

No. 94005-3

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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(Court of Appeals No. 47900-1-II)

SCHNITZER WEST, LLC, a Washington limited liability  
company,

Respondent,

v.

CITY OF PUYALLUP, a Washington municipal  
corporation,

Appellant,

and

NEIL ARTHUR VAN LIEROP, an individual, and VAN LIEROP  
INVESTMENT COMPANY, INC., a Washington company, and VAN  
LIEROP BULB FARMS, INC., a Washington Company,

Additional Parties.

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SUPPLEMENTAL BRIEF OF  
APPELLANT CITY OF PUYALLUP

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- B. Court of Appeals’ January 4, 2017 Order

## I. INTRODUCTION

This appeal concerns the judiciary's subject matter jurisdiction under Chapter 36.70C RCW, the Land Use Petition Act (LUPA). Since the statute was originally enacted over 20 years ago, LUPA jurisdiction has been strictly confined to reviewing a local government's final determination on an applicant's request for a specific land use development permit. The requirement of a formal "application" to this effect is unambiguously embodied in LUPA's definition of a "land use decision", and is further underscored by the context of the surrounding statutory framework.

All relevant Washington precedent reflects this requirement. Of the myriad reported appellate decisions addressing Chapter 36.70C RCW, not a single case has ever recognized LUPA jurisdiction without the requisite "application" from a specific party seeking a municipality's approval for a particular development.

Where amendments to a local zoning code are self-initiated by the municipality's legislative body, the resulting ordinance is not a land use decision reviewable under LUPA. The dispositive factor under such circumstances is not whether the zoning regulations currently affect a limited number of parcels, but instead whether the underlying governmental action represents the municipality's final determination on a developer's application

in the first instance. Without an application, there can be no final determination—and thus no land use decision creating LUPA jurisdiction. This outcome is dictated by the plain language of Chapter 36.70C RCW.

The Court of Appeals correctly dismissed Respondent Schnitzer West, LLC’s land use petition on this basis. It is undisputed that the local enactment challenged in this case, City of Puyallup Ordinance No. 3067, was initiated by the Puyallup City Council itself and did not result from any separate party’s “application”. In promulgating the zoning code amendments contained in Ordinance No. 3067, the Council acted in its legislative policy-making capacity; it did not purport to review or otherwise adjudicate any party’s specific development proposal. LUPA jurisdiction does not lie under these circumstances.

Ordinance No. 3067 is properly appealable to the Growth Management Hearings Board, which has exclusive review authority over local development regulation amendments. The enactment is not reviewable under LUPA. The Supreme Court should accordingly affirm the dismissal of Schnitzer’s land use petition.

## **II. STATEMENT OF THE CASE**

The facts and procedural history of this case are set forth in the Court of Appeals’ decision, *Schnitzer West, LLC v. City of Puyallup*, 196 Wn. App.

434, 435-39, 382 P.3d 744 (2016), and in the City’s opening brief before that court. Appellant’s Opening Brief at 3-8.

### **III. ARGUMENT**

#### **3.1 Summary of Argument.**

The scope of the Land Use Petition Act is limited to reviewing project-specific development permit determinations. Ordinance No. 3067 is a legislatively enacted amendment to the City’s land use code; it is not a site-specific rezone or any other type of project-specific “land use decision” subject to judicial review under Chapter 36.70C RCW. This Court has consistently refused to judicially expand LUPA jurisdiction beyond the Legislature’s intent as expressed by the plain language of the statute. It should likewise reject Schnitzer’s attempt to manufacture LUPA jurisdiction under the facts of this case.

#### **3.2 Standard of Review.**

The issue of subject matter jurisdiction under LUPA is a question of law that this Court reviews *de novo*. *Durland v. San Juan County*, 182 Wn.2d 55, 64, 340 P.3d 191 (2014).

