

NO. 94005-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SCHNITZER WEST, LLC, a Washington limited liability company,
Petitioner,

vs.

CITY OF PUYALLUP, a Washington municipal corporation,
Respondent,

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.

BRIEF OF *AMICUS CURIAE*
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I. INTRODUCTION

Petitioner Schnitzer West LLC presents this Court with a logical fallacy commonly referred to as a false dichotomy: a municipal legislative act touching upon what may be done on land is either site-specific rezone reviewable exclusively under Washington’s Land Use Petition Act (LUPA), ch. 36.70C RCW, or it is a comprehensive plan amendment reviewable under the Growth Management Hearings Act (GMHA), ch. 36.70A RCW. Therefore, under Schnitzer’s view, upholding the Court of Appeals’ decision would grant municipal legislative bodies limitless power and unreviewable authority to regulate land. Previous efforts to misconstrue LUPA by way of a “false dichotomy” in order to further a land use argument have been rejected. *Abbey Rd. Group LLC v. City of Bonney Lake*, 167 Wn.2d 242, 259, 218 P.3d 180 (2009). The Court should do so again.

In truth, municipal legislative authorities routinely enact ordinances that affect few landowners, and in some cases only one. That does not, without more, transform every such ordinance into a “land use decision” as that term is statutorily defined by RCW 36.70C.020(2). The City of Puyallup is correctly notes that LUPA is not the forum for Schnitzer to voice its displeasure with Ordinance 3067 (Puyallup May 28, 2014). This Court should affirm the Court of Appeals.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

WSAMA is a non-profit organization of municipal attorneys who represent Washington's 281 cities and towns. WSAMA members represent municipalities throughout the state. Its members routinely represent local governments like the City of Puyallup in cases advanced under the Land Use Petition Act, ch. 36.70C RCW, and therefore WSAMA has a strong interest in maintaining consistent precedent in this area of law.

III. STATEMENT OF THE CASE

WSAMA adopts the factual background as set forth by the Court of Appeals. *Schnitzer West LLC v. City of Puyallup*, 196 Wn. App. 434, 435-39, 382 P.3d 744 (2016), *rev. granted*, 187 Wn.2d 1025 (2017).

IV. ISSUE PRESENTED

The issue presented is whether an ordinance passed by a municipal legislative body becomes a "land use decision" as defined by RCW 36.70C.020(2)(a) simply because the ordinance in practice affects a select few parcels of land.

V. ARGUMENT

At its core, this case is about statutory construction. The legislature carved out a process for judicial review of municipal actions in the context of land use, and did so with great care. Provided the Court adheres to its longstanding principles of interpreting statutes in a manner that gives effect to all that the legislature has said, the Court of Appeals should be affirmed.

A. Ordinance 3067 regulates development, which by definition is exempted from being a “land use decision” under LUPA.

“[U]nder LUPA, the superior court is granted exclusive jurisdiction to review government actions *meeting the definition of a ‘land use decision’ under RCW 36.70C.020(2)(a).*” *Stafne v. Snohomish County*, 174 Wn.2d 24, 32, 271 P.3d 868 (2012) (emphasis added); *see also* RCW 36.70C.030(1) (subject to exceptions, providing that LUPA is “the exclusive means of judicial review of land use decisions”). The parties seemingly agree that review under the GMHA is far more deferential than LUPA, and it would benefit Schnitzer greatly to proceed under the latter. But as this Court recognized five years ago, “Even if the chances for successful review before the growth board are slim, that cannot change a non-land-use decision into a land use decision under LUPA.” *Stafne*, 174 Wn.2d at 34.

It must be remembered that LUPA exists because the legislature enacted it. Therefore, as with any statute, this Court’s goal is to ascertain and give effect to the legislature’s intent. *HomeStreet, Inc. v. Dep’t of Rev.*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). The primary means of accomplishing this task is to examine the statute’s text. *Id.* If the text is plain, the inquiry ends, *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009), because the Court “presume[s] the legislature says what it means and means what it says,” *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004) (citations omitted).

