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STATE OF WASHINGTON

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No. 47900-1-II

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.

RESPONDENT'S OPENING BRIEF

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I. INTRODUCTION

This case involves an approximately 22-acre property ("Property") previously owned by Neil and Lore Van Lierop located near the intersection of East Pioneer Road and Shaw Road in the City of Puyallup ("City"). The Property was historically used by the Van Lierop family for daffodil farming, but it has been zoned for industrial uses for several years. Schnitzer West, LLC, a Seattle-based real estate development company, has recently acquired the Property with the intent to develop one light industrial warehouse building ("Project").

In early 2013, Schnitzer West submitted a Comprehensive Plan amendment and rezone request to the Puyallup City Council to convert part of the Property from one industrial designation to another, which would allow the entire Property to have the same industrial zoning designation and allow for one contiguous development. The City Council approved the Comprehensive Plan amendment and rezone in November 2013.

Only weeks thereafter, a newly-elected Council majority who objected to development of the Property took steps to reverse the decision of the previous Council. First, it attempted to adopt an "emergency" development moratorium specifically directed at the Property. The ostensible purpose of this moratorium was to allow time to consider whether to extend the City's Shaw-East Pioneer Overlay zone ("SPO

Zone") to several parcels north of East Pioneer Avenue-including the Property-which were annexed into the City in 2012. However, one Council member observed at the moratorium hearing that the moratorium was "personal retribution against Schnitzer"-the only entity with a viable development proposal in the Shaw-East Pioneer area. Another new Council member described the "emergency" basis for the moratorium as follows: "do[] this now before the sale [to Schnitzer] closes." The true purpose of the moratorium was to prevent development of Schnitzer's proposed Project.

The new Council's second step, was to adopt Ordinance No. 3067 ("Ordinance"), a site-specific rezone ordinance that applied solely to the Property. The Council characterized the new Ordinance as an "extension" of the existing SPO Zone, but that characterization is not credible. The original SPO Zone applied only to commercial properties and consisted almost solely of design regulations, whereas the Ordinance applied only to the Property and imposed significant building size restrictions unknown in any other zone in the City-restrictions that would render Schnitzer's proposed Project infeasible.

Although the Ordinance was a site-specific, quasi-judicial rezone, the Council adopted it under the guise of legislative action so that it could avoid the procedures mandated by City Code and state law for adopting site-specific rezones, including the procedural and substantive

requirements of the Appearance of Fairness statute, Chapter 42.36 RCW. Accordingly, several Council members who had exhibited actual bias and prejudgment against the Project voted on the Ordinance. The Council adopted the Ordinance by a 4-0 vote. Although there are seven members on the City Council, three Council members chose not to attend the meeting in protest of what they viewed as arbitrary, discriminatory action on the part of the new political majority.

Schnitzer West appealed the Ordinance to Pierce County Superior Court pursuant to the Land Use Petition Act, Chapter 36.70C RCW ("LUPA"). After conducting a thorough review of the record and considering extensive argument from the parties, the superior court issued a detailed letter ruling ("Ruling") on June 18, 2015 concluding that the Ordinance was an unlawful site-specific rezone and declaring it invalid as a matter of law.

The superior court's ruling invalidating the Ordinance was based on three independent grounds: (1) the Ordinance constitutes an illegal, discriminatory spot-zone; (2) the Council adopted the Ordinance without following required procedures; and (3) the Ordinance was adopted in violation of the Appearance of Fairness doctrine. The superior court entered a LUPA Decision and Judgment ("Decision") consistent with the letter ruling on August 7, 2015.

The City appealed the superior court's Decision.

II. ASSIGNMENTS OF ERROR

Schnitzer is not the appellant in this Court, but as the original LUPA appellant in superior court, Schnitzer continues to bear the burden of proof and is required to file the opening brief in this Court, pursuant to General Order 2010-1 and the Amended Perfection Notice, dated September 8, 2015.

Schnitzer West does not assign error to any aspect of the superior court's Ruling or LUPA Decision, issued on August 7, 2015. The superior court correctly concluded that Ordinance No. 3067 is a discriminatory spot-zone adopted in violation of required rezone procedures and the state Appearance of Fairness doctrine. Schnitzer requests that this Court affirm the superior court's invalidation of the Ordinance.

Schnitzer does assign error to the following decision of the Puyallup City Council: its adoption of Ordinance No. 3067, which amended the City's Municipal Code and Zoning Map to apply a zoning overlay with significant development restrictions solely to the Property without following the procedures required for site-specific rezones.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Ordinance, a site-specific rezone authorized by the City's Comprehensive Plan, is a land use decision subject to LUPA's exclusive review.

2. Whether the City Council violated the LUPA standard of review in RCW 36.70C.130(1)(a) when it adopted the Ordinance without following the procedures in its own City Code and state law governing the adoption of site-specific rezones.

3. Whether the City Council violated the LUPA standard of review in RCW 36.70C.130(1)(b) when it adopted the Ordinance, a discriminatory spot-zone that applied significant new zoning restrictions to a specific tract of property held under common ownership.

4. Whether the City Council violated the LUPA standards of review in RCW 36.70C.130(1)(a) and (1)(b) when it adopted the Ordinance without following the procedural or substantive mandates in the state Appearance of Fairness doctrine, thereby allowing several Council members who had exhibited clear prejudgment and bias against development of the Property to vote on the Ordinance.

IV. STATEMENT OF THE CASE

A. The Property and the Shaw/Pioneer Annexation Area

The approximately 22-acre Property is located in an area of the City that is commonly referred to as the Shaw/Pioneer Annexation Area ("Annexation Area"). The Property was historically used by the Van Lierop family for daffodil farming, but agricultural use of the Property is no longer viable, and the Property has been zoned for industrial uses for the past several years.

In 2007, while the Annexation Area was still in unincorporated Pierce County, the City began planning for its future annexation.[1] CP 78-83. In 2008, after extensive review by the Planning Commission, the City Council adopted an ordinance assigning commercial and industrial land use designations and zoning to the Annexation Area, including the Property, in anticipation of its future annexation. CP 86.

Also in 2009, the City adopted the SPO Zone, codified in Chapter 20.46 of the Puyallup Municipal Code ("PMC"). CP 102. The SPO Zone applied to commercially-zoned properties located south of East Pioneer Avenue near the Shaw Road intersection (which did not include the Property), and it consisted primarily of design standards. CP 103-104. At the time the SPO Zone was adopted by the City Council, the Council expressed its intent to eventually expand the SPO Zone to the *commercially-zoned* properties north of East Pioneer Avenue in the Annexation Area. The original SPO Ordinance expressed no intent to expand the overlay to parcels with manufacturing or industrial zoning, such as the Property. CP 103; *see also* CP 116 (original SPO Zone applied only to commercially-zoned properties).

On January 1, 2012, the City completed its annexation of the Annexation Area, which included the Property. CP 115. The City did not

[1] Citations to the record in this brief are to the Clerk's Papers ("CP") in the Index prepared by the Pierce County superior court on September 18, 2015.

extend the SPO Zone to the Annexation Area at that time.

B. The 2013 Comprehensive Plan Amendment and Rezone

When Schnitzer West entered into a Purchase and Sale Agreement to purchase the Property from the Van Lierops, the entire Property was zoned and designated for industrial and business park uses in the City's Comprehensive Plan. CP 321. However, a portion of the Property was designated in the Comprehensive Plan as Business/Industrial Park ("B/IP") and zoned Business Park ("MP"), and the remainder of the Property had a Light Manufacturing/Warehouse ("LM/W") Comprehensive Plan designation and Limited Manufacturing ("ML") zoning. CP 321.

In order to allow all the parcels in the Property to have the same zoning and create an assemblage that would support a viable industrial project, Schnitzer West submitted a Comprehensive Plan amendment and rezone request to the City in April 2013 to convert one parcel of the Property to a LM/W Comprehensive Plan designation and an ML zoning designation, consistent with the other parcels in the Property. CP 319.

In November 2013, the City Council approved the requested Comprehensive Plan amendment and rezone request by a 4-2 vote via Ordinance No. 3052. CP 317-318. The Council found that the request met the criteria for re-designation in the City's Comprehensive Plan and City Code. The Council also found that, if the request had not been approved,

an industrial development on the Property "would not be economically viable due to the parcel's relatively small size and the high cost of extending the required infrastructure to the site." CP 319.

