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

IN THE SUPREME COURT  
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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PHOENIX DEVELOPMENT'S SUPPLEMENTAL BRIEF

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**TABLE OF CONTENTS**

SUMMARY OF ARGUMENT ..... 1

STATEMENT OF FACTS ..... 3

ARGUMENT ..... 5

    I. Site-Specific Rezone Decisions are Administrative, Quasi-Judicial  
    Acts Subject to Review under the Standards of LUPA. .... 5

        A. There are Two Types of Rezones. .... 5

        B. The Characterization by Washington Courts of Site-Specific  
        Rezone Decisions Has Evolved. .... 6

    II. The Court of Appeals Properly Characterized the City Council  
    Decision as Quasi-Judicial, Applied the Appropriate LUPA  
    Standard of Review, and Imposed the Proper Remedy. .... 16

        A. The Phoenix Site-Specific Rezone Request is a Quasi-Judicial  
        Decision. .... 16

        B. The Court of Appeals Correctly Applied the Proper Standard of  
        Review. .... 17

        C. The Court of Appeals Imposed the Proper Remedy. .... 19

CONCLUSION..... 20

TABLE OF AUTHORITIES

**Cases**

*Ahmanne-Yamane v. Tabler*, 105 Wn.App. 103, 19 P.3d 436 (2001)..... 18

*Besselman v. City of Moses Lake*, 46 Wn.2d 279, 280 P.2d 689 (1955)..... 6

*Bishop v. Houghton*, 69 Wn.2d 786, 420 P.2d 368 (1966) ..... 6

*Chausee v. Snohomish County Council*, 38 Wn.App. 630, 689 P.2d 1084  
(1984)..... 17

*Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947  
P.2d 1208 (1997)..... 14

*Duckworth v. Bonney Lake*, 91 Wn.2d 19, 586 P.2d 860 (1978) ..... 9

*Fleming v. Tacoma*, 81 Wn.2d 292, 502 P.2d 327 (1972) ..... 1, 2, 6, 7, 10

*Henderson v. Kittitas County*, 124 Wn.App. 747, 100 P.3d 842  
(2004) ..... 9, 13, 14, 18

*J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn.App. 920, 180 P.3d  
848 (2008).....2, 14, 20

*Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976) .....1, 7, 15

*Lillions v. Gibbs*, 47 Wn.2d 629, 289 P.2d 203 (1955).....6, 10, 18

*Maranatha Mining, Inc. v. Pierce County*, 59 Wn.App. 795, 801 P.2d 985  
(1990).....2, 20

*Nagatani Brothers, Inc. v. Skagit County*, 108 Wn.2d 477, 739 P.2d 696  
(1987).....2, 20

*Parkridge v. Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978) ..... 1, 2, 8

|  |                        |
|--|------------------------|
| <i>Peterson v. Department of Ecology</i> , 92 Wn.2d 306, 596 P.2d 285<br>(1979) .....            | 10                     |
| <i>Phoenix Development v. City of Woodinville</i> , 154 Wn.App. 492, 229 P.3d<br>800 (2009)..... | 1, 3, 4, 5, 16, 17, 18 |
| <i>Schneider Homes v. City of Kent</i> , 87 Wn.App. 774, 942 P.2d 1096<br>(1997) .....           | 16                     |
| <i>Schofield v. Spokane County</i> , 96 Wn.App. 581, 980 P.2d 277 (1999).....                    | 14                     |
| <i>SORE v. Snohomish County</i> , 99 Wn.2d 363, 662 P.2d 816 (1983).....                         | 8                      |
| <i>State ex rel. Gunning</i> , 58 Wn.2d 275, 277, 362 P.2d 254 (1961).....                       | 6, 15                  |
| <i>Teed v. King County</i> , 36 Wn.App. 635, 677 P.2d 179 (1984).....                            | 9, 10                  |
| <i>Tugwell v. City of Ellensburg</i> , 90 Wn.App. 1, 951 P.2d 272 (1997).....                    | 14                     |
| <i>Wenatchee Sportsmen v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123<br>(2000).....           | 2                      |
| <i>Woods v. Kittitas County</i> , 162 Wn.2d 597, 174 P.3d 25 (2007)<br>.....                     | 11, 12, 14, 17, 18     |