“Land use decisions” are statutorily defined. For purposes relevant here, only the following is considered a “[l]and use decision”:

a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination ... on:

(a) *An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses.*

RCW 36.70C.020(2)(a).¹ Unless Ordinance 3067 falls within the definition provided in RCW 36.70C.020(2)(a), LUPA is not the proper mechanism for judicial review. Again, it bears repeating that a desire to proceed in a more preferable forum “cannot change a non-land-use decision into a land use decision under LUPA.” *Stafne*, 174 Wn.2d at 34.

Puyallup persuasively argues that because there was no “application” by any interested party, Ordinance 3067 cannot be a land use decision. This makes sense in the statutory context. RCW 36.70C.020(2)(a) identifies two byproducts of the requisite “application”: either a “project permit” or some “other governmental *approval*” that

¹ Nowhere has Schnitzer argued that Ordinance 3067 is one of the other statutory alternative “land use decision” definitions. See RCW 36.70C.020(2)(b) (“[a]n interpretive or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, or use of real property”), and RCW 36.70C.020(2)(c) (“[t]he enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property”).

would be “required ... before real property may be improved, developed, modified, sold, transferred, or used.” *Id.* (emphasis added). Time and again this Court has stressed that the judiciary “may not delete language from an unambiguous statute.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Consequently, if the term “application” is given meaning, it must mean some affirmative act requesting the government give a “permit” or “approval” that is “required” prior to any “improve[ment], develop[ment], modifi[cation], ... or use[.]” of “real property.” RCW 36.70C.020(2)(a). Whether limiting LUPA’s jurisdiction to municipal acts responding to “applications” is wise public policy is better suited for the legislative branch, not the judiciary. *Dot Foods, Inc. v. Dep’t of Rev.*, 185 Wn.2d 239, 250, 372 P.3d 747 (2016). For purposes here, this Court must give effect to the word “application.”

But despite the absence of any “application” that led to the passage of Ordinance 3067, that legislative act also falls short of what must *follow* an “application” prior to meeting RCW 36.70C.020(2)(a)’s definition, namely a “project permit.” The statutory definition of “project permit” has been incorporated into the same term’s use in RCW 36.70C.020(2)(a)’s definition of “land use decision.” *Woods v. Kittitas County*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007). Certainly “[a] site-specific rezone” is a “project permit” under RCW 36.70B.020(4), *Woods*, 162 Wn.2d at 610, and if municipal act qualifies as a “project permit,” it is “a land use decision” subject to LUPA. *Id.* This is the thrust of Schnitzer’s argument: Because RCW 36.70B.020(4) includes “site-

specific rezone[s]” within the definition of “project permit,” Ordinance 3067 must be a “land use decision” under RCW 36.70C.020(2)(a). *Cf.* Pet. for Rev. at 11-17.

Critically though, Schnitzer overlooks the remainder of the legislature’s definition of “project permit”: even though the term includes “site-specific rezones,” it explicitly “*exclude[s]* the adoption or amendment of a comprehensive plan, subarea plan, *or development regulations.*” RCW 36.70B.020(4) (emphasis added). A “development regulation” is statutorily defined to mean: “the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto.” RCW 36.70A.030(7). Thus, if a municipal act is a “development regulation,” it is not a “project permit” and therefore not a “land use decision.”

This makes sense. Municipalities have long been afforded the discretion to regulate development within their respective jurisdictions, and courts have long presumed such legislative enactments to be valid. *E.g., Woods*, 162 Wn.2d at 614 (citing RCW 36.70A.320(1)). Central to this flexibility is the fact that local government is the only player in the game tasked with concern for the public as a whole. Schnitzer has its own objectives; as do its neighbors, presumably. Accordingly, it typically falls on government to reasonably regulate to ensure that development occurs

without sacrificing the efficient use of resources, safety, or livability. This authority has deep, common law roots, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S. Ct. 114, 71 L. Ed. 303 (1926), and nothing in LUPA suggests a legislative intention to change that.

