

NO. 62167-0

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

Appellants,

v.

CITY OF WOODINVILLE, a Washington Municipal Corporation,  
and CONCERNED NEIGHBORS OF WELLINGTON, a Washington  
nonprofit corporation,

Respondents.

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BRIEF OF RESPONDENT CONCERNED  
NEIGHBORS OF WELLINGTON

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## **I. INTRODUCTION**

This is the responsive brief of Concerned Neighbors of Wellington (CNW) to the opening brief filed by petitioners Phoenix Development, Inc., et al (collectively "Phoenix"). In this appeal, Phoenix seeks reversal of the decision of the trial court that affirmed the denial by the City of Woodinville of rezone and subdivision requests by Phoenix.

CNW is a local citizen organization composed of residents in the vicinity of the proposed rezones and plats. Tr. 3/15/07, p. 98. CNW has been an active participant in the review process for the Phoenix proposals going back to the original applications in 2004. It has provided extensive comments during the environmental review process and submitted extensive written and oral testimony at the public hearings held on these proposals before the substitute City of Woodinville Hearing Examiner. Tr. 3/15/07, p. 98-100. CNW successfully appealed the Hearing Examiner's decision to the Woodinville City Council. This brief will reply to legal arguments presented in the brief filed by appellant Phoenix Development, Inc. As demonstrated herein, the rezones are inconsistent with applicable standards established by the City of Woodinville in its codes and its comprehensive plan. Because of this, the rezone

proposals were properly rejected by the Woodinville City Council. Because the rezones should be denied, there is no basis for further review of the preliminary plats contingent on them and the City correctly denied them as well.

CNW and the City have conferred as encouraged by RAP 10.1(g) regarding their responses to Phoenix's opening brief. In an effort to reduce the length of briefing before the Court, CNW and the City have agreed on issues that would be emphasized in the respective briefing by each party. Accordingly CNW joins in, and incorporates by reference, the brief of the City and will rely on it for arguments stated therein.

## **II. COUNTERSTATEMENT OF FACTS**

### **2.1 Rezone Described.**

This case involves two separate rezone proposals. The Wood Trails proposal requests the rezone of a 38.7 acre parcel from the R-1 zone, allowing one dwelling unit per acre, to R-4 which would permit four homes to the acre. See Wood Trails Decision, Appendix G to Phoenix Brief. If the rezone is granted, Phoenix would seek approval for a preliminary plat to subdivide the parcel into 66 single family residential lots. The Montevallo proposal is to rezone a separate 16.48 acre parcel from R-1 to R-4

and plat it into 56 single family residential lots, with surplus density proposed to be transferred from the Wood Trails site to this property. *Id.* The general location of the two parcels is found in the record at Appendices A, B and C to Phoenix's Brief.

Both properties are located in what is a long established single family residential area in the northwest corner of the city. This area, known as the Wellington neighborhood, has been platted into a variety of large lots, averaging about an acre in size. *Id.*

The Wood Trails proposal is located on a steep westerly facing hillside and the Montevallo proposal has an extensive wetland on its west side. Both properties are accessed by substandard east-west streets leading from the only arterial street in to the area, 156<sup>th</sup> Avenue Northeast. *Id.*

## **2.2 CNW Analysis of Rezone Applications.**

A critical part of the record before the court is the "Analysis of the Wood Trails Rezone and Preliminary Plat Application" which was prepared by CNW (hereinafter "CNW Analysis"). This document provides information on both the Wood Trails and Montevallo rezones and plats and was submitted during the hearing before the hearing examiner; it was assigned Exhibit 74 in



the Montevallo record and Exhibit 101 in the Wood Trails record.<sup>1</sup> This document represents the written basis for the opposition of CNW to the rezone and plats and contains more than 2,144 pages of maps, drawings, color photographs and technical analyses of rezone and plat issues in three volumes. See Table of Contents of the CNW Analysis and Executive Summary which was paginated by the City Clerk, found at Appendix A hereto. CNW's Analysis demonstrated that the rezone proposals before the city did not meet city criteria, including both the comprehensive plan and zoning code standards.

The CNW Analysis includes technical reports prepared by several licensed professionals addressing the impacts of the Wood Trails and Montevallo rezone and plat proposals. The professional qualification of each contributor is found in the "Resumé" section of the CNW Analysis. See pp. 1254-1311. Each of the witnesses who contributed to the CNW Analysis provided testimony at the hearing. The qualifications of these persons, and a citation to their oral testimony at the public hearing is set forth below.