**Statutes**

|                      |            |
|----------------------|------------|
| RCW 35A.63.100 ..... | 15         |
| RCW 35A.63.170 ..... | 14         |
| RCW 36.70.970 .....  | 14         |
| RCW 36.70A.....      | 11, 13     |
| RCW 36.70A.230 ..... | 13         |
| RCW 36.70B.....      | 11, 12, 13 |
| RCW 36.70C.....      | passim     |
| RCW 36.70C.130.....  | 2, 13, 18  |
| RCW 36.70C.140.....  | 13, 20     |

**Ordinances**

|                     |       |
|---------------------|-------|
| SCC 30.21.030 ..... | 15    |
| WMC 21.04.080 ..... | 3, 19 |

**Other Authorities**

*Final Report of the Governor's Task Force on Regulatory Reform (1995)*  
..... 13

P. Salkin, *Anderson's American Law of Zoning*, Section 8-22..... 7

R. Settle, *Washington Land Use and Environmental Law and Practice*,  
Sect. 2.3, 2.11, 2.11(a) (1983)..... 5

W. Stoebuck and J. Weaver, *17 Wash, Prac., Real Estate*, Sect 4.16  
(2<sup>nd</sup> Ed.)..... 5

## SUMMARY OF ARGUMENT

In this case, the Court of Appeals held that a site-specific rezone request is a quasi-judicial decision that the council must evaluate under legislatively established criteria, which constrain the council's discretion.<sup>1</sup>

The central issue raised by the City of Woodinville ("City") is whether the Court of Appeals properly characterized the city council decision. The City argues that the council was acting in a legislative, not in a quasi-judicial, capacity. As such, the City contends that its decision is entirely discretionary, unconstrained by existing legislative policy, and therefore unreviewable by a court.

The City's appeal fails because, nearly forty years ago, the Washington Supreme Court held that site specific rezones are administrative and quasi-judicial, not legislative. *Fleming v. Tacoma*, 81 Wn.2d 292, 502 P.2d 327 (1972) ("*Fleming*"); *Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976) ("*Leonard*"); *Parkridge v. Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978) ("*Parkridge*"). As such, site-specific rezones are subject to the appearance of fairness doctrine, are not subject to referendum, a verbatim record is mandatory, findings and conclusions must be made, and the burden of proof rests on the proponent. None of these requirements is applicable to legislative actions.

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<sup>1</sup> *Phoenix Development v. City of Woodinville*, 154 Wn.App. 492, 229 P.3d 800 (2009) ("*Phoenix*").

Contrary to the City's histrionic argument about local control, courts have not hesitated, when appropriate, to reverse the decisions of city and county councils when they are acting in their administrative and quasi-judicial capacities. *Fleming, supra* (rezone approval); *Parkridge, supra* (rezone approval); *Nagatani Brothers, Inc. v. Skagit County*, 108 Wn.2d 477, 739 P.2d 696 (1987) (subdivision denial); *Maranatha Mining, Inc. v. Pierce County*, 59 Wn.App. 795, 801 P.2d 985 (1990) (unclassified use denial); *J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn.App. 920, 180 P.3d 848 (2008) (rezone denial).

The court's authority to review a site-specific rezone was confirmed by the Legislature's adoption of the Land Use Petition Act ("LUPA"). RCW 36.70C.130; *Wenatchee Sportsmen v. Chelan County*, 141 Wn.2d 169, 179, n.1, 4 P.3d 123 (2000) ("Challenges to a site-specific rezone should be brought by means of a LUPA petition").

The Court of Appeals decision, fully consistent with judicial precedent and LUPA, should be affirmed. The City's appeal, which seeks to overturn clear precedent and to nullify LUPA, should be denied.

Petitioners have also raised three other issues. Phoenix has fully briefed its position on those issues, and will not repeat that briefing here. As to whether the Court of Appeals decision was "tainted" by GMA, see Appellants' Brief at 22-25; Appellants' Reply Brief at 6-12; and Phoenix's

Answer to Petitions for Review (“Answer to Petitions”) at 15-19. As to whether the Court of Appeals erred by focusing on the FEIS and the hearing examiner findings, see Answer to Petitions at 19-21, 27-29. As to whether the Court of Appeals erred by failing to consider evidence supporting the Council decision, see Appellants’ Brief at 25-48; Appellants’ Reply Brief at 14-23; and Answer to Petition at 21-26.