C. Council Election and Development Moratorium

In early January 2014, after the election of several new Council members, Schnitzer West learned that the new Council majority was considering adopting an "emergency" development moratorium specifically directed at the Property. The ostensible purpose of this moratorium was to consider whether to extend the City's Shaw-East Pioneer Overlay zone, or SPO Zone, to thirteen parcels north of East Pioneer Avenue which were annexed into the City in 2012. The true purpose of the moratorium was to reverse the decision of the previous Council and frustrate, impede, and prevent Schnitzer West's lawful development of the Property.

In order to protect its right to develop the Property, Schnitzer West submitted a short plat application to the City on January 7, 2014. The short plat application vested the Project to the City's current land use regulations.[2]

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[2] The fact that the Project application is vested does not mean it will be approved. In fact, the Project application was submitted almost two years ago, and the City has not issued a final decision on the Project. If any changes are made to the application that the City deems significant, the Project could lose its vesting. Finally, even if the Project is approved, it will immediately become a "nonconforming" structure on the site, because it will not comply with the Ordinance. *See* Chapter 20.65 PMC (City Code places restrictions on expanding, modifying, restoring and reconstructing nonconforming structures in the event they are damaged or destroyed).

Also on January 7, 2014, the City Council held its first hearing on the development moratorium. CP 458. At the hearing, Schnitzer West Senior Investment Manager Jeff Harmer expressed his surprise at the Council's sudden consideration of an "emergency" moratorium in the Shaw/Pioneer area:

> I will say that we were a little bit shell-shocked when this came on the agenda on Thursday for an emergency moratorium. 2012, when you came up with an emergency moratorium for halfway houses for sex offenders, that made sense. And I think again in 2013 when there was an emergency moratorium for marijuana distribution and production, that made sense. To declare an emergency moratorium in this city for possibly landscape or other design features for mixed use and light warehouse seems like a gross overreach of – of what the emergency power should be used for.
>
> Since the rezone happened a couple of years ago, there have been 41 Council meetings where this could have been put on the agenda and talked about. 41 Council meetings. And as developers, all we want to do is be able to have a set of rules that we can trust and work with so that we can invest in your city, so that we can bring jobs, tax revenue, and be able to work collaboratively together.

CP 459, TR 27:7–25.[3]

After a lengthy discussion that focused on Schnitzer West's development proposal for the Property, one Council member observed that the moratorium was "personal retribution against Schnitzer"—the only

[3] The superior court supplemented the record with the video of the January 7, 2014 City Council meeting on the Shaw/Pioneer development moratorium. CP 418–421 (*Order Granting the Motion to Supplement the Record and for Judicial Notice*, dated April 17, 2015). Excerpts from the transcript of the video are cited by CP number, in addition to the transcript page (TR) followed by the page and line numbers.

entity with a viable development proposal in the Shaw-East Pioneer area. CP 463, TR 78:17. And one of the new Council members described the "emergency" basis for the moratorium as follows: "do[] this now before the sale [to Schnitzer] closes." CP 462, TR 56:11.

D. City Planning Commission Review

In April 2014, the City Council directed the City's Planning Commission to consider expanding the SPO Zone to the thirteen parcels on the north side of East Pioneer Avenue, which included the Property. CP 124-129. After studying the request, the Planning Commission determined that there was no basis to extend the SPO Zone to the Property, or any other property in the Annexation Area. CP 151-155.

E. The Council's Adoption of Ordinance No. 3067

Rebuffing the Planning Commission's recommendation, the City Council, at its May 6, 2014 Council meeting, made reference for the first time to a draft ordinance that would apply the SPO Zone *solely to the Property*—leap-frogging over the commercially-zoned properties adjacent to the existing SPO Zone and landing solely upon the Property. *AR* 6. That draft ordinance was not made public until the very day of the Council hearing on May 20. CP 190-196.

On May 20, 2014, the Council held the first reading of the ordinance that would apply the existing SPO zone, with new development regulations, solely to the Property. Again, while the original SPO Zone in

effect to the south consisted almost purely of design regulations and applied only to commercial property, the downzone proposed for the Property contained significant building size limitations unknown in any other zone in the City—building size limitations that would prohibit the Project proposed in the short plat application and preclude economically viable development of the Property.

The City Council scheduled a Special Meeting for the second reading of the ordinance on May 28, 2014. CP 197-199. Despite the fact that the Council now proposed to rezone a specific tract of property held under common ownership, the Council did not follow any of the required procedures in state law or its own City Code for quasi-judicial, site-specific actions. Instead, it considered the proposal under the guise of legislative action, which affords fewer procedural and substantive protections to property owners. The City Council adopted the proposal, Ordinance No. 3067, that evening in a 4-0 vote. CP 200.[4] As noted, three Council members did not attend that meeting in protest of the Council's action.

The Ordinance drastically downzones the Property. The most significant new regulation is the imposition of a maximum 125,000 sq. ft.

[4] Ordinance No. 3067 is attached as Exhibit A.

building size restriction. CP 203. There is currently no maximum building size restriction on the Property, or in any other industrial zone in the City.

F. Schnitzer's Appeal

Schnitzer West sought review of the validity of the Ordinance pursuant to the Land Use Petition Act, RCW 36.70C ("LUPA") by filing a land use petition on June 17, 2014. CP 1-23. An amended petition was filed on July 9, 2014. CP 24-44.[5] The City moved to dismiss the appeal for lack of jurisdiction, arguing that the Ordinance was not a "land use decision" subject to review under LUPA. After considering briefing and oral argument on the City's motion, the superior court denied the City's motion, finding that "Ordinance No. 3067 constitutes a site-specific rezone and is therefore a land use decision reviewable under LUPA, RCW Chapter 36.70C." CP 422-425.

G. The Superior Court's Invalidation of the Ordinance

The superior court reviewed the briefing on the merits and heard oral argument in this matter on May 27, 2015. On June 18, the superior court issued a detailed, 5-page letter ruling finding the Ordinance to be an unlawful site-specific rezone and invalid as a matter of law ("Ruling"). CP 676–680.[6] First, the Ruling affirmed the court's jurisdiction over this

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[5] Schnitzer also filed a timely appeal to the Growth Management Hearings Board, which has been stayed pending resolution of this LUPA appeal.
[6] A copy of the superior court's Ruling is attached as Exhibit B.

matter under LUPA and noted that the jurisdictional authority cited by the City was unpersuasive and superseded by more recent case law.

Second, the Ruling outlined the specific violations that warranted relief under the standards of review in Chapter 36.70C RCW. With respect to the Council's failure to follow required procedures, the superior court found the following deficiencies: (1) there was no open record hearing before the City's hearing examiner as required by Chapter 20.12 PMC, (2) there was no hearing examiner decision outlining the proposed rezone's compliance with the required findings in PMC 20.90.010, and (3) there were no written findings and conclusions in compliance with PMC 20.90.015. CP 677-678.

In addition, the superior court Ruling concluded that "the Ordinance at issue was aimed directly and solely at the Van Lierop property which Schnitzer was intending to develop and therefore constitutes a discriminatory spot zone in violation of RCW 36.70C.130(1)." CP 678.

Finally, the Ruling explained the court's finding that the Council's adoption of the Ordinance violated the Appearance of Fairness doctrine. The court noted that the City made no effort to determine the nature and extent of any ex parte contact, nor did it provide any assurances as to whether the City Council members could consider the matter impartially.

The court issued a LUPA Decision consistent with the Ruling on August 7, 2015. CP 699-705.

The City appealed the superior court's Decision to this Court on August 12, 2015.

V. ARGUMENT

A. The Ordinance is a "land use decision" subject to exclusive review under LUPA.

LUPA grants the superior court exclusive jurisdiction to review local land use decisions, with certain limited exceptions. RCW 36.70C.030(1)(a)(ii). The legislature's purpose in enacting LUPA was to "establish uniform, expedited appeal procedures and uniform criteria for reviewing [land use] decisions [by local jurisdictions] in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010.

A "land use decision" is "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." RCW 36.70C.020(2). The LUPA statute identifies three types of land use decisions:

> (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;

> (b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and
>
> (c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. . .

RCW 36.70C.020(2).

The Ordinance is a final land use decision as defined in RCW 36.70C.020(2)(a). The decision was made by the City Council, the body with the highest level of decision-making authority in the City. Puyallup Municipal Code ("PMC") 1.10.010. In addition, it was a "final" determination because there is no administrative appeal right to a City Council decision. PMC 20.10.035; RCW 36.70C.020. Finally, because the Ordinance effectuated a site-specific rezone authorized by the City's comprehensive plan, it is by definition a "land use decision" under RCW 36.70C.020(a) that is subject to review under LUPA.