#### **3.3 LUPA Jurisdiction Is Expressly Predicated upon a Project-Specific Development Application.**

The controlling statutory provisions in this case are neither ambiguous

nor complex. A reviewing court's subject matter jurisdiction under LUPA is limited to reviewing "land use decisions". RCW 36.70C.030; *Durland*, 182 Wn.2d at 64 (citation omitted). A "land use decision" is defined in relevant part as:

a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold[.]

RCW 36.70C.020(2)(a) (emphasis added).

The Puyallup City Council enacted Ordinance No. 3067 at its own behest and not at the request of Schnitzer or any other party. As the Court of Appeals correctly concluded, LUPA jurisdiction does not lie in this case because the requisite development application is wholly absent. *Schnitzer West, LLC v. City of Puyallup*, 196 Wn. App. 434, 440-44, 382 P.3d 744 (2016). No reported Washington case has ever recognized LUPA jurisdiction where the challenged local land use action did not result from an applicant's project-specific development proposal.

Courts cannot ignore express statutory terms and must interpret statutes to give effect to all words. *Ralph v. Dept. of Natural Resources*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014). The Court of Appeals' decision was

compelled by this fundamental principle of statutory construction. Like the Court of Appeals' dissent below, *Schnitzer*, 196 Wn. App. at 450 (Bjorgen, J., dissenting), Schnitzer essentially invites the Supreme Court to disregard LUPA's express "application" requirement in violation of this basic rule. This Court should decline this invitation as a matter of law.

### **3.4 The Surrounding Statutory Context Underscores the Requirement of a Land Use Development Application From a Separate Party.**

To the extent of any suggestion that the Puyallup City Council's policy decision to enact Ordinance No. 3067 was *itself* an "application", this position defies both the pertinent statutory framework and the common meaning of that word. The term "application" is undefined by Chapter 36.70C RCW, but is commonly understood as "[a] formal request. . . to be allowed to do or have something, submitted to an authority, institution, or organization." *Application*, OXFORD DICTIONARIES (emphasis added)<sup>1</sup>; *see also Application*, CAMBRIDGE ACADEMIC CONTENT DICTIONARY (2008) (defining application as "a formal request to an authority for something") (emphasis added).<sup>2</sup> An application is thus requested by a party lacking the power to grant the request

<sup>1</sup> <https://en.oxforddictionaries.com/definition/us/application> (last visited April 18, 2017).

<sup>2</sup> Undefined statutory terms are afforded their plain meaning by reference to a dictionary. *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001).

in the first instance; the definition necessarily excludes the *sua sponte* exercise of that power by the authority itself. As the Court of Appeals correctly concluded, “a public agency does not apply for a permit to itself nor does it apply for approval of its own action.” *Schnitzer*, 196 Wn. App. at 442.

Statutory terms also take their meaning from the surrounding context, *see, e.g., State v. Larson*, 184 Wn.2d 843, 849, 365 P.3d 740 (2015) (citation omitted), which in the instant case is comprised of LUPA and its cross-referenced corollary statute, the Regulatory Reform Act, Chapter 36.70B RCW. Both statutes repeatedly differentiate—*often in the same sentence*—between project applicants and the local government that accepts, reviews and renders a final permitting decision on the underlying application. *See, e.g.,* RCW 36.70C.020(2)(a); RCW 36.70C.040(2); RCW 36.70C.060; RCW 36.70B.020(4); RCW 36.70B.070; RCW 36.70B.080(3); RCW 36.70B.100; RCW 36.70B.110(7); RCW 36.70B.120(1), (3); RCW 36.70B.130; RCW 36.70B.220.<sup>3</sup> By contrast, neither statute (nor any other Washington law) purports to recognize the local government itself as an “applicant” in this context. As a matter of law, land use permit applicants are distinct from the municipalities which process and adjudicate their development proposals.

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<sup>3</sup> The distinction between municipalities and project applicants is recognized by various other seminal Washington land use statutes, including, *inter alia*, the state impact fee statute (*see e.g.,* RCW 82.02.020; RCW 82.02.050) and the subdivision act (*see e.g.,* RCW 58.17.033; RCW 58.17.070).