### STATEMENT OF FACTS<sup>2</sup>

At the time Phoenix applied for permission to develop its property, the City’s **comprehensive plan** designated the property for low density residential development which it defines as ranging between one and four homes per acre (R-1 to R-4).<sup>3</sup> *Phoenix*, 154 Wn.App. at 511-517. The City’s **zoning code** provided that the City would not allow development to occur at densities less than four homes per acre. The only exception was that if “adequate services cannot be provided,” development may occur at densities lower than four homes per acre. WMC 21.04.080. *Id.* at 806-807.

Phoenix’s proposal included bringing sewer lines to the property. As City staff recognized, that meant “adequate services” would be

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<sup>2</sup> The facts are fully set forth in the Court of Appeals Opinion, 154 Wn.App. at 496-501, and in Appellants’ Brief at 5-20. Only the key procedural facts are set forth here.

<sup>3</sup> In this case, the City has denied Phoenix the right to develop its property at the “low density” of 4 homes per acre.

provided.<sup>4</sup> Accordingly, in compliance with these two identified legislative policies, Phoenix applied for a site-specific rezone to “low density” residential “R-4,” four homes per acre. Id. at 496-497.

Draft and final environmental impact statements were prepared, and numerous public hearings were held. City planning staff ultimately recommended approval of Phoenix’s subdivision and rezone applications because they complied with all city subdivision and rezone criteria. Staff deferred the determination of “demonstrated need” to the Hearing Examiner. The Examiner approved the subdivision and recommended approval of the rezone, also because the application met all City zoning and subdivision criteria, and the Examiner found conclusively that the “demonstrated need” criterion was met. Id. at 497-501.

The Hearing Examiner’s rezone recommendation was then considered by the Council, along with his decision approving the subdivision. After a quasi-judicial hearing, the Council, claiming to act “legislatively,” denied both rezone and subdivision. Id. at 501-502.

The Court of Appeals reversed the Council decision, holding that the City’s development regulations require the City to approve Phoenix’s requests to rezone property to R-4 if adequate services are available to the

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<sup>4</sup> The City Council, in its decision denying the rezone, disagreed with its staff and the Hearing Examiner on the issue of adequacy of services. The City Council’s contention that services are inadequate is refuted in *Phoenix*, 154 Wn.App. at 506-510, and in Appellants’ Brief at 25-33.

Phoenix property and the rezone meets all other ordinance requirements. Id. at 515-516. After reviewing the record, the Court of Appeals concluded that the reasons cited by the Council for denying the rezone were not supported by substantial evidence in the record. The Court reversed the decision denying the rezone because Phoenix's application met all statutory and common law criteria. Id.

## ARGUMENT

### **I. Site-Specific Rezone Decisions are Administrative, Quasi-Judicial Acts Subject to Review under the Standards of LUPA.**

#### **A. There are Two Types of Rezones.**

Washington courts have recognized two different types of rezones. The first is an amendment that affects a wide area, and is usually adopted as part of a general overhaul of the zoning pattern. This amendment is commonly called an "area-wide rezone," and is legislative in nature. By contrast, an amendment requested by a property owner and affecting a limited area is commonly called a "site-specific rezone," and is considered administrative or quasi-judicial in nature. See R. Settle, *Washington Land Use and Environmental Law and Practice*, Sect. 2.3, 2.11, 2.11(a) (1983); W. Stoebuck and J. Weaver, *17 Wash, Prac., Real Estate*, Sect 4.16 (2<sup>nd</sup> Ed.). All parties acknowledge that the Phoenix rezone is "site-specific."

**B. The Characterization by Washington Courts of Site-Specific Rezone Decisions Has Evolved.**

Relying solely on outdated case law, the City contends that city council site-specific rezoning decisions “are discretionary legislative acts,” and, as a result, it is “largely immaterial if an application satisfies rezoning criteria.” City Petition for Review (“City Petition”) at 5, 7, 14.

(1) Judicial Decisions Prior to 1972.