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<sup>1</sup> Because of the extensive size of the record, the parties have agreed that those portions of the record upon which the parties intend to rely will be selected and presented to the Court. The CNW Analysis has been so presented in a separate document.

- Otto Paris is a licensed hydrologist and geologist with a Master's Degree in Geology. (Tr., March 15, 2007, pages 139-146.)<sup>2</sup>
- Matthew Schultz is a licensed professional engineer in the state of Washington with a Master's Degree in Environmental/Civil Engineering. (Tr., March 15, 2007, pages 119-130; April 5, 2007, pages 179-180.)
- Roger Mason is a licensed professional engineer in Washington state with extensive experience in traffic and transportation engineering and analysis. (Tr., March 15, 2007, pages 104-118; April 5, 2007, pages 86-90.)
- Susan Boundy-Sanders has a Master's Degree in Geology and Geophysics. (Tr., March 15, 2007, pages 146-151; April 5, 2007, pages 90-92.)

The CNW Analysis includes specific sections on each of the technical and factual issues pertinent to the criteria for rezones under the City of Woodinville code. Thus, in Vol. 1, Section 2, written and detailed presentations on Infrastructure in the Wellington Area, including subsections on Transportation (the adequacy, capacity and traffic volumes in the area) pp. 20-145, Storm Water Drainage (impacts of water runoff) pp. 146-451, Sanitary Sewers (the location and extension of sewers) pp. 452-496, and Schools (capacity of local schools) pp. 497-499. Each of

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<sup>2</sup> The transcripts are found in Sub #12 sent from the Superior Court.

these sections has a written analysis of the Wood Trails and Montevallo proposals, together with backup information and studies.

Section 3 of the CNW Analysis (in Vol. 2) provides detailed reports and presentations on zoning issues, particularly related to the rezoning criteria in the Woodinville Zoning Code which is discussed in this brief. Individual subsections under the Zoning section include discussion of the City's "Buildable Lands Survey" showing the availability and utilization of land within the city, addressing whether there is a need for the rezones (pp. 508-589). The "Well Established Subdivisions" section traces the history of the development of the Wellington area and the "Impacts" section identifies and analyzes the direct and cumulative impacts of the subdivision proposals. See pp. 590-741.

Section 4 in Vol. 2 of the CNW Analysis entitled "Environment" reviews and reports on the environmental impacts of the proposals. Subsections under this analysis include a "Critical Areas" section which discusses the environmental constraints found on the property including erosion hazard, landslide hazard and other geologic criteria (pp. 1076-1161). The "Wildlife" subsection includes the impacts of the rezones and plats on wildlife

in the area (pp. 1162-1189).

Section 5 in Vol. 2 of the CNW Analysis provides a very detailed review of each subdivision proposal, providing technical analysis. See pp. 1194-1251.

As described in Phoenix's brief, the record in this case is substantial. Part of the record is the verbatim transcript of proceedings before the Hearing Examiner which has been certified to the court. The transcript will be referenced by the date of the hearing and a reference to the page number, i.e. "Tr. 3/14, page \_\_." In addition to the CNW analysis, CNW will cite to other selected materials from the written record. The key decision documents in this matter are the two decisions of the Woodinville City council on this matter which are included in the Addendum and will be referenced as Wood Trails or Montevallo Decisions. See Appendix E to Phoenix Opening Brief.

### **III. ARGUMENT**

#### **3.1 A Rezone Applicant Must Meet Three Criteria to Receive a Rezone in the City of Woodinville: Phoenix Has Not Met Any of Them.**

As acknowledged in Phoenix's brief, a rezone can only be approved if the applicant meets three criteria. See pages 23-24. These are as follows.

**1. Caselaw Requirements.** First, Phoenix has the burden of proof to meet criteria established by Washington caselaw to qualify for a rezone. These criteria are recognized by Phoenix as “the three basic rules that courts have applied to rezones.” See Brief, p. 24. As described in Section 3.2 of this brief, the City correctly determined that these criteria were not met.