### **3.5 Ordinance No. 3067 Is Not a Site-Specific Rezone.**

The Court of Appeals also correctly rejected Schnitzer's proffered characterization of Ordinance No. 3067 as a site-specific rezone. *Schnitzer*, 196 Wn. App. at 440-44. Under the longstanding common law definition of that term, "[a] site-specific rezone occurs when there are specific parties requesting a classification change for a specific tract." *Woods v. Kittitas County*, 162 Wn.2d 597, 611 n.7, 174 P.3d 25 (2007) (citation omitted) (emphasis added). Although some site-specific rezones fall within the statutory definition of a "land use decision" under LUPA, *see* RCW 36.70C.020(2); RCW 36.70B.020(4), Ordinance No. 3067 is not a site-specific rezone in the first instance.

#### **3.5.1 Ordinance No. 3067 did not originate from the request of a specific party.**

Like all other categories of local land use approvals governed by LUPA, site-specific rezones constitute "land use decisions" under the statute only if they represent the municipality's "final determination" on a project-specific "application". RCW 36.70C.020(2); RCW 36.70B.020(4). Indeed, this rule applies with particular force to site-specific rezones, the legal definition of which expressly requires that such reclassifications be "requested" by a "specific party". *See Woods*, 162 Wn.2d at 611 n.7. The

code amendments contained in Ordinance No. 3067 did not originate from the application or request of any “specific party” and thus cannot meet this criterion.

As the Court of Appeals correctly noted, no reported Washington case has ever recognized a site-specific rezone that was self-initiated by a local legislative body. *Schnitzer*, 196 Wn. App. at 440-44. Each of the cases cited by Schnitzer instead involved a local zoning map amendment that was specifically requested by a landowner or other project applicant. *Schnitzer*, 196 Wn. App. at 442-43 (citing *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007); *Kittitas County v. Kittitas County Conservation Coalition*, 176 Wn. App. 38, 45, 308 P.3d 745 (2013); *Spokane County v. Eastern Washington Growth Mgt. Hrgs. Bd.*, 176 Wn. App. 555, 309 P.3d 673 (2013)). This authority is inapposite.

### **3.5.2 Ordinance No. 3067 is not limited to a specific tract.**

Ordinance No. 3067 is not a site-specific rezone for an additional reason not addressed by the Court of Appeals. Site-specific rezones are zoning map reclassifications involving “a specific tract”. *Woods*, 162 Wn.2d at 611 n.7. Washington land use law defines “tract” synonymously with “lot” or “parcel”. *See, e.g.*, RCW 58.17.020(9). By their terms, the text amendments adopted under Ordinance No. 3067 apply uniformly to the City’s

entire ML-SPO overlay district. The current reach of these amendments affects a large (20+ acre) area containing multiple parcels, and the development standards adopted under the ordinance will apply to any other properties that may ultimately be added to the overlay in the future. *CP 205-11*. A text amendment is of area-wide significance if it affects an entire zoning classification and “not just a specific tract.” *Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 365-66, 894 P.2d 1300 (1995) (citing *Raynes v. Leavenworth*, 118 Wn.2d 237, 248, 821 P.2d 1204 (1992) (emphasis added)). The scope of Ordinance No. 3067 clearly extends beyond a single tract and is not site-specific under this standard.

### **3.6 LUPA Jurisdiction Does Not Encompass Local Land Use Actions That Are Appealable To The Growth Management Hearings Board.**

Dismissal of Schnitzer’s land use petition was compelled by an additional ground not reached by the Court of Appeals: LUPA jurisdiction does not extend to “[l]and use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as . . . the growth management hearings board.” RCW 36.70C.030(1)(a)(ii); *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 177-78, 4 P.3d 123 (2000). The GMHB has exclusive jurisdiction over challenges to local

“development regulations”, *see* RCW 36.70A.280(1)(a), defined in relevant part by the Growth Management Act (GMA) as “the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances. . . . together with any amendments thereto.” RCW 36.70A.030(7) (emphasis added).