The pre-1972 case law on which the City relies supports its argument. In *Lillions v. Gibbs*, 47 Wn.2d 629, 632-633, 289 P.2d 203 (1955), the Court held that a board of county commissioners considering a site-specific rezoning “is a legislative body exercising legislative powers.” Unless the board was “arbitrary, capricious and discriminatory,” the Court would not interfere. “The motives of the board in rejecting the commission’s recommendation are not pertinent.” Accord, *Besselman v. City of Moses Lake*, 46 Wn.2d 279, 280 P.2d 689 (1955); *State ex rel. Gunning*, 58 Wn.2d 275, 362 P.2d 254 (1961); *Bishop v. Houghton*, 69 Wn.2d 786, 420 P.2d 368 (1966).

(2) Judicial Decisions 1972-1995.

This characterization proved unworkable, and the Washington courts began to chart a new course. *Fleming, supra*, expressly overruled *Lillions v. Gibbs*. In *Fleming*, the Court held the appearance of fairness doctrine applied to a site-specific rezoning decision made by the Tacoma

City Council, and invalidated the decision. In the process, the Court held for the first time that site-specific rezoning decisions are adjudicatory:

Generally courts will not inquire into the motives of legislative officers acting in a legislative capacity... The rule follows from the doctrine of separation of powers... **[W]e are convinced that zoning amendments are sufficiently distinguishable from other legislative functions that an exception to the general rule is desirable...** Zoning decisions may be either administrative or legislative depending upon the nature of the act...

**[Z]oning decisions which deal with an amendment of the code or reclassification of land thereunder... subsequent to the adoption of a comprehensive plan and zoning code, [are] basically adjudicatory.**

81 Wn.2d at 298-300 (emphasis added).<sup>5</sup>

Four years later, the Supreme Court reaffirmed *Fleming. Leonard, supra*. The issue in *Leonard* was whether a site-specific rezoning approval by a city council could lawfully be subject to a referendum election. The Court held that because site-specific rezoning decisions are administrative and quasi-judicial, and the subject matter of referendum elections is limited to legislative acts, it follows that a site-specific rezoning by a local legislative body could not lawfully be subject to a referendum election.

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<sup>5</sup> The *Fleming* Court acknowledged that by classifying site-specific rezoning decisions as quasi-judicial, it was creating "an exception to the general rule" followed by the majority of courts that site-specific rezoning is legislative in nature. 81 Wn.2d at 330-331. Indeed, the treatise cited by the City for the proposition that site-specific rezoning decisions are legislative acts, specifically also identifies Washington state as being one of the minority of states that has characterized the site-specific rezoning process as quasi-judicial. P. Salkin, *Anderson's American Law of Zoning*, Section 8-22.

**The ordinance [at issue in *Leonard*] merely rezoned the property and modified the language of the plan to reflect the anticipated land use change. We do not view the ordinance as a legislative policy-making decision, and thus it is not subject to a referendum election.**

87 Wn.2d at 849-851 (emphasis added).

In *Parkridge, supra.*, the Court confirmed its prior decisions and held that because site-specific rezone decisions are adjudicatory, the full panoply of judicial safeguards is required. The *Parkridge* court specifically reaffirmed *Fleming*, which “distinguishes between the legislative function of enacting the initial comprehensive plan and zoning ordinance and the basically adjudicatory function of subsequent rezonings.” 89 Wn.2d at 463. Because they differ from legislative actions, in site-specific rezones (1) there is no presumption of validity; (2) the rezone proponents have the burden of proof to demonstrate the presence of changed circumstances since the time of the original rezone;<sup>6</sup> and (3) the rezone must bear a substantial relationship to the public health, safety and welfare. The *Parkridge* Court also ruled that, in contradistinction to legislative actions, a site-specific rezone must be supported by a verbatim record of proceedings and findings and conclusions that justify the local legislative body’s decision. As in any

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<sup>6</sup> The Court later held that a rezone that implements policies of the Comprehensive Plan meets any applicable “changed circumstances” requirement. *SORE v. Snohomish County*, 99 Wn.2d 363, 662 P.2d 816 (1983). It is no longer a separate requirement for rezone approval and is not relevant to a reviewing court’s analysis.

other quasi-judicial proceeding, the evidence in the record must be sufficient to support the rezone decision. *Id.* at 463-464. Because the Seattle Council failed to meet these requirements for a quasi-judicial decision, the *Parkridge* Court reversed the City's rezone. *Id.* at 462-463.<sup>7</sup>

While this Court in *Fleming*, *Leonard* and *Parkridge* charted a new course with respect to site-specific rezones, it continued to hold that area-wide zoning decisions were legislative and subject to minimal scrutiny. *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 586 P.2d 860 (1978) (challenge to zoning provision of general applicability reviewed under standards applicable to legislative acts). This remains the law.

