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.

MOTION FOR RECONSIDERATION BY RESPONDENT CONCERNED NEIGHBORS OF WELLINGTON

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Concerned Neighbors of Wellington (CNW), respondent herein.

II. STATEMENT OF RELIEF SOUGHT.

CNW requests that the Court reconsider its decision filed on November 2, 2009 and affirm the decisions of the City of Woodinville and the Superior Court pursuant to RAP 12.4.

III. FACTS RELEVANT TO MOTION.

CNW relies on the administrative record before the Court in making this motion.

IV. GROUNDS FOR RELIEF AND ARGUMENT.

A. Introduction.

For the reasons set forth herein, CNW respectfully submits that the Court overlooked and misapprehended points of law and fact such that the Court should reconsider its decision.

As will be discussed in more detail herein, the Court's decision determined that the City Council of the City of Woodinville erred in declining to adopt rezone requests proposed by the appellant Phoenix Development. In particular the Court concluded that substantial evidence did not support the Council decision and that other errors were made. CNW, an

association of local residents that opposed the rezone, contends that the Court misapprehended the substantial evidence test under LUPA and further that, under the appropriate standard, there was more than substantial evidence to support the decision of the Council.

CNW has also reviewed the motion for reconsideration filed by the City of Woodinville, concurs in the same and incorporates that motion by reference herein.

B. The Substantial Evidence Test Requires Deference to Local Government Decision Makers Which Was Not Afforded by the Decision of the Court.

Under well settled Washington law, the responsibility for rezoning of property lies with local government, not the courts; the courts will not substitute their judgment for local government. *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 99 Wn.App 127, 133-134, 990 P.2d 429 (1999). Our courts have repeatedly said that reversal of local governmental decision making is not appropriate just because the court might have reached a different result on the facts of the case.

Washington caselaw has set foundational rules for rezoning.

First, when challenging a decision under the Land Use

Petition Act, the appellant bears the burden of proof to demonstrate errors under RCW 36.70C.130(1), even if that party prevailed at the Superior Court. *Quality Rock Products, Inc. v. Thurston County*, 139 Wn.App 125, 134, 159 P.3d 1, 5 - 6 (2007).

Second, the Growth Management Act makes clear that

> Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201 (Emphasis supplied). This section has been interpreted to mean that

> Counties and cities are granted broad discretion in planning for growth as long as their comprehensive plans and development regulations comply with the requirements and goals of the GMA. RCW 36.70A.3201.

Stevens County v. Futurewise, 146 Wn.App 493, 508, 192 P.3d 1, 9 (2008). Indeed, the zoning code adopted by the City of Woodinville has never been challenged and thus complies with the terms of the GMA. *Thurston County v. Western Washington Growth Management Hearings Bd.,* 164 Wn.2d 329, 345, 190

P.3d 38 (2008) ("A comprehensive plan is presumed valid upon adoption, RCW 36.70A.320(1), and is conclusively deemed legally compliant if it is not challenged within 60 days.")

Third, there is no vested right to a rezone. See *Teed v. King County,* 36 Wn.App 635, 644, 677 P.2d 179 (1984) ("Vesting, however, does not apply to rezones.")

The corollary to the broad discretion given local government to make zoning decisions is the limited review of these substantive zoning decisions under LUPA. Under RCW 36.70C.130(1)(c), the merits of land use decisions are reviewed under the "substantial evidence" test, which states that the court can grant relief only if

> the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

Review under this standard begins with the presumption that the local government has correctly made its decision. Indeed, in the present case, the elected City Council of Woodinville unanimously voted to deny the requested rezone. As our Supreme Court said in a recent decision:

> RCW 36.70C.130(1). "Issues raised under subsection (c) challenge the sufficiency of the evidence." *Benchmark Land Co. v. City of Battle Ground,* 146 Wash.2d 685, 694, 49 P.3d 860 (2002). In a challenge for sufficiency of the

> evidence, " '[w]e view inferences in a light most favorable to the party that prevailed in the highest forum exercising fact finding authority.' " *Id.* (quoting *Schofield v. Spokane County,* 96 Wn.App 581, 588, 980 P.2d 277 (1999)). Therefore, we view the record and inferences in the light most favorable to CESS because they prevailed before BOCC

Woods v. Kittitas County, 162 Wn.2d 597, 617, 174 P.3d 25 (2007). Further, the standard to be applied is deferential to the prevailing party. *Peste v. Mason County,* 133 Wn.App 456, 477, 136 P.3d 140 (2006). As described above, the challenging party has the burden of proving that substantial evidence does not exist.

