

No. 84296-5

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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,

Respondents,

v.

CITY OF WOODINVILLE, a  
Washington Municipal Corporation, and  
CONCERNED NEIGHBORS OF WELLINGTON,  
a Washington Nonprofit Corporation,

Petitioners.

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CITY OF WOODINVILLE'S SUPPLEMENTAL BRIEF

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## A. INTRODUCTION

It is important to understand precisely what this case addresses. This is *not* a case about developers versus community groups, with all the expected rhetoric such a case could generate, because an elected legislative body's land use decision can "cut both ways," in some instances favoring a landowner, and other instances favoring opponents of a proposed project.

Rather, this *is* a case about who should make site-specific land use decisions and the standards by which such decisions are reviewed by Washington courts, recognizing the discretion afforded local elected decisionmakers. RCW 36.70.130(1)(b).<sup>1</sup>

In this case, the Woodinville City Council ("Council") made a deliberate and careful decision on rezones requested by Phoenix Development, Inc. ("Phoenix"), issuing comprehensive findings of fact and conclusions of law. The trial court affirmed the Council's decision. However, the Court of Appeals reversed that decision, effectively substituting its judgment for that of Woodinville's elected Council, altering decades of Washington law on the standard for judicial review of land use decisions, implying that the Land Use Petition Act, RCW 36.70C

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<sup>1</sup> As this Court stated in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 412, 120 P.3d 56 (2005), "Local jurisdictions with expertise in land use decisions are afforded an appropriate level of deference in interpretations of law under LUPA."

("LUPA") somehow altered the common law on the deference afforded local land use decisions. Moreover, that court imported Growth Management Act, RCW 36.70A ("GMA") principles into its decision, something this Court has forbidden courts to do.

This Court should reaffirm the traditional role of elected municipal legislative bodies in land use decisionmaking and reject the notion that LUPA changed Washington's common law on the deference afforded local land use decisionmaking.

#### B. STATEMENT OF THE CASE

The relevant factual and procedural history of this case is set forth in the Court of Appeals decision. The instant matter arises out of an attempt by Phoenix to rezone and subdivide two undeveloped parcels located in Woodinville. The property at issue—known as the Wood Trails and Montevallo sites—has been classified as R-1 (one dwelling unit per acre) under the City's zoning code since Woodinville's incorporation in 1993. CP 406, 413.<sup>2</sup> Initially, a hearing examiner recommendation favored Phoenix, but in 2007, following lengthy public hearings, the Council voted unanimously to deny Phoenix's request to rezone the parcels to R-4 (four dwelling units per acre) density levels. CP 411, 418.

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<sup>2</sup> The proposed Wood Trails subdivision is comprised of 38.7 acres and would include 66 residential lots. The proposed Montevallo subdivision is comprised of 16.48 acres and would include 56 residential lots. Op. at 3.

The Council's written decisions regarding each project included pages of detailed findings and conclusions. CP 406-11, 413-18. The Council specifically found, *inter alia*, that: (i) the current R-1 zoning was appropriate for the Wood Trails/Montevallo project sites and was consistent with the City's comprehensive plan; (ii) the City would meet applicable population growth targets without the proposed rezones; (iii) there had been no substantial change in circumstances since the current R-1 zoning designation of the subject properties was originally enacted; (iv) the environmental impact statement ("EIS") for the projects identified unavoidable adverse impacts to the City's transportation networks; (v) the City had made the deliberate policy decision to focus its near-term planning and growth efforts—including capital infrastructure funding—within the downtown area rather than within the City's low-density residential neighborhoods; and (vi) the City's "sustainable development study," aimed at determining appropriate future land use strategies, was not yet complete. *Id.* The Council cited numerous comprehensive plan policies in support of its decisions. CP 407-11, 414-18.

The Council rejected Phoenix's rezones to R-4 because public facilities and services for the project were not adequately addressed, the proposed R-5 density was incompatible with the neighborhoods adjacent to the subject properties zoned R-1, increased densities in the areas where

the properties were located was counterproductive to the City's planned higher density residential development for its downtown district, and there was no demonstrated need for the proposed rezones. CP 407-11, 414-18.