1. The Ordinance is a site-specific rezone

The initial issue is whether Ordinance No. 3067 is a site-specific rezone. A site-specific rezone occurs when there are specific parties requesting a classification change for a specific tract of property. *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007). The City argued below that the Ordinance is not site-specific because (1) it does not alter the underlying zone designation of the Property, (2) it applies to a 20+

acre property; and (3) it was initiated by the City Council instead of a private property owner. None of these arguments is supported by legal authority, and all of them are refuted by the facts of this case.

First, the Ordinance alters the underlying zone designation of the Property. Before the Ordinance was adopted, the Property was zoned ML, which would have permitted development of a 470,000 sq. ft. warehouse facility. The Ordinance adopts a new "overlay" which imposes a 125,000 sq. ft. building limitation, dramatically altering the underlying ML zone designation. CP 203. The superior court in its letter Ruling recognized this fact, concluding that "the fact that the zoning classification itself, ML, did not change as a result of the Ordinance does not change the analysis, as the Ordinance creates an overlay which significantly reduces the type of development that can take place on that particular ML-zoned property and that reduction does not apply to any other similarly ML-zoned property within the City . . ." CP 679. Accordingly, the fact that the City chose to retain the ML zoning label does not mean the Ordinance did not alter the underlying zoning standards.

Second, the Ordinance is site-specific. Although the Property is approximately 20 acres and contains three separate parcels, the Property is held under common ownership and proposed for one coordinated development. Again, the superior court considered this issue and concluded that the Ordinance "was clearly directed at a specific site." CP

677.

Third, the fact that the rezone was initiated by the City has no bearing on whether it is a site-specific rezone. PMC 20.11.005 provides that the following entities can initiate site-specific rezones: "persons or agencies, including owners, bona fide agents, the commission and the council." This section makes clear that the Council, like private property owners, can initiate site-specific rezones.

Several courts have addressed the distinction between site-specific rezones and text amendments that modify a zoning ordinance, holding that site-specific rezones occur when there are "specific parties requesting a classification change for a specific tract." *Raynes v. City of Leavenworth,* 118 Wn.2d 237, 248, 821 P.2d 1204 (1992), *citing* R. Settle, *Washington Land Use and Environmental Law and Practice* § 2.11 (1983). In contrast, when a city council amends the text of the City's zoning code in a way that affects all the property classified in that zone, this is a text amendment subject to GMHB review.

In *Raynes*, the City of Leavenworth adopted a new zoning ordinance that would permit RV parks in the City's "Tourist Commercial" district as a conditional use. The Council adopted this ordinance to address a pressing policy concern facing the entire City—how to deal with the influx of tourists in recreational vehicles. However, although 21 acres of Tourist Commercial-zoned land were eligible for development as an

RV park, only two parcels were considered by the City to be appropriate sites for RV park development. The Raynes, whose property adjoined one of sites deemed appropriate for RV development, appealed the ordinance under LUPA, arguing that it was a site-specific rezone as opposed to a legislative text amendment. The Court disagreed, reasoning that the text amendment was of area-wide significance because it applied to the entire TC district, not just a specific tract, and because it was enacted to benefit the entire City, not just specific property owners.

The facts here are patently distinguishable. The Ordinance in this case was not adopted to address a policy issue facing the City, and it was not designed to be broadly applicable. Rather, under the guise of extending the existing SPO Zone, the City adopted specific new regulations designed to thwart a specific development proposal on a specific tract of property. The Council attempted to disguise its site-specific decision as legislative, but the facts demonstrate otherwise.

2. The Ordinance is a site-specific rezone authorized by the City's Comprehensive Plan, so it is a "project permit application" subject to review under LUPA

The fact that the Ordinance meets the definition of a site-specific rezone does not mean it is automatically subject to LUPA jurisdiction. There is one remaining test, articulated in several recent cases: if a site-specific rezone is authorized by a comprehensive plan, it is a project

permit application reviewable under LUPA. But if a site-specific rezone is adopted concurrently with a comprehensive plan amendment, it is a legislative action subject to review by the Growth Boards. *See Spokane County v. Eastern Washington Growth Management Hearings Board,* 176 Wn. App. 555, 309 P.3d 673 (2013), *review denied*, 179 Wn. 2d 1015 (2014) (Spokane County II); *Kittitas County v. Kittitas County Conservation Coalition*, 176 Wn. App. 38, 50, 308 P.3d 745 (2013); *Feil v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 367, 259 P.3d 227 (2011); *Woods v. Kittitas County*, 130 Wn. App. 573, 123 P.3d 883 (2005), *affirmed by, Woods, supra*, 162 Wn.2d 597.

In *Woods*, the earliest of the cases cited above, three landowner-companies applied for a rezone of approximately 252 acres from forest and range (allowing one dwelling per 20 acres) to rural-3 (allowing one dwelling per 3 acres). The county's board of commissioners reviewed the request and adopted an ordinance approving the rezone. On appeal, the Court analyzed whether jurisdiction was appropriate under LUPA or the GMA, holding that:

> A site-specific rezone authorized by a comprehensive plan is a project permit application. RCW 36.70B.020(4). Consequently, the GMHB does not have jurisdiction to hear a challenge to a site-specific rezone, even if the rezone is adopted as a county ordinance. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn. 169, 179, 4 P.3d 123 (2000). *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997).

> LUPA is the exclusive means for judicial review of land use decisions that are not subject to review by quasi-judicial bodies such as the GMHB. RCW 36.70C.030; *Somers, 105 Wn. App. At 941-42*. Accordingly, if Ms. Woods' challenge is limited to the validity of the site-specific rezone adopted in Ordinance 2005-15, she properly filed a LUPA petition in superior court.

Woods at 580-81. This holding establishes a clear rule that can be applied in cases where jurisdiction may be unclear: a site-specific rezone adopted alone is subject to LUPA; a site-specific rezone adopted in conjunction with a comprehensive plan amendment is subject to the GMA. The Supreme Court upheld this reasoning on appeal. *See Woods, supra*,162 Wn.2d at 612 ("a site-specific rezone authorized by a comprehensive plan is treated as a project permit subject to the provisions of chapter 36.70B RCW").

More recently, in *Kittitas County*, the court considered several actions taken by the Board of County Commissioners to facilitate a truck stop development. These actions included a combination of comprehensive plan amendments and rezone actions. Again, the Court held that the question whether the rezone was "authorized by the comprehensive plan" is the dispositive factor in determining whether the rezone was subject to appeal under LUPA or the GMA:

> Considering all, we 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. In sum, the superior court erred because the hearings board had subject matter jurisdiction

> to review [the] rezone for compliance with both the GMA and SEPA. *See* RCW 36.70A.280(1)(a); former RCW 36.70A.290(2).

Id. at 52, *citing* RCW 36.70B.020(4). This holding affirms the key test: if a site-specific rezone is adopted in conjunction with a comprehensive plan amendment, it is subject to review by the Growth Boards. If, as here, a site-specific rezone is authorized by the existing comprehensive plan, it is a project permit application subject to review under LUPA. *See also Spokane County v. Eastern Washington Growth Management Hearings Board*, 176 Wn. App. at 555 (if a rezone is adopted concurrently with a comprehensive plan amendment, it is a legislative action subject to review by the GMHB); *see also Feil*, 152 Wn. App at 408 ("a site-specific rezone is a project permit under RCW 36.70B.020(4) if it is authorized by a comprehensive plan or development regulations").

The Growth Boards have reached the same conclusion as the Courts, repeatedly holding that a rezone is subject to its exclusive jurisdiction when the rezone is part of a "package" with a comprehensive plan amendment. *North Everett Neighbor Alliance v. City of Everett*, CPSGMHB No. 08-3-0005, Order on Motions (January 26, 2009).[7] The determination of the GMHB is entitled to deference. *Lewis County v.*

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[7] *See also The McNaughten Group v. Snohomish County*, CPSGMHB No. 06-3-0027, Order on Motions (October 30, 2006); *Bridgeport Way Community Association v. Lakewood*, CPSGMHB No. 04-3-0003, Final Decision and Order (July 14, 2004).

Western Washington Growth Management Hearings Board, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006).

It is undisputed that the City did not amend its Comprehensive Plan when it adopted the Ordinance. In fact, the recitals adopted with Ordinance No. 3067 specifically state that the Ordinance is consistent with and "supported by policies within the Comprehensive Plan Community Character Element . . ." The fact that the City took this action under the guise of legislative action is not determinative. Courts have held that "employing a quasi-judicial process, rather than a legislative one, is not determinative of whether the action is properly a policy or regulation subject to GMA." *NENA, supra*, at 23. The reverse also holds true.