In addition, as with this Court's review of trial court findings:

> We overturn an agency's findings of fact "only if they are clearly erroneous and we are 'definitely and firmly convinced that a mistake has been made.' " *Port of Seattle*, 151 Wash.2d at 588, 90 P.3d 659 (internal citation omitted) (quoting *Buechel v. Dep't of Ecology,* 125 Wn.2d 196, 202, 884 P.2d 910 (1994)). "We do not weigh the credibility of witnesses or substitute our judgment for the PCHB's with regard to findings of fact." *Port of Seattle,* 151 Wn.2d at 588, 90 P.3d 659.

Community Ass'n for Restoration of Environment v. State, Dept. of Ecology, 149 Wn.App 830, 841, 205 P.3d 950 (2004).

Washington caselaw has made clear that a court reviewing a rezoning decision of local elected public officials

does not weigh the evidence, a matter of judgment within the province of the local decision makers:

> We view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest form that exercised fact-finding authority, a process that necessarily entails acceptance of the fact-finder's views regarding credibility of the witnesses and the weight to be given reasonable but competing inferences.
>
> *Freeburg,* 71 Wn.App at 371-72, 859 P.2d 610, quoting *State ex rel. Lige & Wm B. Dickson Co. v. County of Pierce,* 65 Wn.App 614, 618, 829 P.2d 217 (1992).

Bjarnson v. Kitsap County, 78 Wn.App 840, 845, 899 P.2d 1290 (1995) (Emphasis supplied). Thus the reviewing court must "accept" the fact finders' decisions regarding credibility of witnesses and the weight given their evidence.

Thus judicial review is not to determine whether a witness, or evidence, is credible or not, but rather whether the record contains evidence that might support the decision. The deference given to local government decisions in LUPA review is substantially identical to the deference given to fact finding at the trial court level. *Batten v. Abrams,* 28 Wn.App 737, 743, 626 P.2d 984 (1981) ("Findings of fact that are supported by substantial evidence, even if the evidence is conflicting, will not be disturbed on appeal."); *Grundy v. Brack Family Trust*, 151

Wn.App 557, 570, 213 P.3d 619 (2009) ("We defer to the finder of fact on issues of credibility and weight of the evidence. *Forbes v. Am. Bldg. Maint. Co. West*, 148 Wn.App 273, 287, 198 P.3d 1042 (2009).")

There are three additional standards that LUPA required of the reviewing court.

First, the substantial evidence test is to be applied to the decision of the "highest forum that exercised fact-finding authority." See *Woods,* 162 Wn.2d at 617. Preliminary review by staff or administrative bodies making recommendations are not reviewed. However, in its opinion here, the Court spends considerable time discussing the recommendation of the City of Woodinville's Hearing Examiner. See Slip Opinion, pages 5-6, 17, 18-19, 20. But reliance on the Hearing Examiner's decision is misplaced for two reasons. First, the Hearing Examiner does not make the decision; he makes a recommendation to the City Council. The City Council is not bound in any manner to the Hearing Examiner's decision. Second, the "highest forum that exercised fact finding authority" is the City Council, not the Hearing Examiner.

Second, the court must review the "whole record before

the court." This is to assure that the court examines all the evidence before the local decision maker to assure that pertinent supporting evidence is not overlooked. In the present case, the Court rested its decision principally on only two items of evidence: the FEIS and the decision of the Hearing Examiner. In fact, a virtual mountain was submitted by members of the public and CNW and reviewed by the Woodinville Council. As will be described in more detail below, the CNW materials were a set of fact-intensive materials prepared by qualified witnesses. The public also spoke out in more than 14 hours of public testimony before the Hearing Examiner. This evidence is mentioned only in passing by the Court at page 5 of the Slip Opinion, where it says that the Hearing Examiner considered "a lengthy analysis of the proposals submitted by the Concerned Neighbors of Wellington (CNW)." There is no consideration by the Court of this evidence and no recognition of the hours of public testimony and other exhibits that were presented.

Third, in construing language of local ordinances, substantial weight is given to the interpretation given by a local government to its own ordinance. As stated in *Neighbors of Black Nugget Road v. King County*, 88 Wn.App 773, 778, 946

P.2d 1188, (1997):

> Ordinances are essentially "local statutes" that we construe according to the rules of statutory construction. Thus, we construe ordinances to fulfill the intent of the legislative entity. We give considerable deference to the enforcing agency's interpretation of an ambiguous ordinance.