Phoenix filed a LUPA petition in King County Superior Court to overturn the Council's decision. Noting that "the standard of review under LUPA is deferential to both the legal and factual determinations of local jurisdictions with expertise in land use regulation," the trial court concluded that Phoenix had failed to satisfy any of the criteria for granting judicial relief. It dismissed Phoenix's petition. CP 583-84.

The Court of Appeals subsequently reversed the Council's decision, effectively ordering the City to rezone the subject property. The Council's decision to deny the Wood Trails/Montevallo rezones was supported by substantial evidence, but the Court of Appeals instead looked to the hearing examiner decision and largely ignored the Council's extensive findings and conclusions. It gave weight to selected portions of the Wood Trails/Montevallo EIS which supported the hearing examiner's recommendation to approve the rezones, but ignored over 2,200 pages of detailed evidence from transportation, engineering, and environmental

professionals the Council considered from the record of the public hearing before the hearing examiner. Op. at 18, 24.<sup>3</sup>

The court's rationale for the reversal focused primarily upon GMA policy considerations and prior decisions of the Growth Management Hearings Board ("GMHB"). Op. at 15-16, 20-23, 25-26.<sup>4</sup> The Court of Appeals concluded that the Council had no discretion to deny Phoenix's rezone requests, stating: "WMC 21.04.080 requires Woodinville to approve a request to rezone property to R-4 if the request meets all the other rezone criteria." Op. at 12. The Court of Appeals subsequently denied the City's motion for reconsideration, but later granted a motion to publish its opinion.

### C. ARGUMENT

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<sup>3</sup> The court should have resolved these evidentiary issues in a fashion similar to Division Three's decision in *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 225 P.3d 448, *review denied*, \_\_\_ Wn.2d \_\_\_ (Aug. 5, 2010). There, the Court of Appeals accepted the final decisionmaker's determination of the weight given to reasonable, but competing, inferences, did *not* substitute its own judgment for that of the decisionmaker, and afforded proper recognition to evidence in the record supporting the decision.

<sup>4</sup> Quoting the GMHB, the court concluded that the City had violated the GMA's residential density objectives by denying Phoenix's rezone proposals:

Woodinville may not engender or perpetuate a near-term land use pattern (one-acre lots) that will effectively thwart long-term (beyond the twenty-year planning horizon) urban development within its boundaries.

Op. at 15 (citing *Hensley v. City of Woodinville*, No. 96-3-0031, 1997 WL 816261 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. October 10, 1997)).

Washington law has clearly established principles governing rezones. First, there is no presumption in favor of a rezone. *Parkridge v. City of Seattle*, 89 Wn.2d 454, 462, 573 P.2d 359 (1978). The proponents of a rezone bear the burden of demonstrating that the conditions since the adoption of the zoning code have changed, and that any rezone is consistent with public health, safety, morals, or the general welfare. *Id.*<sup>5</sup> In making a rezone decision, the views of the community may be given “substantial weight,” but are not controlling. *Id.*; *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 797, 803 P.2d 986 (1995).

Once the Council here made its rezone decision as the highest body entrusted with making that decision, on review, courts must view the record and the inferences from it in a light most favorable to the party that prevailed in the highest fact-finding forum. *Woods v. Kittitas County*, 162 Wn.2d 597, 617, 174 P.3d 25 (2007); *Benchmark Land Dev. Co. v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002). In this case, the courts were required to view the facts most favorably to Concerned

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<sup>5</sup> Courts have occasionally employed the *Parkridge* criteria to reverse local decisions *approving* a rezone proposal. *See, e.g., Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 875, 947 P.2d 1208 (1997). But no reported Washington case has ever used them to overturn a local legislative body’s *denial* of a rezone. *Cf. Balser Investments, Inc. v. Snohomish County*, 59 Wn. App. 29, 40, 795 P.2d 753 (1990) (noting that applicant’s satisfaction of rezone criteria “certainly did not mandate that a zoning official *must* grant a rezone”) (emphasis added).

Neighbors of Wellington. Unlike the trial court, the Court of Appeals failed to satisfy this obligation. That court also overlooked its obligation to give deference to the Council's decision.