In sum, the Ordinance, a site-specific rezone authorized by the City's comprehensive plan, must be reviewed under LUPA. As a practical matter, this conclusion makes sense. Schnitzer is not alleging noncompliance with the City's comprehensive plan or GMA provisions or asserting any other claim the Growth Board is equipped to consider. Rather, Schnitzer is alleging that the Council adoption of the Ordinance violated LUPA's standards of review; only the superior court is authorized to grant the relief sought in the Petition. RCW 36.70C.130.

B. LUPA sets forth the applicable standard of review

The LUPA statute sets forth clear standards of review to guide superior court and appellate courts in their review of local land use

decisions. As noted previously, "on review of a superior court's decision on a land use petition, [the Court of Appeals stands] in the same position as the superior court and [applies] the... standards [set forth in LUPA] to the record created before the board." *Henderson v. Kittitas County,* 124 Wn. App. 752, 100 P.3d 842 (2004). Accordingly, consistent with General Order 2010-1 of this Court, Schnitzer bears the burden of proof under those LUPA standards and is required to file the opening brief setting forth the bases for its challenge to Ordinance No. 3067.

Under LUPA, this Court may grant relief when the petitioner has carried the burden of establishing that:

> (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.

RCW 36.70C.130(1).

The Court of Appeals has stated:

> Standards (a), (b), (e), and (f) present questions of law that this court reviews de novo. Standard (c) concerns a factual determination that this court review for substantial evidence. We grant some deference to the party who prevailed in the highest forum that exercised fact-finding authority.

J.L. Storedahl & Sons, Inc. v. Clark County, 143 Wn. App. 920, 928, 180 P.3d 848 (2008). Substantial evidence is "evidence which 'would convince an unprejudiced thinking mind of the truth of the declared premise.'" *Bjarnson v. Kitsap County,* 78 Wn. App. 840, 844-845, 899 P.2d 1290, 1292 (1995). A decision is clearly erroneous when a reviewing court is "left with the definite and firm conviction that a mistake has been committed." *Schofield v. Spokane County,* 96 Wn. App. 581, 586, 980 P.2d, 277, 280 (1999).

In this case, the City Council's action violated each of the LUPA standards of review, but primarily RCW 36.70C.130(1)(a) and (b). In adopting Ordinance No. 3067, the Council engaged in unlawful procedure and failed to follow its own rezone procedures set forth in City Code and the state Planning Enabling Act, Chapter 36.70. The error was not harmless. In addition to failing to follow required procedures, the Council's action constituted an illegal, discriminatory spot-zone contrary to law, and it did not comply with the state Appearance of Fairness doctrine. For these reasons, the Ordinance must be invalidated.

C. In adopting the Ordinance, the City Council failed to follow specific City Code and state law requirements for adopting site-specific rezones in violation of RCW 36.70C.130(1)(a)

In its Order denying the City's Motion to Dismiss, the superior court found that "Ordinance No. 3067 constitutes a site-specific rezone and is therefore a land use decision reviewable under LUPA, RCW Chapter 36.70C." CP 423. The court made this determination because the Ordinance adopted new zoning regulations authorized by the comprehensive plan that amended the City's zoning map on a specific tract of land held under common ownership. *Woods, supra*, 162 Wn.2d 597. A site-specific rezone is a quasi-judicial, adjudicative decision reviewable by this Court under LUPA as opposed to a legislative decision reviewed by the Growth Management Hearings Board under the GMA. *Wenatchee Sportsman v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000). This distinction is significant because it governs the procedures and substantive review criteria the City Council must employ.

In *Westside Hilltop Survival Committee, et. al. v. King County*, the Washington Supreme Court addressed the difference between legislative and adjudicatory actions as follows:

> Determining that an action is legislative or adjudicatory is more than a matter of semantics; different consequences follow such a determination. Legislative action is far more impervious to review than is adjudication. The "arbitrary or capricious" standard which legislative actions must meet is not nearly as stringent or exacting and is difficult to prove. Adjudicatory functions must also meet the "clearly erroneous" or "substantial evidence" tests, as well as

> negotiate the due process hurdles of "notice," "hearing," and the "appearance of fairness."

96 Wn.2d 171, 176, 634 P.2d 862 (1981). This description makes clear that the procedural and substantive standards for adjudicatory actions are stricter than those that apply to legislative actions. Similarly, the standard of review for adjudicatory actions is more rigorous. This makes sense. Decisions involving specific tracts of property and specific property owners should be based on clear criteria, and affected property owners should be afforded basic due process protections when such decisions are made.

Here, the Council chose to adopt a site-specific rezone under the guise of legislative action, which meant that it failed to follow the procedural requirements and provide the procedural protections afforded to property owners in quasi-judicial matters guaranteed by the Puyallup City Code and other applicable law. These requirements and protections include constitutional due process protections and compliance with the state Appearance of Fairness doctrine.

Chapter 20.90 PMC, "Rezones," sets forth the City's procedural requirements for reviewing and adopting rezones. As a threshold matter, the City's Rezone regulations recognize that area-wide rezones and rezones requiring comprehensive plan amendments are legislative policy decisions to be made by City Council upon recommendation by the

Planning Commission. *See* PMC 20.90.010 ("area-wide rezones considered as part of a city-initiated planning program" and "rezones associated with amendments to the future land use map" shall be "considered by the city council following review and recommendation by the planning commission").

Conversely, site-specific rezones, such as the Ordinance, must follow the procedures for rezone decisions outlined in Chapter 20.90 PMC. These procedures include:

- An open record hearing before the City's hearing examiner pursuant to Chapter 20.12 PMC, which affords the parties the opportunity to make a factual record on the rezone criteria. *See* PMC 20.90.025.
- A hearing examiner decision outlining the proposed rezone's compliance with the required findings in PMC 20.90.010. *See* PMC 20.90.025.
- Written findings and conclusions showing specifically that all of the following conditions exist:
    - That the proposed amendment to the zoning map is consistent with the goals, objectives and policies of the comprehensive plan;
    - That the proposed amendment to the zoning map is consistent with the scope and purpose of this title and

the description and purpose of the zone classification applied for;

- That there are changed conditions since the previous zoning became effective to warrant the proposed amendment to the zoning map;
- That the proposed amendment to the zoning map will be in the interest of furtherance of the public health, safety, comfort, convenience and general welfare, and will not adversely affect the surrounding neighborhood, not be injurious to other properties in the vicinity in which the subject property is located. *See* PMC 20.90.015.

It is undisputed that the Council failed to comply with any of the procedural and substantive requirements of this Chapter 20.90 PMC (Rezones), as well as the procedural and substantive requirements of Chapter 20.12 PMC (Public Hearings) and Chapter 2.54 (Office of the Hearing Examiner), when it adopted the Ordinance.

As explained by the *Westside* Court, these defects are not simply procedural. A site-specific, adjudicatory decision that is adopted as a legislative decision in violation of City Code cannot stand. A quasi-judicial action involves the application of existing law to particular facts rather than the creation of new policy. Thus, when acting in its quasi-

judicial capacity, the council is limited to interpreting existing policies and applying those policies to the particular facts relevant to its decision. *Chausee v. Snohomish Cnty. Council*, 38 Wn. App. 630, 634-35, 689 P.2d 1084 (1984).

Finally, an applicant may challenge a site-specific rezone decision on the basis that a local jurisdiction did not follow its own development regulations. *Woods, supra*, 162 Wn.2d at 610; *see also Smith v. Skagit County*, 75 Wn.2d 715, 743, 453 P.2d 832 (1969) (Zoning enactments adopted in proceedings which do not meet statutory requirements and "the tests of manifest fairness" should be held invalid). This fact alone compels invalidation of the Ordinance under RCW 36.70C.130(1)(a).

D. The Ordinance is a discriminatory spot-zone

In addition to the Council's failure to comply with the procedural and substantive requirements for a site-specific rezone, the Ordinance is also invalid because it constitutes an illegal, discriminatory "spot zone." "Spot zoning" is "arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land . . ." *Smith*, 75 Wn.2d at 743. The Washington Supreme Court has repeatedly held that spot zoning is "arbitrary, capricious and unreasonable," and "should be universally condemned." *Smith*, 75 Wn.2d at 745, *citing State ex. rel. Miller v. Cain*,

40 Wn.2d 216, 242 P.2d 505 (1952); *Pierce v. King County*, 62 Wn.2d 324, 382 P.2d 628 (1963); *Anderson v. Seattle*, 64 Wn.2d 198, 390 P.2d 994 (1964).