**2. General Rezone Criteria in Woodinville Code.**

Second, Phoenix acknowledges that it must meet the general rezone criteria established in the Woodinville Zoning Ordinance at Woodinville Municipal Code (WMC) 21.44.070. Brief at 23-24. These criteria require proving a demonstrated need for the rezoning, the consistency and compatibility with uses and zoning of adjacent properties and that the property is practically and physically suited for uses allowed under the proposed rezone. As described in Section 3.3 of this brief, the City correctly determined none of these criteria were met.

**3. Specific Rezone Criteria for Residential Zones In Woodinville Code.** Third, Phoenix confirms that it must meet the specific criteria for residential zones under the Woodinville Zoning Ordinance at WMC 21.04.080. Brief at 23. These criteria require the applicant to show the property is predominately

environmentally unconstrained, is served by adequate public facilities and services and is consistent with surrounding development. Again, as demonstrated in Section 3.4 the City correctly determined that none of these criteria were met.<sup>3</sup>

In summary, the City of Woodinville has long established criteria to judge rezone applications and Phoenix has had abundant opportunities to attempt to demonstrate that these criteria were met, but has failed to do so. The Woodinville City Council carefully reviewed the facts and the law and turned down Phoenix's application. The City's decision is fully supported by the facts and the law and should be affirmed by this court.

### **3.2 Phoenix Failed to Meet Established Criteria for Rezone under Washington Caselaw.**

The subject proposal is a rezone from R-1 to R-4. As described in the background facts, Phoenix's properties were zoned R-1 by the original Woodinville comprehensive plan adopted in 1996. Phoenix has never asked the City to change or amend its comprehensive plan or zoning/development regulations to be consistent with Phoenix's proposals before the most recent

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<sup>3</sup> Phoenix's brief intersperses these requirements in a confusing fashion. As described above, CNW will consider these criteria sequentially.

application.

The general rules for rezones have been recently stated by our Supreme Court:

Three basic rules apply to rezone applications: (1) they are not presumed valid, (2) the proponent of a rezone must demonstrate that there has been a change of circumstances since the original zoning, and (3) the rezone must have a substantial relationship to the public health, safety, morals, or general welfare. *Citizens for Mount Vernon*, 133 Wn. 2d at 875, 947 P.2d 1208.

*Woods v. Kittitas County*, 162 Wn.2d 597, 617, 174 P.3d 24

(2007). Thus a rezone applicant must meet both general rezone criteria and also criteria set forth in the local code.

*Woods* also makes clear that in any challenge under RCW 36.70C.130(1)(c) , as in this case, is deferential to local government.

"Issues raised under subsection (c) challenge the sufficiency of the evidence." *Benchmark Land Co. v. City of Battle Ground*, 146 Wn. 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 factfinding 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.

*Id.* In the instant case both the record, and inferences to it, must be made in the "light most favorable" to CNW and the City.

*Bjarnson v. Kitsap County*, 78 Wn. App. 840, 845, 899 P.2d

1290 (1995) lists the key criteria to be applied in establishing changed circumstances:

In applying the changed circumstances test courts have looked at a variety of factors, including: changed public opinion, changes in land use patterns in the area of the rezone, and changes on the property itself.

78 Wn. App. at 846-847.

In applying these factors here, it is clear that there are no changed circumstances.

**1. Public Opinion.** Public opinion has strongly changed since 1996 in favor of retaining, not eliminating, the R-1 zone in this area. The numerous comments on the EIS (substantially all in support of retaining the R-1 zone) and at the transcript of the public hearings on the two rezones essentially indicate no public support for the proposed rezones. Indeed, a review of the transcript before the Hearing Examiner shows that only one or two persons actually spoke in favor of the rezone.<sup>4</sup>

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<sup>4</sup> Phoenix claims that the City Council succumbed to community opposition in reaching its decision which was to "achieve a politically expedient result." Brief at 3,22. This rhetorical flourish comes without any factual support or references to the record, predictably because there is no basis for this claim. As the City's brief makes clear, modern land use law requires the City to consider, and indeed solicit, public opinion. That the public reaction to the rezone proposals was intense, and backed by strong technical argument, is testimony to how ill-considered the



**2. Changes in Land Use Patterns.** There has been no change in land use in the local area. As described in materials submitted, the Wellington neighborhood has a long established pattern of larger lots and single family residential uses. The neighborhood consists of subdivisions developed over several years and demonstrates a very stable use for at least the past 20-30 years. This is true as well for the adjacent land uses in all directions. This was demonstrated in the CNW Analysis in the "Well Established Subdivisions" Section, particularly at pages 599-612.