(1) Local Legislative Bodies Have Discretion to Make Site-Specific Rezones

Local elected bodies, not courts, have the authority and discretion to make zoning decisions appropriate for their own communities because such decisions are discretionary legislative acts. The courts cannot compel elected legislative bodies to make particular zoning decisions. *Leonard v. City of Bothell*, 87 Wn.2d 847, 854, 557 P.2d 1306 (1976) (“Amendments to the zoning code or rezone decisions require an informed and intelligent choice by individuals who possess the expertise to consider the total economic, social, and physical characteristics of the community”). *See also, Teed v. King County*, 36 Wn. App. 635, 643, 677 P.2d 179 (1984). The Court of Appeals here substituted its own judgment regarding the merits of the proposed rezones for that of the Council, and compelled the City to rezone the property. Notably, the court did not find the City's zoning code to be unconstitutional or otherwise inconsistent with state law. It simply disagreed with the Council's discretionary decision to deny the rezones and instead substituted its own judgment for that of the elected members of the Council.

At its core, the Court of Appeals mischaracterized a discretionary decision by a local legislative body—denial of a rezone application—as a ministerial decision. The court improperly emphasized the hearing examiner’s recommendation over the well-reasoned decision of the City Council as if the hearing examiner, rather than the Council, was the final decisionmaker on the rezone.<sup>6</sup> The court concluded that because the proposed rezones complied with the City’s zoning code and general rezone criteria, the City was *required* to grant approval. *See Op.* at 3, 14. Nothing in Washington law or Woodinville’s code supports this approach.

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<sup>6</sup> The Court of Appeals decision honored the hearing examiner decision over that of the elected Council. *Op.* at 19, 20. This was error. The decision of a hearing examiner or planning commission in this context is a recommendation to the elected Council which in turn retains the authority to make the final decision. *See RCW 35A.63.170(2)(c); WMC 17.07.030; and WMC 21.42.110(2).* Washington law has routinely recognized that decisions of hearing examiners or planning commissions on land use issues are merely recommendations. *Tugwell v. Kittitas County*, 90 Wn. App. 1, 7-8, 951 P.2d 272 (1998) (planning commission’s decision on a rezone was not a land use decision under LUPA because it was not the decision of the highest authority on a rezone, its decision being only advisory). The Council was required to adopt findings of fact and conclusions of law, *Parkridge*, 89 Wn.2d at 464, as it did here.

Where the hearing examiner recommended approval of Phoenix’s proposed rezones, the Council retained authority to adopt its own findings and to reject the examiner’s recommendation. As Professor Stoebuck notes:

Of course the local legislative body does not have to adopt a rezoning ordinance that is consonant with the planning agency’s action; that action is only recommendatory. The legislative body may adopt a different ordinance *or may refuse to adopt any ordinance.*

William B. Stoebuck & John W. Weaver, 17 *Wash. Prac. Real Estate: Property Law* § 4.16 (2d ed. 2004) (“Stoebuck & Weaver”) (emphasis added).

Rezoning is fundamentally a legislative act. *Lutz v. City of Longview*, 83 Wn.2d 566, 570, 520 P.2d 1374 (1974). (“Only the legislative body is empowered to adopt a zoning map and ordinance”).<sup>7</sup> Unlike virtually every other site-specific land use approval category, because the decision is legislative in nature, the final decision regarding a proposed rezone action must be made by the local legislative body itself, may not be delegated to a planning commission, board of adjustment, hearing examiner or other subordinate decisionmaker, and may not be exercised by local citizens through the initiative or referendum process. See RCW 35A.63.170(2)(c); *Leonard*, 87 Wn.2d at 851. A rezone is likewise the only site-specific land use approval that must be effectuated by ordinance. See, e.g., RCW 35A.63.100(2); *Stoebuck & Weaver* at § 4.16. Finally, rezones are one of the few categories of land use proposals for which applicants are not protected under Washington’s “vested rights” doctrine. *Teed*, 36 Wn. App. at 645.