The majority of reported cases evaluating spot zoning claims arise from situations in which a City Council rezones a parcel to make it inconsistent with surrounding zoning for the *benefit* of a specific property owner. But these cases are equally applicable here, where the rezone was adopted specifically to harm a specific property owner. As the superior court judge noted in her letter ruling, "I cannot find case law which directly limits application of the spot-zoning line of cases solely to those situations in which the alleged spot zone favors the landowner." CP 679.

In *Smith v. Skagit County*, a large aluminum reduction company sought to build a new plant on 470 waterfront acres on Guemes Island. After holding a few "cursory" hearings, the County Council adopted an ordinance rezoning the property from residential-recreational to heavy industrial. On appeal, the Court concluded that "the rezoning constitutes a flagrant case of illegal spot zoning." *Smith*, 75 Wn.2d at 743. The Court reached this decision based on the following factors: (1) the zoning ordinance singled out a parcel of land within the limits of a use district for disparate treatment, and (2) the zoning ordinance was adopted for the benefit of a few, as opposed to the welfare of the community as a whole.

These factors apply with equal force in this case. The Ordinance adopted by the City Council applied the SPO Zone to the Property, with restrictions that do not apply to any other ML-zoned parcel in the City, for the purpose of preventing a specific use proposed by a specific property owner. The Ordinance constitutes an illegal spot zone, which is a second independent ground for its invalidation under RCW 36.70C.130(1).

E. The Council's adoption of the Ordinance violated the Appearance of Fairness Doctrine, Chapter 42.36 RCW

The appearance of fairness doctrine was judicially established in *Smith, supra*, 75 Wn.2d 715, to ensure fair hearings by legislative bodies when acting in a quasi-judicial capacity. The doctrine requires that public hearings which are adjudicatory in nature meet two requirements: the hearing itself must be procedurally fair, and it must be conducted by impartial decision-makers. *Buell v. Bremerton*, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972). The doctrine provides:

> It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.

Smith, at 739.

In 1982, the State Legislature codified the Appearance of Fairness Doctrine in Chapter 42.36 RCW:

> Application of the appearance of fairness doctrine to local land use decisions shall be limited to the quasi-judicial actions of local

> decision-making bodies as defined in this section. Quasi-judicial actions of local decision-making bodies are those actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding. Quasi-judicial actions do not include the legislative actions adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance.

RCW 42.36.010. Consistent with the case law, the statute defines "quasi-judicial" actions to include site-specific rezone decisions, such as the Ordinance at issue here.

Accordingly, quasi-judicial hearings by local decision-making bodies – including the City Council – must have the appearance of fairness and impartiality. RCW 42.36.010; *Organization To Preserve Agricultural Lands v. Adams County ("OPAL")*, 128 Wn.2d 869, 889, 913 P.2d 793 (1996). The Appearance of Fairness Doctrine is met if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial and neutral hearing. *Id.* at 890. Prejudgment of facts, personal bias, or personal prejudice for or against a party support an appearance of fairness claim. *OPAL*, 128 Wn.2d at 890; *Buell, supra,* 80 Wn.2d at 524. If the appearance of partiality exists, then the offending decision-maker must recuse themselves. *Chrobuck v. Snohomish County,* 78 Wn.2d 858, 867, 480 P.2d 489 (1971). If the biased decision-maker fails to recuse, then the decision is invalid. *Id.*

In addition, under RCW 42.36.060, members of a decision-making body reviewing quasi-judicial actions are prohibited from engaging in *ex parte* communications with opponents or proponents "with respect to the proposal which is subject to the proceeding" subject to a limited exception. If *ex parte* contacts occur, a person may avoid a violation by: (1) placing the substance of the communication on the record; and (2) providing a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication be made at "each hearing where the action is considered or taken on the subject . . . " RCW 42.36.060(1)-(2).

Despite these statutory requirements, the City did not even make a pretense of compliance with the requirements of the appearance of fairness doctrine. Indeed, statements made by Council members demonstrated actual bias and prejudgment of facts that by law required them to recuse themselves from participating in the meetings leading to the adoption of the Ordinance.

It is accepted practice that, at the beginning of a quasi-judicial hearing, the City attorney will review the Appearance of Fairness Doctrine, ask the Council members to disclose the nature and extent of any *ex parte* contacts on the record, and asks whether the Council members can consider the matter before them impartially. That did not occur here. In addition to the fact that these procedural safeguards were

not followed, the record demonstrates clear evidence of prejudgment and bias on the part of several Council members.

The hearing transcript from the January 7, 2014 development moratorium hearing is illustrative. At that hearing, which preceded adoption of the Ordinance, the Council members discussed Schnitzer West and its proposed warehouse development at great length. As previously noted, one of the Council members urged her colleagues to adopt the moratorium "now before the sale [to Schnitzer] closes." CP 462, TR 56:11. One Council member cited "major, major concern" about "large-scale development, warehouse development" on the Property. CP 460, TR 52: 8-11. Another noted that "Schnitzer West . . . is proposing a 470,000 sq. ft. warehouse on this property, and which is a huge box, basically. And that's precisely the type of development that raises the concerns." CP 461, TR 55:12-16.

Five months later, despite this obvious prejudgment and bias, these same Council members participated in the quasi-judicial, adjudicative, decision to adopt a new zoning overlay that would apply solely to the Property. The Ordinance was specifically designed to preclude Schnitzer West's warehouse proposal. The record is clear that these Council members were biased about this issue, and that this bias ultimately led them to adopt the Ordinance, which was specifically designed to thwart the Schnitzer West proposal. As the superior court found, no reasonably

prudent disinterested observer could conclude that the Council's actions in adopting the Rezone complied with the Appearance of Fairness doctrine.

Violation of the Appearance of Doctrine provides a third independent basis for invalidating the Ordinance under RCW 36.70C.130(1)(a) and (b).

VI. CONCLUSION

In its haste to prevent a specific warehouse proposal from being developed on the Van Lierop Property, the Puyallup City Council adopted a discriminatory site-specific rezone under the pretense of a legislative action. In doing so, it failed to comply with the procedures mandated by its own City Code and state law for adopting site-specific rezones, including Puyallup Municipal Code Chapters 20.90 ("Rezones") and 20.12 ("Public Hearings") and the requirements of the Appearance of Fairness statute, Chapter 42.36 RCW.

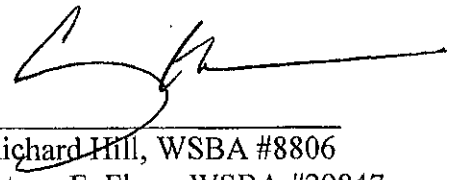
Schnitzer West has met its burden of proof to demonstrate that the Council adopted the Ordinance without engaging in required procedures, and that the Ordinance is an unlawful, discriminatory spot zone adopted in violation of the state Appearance of Fairness doctrine.

Accordingly, Schnitzer West respectfully asks this Court to affirm the superior court's ruling and invalidate the Ordinance.

DATED this 7th day of December, 2015.

Respectfully submitted,

McCullough Hill Leary, PS



By:_____
G. Richard Hill, WSBA #8806
Courtney E. Flora, WSBA #29847
Attorneys for Schnitzer West, LLC

APPENDIX

Exhibit A: Ordinance No. 3067

Exhibit B: Superior Court Ruling

EXHIBIT A

ORDINANCE NO. 3067

AN ORDINANCE of the City Council of the City of Puyallup, Washington, amending Sections 20.46.000 and 20.46.005 of the Puyallup Municipal Code, and adding new sections 20.46.016 and 20.46.017 to the Puyallup Municipal Code, and amending the City Zoning Map to apply the existing Shaw-East Pioneer Overlay (SPO) to new parcels, located in the general vicinity of Shaw Road and E. Pioneer in the City of Puyallup.

