NO. 62167-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PHOENIX DEVELOPMENT, INC., a Washington Corporation, and G&S SUNDQUIST THIRD FAMILY LIMITED PARTNERSHIP, a Washington limited partnership,
Appellants,

v.

CITY OF WOODINVILLE, a Washington Municipal Corporation, and CONCERNED NEIGHBORS OF WELLINGTON, a Washington Nonprofit Corporation,
Respondents.

APPELLANTS' ANSWER TO MOTIONS FOR RECONSIDERATION

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IDENTITY OF ANSWERING PARTY

Appellants Phoenix Development, Inc., and G&S Sundquist Third Family Limited Partnership ("Phoenix") answer the motions for reconsideration submitted by Respondents City of Woodinville ("City") and Concerned Neighbors of Wellington ("CNW").

STATEMENT OF RELIEF SOUGHT

On December 9, 2009, the Court issued two orders directing Phoenix to file answers to the motions for reconsideration filed by the City and CNW, respectively. This pleading complies with those orders.

The Court should deny the motions for reconsideration. Neither the City nor CNW has identified any valid reason for the Court to revisit its decision.

The City and CNW make six arguments: (1) the Council is entitled to make legislative findings, because in a rezone decision it is acting in a legislative capacity; (2) WMC 21.04.080 affords the City the discretion to deny the Wood Trails and Montevallo rezones; (3) Phoenix failed to show a demonstrated need for the proposed rezones; (4) the proposed rezones are inconsistent with the City's comprehensive plan; (5) the rezones are incompatible with the uses and zoning of surrounding properties; and (6) the Phoenix properties are environmentally constrained.

All of these arguments have already been advocated by the City and CNW in their Briefs, and were rejected by the Court in its Decision. These arguments have no merit, and should be rejected on reconsideration for the same reason that they were rejected in the Decision.

First, it is clear that the Council in this case was acting quasi-judicially. Accordingly, the Council is precluded from making legislative findings.

Second, WMC 21.04.080 states that "developments with densities less than R-4 are allowed only if adequate services cannot be provided..." The Court properly held that so long as all other rezone criteria are met, Phoenix is entitled to a rezone to a minimum of R-4 density.

Third, Phoenix showed ample need for the proposed rezones. A full thirty percent of the City is zoned R-1. A mere 2.7 percent of the City is available for development at R-4 density. The City's own policies mandate R-4 development when adequate services can be provided.

Fourth, the record demonstrates that the proposed rezones are consistent with the City's comprehensive plan. The Council failed to identify any portion of the plan with which the rezones were inconsistent.

Fifth, the record shows that the Phoenix proposed R-4 rezones, which allow single family low density uses, are compatible with the uses

and zoning of the surrounding R-1 zoned properties, which are also single family low density uses.

Finally, the record fully supports the conclusion of the City's Sustainable Development Study that there are no environmental constraints on the Phoenix properties that would preclude development at R-4 densities.

ARGUMENT

Phoenix in this answer will address each of the six City/CNW arguments in turn.

A. In a Site-Specific Rezone Decision, the Council, Acting Quasi-Judicially, is Precluded from Acting Legislatively or Adopting Findings "in its Legislative Capacity."

The Court of Appeals held that the Council's Finding of Fact 6, adopted "in its legislative capacity," was unlawful, because "by invoking its legislative authority midway through the quasi-judicial proceeding, the council adopted a new policy rather than applying existing policies and regulations." Slip Op. at 9-10.

The City in its Motion at 3-4 asks the Court to reconsider this holding, because, the City asserts, "the approval... of a rezone... of a particular parcel of property is a discretionary legislative act," citing *Teed v. King County,* 36 Wn.App. 635, 642-43, 677 P.2d 179 (1984). Accordingly, the City contends, it is entitled to apply "broad legislative

discretion" in deciding whether to approve or disapprove a rezone. In so doing, the City contends, the Council may adopt findings of fact in its legislative capacity.

However, the City's position is untenable. Under currently applicable law, which the City in its Motion neither acknowledges nor seeks to distinguish, a **site-specific** rezone request is a **quasi-judicial** decision that the council must evaluate under the already established legislative criteria, including comprehensive plan policies and other development regulations, which constrain the council's discretion. *Woods v. Kittitas County,* 162 Wn.2d 597, 610, 174 P.3d 25 (2007) ("a site-specific rezone is a project permit, RCW 36.70B.020 (4), and thus a land use decision"); *Wenatchee Sportsmen Ass'n. v. Chelan County*, 141 Wn.2d 169, 179 n.1, 4 P.2d 123 (2000) (challenges to "site-specific rezone should be brought by means of a LUPA petition"); *J.L. Storedahl & Sons, Inc. v. Clark County,* 143 Wn.App. 920, 928-931, 180 P.3d 848 (2008).