In summary, the substantial evidence test requires a complete review of all evidence presented to the local government, applying a standard is deferential to the local decision maker.

C. Substantial Evidence Supported the Unanimous Decision of the Woodinville City Council to Deny the Rezone Requests.

1. Introduction.

The Court concluded the Woodinville Council lacked substantial evidence to support several findings supporting denial of the subject rezones. However, in its opinion, the Court overlooked a significant amount of evidence presented by CNW and others during the public review process. CNW requests that the Court review this evidence and reconsider its opinion. In addition there were several mandatory criteria found in the Woodinville ordinance that the opinion failed to mention which also should be the basis for reconsideration.

2. The Court's Opinion Fails to Mention Several

Mandatory Requirements of Woodinville Zoning that the City Council Concluded Were Not Met.

The opinion of the Court correctly notes that there are three basic criteria that must be met for approval of a rezone in Woodinville. First, there are caselaw requirements, which include requirements to demonstrate changed circumstances. Slip Opinion, page 10. Second, the City of Woodinville has its own criteria for approval of rezones found in WMC 21.44.070, set forth in the Slip Opinion at page 10-11. Third, there are "purpose statements" for the various zones found in the Woodinville zoning code; the section for residential zones is found at WMC 21.04.080 and set forth at page 11-12 of the slip opinion. Under the Woodinville code, all of the criteria must be met before a rezone can be approved, but the Woodinville City Council found none of them were met.

However, the Court opinion only discusses four of the multiple criteria:

a) Adequate services under WMC 21.04.080 (Slip Opinion at pages 12-17);

b) Demonstrated Need under WMC 21.04.070 (Slip Opinion at pages 17-19);

c) Consistency with the comprehensive plan under WMC 21.44.070 (Slip Opinion at page pages 19-23);

d) Substantial relationship to Public Health Safety and Morals under caselaw established rezone criteria (Slip Opinion at page 23-25).

However, there are several other criteria which are required to grant a rezone in Woodinville, but which the Court opinion neither mentions nor finds error.

a) WMC 21.44.070 requires that a rezone classification meet the following criteria:

> (2) The zone classification is consistent and compatible with uses and zoning of the surrounding properties.

This criteria has been part of the rezoning requirements of the City since 1997 and was not challenged before the Growth Board or in the Hensley case. The council concluded that the zone should not be changed because of the history of the area in which the property was located and the "maintenance of the existing suburban neighborhood character." Wood Trails decision at Finding 6(a) and (b). The Council found that both the Wood Trails and Montevallo rezones were: "not in character with the surrounding R-1 neighborhoods and properties." Wood Trails Finding 12 and Montevallo Finding 10. Indeed the FEIS indicated that was a "major issue" that needed to be resolved:

> The EIS identifies many issues that will be resolved during City review of the proposal. The major issue regarding

> the proposals is the compatibility of infill residential development (at 4 dwelling units per acre) with existing lower-density residential development (averaging 1 dwelling unit per acre), and the acceptability to the community of the change associated with this infill. The City will need to resolve that issue when it considers the proposed rezones.

FEIS, page 1-45 (emphasis supplied). The City's findings on that issue, a critical criteria for rezones, are not questioned by the Court's opinion.[1]

b) WMC 21.04.080(2)(b) provides that R-4 densities are only appropriate on "lands that are predominately environmentally unconstrained."

The City Council concluded that mapping presented during the review process and the FEIS "showed evidence of area-wide environmental constraints as evidenced in the FEIS and exhibits." See Wood Trails Findings 9 and 10. These findings are well grounded in evidence in the record.

CNW's rezone analysis at pages 1076 to 1093 demonstrated that there were several environmental constraints on the Wood Trails properties in materials prepared by a licensed professional hydrogeologist (Otto Paris) and a highly

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[1]The Court's opinion mentions that rezones are consistent with uses and zoning of the surrounding properties (Slip Opinion at 25), but does not disturb city findings on the subject. Caselaw mentioned above does not permit the Court to make its own findings on a matter under the City's jurisdiction.

qualified geologist (Susan Boundy Sanders). Additional identification of environmental constraints was identified during the public hearing by another qualified geologist, Robert Harmon. See Exhibit 97, Tr. March 14, page 109-112, Tr. April 5, pages 10-20. CNW's mapping showed these environmental constraints on the Wood Trails rezone area, including landslide and erosion hazard areas. Indeed, the FEIS admitted that:

> Erosions hazard areas exist on Wood Trails. Neighbors, technical experts and the general public differ in their views. Some contend that the slope (sic) are stable and can handle engineering solutions, while others believe that slopes of this nature tend to create long-term erosion and stability problems, that are difficult to prevent.