Whereas, as part of the 2008 annual Comprehensive Plan Amendments, formally adopted by City Council in 2009, the Shaw-East Pioneer Overlay Zone (SPO Zone) was created and codified in Chapter 20.46 of the Puyallup Municipal Code;

Whereas, the SPO Zone presently applies to property south of E. Pioneer near the E. Pioneer and Shaw Road intersection;

Whereas, the City's Planning Commission and City Council considered the E. Pioneer/Shaw Road area as a "gateway" to the City and wanted to create additional performance standards to supplement the existing zoning standards to accomplish the following goals: 1) encourage quality development while still allowing flexibility and creativity; 2) create a walkable, safe, and pedestrian friendly community; and 3) use low- impact development principles;

Whereas, at the time the SPO Zone was adopted by City Council, the area commonly known as the "Van Lierop et al., Annexation Area" (Van Lierop Annexation Area) had not yet been annexed into the City;

Whereas, as provided in Puyallup Municipal Code 20.46.005, City Council's intent in adopting the SPO Zone was to expand the SPO Zone into the Van Lierop Annexation Area upon such area being annexed by the City;

Whereas, the City Council, on January 28, 2014 approved a motion directing City staff and the Planning Commission to consider options for the potential expansion of the SPO Zone into the aforementioned annexation area, as originally intended;

Whereas, the Planning Commission held study sessions on this topic on March 12, 2014 and April 9, 2014, culminating in a public hearing on April 23, 2014, considering both potential text amendments to Section 20.46 of the Puyallup Municipal Code and map amendments to the City Zoning Map pertaining to the SPO Zone;

Whereas, City Council held a meeting on May 6, 2014 and gave direction on an ordinance to implement a new ML-SPO portion of Sec. 20.46, applying said new standards to Limited Manufacturing-zoned parcels north of East Pioneer Way. This ordinance would be

supported by policies within the Comprehensive Plan Community Character Element which prioritize quality perimeter landscaping, street buffering and architectural design features for industrial development;

Whereas, applicable findings as contained in Puyallup Municipal Code Sections 20.90.015 and 20.91.010 can be made for the map and text amendments as contained within this ordinance. In addition, the required SEPA Determination has been made for the amendments contained within this ordinance; and

Whereas, the Community Character Element of the City of Puyallup Comprehensive Plan governs design concepts and the character of industrial, manufacturing and warehousing areas as follows:

- Insofar as industrial development is concerned, it is important that industrial development be complementary to and compatible with the overall character of the community. Streetscape appearance is of particular interest especially in areas along community entrances. In addition, the City must: seek to assure the development of industrial uses which complement and contribute positively to the character of the community; and be mindful of local context and community identity; and encourage pleasing architectural design and scale of industrial buildings; and require ornamented buildings through a choice of architectural design techniques and landscaping measures; and require parking areas to be located to the interior of industrial developments and buffered by buildings or landscaping; and require landscape plantings including trees to be provided around the perimeter and within the interior of industrial visitor/employee parking lots to provide visual screening, for climate control, and to visually break up expansive paved areas; and
- Insofar as light manufacturing and warehousing developments are concerned, Streetscape appearance is a prime concern motivating screening requirements. Thus, landscaping must be required along street frontages of light manufacturing and business/research park developments. And, loading docks, waste facilities, outdoor storage areas, and other service areas in light manufacturing and warehousing developments shall be sited and screened so as to not be visually prominent from streets; and
- Insofar as manufacturing and warehousing uses are concerned, there should be buffering along street frontages to screen parking areas. Perimeter landscaping would consist of either preserved native vegetation or new landscaping, including trees. Loading docks, waste facilities, and other service areas would be located or landscaped so as to not be visually prominent from the street.

NOW THEREFORE, the City Council of the City of Puyallup ordains as follows:

Section 1. Section 20.46.000 of the Puyallup Municipal Code is hereby amended to read as follows:

The following SPO Shaw-East Pioneer overlay zones are established. Properties so designated shall be subject to the provisions contained in this chapter:

CB-SPO Community business, Shaw-East Pioneer overlay zone

CG-SPO General commercial, Shaw-East Pioneer overlay zone

ML-SPO Limited manufacturing, Shaw-East Pioneer overlay zone

Section 2. Section 20.46.005 of the Puyallup Municipal Code is hereby amended to read as follows:

The SPO zone is intended to apply to ~~these properties~~ parcels with specific zoning ~~within~~ in the vicinity of the Shaw-East Pioneer ~~neighborhood plan~~ area. As an overlay zone, it establishes standards to supplement base zoning standards in this area, either on an area-wide basis or ~~per~~ in conjunction with an underlying zone district. Consistent with the city's zoning map, the SPO zoning shall apply only to specific parcels that are zoned business commercial and general commercial on the south side of East Pioneer in the vicinity of Shaw Road, ~~until the SPO is expanded to address areas~~ as well as to parcels that are zoned limited manufacturing on the north side of East Pioneer ~~upon annexation of said areas as well as specific parcels on the north side of East Pioneer~~ in the vicinity of Shaw Road.

In addition to zone-specific standards as cited herein, the general intent of this overlay zone as applied is to accomplish the following:

(1) To encourage quality development within a framework of neighborhood consistency while still allowing flexibility and creativity;

(2) To provide streetscape standards that create a walkable, safe, pedestrian-friendly community; and

(3) To encourage the use of LID principles, techniques and practices.

Section 3. A new section entitled "20.46.016 Permitted uses and conditionally permitted uses – ML-SPO zone" is added to Chapter 20.46 of the Puyallup Municipal Code to read as follows:

The underlying ML zone regulations that govern uses shall apply to properties in the ML-SPO overlay zone, with the following additional use standards: Outdoor storage uses, such as equipment, material, junk, scrap or vehicle storage areas, shall be allowed only if such areas are thoroughly obscured from off-site vantage points, which have the same,

similar or lower elevation as the storage area, by locating such storage area behind street facing buildings or other structures, including walls, or vegetation with sufficient growth. In addition, outdoor storage uses shall be partially obscured from off-site vantage points, which have higher elevations than such storage areas, by on-site structures or vegetation with sufficient growth. Any building area containing loading docks, or parking or impound areas used for equipment or vehicle storage, shall be considered outdoor storage uses for purposes of this section.

Section 4. A new section entitled "20.46.017 Property development and performance standards – ML-SPO zone" is added to Chapter 20.46 of the Puyallup Municipal Code to read as follows:

The following development and performance standards shall apply to properties located in the ML-SPO zone in addition to the development and performance standards specified for the underlying zone:

(1) Setbacks/Building Orientation. A 25-foot setback shall be established on all non-street frontage perimeters and the setback area shall be landscaped with vegetation that provides screening, specifically, Type II or Type III perimeter buffer types from the City's Vegetative Management Standards, or functional equivalent. Loading docks or bays shall be oriented in a manner that has the least visual impact from frontage streets and surrounding off-site vantage points, which have the same or similar elevation as the docks or bays, and typically should be oriented toward the interior of the site.

(2) Landscape Area/Open Space/Pedestrian. Streetscape landscaping and sidewalks along street frontage shall be implemented from the curb in the following order: planting or planter strip, sidewalk and then landscape buffer. The planting strip shall be no less than 10 feet wide; the sidewalk shall be no less than 8 feet wide; the landscape buffer shall be no less than 25 feet wide and shall be landscaped with vegetation that provides screening, specifically, Type II or Type III perimeter buffer types from the City's Vegetative Management Standards, or functional equivalent. The area immediately adjacent to the exterior of buildings or other structures shall be landscaped in accordance with PMC 20.58 and PMC 20.26.400. In addition to the foregoing, a minimum of 20% of the project site shall be landscaped or occupied by vegetation, and such landscaping or vegetation areas shall be distributed across the site. The following items when on-site, i.e., permeable sidewalks, vegetation roofs, swales, rain gardens, and stormwater ponds may be included as part of the 20% area. The site shall be integrated with and connected to adjacent area trails and street sidewalks.

(3) Design Standards. Projects shall meet industrial design standards of PMC 20.26.400. In addition, all building architectural plans shall demonstrate the use of additional measures to break-up the appearance of large building walls (i.e. walls with a façade length greater than 100 feet and height exceeding 24') through usage of modulation, articulation, façade material changes, glazing, etc.; long rooflines (i.e. exceeding 100 linear feet) through roofline plane modulation, creative parapet design or other treatment;

and building entrance/corners through use of creative design features such as different building massing, façade material changes, roofline/canopy features, glazing, etc.

(4) Building Size. Underlying zoning standards as to lot coverage and floor area ratios shall apply. However, an individual building footprint shall not exceed 125,000 square feet in size.

(5) Signs. Underlying zoning standards as to signage shall apply, with the additional requirements that all freestanding signage shall be of a monument style and that no electronic display signs are permitted.