Accordingly, the Court properly held that finding of fact 6 "is the product of an unlawful exercise of the council's legislative authority."

B. WMC 21.04.080 Requires the City to Approve an Otherwise Qualified Rezone Application Unless Adequate Services Cannot be Provided.

The Court of Appeals held that "WMC 21.04.080 requires that the City approve an otherwise qualified rezone application unless adequate services cannot be provided." Slip Op. at 25.

The City asks the Court to reconsider this holding. The City contends that this holding "essentially rewrites the Woodinville zoning code," because, the City contends, "the effect of this interpretation is to wholly eliminate any City Council discretion in the rezoning process." City Motion at 5.

The City misrepresents the effect of the Court's holding. The Court's holding acknowledges that, in addition to demonstrating that adequate services can be provided, a rezone applicant must demonstrate that there is a demonstrated need for the rezone, that the proposals are consistent with the comprehensive plan and bear a substantial relationship to the public welfare, that they are consistent and compatible with uses and zoning of the surrounding properties, and that the property is practically and physically suited for the uses allowed in the proposed zone reclassification. Slip Op. at 25-26.

Contrary to the City's contention, the Court did recognize that the Council's quasi-judicial decision on the proposed rezones required it to

exercise discretion. However, that discretion is "constrained" by the City's legislatively established criteria set forth in the comprehensive plan and development regulations. Slip Op. at 9. It is against this constraint that the City chafes. But that constraint is established in the law, and the City is obligated to submit to it. *Woods,* 162 Wn.2d at 613 ("local development regulations ... directly constrain individual land use decisions"); *Storedahl, supra.* As a "project permit," there is no doubt in the law that local government review is governed by the existing development regulations.

> A site-specific rezone authorized by a comprehensive plan is treated as a project permit subject to the provisions of RCW 36.70B RCW. In reviewing a proposed land use project, a local government must determine whether the proposed project is consistent with applicable development regulation ...

Woods, 162 Wn.2d at 613. The Court's decision is consistent with this well-established law and need not be revisited.

The City also asserts that the Court failed to acknowledge the City's Finding of Fact 6(c), which alleged that there was a lack of adequate public facilities and services to support the proposed R-4 development. City Motion at 6. However, to the contrary, the Court specifically addressed that issue. Slip Op. at 16-17. WMC 21.04.080(1)(a) states that R-4 development is required unless adequate

"services" can not be provided. The only inadequate "service" identified in Finding of Fact 6(c) is transportation ("parks" are facilities, not services). The Court reviewed the record with respect to transportation. The record establishes beyond dispute that the additional traffic caused by the projects would cause no "significant impacts to the existing level of service," and that in fact the R-1 development alternative would actually generate more daily traffic on some streets than the proposed action. Slip Op. at 16-17. The Roger Mason testimony, cited by CNW in its Motion at 16-17, was fully rebutted by the City's experts, *see* Appellants Brief at 28-30, and in any event Mr. Mason did not even attempt to argue that the proposals would result in significant impacts to the existing level of service to the properties.

The Court accordingly properly held that WMC 21.04.080 requires the City to approve the proposed rezones, in the event all other City rezone criteria are met, and that the properties are served by adequate public facilities. The Court's holding need not be revisited.

C. There is a Demonstrated Need for the Phoenix Rezones.

The Court of Appeals held that "the city's finding that the proposed rezones are not needed is not supported by evidence that is substantial when viewed in light of the whole record before the court." Slip Op. at 19.

The City asks the Court to reconsider this holding. City Motion at 7-9. However, the City, despite devoting three pages of briefing to this request, cites to **no evidence** in the record that supports the Council's finding. The City's sole argument is that the Court allegedly "deferred" to the decision of the Hearing Examiner, rather than to that of the Council, on this issue. However, the issue is not one of the appropriate entity to whom deference is due. The issue is whether there is substantial evidence, viewing the record as a whole, that supports the Council's finding. Since the City cites to no evidence in support of the Council's finding, the City fails to identify any reason for reconsideration of the Court's holding.

