

Supreme Court No. 94005-3

---

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

SCHNITZER WEST, LLC, a Washington limited liability company,

Respondent,

v.

CITY OF PUYALLUP, a Washington municipal corporation,

Appellant,

and

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

Additional Parties.

---

**AMICUS CURIAE BRIEF OF  
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON  
IN SUPPORT OF RESPONDENT**

---

Adam Frank  
WSBA No. 43389  
BIAW  
111 21<sup>st</sup> Avenue SW  
Olympia, WA 98501  
(360) 352-7800  
adamf@biaw.com

Attorney for Amicus Curiae Building  
Industry Association of Washington

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. IDENTITY AND INTEREST OF AMICUS CURIAE  
BUILDING INDUSTRY ASSOCIATION OF  
WASHINGTON.....2

III. ISSUE OF CONCERN TO AMICUS CURIAE.....3

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....3

    A. The City’s action, if initiated by any other party,  
    would appropriately and indisputably be termed  
    a site-specific rezone.....3

    B. The Court of Appeals decision arbitrarily limits the types of  
    claims available to property owners.....6

VI. CONCLUSION .....7

**TABLE OF AUTHORITIES**

**Cases**

*Kittitas Cty. v. Kittitas Cty. Conservation Coal.*, 176 Wn. App. 38,  
308 P.3d 745 (2013).....1

*Schnitzer W., LLP v. City of Puyallup*, 196 Wn. App. 434,  
382 P.3d 744 (2016).....passim

*Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*,  
176 Wn. App. 555, 309 P.3d 673, *review denied*, 179 Wn.2d 1015,  
318 P.3d 279 (2014).....1

*Woods v. Kittitas Cty.*, 162 Wn.2d 597, 174 P.3d 25, (2007).....1, 4, 5

**Statutes**

RCW 36.70A.280(1).....6

RCW 36.70C.....passim

RCW 36.70C.020(a).....7

RCW 36.70C.130.....7

## I. INTRODUCTION

The Land Use Petition Act (LUPA) was enacted by the legislature in 1995 to provide a swift appeal process for final local land use decisions. This Court has previously held that LUPA is the proper channel to appeal a site-specific rezone. *Woods v. Kittitas Cty.*, 162 Wn.2d 597, 610, 174 P.3d 25, 31 (2007). Multiple Court of Appeals Decisions have held the same. *Kittitas Cty. v. Kittitas Cty. Conservation Coal.*, 176 Wn. App. 38, 52, 308 P.3d 745, 751 (2013); *Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 572, 309 P.3d 673, 681, *review denied*, 179 Wn.2d 1015, 318 P.3d 279 (2014) (both cases using identical language to hold that a site-specific rezone authorized by a comprehensive plan is a project permit properly reviewed under LUPA). The only issue in this case, therefore, is to decide whether the action taken by the Puyallup City Council on one owner's property was a site-specific rezone.

The Court of Appeals chose form over substance when it ruled that the council's actions do not constitute a site-specific rezone because the council did not submit an application to itself to initiate the rezone process. What results, then, is an absurd inequity between the reviewability of site-specific rezones initiated by property owners, and site-specific rezones initiated by local governments. The significant difference that allows for unequal treatment of these two effectually

identical outcomes, in the opinion of the Court of Appeals, is the presence of a piece of paper requesting a change to the zoning rules affecting one owner's property. The result of the decision from the Court of Appeals is to allow local governments to "legislate" away the expected and relied upon available land uses of one owner's property on an individual basis, while leaving legitimate claims against the process unavailable to the affected property owner.

The Building Industry Association of Washington respectfully asks this Court to hold that the change to the scope of allowed activities on only Schnitzer West, LLC's (Schnitzer) property, initiated by the Puyallup City Council, is a site-specific rezone, and that the Land Use Petition Act is therefore the proper vehicle for Schnitzer's appeal.

**II. IDENTITY AND INTEREST OF AMICUS CURIAE  
BUILDING INDUSTRY ASSOCIATION OF  
WASHINGTON**

The Building Industry Association of Washington (BIAW) represents over 7,500 member companies who employ nearly 200,000 residents of Washington.

BIAW's members engage in every aspect of residential building—from site development to remodeling. They regularly invest valuable time and thousands of dollars into developing site plans based on established

zoning and other land use regulations that they should reasonably be allowed to rely on when planning for the development of their land. The Court of Appeals decision gives local governments an extraordinary power to target individual land owners and their projects on a purely individual basis by picking and choosing which rules will apply to which properties.

### **III. ISSUE OF CONCERN TO AMICUS CURIAE**

Does the definition of a site-specific rezone appealable under the Land Use Petition Act turn on the identity of the party initiating it?

### **IV. STATEMENT OF THE CASE**

BIAW relies on the Statement of the Case found in Respondent Schnitzer West, LLC's Petition for Review.