To support its contention that site-specific rezones are legislative, the City relies heavily on dictum in *Teed v. King County*, 36 Wn.App. 635, 677 P.2d 179 (1984). There, the County Council passed a motion approving a site-specific rezone subject to certain conditions. The plaintiffs conveyed a strip of land to the County to satisfy one of the conditions. The Council later adopted a comprehensive zoning ordinance

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<sup>7</sup> Despite having reclassified the nature of site-specific rezones as quasi-judicial rather than legislative, and having shifted the burden of proof in a manner appropriate to judicial acts and inappropriate for legislative acts, the Court continued to test site-specific rezones by the "arbitrary and capricious" standard of review appropriate for legislative acts. The combination of the *Parkridge* standard with the pre-existing "arbitrary and capricious" standard resulted in an overall standard of review that uncomfortably mixed the new with the outdated. This anomaly was ultimately resolved when the Washington Legislature adopted the uniform standard of review for all quasi-judicial actions, including site-specific rezones, set forth in LUPA. *Henderson v. Kittitas County*, 124 Wn.App. 747, 752 n.2, 100 P.3d 842 (2004).

which disallowed the plaintiffs' intended use of their property. Plaintiffs sought a writ of mandamus to compel the Council to adopt the rezone.

In characterizing *Teed* as holding that a site-specific rezone is a legislative act, the City omits critical facts. *Teed* does say "a reclassification of a particular parcel of property is a discretionary legislative act..." 36 Wn.App. at 642-643. But *Teed* relies for this proposition on *Lillions v. Gibbs, supra*, an explicitly overruled case. See *Fleming*. Ironically, the City fails to tell this Court that *Teed* also cites *Fleming* for the opposite proposition: that "rezoning actions are basically adjudicatory..." 36 Wn.App. at 643.

This imprecision in the *Teed* court's characterization of the rezone at issue is to be forgiven, perhaps, because whether a rezone decision is legislative (as the Court would have said in 1955) or administrative/quasi-judicial (as the Court did say in 1972 and 1976), a writ of mandamus would not lie. Both legislative and administrative/quasi-judicial decisions require an exercise of discretion. Mandamus does not lie to compel performance of a discretionary act. *Peterson v. Department of Ecology*, 92 Wn.2d 306, 314, 596 P.2d 285 (1979) (administrative permit is discretionary act not subject to mandamus). Thus, *Teed* does not apply where a court is reviewing a site-specific rezone in a LUPA context.

(iii) Judicial decisions Since 1990.

Between 1990 and 1995, the Legislature took three significant steps relating to the adjudication of rezones: The adoption of the Growth Management Act, RCW 36.70A (“GMA”), the Local Project Review Act, RCW 36.70B, and the Land Use Petition Act, RCW 36.70C (“LUPA”).

The impact of this legislation on land use law was summarized in *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007):

The legislature enacted the [Growth Management Act] in 1990 to address concerns related to “uncoordinated and unplanned growth” in the State and “a lack of common goals expressing the public’s interest in the conservation and the wise use of our lands.” RCW 36.70A.010. The GMA requires counties [and cities] to develop a “comprehensive plan,” which sets out the “generalized coordinated land use policy statement” of the county’s governing body. Former RCW 36.70A.030(4) (1997)...

Along with a comprehensive plan, the GMA requires counties [and cities] to adopt development regulations that are “consistent with and implement the comprehensive plan.” RCW 36.70A.040(3)(d), 4(d). “Development regulations” include, but are not limited to, zoning ordinances. Former RCW 36.70A.030(7) (1997)...

The legislature created three GMHBs in 1991 to hear petitions alleging violations of the GMA. RCW 36.70A.250, .280. GMHBs have limited jurisdiction to decide only petitions challenging comprehensive plans, development regulations, or permanent amendments to comprehensive plans or development regulations....

