota neighborhood. WT Ex. 83, pp. 15-16. In addition, as Phoenix demonstrated in its Opening Brief at pp. 34-41, R-4 zoning is needed due to market demand, the State’s adopted public policy to end sprawl, sound planning principles, the legal requirements of the City’s own comprehensive plan and development

regulations, the doctrine of collateral estoppel, and the rules of statutory construction.

**H. The Proposed Rezones are Consistent with the Public Health, Safety and Welfare.**

The City does not dispute Phoenix's citation to *Henderson v. Kittitas County*, 124 Wn.App. 747, 756, 100 P.3d 842 (2004), which holds that consistency with the comprehensive plan is evidence that a rezone promotes the public health, safety and welfare. City Brief at pp. 38-39.

As explained in the Phoenix opening brief at pp. 37-39, the record is replete with analysis of the consistency of the Phoenix rezone proposal with the City's comprehensive plan. The EIS, the City Staff Report, and the Hearing Examiner decision all engage in extensive review of the comprehensive plan, and all conclude, as the Staff Report found, that "the proposed rezone to R4, Low Density Residential, complies with the policies of the Comprehensive Plan..." WT Ex. 1, p. 13.

The City asserts that while it "could have concluded" that the proposal was consistent with the comprehensive plan, "it did not do so." The City asserts that "its reasons are supported by its findings..." However, the City does not refer to any adopted findings that support those reasons. As explained in the Phoenix opening brief at pp. 38-39, a review of those findings refers to no comprehensive plan provision with

which the proposal is inconsistent.

CNW does make the claim that the proposal is inconsistent with the City's plan. CNW Brief at pp. 41-45. As opposed to the 25 comprehensive plan policies analyzed in the City's EIS, with all of which the EIS found the Phoenix proposal to be consistent (M Ex. 40, pp. 3.4-22 – 3.4-28), CNW selects a mere four policies it claims the Phoenix proposal is inconsistent with.

The first policy is LU 1.1, which seeks to “preserve the character of existing neighborhoods in Woodinville while accommodating the state's 20-year growth forecasts for Woodinville.” CNW claims (a) R-4 zoning in an R-1 neighborhood will negatively impact its character; and (b) the growth forecasts can be accommodated without designating the site as R-4. However, the EIS, M Ex. 40 at p. 3.4-22, explains that the Phoenix proposal “would do the most to help accommodate the growth forecast,” compared to the R-1 alternative. The EIS also notes that the Phoenix proposal “would preserve the detached single-family residential land use pattern of the Wellington neighborhood,” while acknowledging that it “would be denser and more intensive than existing development.”

Providing low-density (R-4) development in an existing low-density (R-1) neighborhood, while certainly increasing density somewhat, is nonetheless consistent with the existing neighborhood as to use (single

family) and appearance (residential structures).

The second policy cited by CNW is LU-1.2, which provides that future development should be encouraged in areas “with the capacity to absorb development...” As demonstrated in the Phoenix opening brief at pp. 25-37, the City’s EIS, Sustainable Development Study, and Hearing Examiner all found that the Phoenix properties have the capacity to absorb the proposed density.

The third policy cited by CNW is Goal LU-2, which encourages land use patterns that encourage less reliance on single-occupant vehicle travel. CNW suggests that R-4 zoning is inconsistent with this policy. As pointed out in the Opening Brief at pp. 31-32, it is necessary to substantially increase zoning densities, rather than maintain existing sprawling densities, in order to support transit. Of all zoning densities available, R-1 is the least supportive of transit. Moreover, there is transit service available in the vicinity of the project site, and a park and ride facility a short distance away for commuting to neighboring employment.

The fourth policy cited by CNW is Goal ENV-3, to preserve and enhance aquatic and wildlife habitat. The EIS discusses this goal at M Ex. 40, p. 3.4-27. It points out that there will be “no net loss” of wetland functions and values from the Phoenix proposals. The EIS adds that in fact the R-1 zoning alternative “would be less protective of stream

functions and values,” because it would rely on septic systems for sewage disposal. In addition, the EIS notes that all the development alternatives, including the Phoenix proposal, will “maintain a large area of existing habitat,” and will “meet or exceed City tree retention standards.”