These unique characteristics underscore the significance of rezoning in relation to other, less consequential development approvals. While other permits may authorize an applicant to occupy, subdivide, or

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<sup>7</sup> LUPA itself recognizes that an area-wide rezone is fundamentally a legislative action. RCW 36.70C.020(1). There is no conflict in the recognition that a site-specific rezone is both adjudicatory in nature requiring a quasi-judicial hearing procedure and legislative in nature requiring a legislative action to effect the rezone. See, e.g., *Teed*, 36 Wn. App. at 643-44.

use real property in a particular manner, only a rezone involves the formal amendment of the official zoning map to permanently *reclassify* a parcel. RCW 35A.63.100(2); Stoebuck & Weaver at § 4.16. For this reason, as this Court has observed, “the state has vested the authority to zone and rezone *solely* in the city council.” *Lutz*, 83 Wn.2d at 570 (emphasis added).<sup>8</sup>

The corollary to this principle is that a local legislative body’s rezoning determination—particularly its decision *not* to rezone a particular parcel—is inherently discretionary. *See, e.g., Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 27, 586 P.2d 860 (1978) (wisdom, necessity, and policy of zoning law are matters left “exclusively to the legislative body”); *State ex rel. Myhre v. City of Spokane*, 70 Wn.2d 207, 210, 422 P.2d 790 (1967) (“Zoning is a discretionary exercise of police power by a legislative authority. . . . If the validity of a legislative authority’s classification for zoning purposes is fairly debatable, it will be sustained”).<sup>9</sup> In short, “[t]he city council cannot be compelled to pass a

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<sup>8</sup> Amendments to local comprehensive plans, for example, are similarly legislative acts. *See, e.g., Coffey v. City of Walla Walla*, 145 Wn. App. 435, 187 P.3d 272 (2008) (discussing legislative actions).

<sup>9</sup> These decisions cut both ways – sometimes favoring project proponents and sometimes project opponents. *See, e.g., SANE v. City of Seattle*, 101 Wn.2d 280, 676 P.2d 1006 (1984) (rejecting neighborhood group’s challenge to council approval of rezone); *Snohomish County Improvement Alliance v. Snohomish County*, 61 Wn. App. 64, 808 P.2d 781 (1991) (affirming county council’s approval of rezone request by Phoenix over opposition by neighborhood group).

rezoning ordinance, however fair, reasonable, and desirable it may be[.]” *Besselman v. City of Moses Lake*, 46 Wn.2d 279, 280, 280 P.2d 689 (1955).

This historical judicial deference to local land use decisionmaking acknowledges that city councils (or county legislative bodies), comprised of elected officials, are ultimately accountable to local voters for their zoning decisions. Unlike other land use permits which are decided by reference to fixed approval criteria, zoning amendments necessarily involve *policy* considerations—*e.g.*, implementation of the city’s comprehensive plan, shifts in local public opinion, and changes in nearby land use patterns. *See Henderson v. Kittitas County*, 124 Wn. App. 747, 754, 100 P.3d 842 (2004), *review denied*, 154 Wn.2d 1028 (2005).

A rezone cannot be compelled by the courts. In *Teed*, for example, the Court of Appeals reaffirmed the traditional principle that “[t]he approval or disapproval of a rezone or reclassification of a particular property is a discretionary legislative act *which cannot be compelled*[.]” 36 Wn. App. at 642-43 (emphasis added). As the *Teed* court recognized, “[c]ourts simply do not possess the power to amend zoning ordinances or to rezone a zoned area[.]” *Id.* at 644 (citation omitted) (emphasis added). *Teed* reflects a longstanding rule of Washington jurisprudence that courts will not—and cannot—force city and county councils to rezone property.

*See, e.g., Myhre*, 70 Wn.2d at 210; *Bishop*, 69 Wn.2d at 792-93; *Besselman*, 46 Wn.2d at 280.<sup>10</sup>

The judiciary's refusal to compel zoning amendments is rooted in separation of powers concerns. *Bishop v. Town of Houghton*, 69 Wn.2d 786, 792-93, 420 P.2d 386 (1996). ("Courts simply do not possess the power to amend zoning ordinances or to rezone a zoned area, and they cannot and should not invade the legislative arena or intrude upon municipal zoning determinations, absent a clear showing of arbitrary, unreasonable, irrational or unlawful zoning action or inaction.")<sup>11</sup>

Even if an applicant complies with zoning reclassification criteria, rezones are not *automatic*, like ministerial decisions, precisely because the overall rezone decision is entirely discretionary with local elected officials. As noted in *Teed*, a writ of mandamus cannot issue to compel a rezone because such a decision is *discretionary*. 36 Wn. App. at 642-43.