FEIS, page 1-44.

In sum, the council's findings and conclusions on these mandatory requirements were both undisturbed by the opinion and supported by expert analysis and testimony. The Court should reconsider whether reversal is appropriate when these mandatory criteria are not disturbed.

3. <u>There Is Abundant Evidence to Support the Findings of the City Council to Deny the Proposed Rezone.</u>

The Court's opinion discusses five principal points on which it concludes there was not substantial evidence to support the findings made by the Council. As will be described below, in

each area there was more than substantial evidence to support the City Council's findings.

a. Changed Circumstances

At page 10 of the Slip Opinion, the Court concludes that the required showing of changed circumstances is met if the rezone is consistent with the comprehensive plan, citing *Bjarnson v. Kitsap County*, 78 Wn.App 840, 846, 899 P.2d 1290 (1995).

However, there is a significant difference between the *Bjarnson* case and the current case. In *Bjarnson*, Kitsap County had changed its comprehensive plan to provide for a regional shopping center at the site of the requested rezone but had not changed the zoning to be consistent with this "newly adopted" comprehensive plan designation. However, in the present case, the Woodinville Comprehensive Plan was adopted in 1995. See Wood Trails and Montevallo Finding 3. As Finding 3 indicates, the R-1 zoning was a continuation of the prior King County zoning and that zoning was adopted after the comprehensive plan was adopted.

Thus the question is whether there were "changed circumstances" that indicated R-1 zoning (consistent with the

comprehensive plan) should be changed to R-4. Wood Trails and Montevallo Finding 6(e) clearly states there were no changed circumstances and this finding was not challenged.

Under this criteria, where the existing zoning is consistent with the comprehensive plan, there must be a showing that conditions in the area had changed. For example, in *Henderson v. Kittitas County,* 124 Wn.App 747, 755, 100 P.3d 842, 845 (2004) there was clear evidence that the neighborhood character had changed: "in testimony and the findings indicate changes in local land use patterns from largely agricultural to residential on diverse sizes of lots.. . ." In fact, as shown in the CNW Analysis, and as found by the Council, the character of the neighborhood had not changed.

b. Adequate Services under WMC 21.04.080.

At pages 12-17 of its opinion, the Court concludes that "substantial evidence" does not support the findings of the city that the area for the proposed rezones lacks adequate services for the proposed R-4 zone. The GMA compliant code provides that R-4 zoning can only be permitted only where the land to be rezoned is "served at the time of development by adequate public sewers, water supply, roads, and other needed public

facilities and services."

The Council found that adequate services could not be provided to support the proposed R-4 rezone:

> The lack of adequate public facilities and services to support the proposed R-4 development, including, but not limited to the substandard roads and pedestrian walkways providing access to and from the subject property, the absence of any City parklands within walking distance of the subject property and the absence of public transit services serving the neighborhood area.

Finding 6(c) for both the Wood Trails and Montevallo rezones.

The Court concluded that "[t]he council does not identify any services that cannot be provided to Montevallo or Wood Trails." Slip Opinion, page 16. However, as seen above, the Council did clearly spell out what services were inadequate: roads, sidewalks, parks and transit. Ignoring the other services the Council found to be inadequate, the Court focuses on transportation. It says that "there is no evidence that transportation cannot be provided to the proposed developments." Slip Opinion at 16. But the Court applies the wrong criteria: it is not that *no services* can be provided, but that *adequate services* cannot be provided as set forth in WMC 21.04.080.

The council's finding of a lack of adequate services is richly supported in the record. Regarding transportation, CNW

expert witness, Roger Mason, a licensed professional transportation engineer with 25 years experience, concluded that "local access roads do not meet commonly accepted standards" and there will be "increased safety risks with the new development." See Volume 2 of the CNW Analysis at pages 1298-1300. Mr. Mason's testimony on the same subject is found in the transcript for March 15 at pages 104-118. He also pointed out the lack of sidewalks in the area and that there was no transit service nearby. As to parks, even the FEIS admits there are "no existing City of Woodinville parks, recreational facilities or properties (developed or undeveloped) in the West Wellington neighborhood or within close walking distance." FEIS, p. 3.6-1.