(6) Low Impact Development/Green Buildings. Low impact development principles, practices or techniques for stormwater management, such as implementation of swales, rain gardens, permeable surfaces, and vegetative roofs, are the preferred method for storm water management, and should be implemented where feasible to minimize pollutant loadings into adjacent rivers and streams. LEED/Green Built projects are encouraged.

Section 5. The official Zoning Map of the City of Puyallup is hereby amended to include expansion of the SPO Zone to new parcels as show on Exhibit A of this ordinance.

Section 6. **Effective Date.** This Ordinance shall take effect and be in force five (5) days after final passage and publication, as provided by law.

Section 7. **Severability – Construction.** If a section, subsection, paragraph, sentence, clause, or phrase of this ordinance is declared unconstitutional or invalid for any reason by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance unless the invalidity destroys the purpose and intent of this ordinance. If the provisions of this ordinance are found to be inconsistent with other provisions of the Puyallup Municipal Code, this ordinance is deemed to control.

Passed and approved by City Council of the City of Puyallup at an open public meeting on the 28th day of May, 2014.

John Hopkins
Deputy Mayor

Approved as to form:

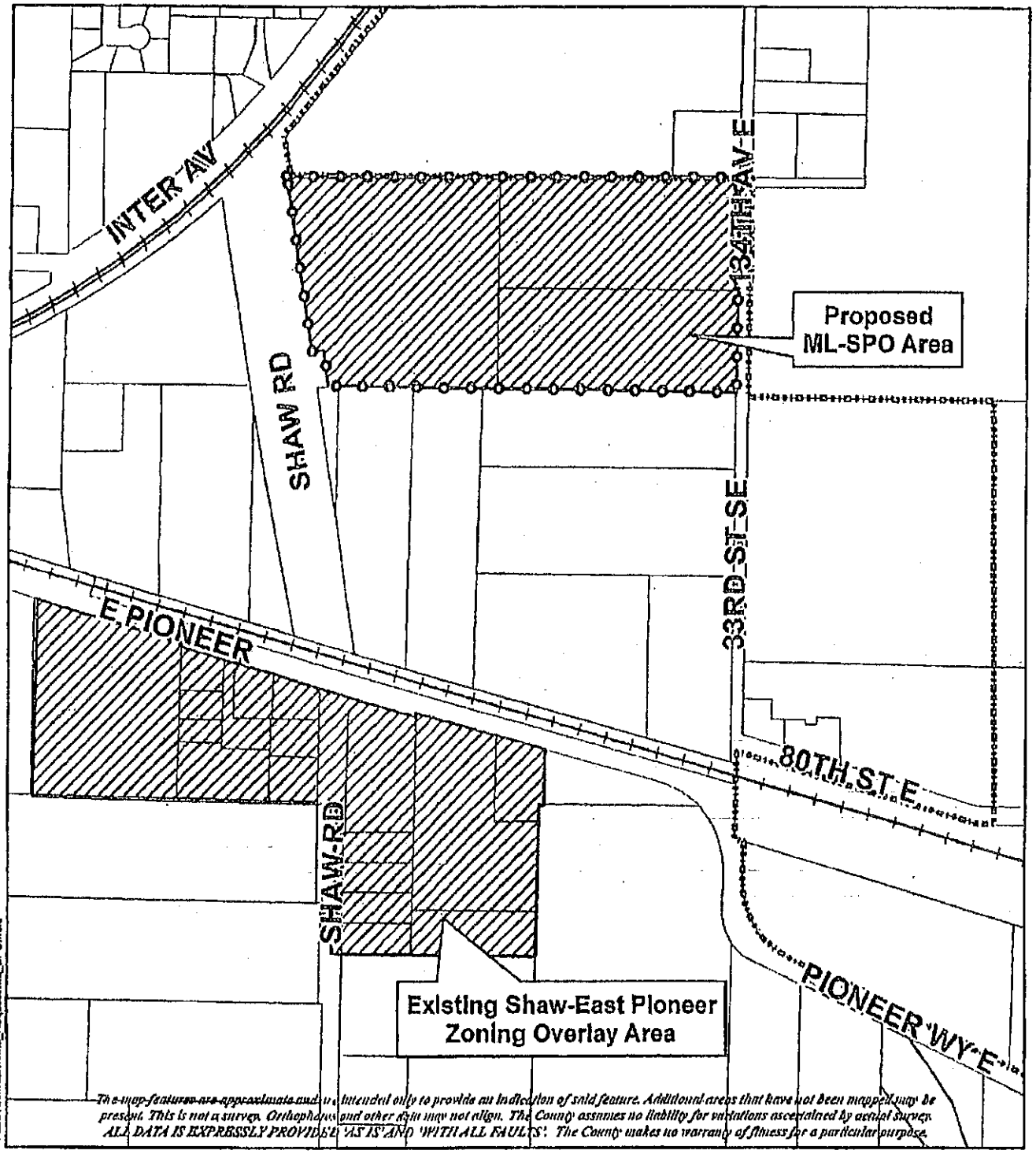
Kevin Yamamoto
City Attorney

Attest:

Brenda Arline
City Clerk

Published: May 30, 2014
Effective: June 4, 2014

Ordinance Exhibit - New ML-SPO Area



City of Puyallup
Development Services
Department
Planning Division

May 14, 2014

Proposed ML-SPO Area

Shaw-East Pioneer Zoning Overlay

Puyallup City Limit

Tax Parcels

Streets

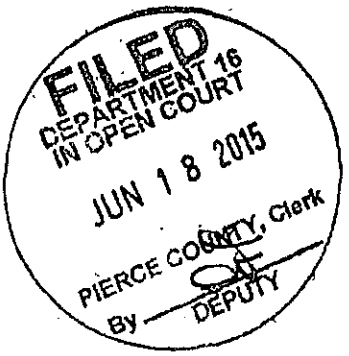
Railroad

N

0 250 500
Feet

EXHIBIT B

SUPERIOR COURT
OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY



ELIZABETH MARTIN, JUDGE
DEA FINIGAN, Judicial Assistant
Department 16
(253) 798-6630

334 COUNTY-CITY BUILDING
930 TACOMA AVENUE SOUTH
TACOMA, WA 98402-2108

June 18, 2015

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PO BOX 488
317 S MERIDIAN
PUYALLUP, WA 98371-5913

STEVEN M KIRKELIE
333 S MERIDIAN
PUYALLUP, WA 98371-5904

RE: SCHNITZER WEST LLC vs. CITY OF PUYALLUP
Pierce County Cause No. 14-2-09650-5

Dear Counsel:

This letter will set forth the court's ruling in the above-referenced matter regarding City of Puyallup Ordinance No. 3067 following oral argument on the Petitioner's LUPA appeal held May 27, 2015. Subsequent to that hearing, in compliance with this Court's oral request, the parties submitted supplemental briefing and the petitioners provided to this court a transcript of all proceedings related to the Ordinance.

My decision is based on all briefing of the parties, the exhibits in the file, my review of the relevant statutory and case authority, the oral arguments of counsel at both the April 16, 2015 motion to dismiss hearing and at the hearing on the merits of May 27, 2015, my review of the transcript of proceedings filed on June 8, 2015 and on the supplemental briefing of the parties regarding the GMHB decision in *Bridgeport Way Community Ass'n*, CPSGMHS Case No. 04-3-0003 (FDO July 14, 2004), submitted after the oral argument.

As set forth more fully below, I find the Ordinance to be an unlawful site-specific rezone and therefore declare Ordinance No. 3067 to be INVALID as a matter of law.

1. This Court has jurisdiction over the appeal under RCW 36.70C.020(2)

At the outset, I affirm my previous ruling regarding this court's jurisdiction under LUPA, RCW Ch. 36.70C, based on my determination that Ordinance No. 3067 constitutes a site-specific rezone and is therefore a land use decision quasi-judicial in nature rather than purely legislative and therefore reviewable under LUPA. (See Court's Order Denying Motion to Dismiss, dated April 17, 2015). Although the City urged at oral argument on the merits that this court essentially reconsider its prior ruling on the City's motion to dismiss, I decline to do so.

With regard to the *Bridgeport Way Community* decision urged by the City at oral argument, to the extent it has any precedential effect on this court, I do not find it persuasive. I find that the ordinance at issue here was clearly directed at a specific site, with one common owner, that it was not part of an amendment to the City's Comprehensive Plan and did not constitute an area-wide rezone. The ordinance at issue in this case is therefore different than that presented in the Bridgeport Way case.