The design standards, setback requirements, use regulations, signage provisions and stormwater requirements imposed by Ordinance No. 3067 are precisely the type of local “controls placed on development or land use activities” over which the GMHB has exclusive jurisdiction. *See* RCW 36.70A.030(7); RCW 36.70A.280(1)(a). The expansion of the City’s SPO overlay district also falls squarely within the GMHB’s review authority under these circumstances. Where a local zoning map amendment is adopted concurrently with text amendments to the city’s code, the entire enactment falls within the GMHB’s subject matter jurisdiction. *See, e.g., Bridgeport Way Community Ass’n v. City of Lakewood*, CPSGMHB Case No. 04-3-0003, Final Decision & Order (July 14, 2004), at 8. The GMHB’s longstanding holding to this effect is entitled to substantial weight by this Court. *See, e.g., Kittitas County v. E. Wash. Growth Mgmt. Hr’gs Bd.*, 172 Wn.2d 144, 154, 256 P.3d 1193 (2011); *Lewis County v. W. Wash. Growth Mgmt. Hr’gs Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006).

### **3.7 Dismissal Will Not Orphan Schnitzer's Appeal or Otherwise Create a Jurisdictional Void.**

The GMHB's statutory jurisdiction removes any concern that Schnitzer's challenge to Ordinance No. 3067—and the future appeals of similarly situated litigants—will be deprived of an appellate venue. Petition for Review at 17-18. Indeed, Schnitzer's own appeal of the ordinance is currently pending before the GMHB. *See Schnitzer West v. City of Puyallup*, CPSGMHB Case No. 14-3-008.

This conclusion is unchanged even to the extent that particular claims of land use appellants may not fall neatly within the subject matter jurisdiction of either LUPA or the GMA. Under such circumstances, Washington law recognizes the availability of a constitutional writ as an alternative vehicle by which to seek review of allegedly “arbitrary, capricious, or illegal” governmental treatment. Const. art. IV, §6; *Coballes v. Spokane Cty.*, 167 Wn. App. 857, 866–67, 274 P.3d 1102 (2012) (citations omitted). Contrary to Schnitzer's assertion, the Court of Appeals' decision does not create a jurisdictional crisis under state law or otherwise prevent litigants from seeking review of local land use actions. Instead, it merely reaffirms—correctly—that LUPA review is strictly confined to “land use decisions” within the statutory meaning of that term.

### **3.8 Legislative Enactments Fall Outside LUPA’S Jurisdiction, Irrespective of Their Scope.**

Schnitzer’s chief contention posits that Ordinance No. 3067 is subject to LUPA jurisdiction because the overlay regulations enacted under the ordinance currently apply to only three parcels. *See* Petition for Review at 11-14. The Court of Appeals’ dissent accepted this view. *Schnitzer*, 196 Wn. App. at 444-50 (Bjorgen, J., dissenting). But this position fundamentally misunderstands the nature of the challenged ordinance as a *legislative* enactment, and it erroneously disregards LUPA’s exclusive function as a procedure for adjudicating appeals of local *permitting* decisions. The Court of Appeals did not reach these issues below, but when properly analyzed they further support the appellate court’s holding.

#### **3.8.1 Ordinance No. 3067 is a legislative enactment that is not subject to review under LUPA.**

LUPA jurisdiction expressly excludes “applications for legislative approvals”. RCW 36.70C.020(2)(a) (emphasis added); *Stafne v. Snohomish County*, 174 Wn.2d 24, 33, 271 P.3d 868 (2012). A municipality acts in a legislative capacity through “the enactment of a new general law of prospective application.” *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244-45, 821 P.2d 1204 (1992) (citation omitted). Local legislative actions

include, *inter alia*, “adopting, amending or revising... area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance.” RCW 42.36.010.

This Court has developed a four-part test for determining whether a local action is legislative in character:

(1) whether the court could have been charged with the duty at issue in the first instance; (2) whether the courts have historically performed such duties; (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new law of prospective application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators.