The presumption is, in fact, to the contrary. Had LUPA been a mechanism for transferring the authority of elected individuals, speaking on behalf of local communities, to the courts, that intention would have been expressed. *See, e.g., McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980) (“the statute, being in derogation of the common law, must be strictly construed and no intent to change that law will be found, unless it appears with clarity”). It was not, presumably, because such a subversion of traditional democratic principles was not envisioned or intended. And this Court should not imply it.

Simply because a particular zoning ordinance has a geographically limited scope does not transform the ordinance into a “site-specific rezone” in the manner contended by Schnitzer.² Its argument exemplifies the type of argument previously considered and rejected by this Court, namely employing a “laser focus” on a select few statutory words while disregarding the remainder of what the legislature has said. *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 176-77, 149 P.3d 616 (2006). Ordinance No. 3067 imposed a variety of new design standards and

² Municipal legislative bodies frequently enact ordinances to regulate development and uses within a specific area for reasons such as promoting economic welfare and safety. *E.g.*, Ordinance 6008 (Bellevue, July 5, 2011); Ordinance 121823 (Seattle, June 6, 2005).

development regulations. It contained a building size limitation of 125,000 square feet, among other design standards. It exemplifies the definition of a “development regulation.” As such, Ordinance 3067 is exempt from the definition of “project permit” under RCW 36.70B.020(4)—which wholly comports with the lack of any “application” for purposes of RCW 36.70C.020(2)(a). Plainly, Ordinance 3067 was not a “land use decision.” The scope of review under the GMA or some other scheme does not—and should not—create a judicial license to rework a carefully crafted legislative scheme in order to secure an outcome. The sole question is whether Ordinance 3067 is a “land use decision” as defined statute. It is not, meaning the Court of Appeals should be affirmed.

B. Legislative amendments to development standards are not “land use decisions” when they create a preexisting nonconforming structure or use.

It is important to note that Schnitzer has every right to develop its land consistent with its short plat application that was filed prior to Ordinance 3067 taking effect. *See generally McMilian v. King County*, 161 Wn. App. 581, 591-92, 255 P.3d 739 (2011). Schnitzer’s short plat application contemplated – included in its details - the construction of an approximately 470,000 square foot warehouse. The application was submitted and approved under the codes in effect prior to the adoption of Ordinance No. 3067. Thus, when the Ordinance was then adopted, it did not affect the Respondent’s project as identified in the application. RCW 58.17.033; *see also Snohomish County v. Pollution Control Hearings*

Board, 187 Wn.2d 346, 362, 386 P.3d 1064 (2016); *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997). Thus, concerns raised by Chief Judge Bjorgen that “[t]he effect of [Ordinance 3067] was to make Schnitzer’s specific warehouse proposal illegal” appear to be mistaken. *Schnitzer West*, 196 Wn. App. at 445 (Bjorgen, C.J., dissenting). But the revised development standards of Ordinance No. 3067 would apply if the Respondent expanded or materially modified its project.

1. Ordinance No. 3067 establishes Schnitzer’s property as nonconforming, which is a perfectly valid exercise of Puyallup’s police power.

A “nonconforming use”³ in land use/zoning law is a use that would not be permitted as a new use under the applicable zoning code, but, because it was permitted before the present land use/zoning code was imposed, it is allowed to continue. *Anderson v. Island County*, 81 Wn.2d 312, 501 P.2d 594 (1972); *Summit-Waller Citizens Ass’n v. Pierce County*, 77 Wn. App. 384, 895 P.2d 405 (1995). Typically, the party claiming the pre-existing nonconforming use has the burden of proving that it existed prior to current codes, that it was lawful at the time and it was not abandoned. *McMilian*, 161 Wn. App. at 591-92. Any zoning change can render a structure nonconforming, for example, as to setbacks, lot size,

³ WSAMA recognizes that Schnitzer’s warehouse is not necessarily a “non-conforming use” because even under Ordinance 3067, Schnitzer is entitled to “use” its property to construct a warehouse. That said, the 470,000 square-foot warehouse would not conform to Ordinance 3067 due to its size, thus making this more of a non-conforming structure. For purposes of zoning law, this a distinction without a difference.

