

No. 94005-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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

SCHNITZER WEST, LLC, a Washington limited liability
company,

Respondent,

v.

CITY OF PUYALLUP, a Washington municipal corp,

Appellant,

and

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

Additional Parties.

APPELLANT CITY OF PUYALLUP'S ANSWER TO BRIEFS
OF AMICUS CURIAE BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON AND WASHINGTON
STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

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I. INTRODUCTION

Appellant City of Puyallup hereby answers the *amicus curiae* briefs filed in the above-captioned matter by the Building Industry Association of Washington (BIAW) and the Washington State Association of Municipal Attorneys (WSAMA), respectively. The briefs of these two *amici* present the Court with a study in contrast. The WSAMA submittal accurately describes Washington’s longstanding jurisdictional framework for local land use challenges and explains why the Court of Appeals’ decision below is entirely consistent with—indeed, compelled by—this unambiguous body of law. BIAW’s brief disregards controlling legal standards, invites this Court to improperly legislate from the bench, and ultimately recycles the same arguments that were properly rejected by the Court of Appeals. WSAMA’s brief further supports the Court of Appeals’ holding that the City of Puyallup ordinance challenged in this case is not a “land use decision” under the Land Use Petition Act, a conclusion that should be affirmed by this Court.

II. ARGUMENT

2.1 Response to WSAMA *Amicus* Brief.

The City concurs with and joins in the arguments set forth in WSAMA’s *amicus* brief.

2.2 Response to BIAW *Amicus* Brief.

2.2.1 Legislatively-Initiated Zoning Ordinances Are Not Site-Specific Rezones.

“A site-specific rezone occurs when there are specific parties requesting a classification change for a specific tract.” *Woods v. Kittitas County*, 162 Wn.2d 597, 611 n.7, 174 P.3d 25 (2007) (citing *Cathcart–Maltby–Clearview Cmty. Council v. Snohomish County*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981)) (internal punctuation omitted). Contrary to BIAW’s chief contention, the Court of Appeals did not elevate form over substance by rejecting Schnitzer West’s proffered characterization of Ordinance No. 3067 as a site-specific rezone under this standard. BIAW Amicus Brief at 1. The *Schnitzer* Court instead merely acknowledged and applied the longstanding Washington definition of that term—a definition that is unequivocally predicated upon a “request” by “specific parties” for the underlying zoning action. *Schnitzer West, LLC v. City of Puyallup*, 196 Wn. App. 434, 441-44, 382 P.3d 744 (2016). This legal standard has endured unchanged for several decades, *see, e.g., Cathcart-Maltby*, 96 Wn.2d at 2012, and it controls the outcome of the instant case: City of Puyallup Ordinance No. 3067 cannot be a site-specific rezone because it did not result from any specific party’s request.

For this reason, BIAW’s assertion that “a site-specific rezone is such, regardless of how it comes into being” is simply erroneous. BIAW Amicus

Brief at 4. How a site-specific rezone originates, and at whose request, is a defining characteristic of the act itself as a matter of law. *See Woods*, 162 Wn.2d at 611 n.7. BIAW’s “looks like a duck, swims like a duck” metaphor accordingly misses the mark. BIAW Amicus Brief at 1. A site-specific rezone (the “duck” in this instance) is a legal term of art comprised of three constituent elements, each of which must be satisfied. *Woods*, 162 Wn.2d at 611 n.7. A request from a specific party is as integral and fundamental to this standard as the underlying property reclassification and the “specific tract” criteria. *Id.*

Like Schnitzer, BIAW is unable to cite any Washington precedent or statute purporting to modify this standard or otherwise recognizing a site-specific rezone where, as here, a local zoning action is self-initiated by a municipality’s governing body. No such authority exists. Although LUPA’s statutory framework contains an undefined reference to “site-specific rezones”, *see* RCW 36.70C.020(2)(a), RCW 36.70B.020(4), BIAW is incorrect as a matter of law in asserting that the Legislature omitted a definition of this term “only because it is self-explanatory.” BIAW Amicus Brief at 4-5. To the contrary, the Legislature was presumptively cognizant of the term’s pre-existing common law definition—including the requirement that site-specific rezones must be “requested” by “specific parties”. *See, e.g.,*