GMHBs do not have jurisdiction to decide challenges to site-specific land use decisions... A challenge to a site-specific land use decision should be brought in a LUPA petition at superior court...

LUPA grants the superior court *exclusive jurisdiction* to review a local jurisdiction's land use decisions... RCW 36.70C.030(a)(ii). The legislature's purpose in enacting LUPA was to "establish [] uniform, consistent expedited appeal procedures and uniform criteria for reviewing [land use] decisions [by local jurisdictions], in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010...

**A site-specific rezone is a project permit, RCW 36.70B.020(4), and, thus, a land use decision...**

**[T]he GMA indirectly regulates local land use decisions through comprehensive plans and development regulations, both of which must comply with the GMA... [L]ocal development regulations, including zoning regulations, directly constrain individual land use decisions...**

In reviewing a proposed land use project, a local government must determine whether the proposed project is consistent "with applicable development regulations, or in the absence of applicable regulations the adopted comprehensive plan." RCW 36.70B.030(1)... **[T]he land use planning choices reflected in the comprehensive plan and regulations "serve as the foundation for project review."** RCW 36.70B.030(1).

162 Wn.2d at 608-610, 613 (emphasis added).

With respect to legislative, area-wide rezones, these statutory developments fundamentally alter both the standards and process for review. GMA replaces the minimal "arbitrary and capricious" standard of review accorded other legislative decisions with a new process and standard. Legislative, area-wide rezone decisions are now reviewed by the GMHB. While these decisions are presumed valid upon adoption, the GMHB may find non-compliance if the action by the local legislative

body is “clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [GMA].” RCW 36.70A.320.

The changes wrought by this legislation on judicial review of site-specific rezone decisions are more evolutionary than revolutionary, thanks to the course that had already been charted in the 1970s by *Fleming*, *Leonard* and *Parkridge*. RCW 36.70B and RCW 36.70C confirm, clarify and elaborate the holdings of those three cases.

- Site-specific rezone decisions are administrative decisions appealable to court via LUPA, not legislative decisions appealable to the GMHB via GMA;<sup>8</sup>
- The “arbitrary and capricious” standard for granting relief is replaced by the “error of law” and “substantial evidence” standard of review traditionally used by appellate courts in reviewing the decisions of trial courts;<sup>9</sup>
- If the court determines that relief is appropriate, the Court may affirm or reverse the land use decision under review or remand it for modification or further proceedings.<sup>10</sup>

Since 1995, Washington courts have consistently acknowledged

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<sup>8</sup> RCW 36.70B.020(4); RCW 36.70C.020-030. This was a considered policy decision made by the Legislature at the explicit recommendation of the *Final Report of the Governor’s Task Force on Regulatory Reform* (1995): “The definition of development regulations made under the GMA should be clarified to exclude quasi-judicial permits and approvals for specific projects. These permits and approvals include approvals for subdivisions, planned unit developments, and individual rezones.... The GMA provides that the adoption and amendment of development regulations are appealable to the [GMHBs]. Quasi-judicial actions were not intended to be subject to these procedures.” At 46 (emphasis added).

<sup>9</sup> See RCW 36.70C.130. This standard of review is what one would expect because site-specific rezone decisions are classified as quasi-judicial rather than legislative. See also *Henderson v. Kittitas County*, *supra*.

<sup>10</sup> See RCW 36.70C.140.

the applicability of these statutory directives to their adjudication of challenges to site-specific rezone decisions. In addition to *Woods v. Kittitas County*, *supra*, see, e.g., *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (1997); *Tugwell v. City of Ellensburg*, 90 Wn.App. 1, 951 P.2d 272 (1997); *Schofield v. Spokane County*, 96 Wn.App. 581, 980 P.2d 277 (1999); *Henderson v. Kittitas County*, *supra*; *J.L. Storedahl Sons, Inc. v. Clark County*, *supra* (2008).

(iv) City Arguments Have No Merit.

The City makes five arguments in support of its contention that “[t]he power to rezone property is unique under Washington law.” City Petition at 7. None has merit.

First, the City contends that “[r]ezoning is fundamentally a legislative act.” *Id.* As demonstrated above, that premise has been false since 1972.