CNW also asks the Court to reconsider this holding. CNW Motion at 18-20. However, CNW also cites to no evidence in the record supporting the Council's finding, with the exception of the reference to the City's having met its GMA housing allocation.

The Court also acknowledged this factor, at p. 18 of its Slip Opinion. However, this single factor does not constitute "evidence that is substantial" to support the Council's holding, in light of the evidence in the record as a whole before the Court, Slip Op. at 18-19, particularly the undisputed fact that thirty percent of the City is zoned R-1, and only 2.7 percent of City land is available for development at R-4 density.

Accordingly, the City and CNW have failed to demonstrate that this holding of the Court should be reconsidered.

D. The Phoenix Proposals Are Consistent with the Comprehensive Plan.

The Court of Appeals held that "the council's findings do not support its conclusion that the proposals are inconsistent with the comprehensive plan," because "the council did not identify any plan goals or policies that were inconsistent with the proposals." Slip Op. at 21.

The City argues that, to the contrary, the Council did refer to several provisions of its comprehensive plan, and therefore the Court's holding should be reconsidered. City Motion at 9-11.

The City refers to six of its findings, and claims that these six findings "*did* identify numerous applicable plan goals and policies that were inconsistent with approval of the rezones." City Motion at 10-11. However, none of the six findings identified in the City's motion refers to a single City comprehensive plan goal or policy with which the Phoenix proposals are arguably inconsistent. See City Motion at 9-11. In the absence of such a reference, there is no basis for reconsideration.

CNW also asks the Court to reconsider its holding on this issue. CNW Motion at 20-23. Yet CNW identifies no comprehensive plan policies with which the proposals are inconsistent. The Phoenix proposals

are fully consistent with each and every one of the policies and goals identified by CNW. See Appellants' Reply Brief at 19-22.

The Phoenix proposals are fully consistent with the comprehensive plan. The Court's holding on this question should not be reconsidered.

E. The Compatibility Criterion is Met.

CNW contends the Court's decision should be reconsidered because the compatibility criterion of WMC 21.44.070 ("the zone classification is consistent and compatible with uses and zoning of the surrounding properties") is not met. CNW Motion at 11-12.

However, the Council did not cite to WMC 21.44.070 as a basis to deny the rezones. Moreover, the City in its Motion for Reconsideration does not cite this provision as a basis for reconsideration.

It is undisputed that the R-4 zone is a single family zone, which has the same single family uses as the surrounding R-1 zone properties. It is also undisputed that the R-4 zone is considered by the City to be a low density residential zone, as are the surrounding R-1 zone properties.

It is for this reason that the City's staff report, EIS, and Hearing Examiner recommendations all agreed that the proposals met this criterion. *See* Appellants' Brief at 46; Appellants Reply Brief at 22-23.. Nor did the City contend that the proposals failed to meet this criterion.

CNW's request that the Court's decision be reconsidered on this basis must accordingly be denied.

F. The Phoenix Properties Are Predominantly Environmentally Unconstrained.

WMC 20.40.080(2)(b) provides that R-4 designations are appropriate on lands "that are predominantly environmentally unconstrained..." Phoenix summarized the evidence in the record on this question in its Appellants' Brief at pp. 33-37, and demonstrated that there is no substantial evidence in the record that would convince an "unprejudiced thinking mind" that environmental constraints would "severely limit" the ability of the Phoenix properties to be developed at R-4 densities. *Bjarnsen v. Kitsap County,* 78 Wn.App. 840, 844-845, 899 P.2d 1290 (1995).

The City has not cited this provision as a basis for the Council decision, nor as a basis for its request for reconsideration. CNW does offer a brief reference to testimony of certain neighborhood opponents to the effect that environmental constraints exist on the property. CNW Motion at 12-13. The City's own Sustainable Development Study, however, rejected that testimony, and concluded that there are no "area-wide environmental constraints" that would preclude development at R-4 densities on the Phoenix properties. This City Study conclusion was

confirmed by the City's EIS consultants, the City's staff report, the testimony of the Project Engineer Ray Coglas, and the Hearing Examiner who heard and weighed the evidence. Appellants' Brief at 33-37.

Even had the Council identified this issue as a basis for rezone denial, which it did not, there is no substantial evidence in the record that would have supported the Council on this point.

The issue of environmental constraints, accordingly, is not a ground for revisiting the Court's decision in this matter.

CONCLUSION

Phoenix respectfully asks the Court to deny the motions for reconsideration.

DATED this 22nd day of December, 2009.

Respectfully submitted,

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