*Raynes*, 118 Wn.2d at 244-45 (citing *Standow v. City of Spokane*, 88 Wn.2d 624, 631, 564 P.2d 1145 (1976)).

Ordinance No. 3067 is facially legislative under this test. The enactment is comprised almost entirely of text revisions to the City’s generally applicable zoning code, *see CP 207-09*, which are *per se* legislative in character. *Raynes*, 118 Wn.2d at 248; *Citizens Alliance*, 126 Wn.2d at 365-66. These amendments establish a body of prospective, generally applicable land use regulations intended to govern future, *unspecified* development

within a designated area—the City’s newly created ML-SPO overlay. *CP 205-11*. The amendments likewise implicated the policy-making role of the Puyallup City Council and did not purport to apply the City’s current regulations to any specific facts or any particular development proposal.

The remaining standards of the legislative test are also clearly satisfied. It is axiomatic that courts do not adopt local land use ordinances and have never historically performed this function. The enactment of municipal zoning regulations is instead the “ordinary business” of local legislative bodies, *see, e.g.*, RCW 35A.11.020; RCW 35A.63.100; RCW 36.70A.040, not the courts:

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.

*Bishop v. Houghton*, 69 Wn.2d 786, 792-93, 420 P.2d 368 (1966).

For this reason, Schnitzer’s appearance of fairness challenges are without merit. The appearance of fairness doctrine is confined to the quasi-judicial functions of local governments—i.e., actions that “determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.” RCW 42.36.010. The doctrine is categorically inapplicable

where a municipality acts in its legislative capacity. *Id.*

The Puyallup City Council did not act—and could not have acted—in an adjudicative role when enacting the code amendments contained in Ordinance No. 3067. The ordinance does not reference any specific parties or purport to evaluate any particular development proposals, and therefore cannot be a “final determination” in the manner contemplated by RCW 36.70C.020. *See, e.g., Samuel’s Furniture, Inc. v. State Dept. of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002) (a “final determination” under LUPA is one that “reaches the merits and terminates the *permit process*”) (emphasis added). Indeed, without a specific land use development application to consider and render a determination upon, there was simply nothing for the City Council to adjudicate.

**3.8.2 The size of the area currently subject to the development regulations adopted under Ordinance No. 3067 is not dispositive.**

Schnitzer attempts to frame the jurisdictional divide under Washington land use law as hinging upon the “site-specific” character of a particular local zoning action. Petition for Review at 14-17. Like the Court of Appeals’ dissent below, Schnitzer relies primarily upon *Woods v. Kittitas County* for this proposition. *Id.*; *Schnitzer*, 196 Wn. App. at 445-49 (Bjorgen, J., dissenting). For several reasons, this argument is unavailing.

First, and most significantly, Ordinance No. 3067 is not “site-specific” in the first instance. The zoning overlay established under the ordinance currently encompasses a large, *multi-parcel* subdistrict exceeding 20 acres—a sizeable area by any measure, and particularly so within the context of a small municipality like Puyallup. These factors demonstrate that Ordinance No. 3067 is *area-wide* rather than site-specific. *Cf. Woods*, 162 Wn.2d at 611 n.7, *supra*. Schnitzer does not, and cannot, cite any Washington authority recognizing a local zoning action as site-specific under these circumstances.

Second, even if the scope of Ordinance No. 3067 could accurately be characterized as site-specific (it cannot), this Court has soundly rejected the contention that this fact would transform the measure into a quasi-judicial decision. As a matter of law, the legislative character of a zoning ordinance is not changed merely because the enactment presently “affects. . . a limited area and involves readily identifiable individuals.” *Raynes*, 118 Wn.2d at 241, 247-49 (zoning amendment was legislative even where only *two* parcels were potentially affected). Where the nature of a particular zoning action is legislative, LUPA jurisdiction simply does not apply. *Stafne*, 174 Wn.2d at 33 (citing RCW 36.70C.020(2)(a)).