Nothing in the Woodinville Code altered the discretion of the Council on rezones, nor made issuance of a rezone automatic upon

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<sup>10</sup> This reflects the consensus view in other jurisdictions. *See, e.g.,* Patricia E. Salkin, *Anderson's American Law of Zoning* § 8:23 (Fifth ed. 2009) p. 8-78, 8-79 ("The courts do not possess the power to amend. . . zoning regulations. [T]he power to amend a zoning ordinance. . . cannot be exercised by the courts even where a denial of an application to rezone is discriminatory.").

<sup>11</sup> This Court has only recently confirmed the importance of separation of powers analysis in *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009) and *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010).

satisfaction of the requirements set forth in the Code for a rezone. WMC 21.44.070. *See* Appendix. Under all of the criteria in WMC 21.44.070, the Council retains discretion over the legislative act of rezoning.<sup>12</sup> The Council's findings incorporated by reference certain of the hearing examiner findings. CP 406, 413. The Council also made independent findings that there was no need for the rezones and that the proposed residential density increase was incompatible with the City's R-1 residential zoning for surrounding properties. CP 408, 415. The Council's decision was reasoned and based upon substantial evidence in the record.

The Court of Appeals ignored controlling precedent and instead cited to a single, factually distinguishable case to support its analysis. *J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn. App. 920, 180 P.3d 848, *review denied*, 164 Wn.2d 1031 (2008). *Op.* at 8-9, n. 22, 24, 26. In *Storedahl*, the court reversed a board of county commissioners' decision to deny a rezone, but solely because the board failed to follow local code

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<sup>12</sup> Phoenix and the Court of Appeals relied on WMC 21.04.080. That code section merely describes the purpose of various zones. *Nothing* in that code section makes a rezone mandatory or even establishes criteria for a rezone. The Council, on the other hand, used WMC 21.04.080(2)(a) and (b) as a guide in finding that the R-1 zoning designation was appropriate for the properties. *See* Council finding 6.f. in both rezone decisions. WMC 21.04.020 specifically provides that the purpose statements like WMC 21.04.080 are to be used only as a "guide" and not as mandatory directives, contrary to the construction of WMC 21.04.080 by the Court of Appeals. *See HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 480-81, 61 P.3d 1141 (2003) (purpose section of statute is only a guide to interpretation of operative sections of statute).

procedures requiring it to enter its own findings of fact unless it accepted the hearing examiner's recommendation. Unlike the Council in this case, the board failed to enter its own findings. *Storedahl* is inapposite because it did not apply substantive rezone criteria to reverse the rezone denial at issue in that case, and thus, unlike the Court of Appeals decision here, did not invade the local legislative body's discretionary authority.

The Court of Appeals decision turns a decades-old principle of deference to elected bodies in land use decisionmaking on its head and effectively transforms the local rezoning process into a ministerial act, i.e., one in which "the applicant. . . is entitled to its immediate issuance upon satisfaction of relevant ordinance criteria. . . ." *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 960, 954 P.2d 250 (1998).<sup>13</sup> The crux of the court's holding is that the City was *required* to grant the Wood Trails/Montevallo rezone requests if they satisfied the City's zone reclassification standards and were generally compliant with the City's comprehensive plan. Op. at 16, 26. But a rezone decision is *not* a ministerial act, as noted above.

The Court of Appeals decision flies in the face of Washington statutes and the public policy that local legislative bodies have discretion

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<sup>13</sup> It is noteworthy that *Mission Springs* involved a truly ministerial act by a local government—the issuance of a grading permit. *Mission Springs*, 134 Wn.2d at 954.

in granting proposed rezones and will only encourage LUPA petitions challenging denials of site-specific rezone requests by local legislative bodies with the judiciary weighing the merits of each proposal.