Moreover, the position urged by the City is inconsistent with case law (which post-dates the Bridgeport Way decision) which holds that a zoning amendment to a specific property, done without corresponding amendment to the Comprehensive plan, was a quasi-judicial decision subject to review under LUPA. See e.g., *Feil v. Eastern Washington Growth Management Hearings Board*, 172 Wn. 2d 367, 259 P.3d 227 92011); *Wenatchee Sportsman v. Chelan County*, 141 Wn. 2d 169, 178, 4 P.3d 123 (2000). *See also Woods v. Kittitas County*, 162 Wn. 2d 597, 610, 174 P.3d 25 (2007).

In order to prevail in this appeal, the Petition must establish that one of the standards set forth in RCW 36.70C.130(1) has been met. My findings in that regard are

2. The City of Puyallup engaged in unlawful procedure or failed to follow a prescribed process, which was not harmless in violation of RCW 36.70C.130(1)(a).

I agree with Petitioner that the City Council's adoption of the Ordinance at issue violated its own procedures for rezone decisions outlined in PMC Chapter 20.90. Specifically, I find the following deficiencies:

a. There was no open record hearing before the City's hearing examiner pursuant to Chapter 20.12 PMC. See PMC 20.90.025.

b. There was no hearing examiner decision outlining the proposed rezone's compliance with the required findings in PMC 20.90.010.

c. There were no written findings and conclusions in compliance with PMC 20.90.015.

It appears to this court that even though the Planning Commission recommended NOT adopting the proposed Shaw-Pioneer overlay to properties on the north side of Pioneer, the Council drafted an ordinance specifically to do just that solely for this property without going through its normal procedures for a site-specific rezone. Thus, it cannot

fairly be categorized as an area-wide rezone, which would have allowed consideration by the City Council in its legislative capacity.

3. **The Ordinance at issue was aimed directly and solely at the Van Lierop Property which Schnitzer was intending to develop and therefore constitutes a discriminatory spot zone in violation of RCW 36.70C.130(1).**

A review of the entire record in this matter makes clear that the issue of development on the property in question, known locally as the "Van Lierop property", site of a former daffodil bulb farm owned by the Van Lierop family, has been highly controversial within Puyallup and the subject of much debate within the City Council. After an annexation which brought the subject property within the City limits in 2012, the Petitioner, Schnitzer West entered into a Purchase and Sale Agreement with the Van Lierops to purchase the property. At that time, the property was zoned and designated for industrial and business uses with multiple zoning classifications within the City's Comprehensive Plan.

In November 2013, the City Council approved a requested Comprehensive Plan amendment and rezone via Ordinance No. 3052 which allowed all the parcels within the Van Lierop property to have the same zoning converting the property to a Light Manufacturing Warehouse ("LM/W") Comprehensive Plan designation and Limited Manufacturing "ML" zoning designation.

On January 7, 2014, apparently after a new City Council election, the City Council entertained an emergency development moratorium aimed specifically at the Van Lierop property. The comments reflected in the transcript of that meeting make clear that stopping development on this particular property was the goal of the proponents of the moratorium. In response to the proposed moratorium, Schnitzer submitted a short plat application which vested their proposed project under existing land use regulations.

The Ordinance at issue was adopted at a special meeting of the Puyallup City Council on May 28, 3014 with 4 out of 7 Council members present and with no opportunity for public comment. The Ordinance has its first reading at the Council meeting on May 20, 2014 and was referred on to a final reading at the special meeting by a 4-3 vote. Prior to the May 20th meeting, the Planning Commission met to discuss the broader issue of an overlay to several parcels with 3 different zoning categories on the North side of Shaw Rd (the Shaw-Pioneer Overlay). By a 5-2 vote, the Planning Commission at its April 23, 2014 meeting voted NOT to recommend any changes to any of the properties in the Shaw-Pioneer Overlay, including the Van Lierop/Schnitzer West property.

A draft ordinance, which eventually became the ordinance at issue here, was referenced at the next City Council meeting on May 6, 2014, and clearly relates solely to the ML-zoned Van Lierop property. Of significance is the fact that the ordinance reduces the size of a building that may be constructed on that particular ML-zoned property from approximately 450,000 sq ft to only 125,000 sq ft.

The Washington Supreme Court has repeatedly held that spot zoning is "arbitrary, capricious and unreasonable" and should be universally condemned. *Smith v. Skagit County*, 75 Wn. 2d 715, 745, 453 P.2d 832 (1969). The City argues that those cases involving spot zoning all involve situations in which a City Council rezones a parcel to

make it inconsistent with surrounding zoning for the benefit of the landowner to the detriment of the public.

In this case, the redefinition of the ML zoning designation for this parcel was to the detriment of the landowner for the purported benefit of the public. Although I understand the desire of certain members of the City Council to carry out what they believed to be the wishes of their constituents to preserve beautiful agricultural land or at least prevent development of large warehouse structures, I cannot find case law which directly limits application of the spot-zoning line of cases solely to those situations in which the alleged spot zone favors the landowner.

Similarly, the fact that the zoning classification itself, ML, did not change as a result of the Ordinance does not change the analysis, as the Ordinance creates an overlay which significantly reduces the type of development that can take place on that particularly ML-zoned property and that reduction does not apply to any other similarly ML-zoned property within the City, based on the record before the court.

Therefore, I find that the ordinance in question constitutes an discriminatory and therefore illegal spot zone and for that reason is invalid.

4. The Ordinance at issue violates the Appearance of Fairness Doctrine.

The appearance of fairness doctrine was judicially established to ensure fair hearings by legislative bodies when acting in a quasi-judicial capacity. *Smith v. Skagit County, supra.* This doctrine requires that public hearings which are adjudicatory in nature meet two requirements: the hearing must be procedurally fair and it must be conducted by impartial decision-makers. *Buell v. Bremerton*, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972). The doctrine applies to all hearings which either amend existing zoning codes or reclassify particular land under the code. *Fleming v. Tacoma,* 82 Wn. 2d 292, 299, 502 P.2d 327 91972). RCW 42.36.010 codifies the appearance of fairness doctrine and makes clear that it applies to local land use decisions of a quasi-judicial nature made by local decision-making bodies, which would include the City Council.

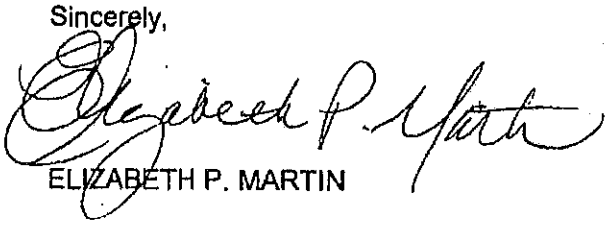
I find that the doctrine applied to the decision of the Council in adopting Ordinance No. 3067 and further that it was violated. There was no effort, as reflected in the transcript of the May 28, 2014 City Council meeting, to determine the nature and extent of any *ex parte* contacts nor any assurance as to whether the City Council members present could consider the matter impartially. At the very least, comments surrounding the moratorium passed on January 7, 2014 and comments at subsequent meetings relating to this property raise an issue as to impartiality on this issue.

To be fair, the Council throughout this matter considered itself to be acting in a legislative capacity, which would not trigger application of this doctrine, but this court, having found that the Ordinance qualifies as a quasi-judicial action involving a site-specific rezone, must also find that the Appearance of Fairness Doctrine applies and was not followed.

Having determined that Ordinance No. 3067 was invalid for the reasons set forth above, this Court need not address the Petitioner's argument that the Ordinance also violated the State Environmental Policy Act (SEPA) and therefore does not address that issue.

The Petitioners are requested to prepare appropriate findings of fact and conclusions of law for signature by the Court. I have scheduled presentation for Friday, July 17, 2014 at 9 a.m. If that date and time do not work for counsel, please contact my judicial assistant, Dea Finigan for an alternate date.

Sincerely,



ELIZABETH P. MARTIN

cc: Pierce County Clerk for filing

FILED
COURT OF APPEALS
DIVISION II

2015 DEC -7 PM 7:27

STATE OF WASHINGTON

BY_____
DEPUTY

No. 47900-1-II

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.

PROOF OF SERVICE

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Courtney E. Flora, WSBA #29847
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I, LAURA COUNLEY, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am employed with McCullough Hill Leary, PS, attorneys for Schnitzer West, Respondent. On the date indicated below, I caused a copy of **RESPONDENT'S OPENING BRIEF** and this **PROOF OF SERVICE** to be served via Washington Legal Messenger with a courtesy copy via electronic mail on the following parties:

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DATED this 7th day of December, 2015, at Seattle, Washington.

LAURA COUNLEY