Second, the City argues that “the final decisions regarding a proposed rezoning action must be made by the local legislative body itself,” and may not be delegated to a hearing examiner. *Id.* This is also false. RCW 35A.63.170 and RCW 36.70.970 authorize cities and counties to adopt a hearing examiner system to make final decisions on site-specific rezones, subject to quasi-judicial administrative appeals.

Third, the City contends that, “[u]nlike virtually every other site-specific land use approval category,” site-specific rezone decisions may not be made by local citizens through the referendum process. *Id.* While this statement is true, the reason it is true is because such decisions are administrative, not because they are legislative. *Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976). For the same reason, every site-specific land use approval would not be subject to the referendum process. Indeed, this argument demonstrates that site-specific rezones are similar to other site-specific land use approvals, not distinct from them.

Fourth, the City contends that a rezone is “the only site-specific land use approval that must be effectuated by ordinance.” *Id.* This contention is also false. RCW 35A.63.100 provides that land use regulations may be implemented “by ordinance or other action to such extent as the legislative body deems necessary or appropriate.” In Snohomish County, for example, zoning map amendments may be approved by a hearing examiner, who is without authority to adopt ordinances. SCC 30.21.030. See also *State ex rel. Gunning*, 58 Wn.2d 275, 277, 362 P.2d 254 (1961) (Rezone adopted by resolution).

Fifth, the City contends that rezones “are one of the few categories of land use proposals for which applicants are not protected under Washington’s ‘vested rights’ doctrine.” *Id.* This too is an incorrect

statement of the law. See *Schneider Homes v. City of Kent*, 87 Wn.App. 774, 942 P.2d 1096 (1997) (effect of subdivision application is to also vest site-specific PUD rezone application).<sup>11</sup>

In a nutshell, none of the City's arguments support the so-called "uniqueness" of site-specific rezone decisions. Site-specific rezones are, like other quasi-judicial permits, subject to review under LUPA. The discretion of local legislative bodies acting on such applications is constrained by existing legislative policies. If the local legislative body does not lawfully exercise that discretion, LUPA provides the courts with the express authority to reverse the decision of the local legislative body.

**II. The Court of Appeals Properly Characterized the City Council Decision as Quasi-Judicial, Applied the Appropriate LUPA Standard of Review, and Imposed the Proper Remedy.**

**A. The Phoenix Site-Specific Rezone Request is a Quasi-Judicial Decision.**

All parties agree that the decision under review is a site-specific rezone. While such a rezone was once classified as legislative, since 1972 it has been classified as quasi-judicial. See *supra* at 6-10. Accordingly, the Court of Appeals' characterization of the decision in this case as quasi-judicial was correct and should be affirmed. *Phoenix*, 154 Wn.App. at 503.

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<sup>11</sup> Paradoxically, in light of the argument it is making to the Court, the City itself has acknowledged that Phoenix's rezone applications are vested. See, e.g., Wood Trails Staff Report at 3.

The City asserts that the Court of Appeals “effectively transforms the local rezoning process into a ministerial act.” City Petition at 10. This is false. In its opinion, the Court of Appeals did not remotely suggest that the rezoning process is ministerial. To the contrary, the Court of Appeals acknowledged that the Council exercises discretion in making local land use decisions. However, as the Supreme Court stated in *Woods*, that discretion is constrained by the local development regulations it has itself adopted. 162 Wn.2d at 613. When a city council acts in its quasi-judicial capacity, its discretion is that necessary to apply “existing law to particular facts rather than the creation of new policy.” *Phoenix*, 154 Wn. App. at 503, citing *Chausee v. Snohomish County Council*, 38 Wn.App. 630, 634-635, 689 P.2d 1084 (1984).

The City in effect asks the Court to reverse the last 40 years of Washington zoning law, to nullify LUPA, and to rule that the City’s discretion in site-specific rezoning decisions is unbounded by existing law, even the laws it has adopted. The City has cited no authority that suggests such a radical departure from settled law is appropriate.