(2) LUPA Did Not Alter the Standard for Judicial Review of Local Land Use Decisions

Notwithstanding the rich body of precedent on local land use decisionmaking, Phoenix has argued that the courts have explicit authority to reverse the Council's rezone denial implying that LUPA changed Washington law on the deference afforded to elected land use decisionmakers. Answer to Petition for Review at 14-15. Phoenix is wrong.

LUPA is a procedural statute enacted in 1995 to supplant the confusing common law standards for appealing local land use decisions.

In fact, the statutory statement of intent for LUPA states:

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.

RCW 36.70A.010. There is *no authority* for the proposition that LUPA was intended to override decades of law on a municipality's discretionary decisionmaking authority on rezones. RCW 36.70A.010 simply made uniform those standards that were historically used by the courts to

determine whether an administrative land use decision was arbitrary and capricious or contrary to law in pre-LUPA cases.<sup>14</sup>

LUPA retains a deferential standard for overturning a land use decision. As the Court of Appeals observed in *Woods v. Kittitas County*, 130 Wn. App. 573, 581-82, 123 P.2d 883 (2005), *aff'd*, 162 Wn.2d 597, 174 P.3d 25 (2007), a party challenging a site-specific rezone through a LUPA petition must establish at least one of the standards in RCW 36.70C.130(1). *See* Appendix. In this case, Phoenix did not bear its burden of proving that the Council's findings were unsupported by substantial evidence.

Nothing in LUPA's text, the cases interpreting it, or LUPA's legislative history provides any support for Phoenix's argument that LUPA was intended to empower courts to compel local legislative bodies to grant rezones. Such an invasion of local land use decisionmaking discretion should be rejected.

(3) The Court of Appeals Allowed GMA to Influence a Site-Specific Land Use Decision

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<sup>14</sup> Historically, rezones were not disturbed by courts unless the local elected body's decision was "arbitrary and capricious." *Cathcart-Maltby-Clearview Comm'ty Council v. Snohomish County*, 96 Wn.2d 201, 211, 634 P.2d 853 (1981); *Teed*, 36 Wn. App. at 644. "Arbitrary and capricious" means "wilful and unreasonable action, without consideration and regard for facts and circumstances." *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 769, 49 P.3d 867 (2002) (quoting *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999)).

The Court of Appeals overturned a site-specific rezone determination based upon its erroneous perception that the City failed to comply with the GMA. Op. at 13-14, 19, 21-22. In *Woods v. Kittitas County*, 162 Wn.2d 597, 614, 174 P.3d 25 (2007), this Court instructed that GMA principles could not be applied in the context of a site-specific decision, stating “we hold that a site-specific rezone cannot be challenged for compliance with GMA.” However, that is precisely what the Court of Appeals did here. The City’s development regulations permit development projects within the R-1 residential zones. WMC 21.08.030, 21.12.030; CP 406-07, 413-14. Phoenix’s challenge is ultimately a disguised objection to these provisions, and to the adequacy of the City’s comprehensive plan and zoning regulations under the GMA’s urban density policies.

In the course of reengineering the language of WMC 21.04.080 to mandate that the Council approve the rezone if other code requirements for rezone approval are met, the Court of Appeals repeatedly referred to the GMHB’s four-dwelling-units-per-acre “bright line rule” for urban density, emphasizing specifically the GMHB’s *Hensley* decision. Op. at 15, 20, and 23.<sup>15</sup>

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<sup>15</sup> Since this GMHB decision, the City made significant efforts to increase urban density in its downtown core as part of its comprehensive plan. CP 408-11, 415-18. This is a legislative decision. The Court of Appeals improperly imported the policy

Even though *Hensley's* so-called “bright line” rule is no longer viable after *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 128-30, 118 P.3d 322 (2005) and *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009) (holding that GMHB lacks authority under GMA to impose numerical density standards or make policy), the Court of Appeals infused this refuted GMA policy into its interpretation of the City’s development regulations. Op. at 15-16, 20-26. The court reasoned that the City must have intended to comply with the GMHB’s urban density standard by allowing developments with densities less than R-4 only if adequate services could not be provided. Op. at 16. The court reached this conclusion even though development activity on R-1 zoned lands in the City is *specifically permitted* by the City’s zoning code. See Residential Land Use Table at WMC 21.08.030 (designating single detached residences as permitted use in R-1 zone); *see also*, WMC 21.12.030 (base density for an R-1 zone is 1 dwelling unit per acre).<sup>16</sup>

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issues involved in the GMHB decision into the site-specific rezone decision at issue here. The court used apples to analyze oranges.