and other dimension standards. *See State ex rel. Edmond Meany Hotel, Inc. v. City of Seattle*, 66 Wn.2d 329, 337, 402 P.2d 486 (1965) (applying an ordinance precluding reconstruction of a building nonconforming as to height, even if use as hotel or adult living facility is conforming). An owner's right to maintain, alter, rebuild, or repair a nonconforming structure is subject to the restrictions imposed by zoning laws. *See* 8A Eugene McQuillin, *The Law of Municipal Corporations*, § 25:216 at 192 (“The general rule is that structural or substantial alterations of nonconforming structures are prohibited under zoning laws.”).

Courts have upheld ordinances imposing reasonable phase-out deadlines (amortization periods) for eliminating nonconforming structures. 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 4.21, at 252 (2d ed. 2004) (“Most decisions uphold the phase-out technique, which has become a standard feature of zoning.”); *see also Ackerley Commc'ns, Inc. v. City of Seattle*, 92 Wn.2d 905, 913-19, 602 P.2d 1177 (1979) (upholding an ordinance requiring removal of outdoor advertising signs without compensation after three to seven-year amortization period). To hasten the demise of nonconforming uses that hang on, in the past 30 years or so, cities and counties have adopted what are called “amortization” or “phase-out” ordinances. “Amortization,” an accounting concept, is not properly used in this instance; perhaps “phase-out” is better. *Id.* Phase-out ordinances are accepted in Washington, and the initial and leading decision, *City of Seattle v. Martin*, 54 Wn.2d 541, 342 P.2d 602 (1959), upheld a one-year

phase-out period. Following *Martin, Asia v. City of Seattle*, 4 Wn. App. 530, 482 P.2d 810 (1971), a court of appeals decision, used the *Martin* balancing test, and upheld a phase-out ordinance, observing that the ordinance was not invalid just because it reduced the total value of a parcel of land. *Asia*, 4 Wn. App. at 531-32

2. Ordinances that change zoning or development standards and create nonconforming used are not land use decisions under LUPA.

The very fact that cities are entitled to phase out or amortize pre-existing nonconforming uses demonstrates the legitimacy of a city taking action such as Puyallup's adoption of Ordinance No. 3067, prohibiting new uses inconsistent therewith and creating pre-existing nonconforming status to those uses that may already exist. In this case, the Respondent argued that the adoption of Ordinance No. 3067 was the "land use decisions made by [a] local jurisdiction," per RCW 36.70C.010, and was entitled to a review through the LUPA process. However, in *Horan v. City of Federal Way*, 110 Wn. App. 204, 39 P.3d 366 (2002), a case specifically addressing the application of LUPA to a nonconforming use, the court held that a city ordinance extending an amortization period did not trigger LUPA. It was, rather, the decision of the hearing examiner affirming the city's sign-removal order that was subject to LUPA. *Id.* 207.

So, too, in this case, Ordinance No. 3067, establishing the pre-existing nonconforming use of the Respondent's property, does not trigger LUPA review, though a determination of a City official/hearing examiner was in violation of City codes could.

C. Property developers have multiple avenues to challenge municipal legislation with which they disagree.

The unstated but faulty premise underlying Schnitzer’s argument is that LUPA is the *only* redress available to it. But this is not so. Even assuming for the sake of argument that the GMA does not furnish a remedy, it is a fact that parties adversely impacted by legislation do have options—which are, rightly, commensurate with what they are asking the Court to do; that is, displace democratically enacted legislation.