### **V. ARGUMENT**

#### **A. The City's action, if initiated by any other party, would appropriately and indisputably be termed a site-specific rezone.**

As the old saying goes, if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck. Some would say that some sort of intelligent design is responsible for the existence of the duck; others would credit the duck's existence to a coincidental combination of

elements and a lengthy process of evolution. Yet the two sides would not disagree that the subject of the analysis is a duck. However, according to the reasoning of the Court of Appeals in this case, whether or not the animal is a duck necessarily turns on how the creature came into being.

The Court of Appeals held that the action taken by the Puyallup City Council to reduce the scope of allowable development on only the property owned by Schnitzer was not a site-specific rezone because the city did not submit an application to itself to initiate the rezone. *Schnitzer W., LLP v. City of Puyallup*, 196 Wn. App. 434, 443-44, 382 P.3d 744, 749 (2016). But a site-specific rezone is such, regardless of how it comes into being.<sup>1</sup>

The legislature has not defined the term, but only because it is self-explanatory: a site-specific rezone is a rezone of a specific site—a change

---

<sup>1</sup> The City of Puyallup, of course, disagrees. *See* Supplemental Brief of Appellant City of Puyallup, at 7. However, as Judge Bjorgen pointed out in his dissent,

[i]n the absence of analysis and the presence of dicta drawing on further dicta, neither *Woods* nor *Spokane County* can be taken as authority that a rezone initiated by a local government can never be deemed site-specific under LUPA. To the contrary, an express holding of *Spokane County* suggests the opposite:

[W]e hold a site-specific rezone is a project permit approval under LUPA if it is authorized by a then-existing comprehensive plan and, by contrast, is an amendment to a development regulation under the GMA if it implements a comprehensive plan amendment.

*Schnitzer*, 196 Wn. App. at 448, 382 P.3d at 751 (citation omitted).

to the scope of kinds of activity allowed on one particular piece of land. Neither party in this case disputes the fact that the rules were changed for Schnitzer's property, and only for Schnitzer's property. Neither the Court of Appeals nor the City of Puyallup disputes prior holdings of this and lower courts that a site-specific rezone is appealable under LUPA. Thus, the only question for this Court is whether the change in the rules affecting only one owner's property can be properly classified as a site-specific rezone, given its origins not with an application submitted by Schnitzer, but with a process initiated by the Puyallup City Council.

As stated above, the Court of Appeals held, and the City of Puyallup continues to argue, that a city council-initiated change in zoning rules that applies to only one owner's property cannot be a site-specific rezone because the city council does not submit an application to itself to initiate the rezone process. Thus, according to the City of Puyallup, even if the identical result could be achieved through review of an application submitted by someone other than the city council, the presence or absence of that application is the dispositive factor in the subsequent analysis of whether the decision affecting only one owner's property is appealable via the Land Use Petition Act (LUPA). The rule seems simple enough: no application, no LUPA. But "no LUPA" has significant consequences in terms of the types of claims that a citizen can make against his or elected

representatives who have adjudicated the activities permitted on only his or her property. Those claims available to a property owner should not be determined by the presence or absence of an application, especially when the identical result can be achieved without any application at all.

**B. The Court of Appeals decision arbitrarily limits the types of claims available to property owners.**

The Court of Appeals and the City of Puyallup instead point to the Growth Management Hearings Board (GMHB) as the proper channel for this appeal, even though the zoning changes are indisputably site-specific, and even though the GMHB's subject matter jurisdiction does not reach the legitimate, substantiated claims Schnitzer makes in its appeal. RCW 36.70A.280(1). What results, then, is an arbitrary inequity between the reviewability of site-specific rule changes initiated by developers and even identical site-specific rule changes that could be initiated by local governments. There is simply no justification for making this distinction when the effects of the action are the same, and the same potential for improper conduct giving rise to LUPA claims exists in both scenarios.

Whereas the GMHB is, stated simply, limited to hearing complaints that a particular action has not complied with the Growth Management Act, *id.*, LUPA allows aggrieved parties to challenge the process by which the zoning was changed for one specific property, or the

conduct of those making the changes, both of which are clearly concerning issues in this case. RCW 36.70C.130; *see also* RCW 36.70C.020(a) (which makes a distinction between individual and area-wide land use decisions). Because the zoning changes at issue in this case were openly designed to thwart an existing proposal on only one owner's property, the City's action is a site-specific rezone subject to the claims allowed under LUPA's standards for granting relief. RCW 36.70C.130.

## **VI. CONCLUSION**

The Court of Appeals decision conflicts with Supreme Court and Court of Appeals precedent that places review of site-specific rezones under LUPA jurisdiction. This Court should not allow local governments to escape liability for illegal, site-specific rezones by arbitrarily limiting property owners' claims to those allowed under the limited jurisdiction of the GMHB.

RESPECTFULLY SUBMITTED this 28 day of April, 2017.

/s/ Adam Frank  
WSBA No. 43389  
BIAW  
111 21<sup>st</sup> Avenue SW  
Olympia, WA 98501  
(360) 352-7800  
adamf@biaw.com