<sup>16</sup> In light of the above-cited code provisions, the Court of Appeals clearly erred by construing the City’s development regulations—specifically WMC 21.04.080—as a rezoning mandate rather than a nonbinding purpose statement. Op. at 14, 16. The Council’s interpretation of this text should have been entitled to significant judicial deference on appeal. *See, e.g., Pinecrest Homeowners’ Ass’n v. Glen A. Cloninger & Assoc.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004). By its plain terms, WMC 21.04.080 simply describes the “purpose of the City’s Urban Residential zones.” *See* WMC 21.04.020 (emphasis added). This section is located in a whole different code chapter from the City’s zone reclassification criteria. *See* WMC 21.44.070. It does not purport to

GMA concerns likewise influenced the Court of Appeals' interpretation of the City's zone reclassification criteria, which, *inter alia*, require an applicant to show a "demonstrated need" for the requested rezone. *See* WMC 21.44.070. The Council determined that the proposed Wood Trails/Montevallo rezones were not "needed" at this time. CP 408, 415. In supplanting the Council's policy judgment on this point, the Court of Appeals reasoned that the *Hensley* decision "reflected Woodinville's obligation to look beyond the 20 year horizon when evaluating housing needs and the impact of a current [site-specific] decision." Op. at 20. Thus, the Court of Appeals imported GMA standards and the GMHB's decision in *Hensley* into a site-specific rezone decision. This Court's holding in *Woods* is unequivocal: "the . . . court does not have subject matter jurisdiction to decide whether a site-specific rezone complies with the GMA." *Woods*, 162 Wn.2d at 616.

#### D. CONCLUSION

The Court of Appeals departed from longstanding principles of land use law by compelling the Council to pass a rezoning ordinance the Council, in the exercise of its discretion, had properly rejected in extensive findings and conclusions. By applying GMA considerations in a project-

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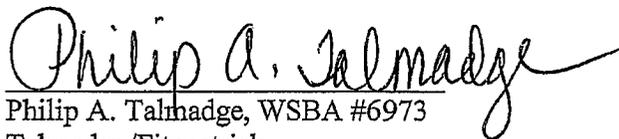
supersede or otherwise modify those standards, and, as explained by WMC 21.04.020, is intended only to "*guide the application of the zones and designations* to all lands in the City of Woodinville." (emphasis added).

specific land use appeal, the Court of Appeals also disregarded this Court's plain holding in *Woods*. The Court of Appeals opinion should not stand. This Court should reaffirm the essential role in land use decisionmaking played by elected legislative bodies.

This Court should reverse the Court of Appeals' decision and reinstate the decision of the trial court and the Council. Costs on appeal should be awarded to the City.

DATED this 8th day of September, 2010.

Respectfully submitted,



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# APPENDIX

RCW 36.70C.130(1):

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

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

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

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

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

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

WMC 21.44.070:

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

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

DECLARATION OF SERVICE

On said day below I emailed and deposited with the US Postal Service a true and accurate copy of the following document: City of Woodinville's Supplemental Brief in Supreme Court Cause No. 84296-5 to the following:

G. Richard Hill McCullough Hill, PS 701 5 <sup>th</sup> Avenue, Suite 7220 Seattle, WA 98104	Timothy M. Harris Building Industry Association of Washington State 111 21 <sup>st</sup> Avenue SE Olympia, WA 98501-2925
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 8, 2010, at Tukwila, Washington.

  
Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick

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Per Mr. Talmadge's request, please see the attached for filing in the following case:

Case Name: Phoenix Development v. City of Woodinville  
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Sincerely,

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