The assurance that services are available is perfectly consistent with the hierarchy of when urban growth will be permitted under the GMA:

> (3) Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas.

RCW 36.70A.110 (Emphasis supplied). The City's decision to deny this rezone when adequate services are not available is

consistent both with its own code and with the GMA. The City concluded that it is unlikely that adequate services will be provided in this area soon because of City priorities to build out infrastructure in other areas.

The Court should reconsider its decision in this regard.

c. Demonstrated Need.

At page 17-19 of the Slip Opinion, the Court concludes that there was not substantial evidence to support the Council's finding that Phoenix did not demonstrate a need for the proposed zoning.

The requirement that there be "demonstrated need" for the rezone is a specific criteria for rezones in Woodinville; the requirement is one adopted by the City and is not a part of other ordinances or statutes. As described above, the City's interpretation of this provision is entitled to substantial deference by the Court.

The Council found that growth targets had been established by the Growth Management Act, ch. 36.70A RCW (GMA), Wood Trails and Montevallo Finding 7. In those same findings, the City concluded that because these goals for new residential growth were being met, there was no "demonstrated need" for higher density zoning.

This finding was fully supported by significant and substantial

evidence. The City Planning Director said that the city "does not need residential rezones to comply with its comprehensive plan" or other city goals and visions. TR March 14 at page 38. Further, the CNW Analysis of the rezone requests shows that the City has an excess of 477 building units over its 20 year planning period, without the Wood Trails or Montevallo rezones. See CNW Analysis, page 516. That there is no need for the proposed rezones is fully supported by competent evidence in the record. Review of this issue by the court is also limited by the legislative direction that "the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community." RCW 36.70A.3201.

The Court's opinion appears to have accepted the urging of Phoenix to "adopt the hearing examiner's view" on this matter. Slip Opinion at 17. However, the Hearing Examiner is not the fact finder under the Woodinville code, the City Council is; the Hearing Examiner only makes recommendations. While the Court may believe the Hearing Examiner's reasoning should be adopted over that of the City Council, it is not the Court's role to substitute its judgment. The Court's role is to determine whether there is "substantial evidence" to support the City Council's view, giving the

Council's interpretation of its own ordinances great deference. Based on thorough evidence, including the guidance of its own planning director, the Council concluded that it had sufficient density to meet its planning goals under GMA. The Court should reconsider its ruling that this finding was not supported by substantial evidence.

d. Consistency with Comprehensive Plan.

At pages 19-23 of the Slip Opinion, the Court concludes that "[t]he council erred when it concluded the proposed rezones were inconsistent with the comprehensive plan." The Council in fact concluded that the current zoning, R-1 was consistent with the comprehensive plan and that it was not necessary to rezone the property to be consistent with the comprehensive plan. See Wood Trails and Montevallo Findings 4 and 5. Conclusion 1 in both decisions determined that "a site specific rezone of the property to R-4 density would be consistent with significant Comprehensive Plan policies . . ."

The Court's opinion does not say which standard found in RCW 36.70C.130(1) is the basis for its decision. Once again, the Council's interpretation of its own comprehensive plan is entitled to substantial deference by the Court.

But again the record is replete with evidence that the

proposed rezones were not consistent with the comprehensive plan. However, the Court's opinion references only the FEIS and the Hearing Examiner's decision. Recognizing that the Hearing Examiner's decision is only a recommendation, and the final decision maker is the City Council, and that the FEIS is but one piece of evidence in a lengthy record, sole reliance on such limited documents is inappropriate.

Several comprehensive plan policies were identified during the hearing with which the proposed rezone was inconsistent. These include the following:

> LU-1.1 Preserve the character of existing neighborhoods in Woodinville while accommodating the state's 20-year growth forecasts for Woodinville.
>
> LU-1.2 Encourage future development in areas:
>
> 1. With the capacity to absorb development (i.e. areas with vacant or underdeveloped land and available utility, street, park and school capacity, or where such facilities can be cost effectively provided
>
> GOAL LU-2 To establish land use patterns, densities of site designs that encourage less reliance on single-occupant vehicle travel
>
> Goal ENV-3 To preserve and enhance aquatic and wildlife habitat.