The Phoenix proposal then, is consistent with all four of these policies, as well as all of the other many policies discussed in the EIS, staff report and Hearing Examiner decision.

**I. The Phoenix Proposals Are Compatible with Surrounding Development.**

The City asserts that the Phoenix proposals are incompatible with surrounding development, City Brief at pp. 39-41, but provides the Court with no explanation. The City merely states that it is “has the discretion” to deny the proposal on this basis. Once again, the City appears to be seeking to characterize its decision-making as legislative. Rather, as a quasi-judicial decision-maker, it has the obligation to explain the basis for its decision to enable meaningful judicial review. Failure to do so suggests that its decision is arbitrary. *Pentagram v. Seattle*, 28 Wn.App. 219, 622 P.2d 892 (1981).

Rather than seek to defend its unsupported conclusion on compatibility, the City asks the Court instead to refer to the CNW brief. City Brief at p. 39.

However, the CNW discussion is virtually as truncated as that of the City. CNW merely cites evidence in the record that there are many surrounding homes that are placed on lots “that average just less than one acre.” CNW Brief at p. 26.

However, Phoenix’s burden is to demonstrate “compatibility” with the uses and zones of surrounding properties, not “identity of size of lots.” WMC 21.44.070. R-4 zoning is certainly compatible with the “uses” of surrounding properties. The surrounding properties are single family residential. R-4 zoning uses are also single family residential. R-4 zoning is also compatible with the R-1 zoning classification which surrounds the Phoenix properties. It is, like R-1, a low-density zoning classification. All properties in this area are designated in the Comprehensive Plan as appropriate for densities as high as R-4. See Phoenix Opening Brief at p. 46.

**J. Finding #6 is Unlawful.**

At pp. 41-43, the City continues to seek to convince the Court that “the decision to rezone is a discretionary act of the City Council” that “is an exercise of legislative discretion.” City Brief at p. 41. Accordingly, the City contends that it is appropriate for it to make its Finding #6 “in its legislative capacity.”

As pointed out above, the City is wrong in making these assertions. All the cases cited by the City in support of these propositions pre-date the adoption of LUPA. Since the adoption of LUPA, they are no longer good law.

The Council's effort to adopt **legislative** findings in this case was accordingly unlawful. Those findings should be stricken.

**K. The City's Zoning Code Prohibits Phoenix from Developing its Property at R-1 Densities.**

The Hearing Examiner properly found that the City's zoning code precludes development of Phoenix's property at R-1 density. WMC 21.04.080(1)(a). See, e.g., HE M Decision at p. 10. When the zoning code states that developments at less than R-4 are allowed only when services are not available, any reasonable person would take that statement at face value.

The City does not. While acknowledging this provision is a part of its zoning code statement of legislative policy, it contends a reasonable person would have understood that subdivision development at R-1 densities would have been allowable on the Phoenix properties even if adequate services were available. City brief at pp. 43-44.

However, WMC 21.04.080(1)(a) explicitly forbids such development. For a subdivision to be approved in the City of

Woodinville, it must comply with the development standards set forth in WMC Title 21, which includes, of course, WMC 21.04.080(1)(a). See WMC 20.06.020.B. A property owner applicant would be foolhardy, to say the least, to pursue a development at R-1 density in the light of the WMC 21.04.080(1)(a) prohibition.

**CONCLUSION**

Phoenix respectfully asks the Court to reverse the decisions of the Woodinville City Council to deny the rezone and subdivision applications for Wood Trails and Montevallo. The Council's decisions were clearly erroneous, contrary to law, and not supported by substantial evidence.

DATED this 9<sup>th</sup> day of January, 2009.

Respectfully submitted,

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