Finally, while the purported site-specific vs. legislative “fault line” dividing LUPA jurisdiction from GMHB jurisdiction is often accurate in

practice, *see, e.g., Schnitzer*, 196 Wn. App. at 448-49 (Bjorgen, J., dissenting), it is ultimately an incomplete statement of the law. This practical reality necessarily remains subordinate to the express, statutory prerequisite of a formal development application for purposes of LUPA jurisdiction. RCW 36.70C.020(2)(a).

This Court’s holding in *Woods v. Kittitas County*, cited heavily by both *Schnitzer* and the Court of Appeals’ dissent, acknowledges this point. As *Woods* concluded in relevant part, “[a] challenge to a site-specific land use decision should be brought in a LUPA petition at superior court.” *Woods*, 162 Wn.2d at 610 (emphasis added) (citation omitted). The Court’s deliberate reference to “land use decision”—a statutory term of art under RCW 36.70C.020—is inherently qualified by the “application” requirement subsumed within that term. This Court has never suggested that a municipality’s land use action is appealable under LUPA merely because the immediate effect of the measure is limited to a particular geographic area. As such, and although in practice these concepts often overlap, the boundary of LUPA’s jurisdiction is more accurately expressed as *project*-specific rather than site-specific.

**IV. MOTION TO DISMISS FOR LACK OF STANDING PURSUANT  
TO RAP 17.4(d).**

The instant judicial appeal of Ordinance No. 3067 is not only brought in the wrong forum, it is also being improperly litigated by a party (Schnitzer) without standing in the first instance.

At the commencement of this case, Schnitzer originally identified itself as the “contract purchaser” of the underlying property, *see, e.g.*, CP 3-5, 26-27, and later represented that it had “recently acquired the [p]roperty”. Respondent’s Opening Brief at 1. During the parties’ motions practice following the Court of Appeals’ October 18, 2016 decision, it was revealed for the first time that: (i) Schnitzer itself has *never* actually owned the property; (ii) Schnitzer previously assigned its purchase rights to a separate entity (Puyallup 5th Avenue, LLC), which subsequently acquired the property and then transferred it to an unrelated purchaser (the current owner, Viking JV, LLC); and (iii) Schnitzer’s sole purported interest is derived from an unspecified, post-closing contingency contained in the Purchase and Sale Agreement between the other two subsequent purchasers. This contingency would purportedly entitle Puyallup 5th Avenue, LLC—*not* Schnitzer—to

additional monetary compensation if Ordinance No. 3067 was ultimately invalidated. Declaration of Pamela Hirsch at p. 3.<sup>4</sup>

“Only an aggrieved party may seek review by the appellate court.” RAP 3.1. As a “cardinal principle” of standing, “every person desiring to appeal. . . must have an interest in the subject-matter of the litigation. . . . [that is] immediate and pecuniary, and not a remote consequence of the judgment; a future, contingent, or speculative interest is not sufficient.” *Terrill v. City of Tacoma*, 195 Wash. 275, 280, 80 P.2d 858 (1938) (citing 2 Am.Jur., Appeal and Error, §§ 150 and 152) (emphasis added).

Schnitzer West, LLC lacks standing under this well-established standard. Schnitzer does not own the underlying property and is not even in contractual privity with the current owner. The indirect, future financial contingency between two separate, subsequent purchasers of the land is far too attenuated from the actual stake—if any—actually held by Schnitzer itself. Schnitzer’s appeal should be dismissed on this basis.

## V. CONCLUSION

“A superior court hearing a LUPA petition acts in an appellate

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<sup>4</sup> A true and correct copy of Schnitzer West, LLC Managing Partner Pamela Hirsch’s Dec. 15, 2016 Declaration is attached hereto as Appendix A. The City immediately moved to dismiss Schnitzer for lack of standing when these facts were disclosed. The Court of Appeals denied the City’s motion “without prejudice” in light of Schnitzer’s then-pending Petition for Review, essentially deferring the issue to this Court. A true and correct copy of the Court of Appeals’ January 4, 2017, Order is attached hereto as Appendix B.

capacity and has only the jurisdiction conferred by law.” *Durland*, 182 Wn.2d at 64 (citation omitted). Consistent with this principle, the Court has emphasized that appellants “cannot change a nonland use decision into a land use decision under LUPA.” *Stafne*, 174 Wn.2d at 34. This, however, is precisely what Schnitzer has attempted to do in this appeal.