Price v. Kitsap Transit, 125 Wn.2d 456, 463, 886 P.2d 556 (1994) (“[t]he Legislature is presumed to know the existing state of the case law in those areas in which it is legislating”). If the Legislature had intended to alter this longstanding common law standard, it could easily have done so by codifying a different one.¹

2.2.2 LUPA Jurisdiction Is Predicated Upon a Party’s Formal Application.

Even if there was any legitimate dispute about the “requested by specific parties” criterion for site-specific rezones under Washington’s common law, RCW 36.70C.020(2)(a) resolves the question definitively for purposes of LUPA jurisdiction. The statute unambiguously defines a “land use decision” as a local government’s final determination on an “application” for a project permit. While some site-specific rezones are project permits in the same manner as binding site plans, subdivisions, building permits, conditional use permits, etc., *see* RCW 36.70B.020(4), Chapter 36.70C RCW clarifies that each of these land use actions are subject to LUPA jurisdiction only where a development applicant has submitted a formal application to the municipality. RCW 36.70C.020(2)(a); RCW 36.70C.030. Washington’s

¹ Separately, Ordinance No. 3067 is also not a site-specific rezone because its scope affects multiple lots and is not confined to “a single tract.” *Schnitzer*, 196 Wn. App. at 436-37 (emphasis added); *Woods*, 162 Wn.2d at 611 n.7.

common law “requested by specific parties” requirement for site-specific rezones has been codified in this manner since the enactment of LUPA over twenty years ago. *See* Laws of 1995, Regular Sess., ch. 347, § 703.

BIAW does not, and cannot, meaningfully address LUPA’s application requirement, and its *amicus* arguments essentially ask the Court to ignore this express statutory term. BIAW Amicus Brief at 5-6. This Court, however, does not rewrite statutes by deleting words that were chosen with presumptive deliberation by the Legislature. *See, e.g., In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 69, 109 P.3d 405 (2005); *Aviation West Corp. v. Dept. of Labor & Indus.*, 138 Wn.2d 413, 421, 980 P.2d 701 (1999). Instead, basic principles of construction require the Court to interpret statutes in a manner that gives effect to all terms. *City of Seattle v. Fuller*, 177 Wn.2d 263, 269, 300 P.3d 340 (2013). BIAW’s proffered interpretation openly violates this rule.

2.2.3 The Jurisdictional Analysis Is Unchanged by the Fact that Legislatively-Initiated Zoning Actions Can Implicate the Same Substantive Result as Applicant-Initiated Zoning Actions.

Notwithstanding that an applicant’s specific request is required for a site-specific rezone under both the common law and Chapter 36.70C RCW, BIAW nevertheless contends that legislatively-initiated zoning actions *should* be subject to LUPA jurisdiction because they implicate the same outcome

(i.e., a zoning reclassification of the subject land) as applicant-initiated ones. BIAW Amicus Brief at 5-7. In BIAW’s view, excluding the former category of local zoning actions from LUPA’s review authority creates an “arbitrary inequity” that unfairly hinders landowner claims against the municipality. *Id.*

This argument is without merit. The jurisdictional divide established by Chapter 36.70C RCW reflects a clear policy determination by the Legislature that only project-specific, applicant-initiated land use actions will be subject to LUPA review. This is inherent in LUPA’s definition of “land use decision”, *see* RCW 36.70C.020(2)(a), as well as the various categories of development permits which are cross-referenced by that statute. *See* RCW 36.70B.020(4). Equally telling are the types of governmentally-generated actions that are recognized as “land use decisions” by Chapter 36.70C RCW—i.e., zoning interpretations, *see* RCW 36.70C.020(2)(b), and code enforcement actions. *See* RCW 36.70C.020(2)(c). Clearly the Legislature knows how to designate certain municipality-initiated local land use matters as falling within LUPA’s jurisdiction. It has simply chosen not to do so in the context relevant to this appeal.