**B. The Court of Appeals Correctly Applied the Proper Standard of Review.**

The City appears to contend that the Court of Appeals should have applied the “arbitrary and capricious” standard of review to the decision of

the Council.<sup>12</sup> As the analysis above indicates, had the Court of Appeals conducted its review under that standard, it would have committed reversible error. *Ahmanne-Yamane v. Tabler*, 105 Wn.App. 103, 111, 19 P.3d 436 (2001), overruled by *Henderson v. Kittitas County*, *supra*.

It is beyond argument, then, that a site-specific rezone is reviewed under the standards defined in LUPA. *Woods v. Kittitas County*, *supra*. The “arbitrary and capricious” standard of review no longer applies to site-specific rezones. *Henderson v. Kittitas County*, *supra*.

Thus, the Court of Appeals correctly held that Phoenix was entitled to relief if Phoenix met its burden of demonstrating that one of the six standards set forth in RCW 36.70C.130 was met. And its description of the standard was correct: “When reviewing a challenge to the sufficiency of the evidence, we view facts and inferences in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority, in this case the city and CNW.” *Phoenix*, 154 Wn.App. at 502.

After describing the appropriate standard of review, the Court of Appeals methodically analyzed the case as directed by LUPA.

- The Court reviewed the City’s “legislative findings,” and, found that they were “the product of an unlawful exercise of the city’s legislative authority.” *Id.* at 503-504.

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<sup>12</sup> The City does not directly acknowledge that any standard of review is appropriate. But even before 1972, Washington courts were free to overturn local legislative decisions which they found were “arbitrary and capricious.” *Lillions v. Gibbs*, *supra*.

- The Court reviewed the “existing law” that the quasi-judicial city council was due to apply, including the *Parkridge* criteria, the City’s rezone application criteria, and the City zoning purpose statements. *Id.* at 503-505.
- The Court examined the record to determine whether the reasons the City Council offered to deny the rezone were supported by substantial evidence, and found the Council’s reasons were not so supported. *Id.* at 505-516.
- The Court concluded that WMC 21.04.080 requires that the city approve an otherwise qualified rezone application unless adequate services cannot be provided. Because the Phoenix rezone met all applicable rezone criteria, the Court reversed the Council’s denial. *Id.* at 516.

Despite this thorough and methodical “LUPA-compliant” analysis of the Phoenix petition, the City mischaracterizes the Court of Appeals’ process as “substituting its judgment for that of the City Council.” City Petition at 5. The City’s assertion is unfounded. As this summary of the Court of Appeals opinion discloses, it was careful to limit its review to the grounds defined by LUPA. It applied existing law as set forth in the City’s Comprehensive Plan and Land Use Code, and reviewed the record to determine whether the City Council’s conclusion that the rezone applications should be denied was supported by substantial evidence and applicable law. This is precisely what LUPA instructs the Court to do.

**C. The Court of Appeals Imposed the Proper Remedy.**

Finally, the City contends that the Court of Appeals is without authority to “compel” the City Council to approve a site-specific rezone.

As indicated above, this argument is dependent on the City's fallacious characterization of the City Council action as legislative. But as Phoenix has demonstrated, the City Council action in this case was indisputably quasi-judicial and administrative. For decades, Washington courts have held that in appropriate circumstances legislative bodies may be compelled to approve applications for quasi-judicial and administrative approvals. *Nagatani Brothers, Inc. v. Skagit County*, 108 Wn.2d 477, 739 P.2d 696 (1987) (subdivision denial reversed); *Maranatha Mining, Inc. v. Pierce County*, 59 Wn.App. 795, 801 P.2d 985 (1990) (unclassified use permit denial reversed); *J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn.App. 920, 180 P.3d 848 (2008) (site-specific rezone denial reversed). In 1995, the Legislature codified this authority. LUPA provides express legislative confirmation that a court may "reverse" a decision of a local legislative body. RCW 36.70C.140. The Court of Appeals did no more here.

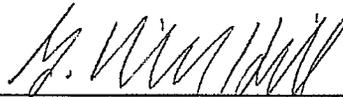
## CONCLUSION

The Court of Appeals decision in this case properly characterized the Council decision, applied the correct standard of review, ruled correctly that Phoenix is entitled to relief, and imposed appropriate relief. Phoenix asks this Court to affirm the decision of the Court of Appeals.

DATED this 8<sup>th</sup> day of September, 2010.

Respectfully submitted,

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