The dispositive issue in this case distils to a basic question of statutory construction that was properly resolved by the Court of Appeals. But Schnitzer’s appeal also fundamentally misconstrues the nature of the underlying ordinance and the jurisdictional divide under state law for local land use challenges. Ordinance No. 3067 is a legislative amendment to the City’s development regulations—not a land use decision under LUPA.

LUPA’s strictly limited jurisdiction cannot be judicially expanded in the manner requested by Schnitzer. In dismissing Schnitzer’s land use petition, the Court of Appeals correctly refused to disregard the plain language of Chapter 36.70C RCW. The Supreme Court should affirm this decision.

RESPECTFULLY SUBMITTED this 28th day of April, 2017.

OGDEN MURPHY WALLACE, PLLC

By /s/ J. Zachary Lell  
J. Zachary Lell, WSBA #28744  
Attorneys for Appellant City of Puyallup

## APPENDIX A

No. 47900-1-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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SCHNITZER WEST, LLC, a Washington limited liability company,

*Respondent,*

v.

CITY OF PUYALLUP, a Washington municipal corporation,

*Appellant.*

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DECLARATION OF PAMELA HIRSCH IN SUPPORT OF MOTION  
FOR SUBSTITUTION

---

G. Richard Hill, WSBA #8806  
Courtney E. Flora, WSBA #29847  
McCullough Hill Leary, P.S.  
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(206) 812-3388  
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Email: [cflora@mhseattle.com](mailto:cflora@mhseattle.com)

I, Pamela Hirsch, declare as follows:

1. I am Managing Partner of Schnitzer West, LLC (“Schnitzer”). I have been with Schnitzer for 18 years and have served as Managing Partner since 2012. I am competent to make this declaration, which is based on my actual knowledge.

2. When Schnitzer initiated this Land Use Petition Act (“LUPA”) appeal in June 2014 challenging the discriminatory spot-zone adopted by the Puyallup City Council, Schnitzer was the contract purchaser of the subject property, located at the intersection of Shaw Road and East Pioneer Avenue in the City of Puyallup (“Property”). At that time, Neil Arthur Van Lierop and Van Lierop Investment Company, Inc. (“Van Lierop entities”) owned the Property. Accordingly, the Van Lierop entities were named as necessary parties to the appeal.

3. Schnitzer’s affiliate Puyallup 5<sup>th</sup> Avenue LLC subsequently acquired the Property, and it was the sole owner of the Property when the Court of Appeals heard oral argument in the LUPA appeal on June 28, 2016.

4. On July 29, 2016, Puyallup 5<sup>th</sup> Avenue LLC transferred the Property to Viking JV LLC.

5. The Purchase and Sale Agreement (“PSA”) for sale of the Property to Viking recognizes that the Property value will increase if Schnitzer prevails in the LUPA action, rendering the proposed industrial

development on the Property “conforming” as opposed to “nonconforming” to City development regulations.

6. For that reason, the PSA includes a substantial six-figure “Contingent Payment” to be made by Viking to Puyallup 5<sup>th</sup> Avenue LLC in the event that the City Council’s rezone decision is deemed invalid or otherwise inapplicable to the Property. Schnitzer is contractually entitled to receive a portion of the Contingent Payment.