BIAW’s attempted characterization of municipality-initiated zoning actions as “adjudicative” is likewise erroneous. BIAW Amicus Brief at 6. A local government acts in an adjudicative role only when there is actually

something (i.e., a specific development proposal) to adjudicate in the first instance. Without a landowner's permit application to this effect, a municipality does not, and cannot, adjudicate anything. Instead, where a local governing body adopts a zoning ordinance containing new or different development regulations, it acts in its legislative capacity—i.e., it establishes new standards that will prospectively govern all *unspecified* future development on the affected property. See *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244-45, 821 P.2d 1204 (1992) (citation omitted).² City of Puyallup Ordinance No. 3067 reflects this approach, as the ordinance does not reference or otherwise purport to pass judgment upon any specific development proposal whatsoever. CP 205-11. There is no “adjudication” under such circumstances, even where the enactment may in practice affect only a few parcels or individuals. See, e.g., *Raynes*, 118 Wn.2d at 241, 247-49. Legislative actions of this type are categorically excluded from LUPA jurisdiction. See RCW 36.70C.020(2)(a); *Stafne v. Snohomish County*, 174 Wn.2d 24, 33, 271 P.3d 868 (2012).

2.2.4 Schnitzer's Challenge to Ordinance No. 3067 Falls Within the GMHB's Subject Matter Jurisdiction.

² Development regulations are expressly excluded from the statutory definition of a project permit, see RCW 36.70B.020(4), and are thus beyond LUPA's jurisdiction. RCW 36.70C.020(2)(a).

The Growth Management Hearings Board has jurisdiction over challenges to local development regulations of the type contained in Ordinance No. 3067. RCW 36.70A.280(1)(a). LUPA jurisdiction does not extend to matters that are within the GMHB's purview. RCW 36.70C.030; *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 177-78, 4 P.3d 123 (2000). This is precisely why Schnitzer's separate challenge to Ordinance No. 3067 is currently—and correctly—pending before the GMHB.

To the limited (and rare) extent that a particular landowner's claims arising out of a legislatively-enacted zoning code amendment do not fall within the scope of the GMHB's review authority, the applicable avenue of challenge is through a constitutional writ proceeding. *See* Const. art. IV, §6; *Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn. 2d 756, 769, 261 P.3ed 145 (2011) (citation omitted) *Coballes v. Spokane Cty.*, 167 Wn. App. 857, 866–67, 274 P.3d 1102 (2012). Irrespective, and regardless of the appropriate venue for such claims, the salient point for purposes of the instant case is that they are not appealable under LUPA.

Although BIAW objects to the “arbitrary inequity” resulting from this well-established jurisdictional framework, *see* BIAW Amicus Brief at 6, its arguments are appropriately directed to the Legislature rather than to the Court. Again, this Court does not legislate from the bench by rewriting

unambiguous statutes, and it cannot expand LUPA's strictly limited jurisdiction by altering the statutory definition of a land use decision. *See, e.g., Durland v. San Juan County*, 182 Wn.2d 55, 64, 340 P.3d 191 (2014); *Stafne*, 174 Wn.2d at 34.

III. CONCLUSION

The arguments asserted by *amicus curiae* BIAW are unpersuasive and do not support reversal of the Court of Appeals' decision in the above-captioned matter. For the reasons set forth in the City's own appellate briefing and in the *amicus* brief submitted by WSAMA, the Court of Appeals' decision should be affirmed by this Court.

RESPECTFULLY SUBMITTED this 31st day of May, 2017.

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By /s/ J. Zachary Lell
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I certify that on the date below, I e-filed this document with the Supreme Court at Supreme@courts.wa.gov, and provided copies of the foregoing upon the following counsel:

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