The evidence in the record included the Sustainable Development Study prepared by the city, which found that the character of the neighborhood in which the rezones are requested "is best preserved

by lower density zoning." See Exhibit 74, the CNW Analysis at page 718. A more thorough analysis of neighborhood character is found in the "Well Established Subdivisions" section of the same CNW Analysis at page 692-700. In sum, competent evidence supported the Council's decision.

The Court's opinion again emphasizes the decision of the Growth Management Hearings Board in the *Hensley I* matter. See Slip Opinion at page 21-22. However, there was no challenge to the comprehensive plan policies and goals mentioned above in the *Hensley I* case. Once a comprehensive plan is adopted, and not successfully challenged, its terms are not subject to further attack.

Further, reliance on the decision of the Growth Management Hearings Board in the *Hensley I* case, a case now more than 12 years old, is misplaced. Since *Hensley I*, the Legislature has amended GMA to make clear that local government has increased discretion in local planning decisions by passing RCW 36.70A.3201. Moreover, the Washington Supreme Court has explicitly rejected the kind of autocratic "bright line" rules for minimum density established by the Growth Boards in cases such as *Hensley I*:

> The GMHB, as a quasi-judicial agency, lacks the power to make bright-line rules regarding maximum rural densities. *Viking Props.*, 155 Wn.2d at 129-30, 118 P.3d 322. We hold a GMHB may not use a bright-line rule to delineate between

> urban and rural densities, nor may it subject certain densities to increased scrutiny.

Thurston County v. Western Washington Growth Management Hearings Bd., 164 Wn.2d 329, 359, 190 P.3d 38 (2008). In footnote 21 of that case, the court specifically points to *Bremerton v. Kitsap County,* Wash. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 95-3-0039, 1995 WL 903165, 35 (Oct. 6, 1995) as one of the cases that employed the "bright line" test; that case is the basis for the decision in *Hensley I*.

In sum, *Hensley I* should not be relied upon as precedent because of the fundamental changes made by the legislature (RCW 36.70A.3201) and Supreme Court to broaden the authority of local governments to make decisions based on local circumstances, not by a "bright line" test.

The Woodinville City Council examined its own comprehensive plan, its provisions to preserve existing character of existing neighborhoods, and the policy against development where public services are not available in a cost effective manner and concluded that the rezones should be denied.

e. Substantial Relationship to Public Health, Morals or Welfare.

At page 25 of the Slip Opinion, the Court concludes that:

> The proposed rezones further a number of comprehensive plan policies and therefore bear a substantial relationship to the public health safety, morals and welfare.

Again, the Court relies on the decision of the Hearing Examiner to support its decision, overlooking that it is the City Council that is the final fact finder and decision maker for the City. That one or more comprehensive plan policies are "furthered" is not determinative.

The Court places much reliance in this portion of this decision on *Henderson v. Kittitas County,* 124 Wn.App 747, 752, 100 P.3d 842 (2004). However, there the court affirmed the exercise of discretion by the Kittitas County Commissioners in granting a rezone. The *Henderson* court recognized that the decision of the Commissioners could only be overturned on the basis of "a clearly erroneous application of law only if we are left with the firm conviction that it made a mistake." The deferential standard of that case applies to all local governmental decisions, not just denials of rezone requests.

V. CONCLUSION AND REQUESTED RELIEF.

CNW respectfully requests that the Court reconsider its decision in this appeal. CNW believes that the Court has overlooked the large body of competent evidence, prepared by qualified experts, that supported the council's decision in the CNW

Analysis of the rezone applications. CNW also believes that the Court misapprehended pertinent cases regarding the Court's role in rezoning matters. This well settled caselaw recognizes that judicial review of zoning decisions is deferential. Upsetting a carefully considered local government decision requires a review of the entire record, not just a few isolated documents. The separation of powers between the courts and elected public officials, with intimate knowledge of local circumstances, makes clear that local government officials make rezoning decisions, a policy also adopted by RCW 36.70A.3201. It may be that the Court would decide these rezone matters contrary to how the Woodinville Council did, but the Court's role is limited to determining whether there was evidence that supported the local government zoning decision.

CNW respectfully maintains that the opinion of the Court in this case misapprehended the role of the Court and should be reconsidered.

DATED: NOV. 23, 2009

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The undersigned declares that she is a citizen of the United States, over the age of 18 years and not a party to the above-entitled action. On the date below written I caused one copy of the foregoing document and this Certificate of Service to be served on counsel herein as follows:

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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true to the best of my knowledge and belief.

DATED at Seattle, WA this 23rd day of November, 2009.

Carol Cohoe

Carol Cohoe