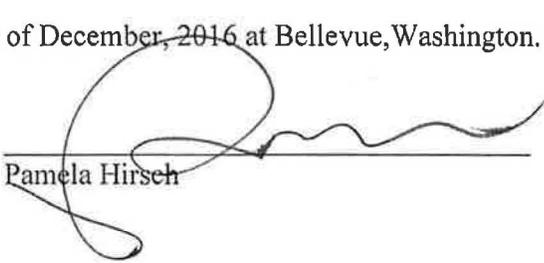
7. The Court of Appeals issued its decision in this matter on October 18, 2016. After extensive review and consultation with Viking, Schnitzer made the decision to seek review of the Court of Appeals decision in the Supreme Court. The decision to file a Petition for Review (“PFR”) was made on October 27, 2016.

8. Promptly thereafter, on November 15, 2016, Schnitzer filed a Motion to Substitute. The purpose of the Motion to Substitute was to substitute the Van Lierop entities as parties to the litigation, as they no longer have ownership interest in the Property, with Viking, the new owner of the Property. Schnitzer will, of course, remain as a party due to its substantial financial interest in the outcome of the litigation.

9. We have kept Viking apprised of the litigation. Schnitzer provided a draft of the Motion to Substitute to Viking and obtained Viking’s approval before filing the Motion.

I declare under penalty of perjury that I am competent to make this declaration, and that the foregoing is true and correct.

Executed this 6<sup>th</sup> day of December, 2016 at Bellevue, Washington.

  
\_\_\_\_\_  
Pamela Hirsch

## APPENDIX B

FILED  
COURT OF APPEALS  
DIVISION II  
2017 JAN 4 PM 2:40  
STATE OF WASHINGTON  
BY   
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

SCHNITZER WEST, LLC, a Washington  
limited liability company,

Respondent,

v.

CITY OF PUYALLUP, a Washington  
municipal corporation,

Appellant,

and

NEIL ARTHUR VAN LIEROP, an individual,  
and VAN LIEROP INVESTMENT  
COMPANY, INC., a Washington company,  
and VAN LIEROP BULB FARMS, INC., a  
Washington company,

Additional Parties.

No. 47900-1-II

ORDER GRANTING MOTION TO  
SUBSTITUTE PARTY AND DENYING  
MOTION TO DISMISS

The respondent has filed a motion to substitute parties to this appeal and the appellant filed a motion to dismiss for lack of standing. Following consideration, the court grants the motion to substitute parties, removing additional parties Neil Arthur Van Lierop, Van Lierop Investment Company, Inc. and Van Lierop Bulb Farms, Inc. from this appeal and substituting in Viking JV,

No. 47900-1-II

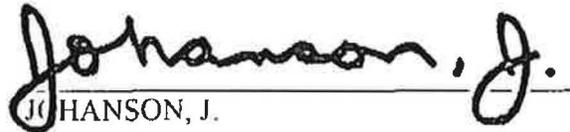
LLC as an additional party. The court denies the motion to dismiss for lack of standing, without prejudice. Accordingly, it is

**SO ORDERED.**

DATED this 4<sup>th</sup> day of January, 2017.

PANEL: Jj. Johanson, Bjorgen, Maxa

FOR THE COURT:

  
JOHANSON, J.

**CERTIFICATE OF SERVICE**

I certify that on the date below, I e-filed this document with the Supreme Court at [Supreme@courts.wa.gov](mailto:Supreme@courts.wa.gov), and provided copies of the foregoing upon the following counsel:

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<p>Viking JV, LLC  Tim Berry, <a href="mailto:tim@michelsonrealty.com">tim@michelsonrealty.com</a>  c/o Michelson Commercial Management and Leasing, LLC  13800 - 24<sup>th</sup> Street East  Sumner WA 98390-5001</p>	<p><input checked="" type="checkbox"/> Via Email   <input checked="" type="checkbox"/> via Regular mail</p>
<p>Adam Frank, <a href="mailto:adamf@biaw.com">adamf@biaw.com</a>  BIAW  111 21<sup>st</sup> Avenue SW  Olympia WA 98501</p>	<p><input checked="" type="checkbox"/> Via Email   <input checked="" type="checkbox"/> via Regular mail</p>

DATED this 28th day of April, 2017.

  
Gloria J. Zak