The ultimate remedy is, of course, the democratic process itself. City and county councils are comprised of elected officials, who serve only at the pleasure of the governed. Schnitzer, and those of like-mind, have a near-absolute right to assemble, petition, and seek redress from the City of Puyallup. *See* U.S. CONST., amend. I. They can show up at council meetings, circulate petitions, picket, and attempt to persuade their neighbors of the legitimacy of their position. Legislatures are, by definition, not free to ignore the will of the people. *See Davis v. Bandemer*, 478 U.S. 109, 132, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986) (even an individual who votes for a losing candidate “is usually deemed to be adequately represented” for the courts “cannot presume in such a situation ... that the candidate elected will entirely ignore the interests of those voters.”). It is for this reason that this Court has long acknowledged that it has no “function to question the wisdom of an enactment.” *State v. Heiskell*, 129 Wn.2d 113, 123, 916 P.2d 366 (1996).

Oftentimes, mechanisms are often built into city and county codes to ensure even greater access to democracy. Of course, there are circumstances in which government *does* overstep. When the grievance is of constitutional dimension, courts rightly play a larger role. *E.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d (2015). City councils are not free to disfavor protected classes or burden fundamental rights. In those circumstances, citizens may certainly turn to the courts to seek redress for due process violations and equal protection. But this is not one of those times.

Crucially—and as confirmed by the courts themselves—this is a carefully limited role. Especially in the context of land use, courts do not play the role of “supercharged zoning boards.” *See Cordi-Allen v. Conlon*, 494 F.3d 245, 252 (1st Cir. 2007) (rejecting equal protection arising out of land use dispute; noting the importance of deference). Nor is property development a “fundamental right” in the constitutional sense. *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012); *see also Jackson Water Works, Inc. v. Pub. Utils. Comm’n*, 793 F.2d 1090, 1093 (9th Cir. 1986) (government action that “affects only economic” interests does not implicate fundamental rights). Courts serve to ensure that legislation—be it by a local city council, state legislature, Congress, or even an Executive Order by the President—remains within the bounds of the Constitution.

But even absent a constitutional right, citizens can and do seek redress from unfavorable legislation through the declaratory judgment or

writ process. *See, e.g., Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 689, 169 P.3d 14 (2007) (seeking declaration that, *inter alia*, ordinance violated state law); *Burg v. City of Seattle*, 32 Wn. App. 286, 290, 647 P.2d 517 (1982) (writs of mandamus available to compel performance when there is a “clear duty to act” or duty “enjoined by law”). Courts may also appropriately invalidate irrational or arbitrary legislation. *See, e.g., HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005) (condemnation authority may not be arbitrary and capricious).

The burden is typically on the proponent of the challenge to show utter irrationality or malfeasance of the worst kind. Such challenges are not the stuff of mere disagreement—which is a high bar. Government action is *not* subject to challenge when there is “room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached.” *See generally State v. Hutch*, 30 Wn. App. 28, 35, 631 P.2d 1014 (1981).

And WSAMA would submit that it *should* be a high bar. The people should be allowed room to govern themselves; and the remedy for faulty public policy is usually better public policy. This Court has emphasized that legislative bodies are entrusted to determine, enact, and make public policy, and so long as that authority is exercised within the bounds of the Constitution, the power will not be disturbed. *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001); *see also Roberts v. Dudley*, 140 Wn.2d 58, 79, 993 P.2d 901 (2000) (Talmadge, J.,

concurring) (“The specter of judicial activism is unloosed and roams free when a court declares, ‘This is what the Legislature meant to do or should have done.’”). Allowing parties like Schnitzer to challenge and overturn properly-enacted legislation, absent fraud or a constitutional issue, subverts the democratic process. It is a referendum, based upon the wishes and desires of one.

VI. CONCLUSION

LUPA is an appellate process for quasi-judicial decisions. It is not, and was never intended to be, a check on legislative decision-making. Read properly, the statute itself confirms this. Absent articulation of a different intention by the state legislature, this Court should affirm the Court of Appeals.

RESPECTFULLY SUBMITTED on May 1, 2017.

/s/ Daniel G. Lloyd

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CERTIFICATE OF SERVICE

I certify that on the date referenced below, I e-filed this document with the Supreme Court by sending a copy via email at Supreme@courts.wa.gov. I further certify that I served a copy of the foregoing document to each and every attorney of record herein, as identified below, by U.S. mail, first class, postage prepaid:

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