What has changed in the city is that it is clearly meeting its obligations for new housing units. See Wood Trails Staff Report, page 5 (Wood Trails Exhibit 1).<sup>5</sup> Zoning changes and development in other parts of the city have created housing opportunities in commercial zones and tourist business zones and new housing is being developed there. See Ordinance 431, §13(b) at CNW Analysis at pp. 727-728.

**3. Changes on the Subject Property.** The subject

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proposals were. Indeed, the Council decision was unanimous. There were no challenges by Phoenix that the decisions were improper because of conflicts of interest.

<sup>5</sup> The Staff Report is found in Packet 1 of Sub. #20.

property has not changed over the years. Both the Montevallo and Wood Trails properties have been in the same uses for at least 30 years. Indeed, the entire neighborhood is stable, with well maintained housing stock. See CNW Analysis at pp. 605-611.

The City Council addressed the change in circumstances in its decisions at Wood Trails Decision, Finding 6(e) and Montevallo Decision, Finding 6(d):

The absence of any substantial changes in the circumstances from which the original zoning determination was made, including, but not limited to land use patterns, public opinion, established neighborhood character, substandard roadways, the absence of stores, sidewalks, and community parks. Public sewer has not been brought to the property, but the Applicant for the rezone has proposed bringing public sewer to the property in its preliminary plat application. The Applicant would connect to public sewer at locations that have existed and been available for sewer connection since the mid 1990's.

As the Council found, there are also no changes in public services to the property. Sewer service has been available on adjacent property to the west for at least 20 years, well before the current zoning on the property was adopted. The CNW Analysis (Exhibit 74) at Volume 1, Section 2 "Infrastructure" in the "Sanitary Sewer" section at pages 452(c) to 453 describes the history of the sanitary sewer connection.

In summary, the City Council carefully reviewed the

evidence presented to it and determined that the basic rezone criteria under Washington law were not met. There was abundant evidence supporting the Council's decision and it should be affirmed by this Court.

### **3.3 The Rezone Applications Do Not Meet the General Rezone Criteria in WMC 21.44.070.**

The City has established two sets of criteria for evaluation of rezone applications. First, there are general rezone criteria, applicable to any rezone application within the City. WMC 21.44.070. In this section of its brief CNW will show that the City Council correctly determined that the Phoenix application did not meet these general criteria. Second, there are specific guidelines for residential zones as to when R-1 (the current zone) and R-4 (Phoenix's requested rezone) are to be applied. WMC 21.04.080(2). In Section 3.4 of this brief CNW will demonstrate that there was substantial, indeed overwhelming evidence that the request for R-4 zoning was not consistent with these criteria.

The City of Woodinville zoning code sets forth three general criteria for rezone approval in WMC 21.44.070. These are:

A zone reclassification shall be granted only if the applicant demonstrates that the proposal is consistent with the Comprehensive Plan and applicable functional plans at the time the application for such zone reclassification is submitted, and complies with

the following criteria:

- (1) There is a demonstrated need for additional zoning of the type proposed;
- (2) The zone reclassification is consistent and compatible with uses and zoning of the surrounding properties; and
- (3) The property is practically and physically suited for the uses allowed in the proposed zone reclassification.

(Emphasis supplied). The code is clear that the burden of proof is on the applicant to meet these criteria. (i.e., rezone grant "only if the applicant demonstrates. . .")

As will be described below, the City Council correctly determined that the applicant did not meet any of these established criteria, though an applicant must demonstrate that all three are met.

### **3.3.1 The Growth Board Decision In *Hensley v. City of Woodinville* Is Not Applicable to These Proceedings.**

Phoenix relies extensively in its brief on the decision of the Central Puget Growth Management Hearings Board in *Hensley v. City of Woodinville*, Case No. 96-3-0031 (February 25, 1997). See pages 1,6,44-45. For the reasons stated by the City in its brief, the *Hensley* case is not applicable to these proceedings. The statement of facts offered by Phoenix provides a personalized description of meetings between planning staff and the long time

owners of the properties in question describing what the owner "learned" from planning staff. Brief at page 9-10. However, the owners are professional land developers (see Tr. 3/14/07, p. 66); it is acknowledged that the properties in question had been owned by the applicant for "many, many, many years. . . ." Brief at 9. Certainly, these properties were in Phoenix's ownership in 1997 when the properties were zoned R-1 after proceedings before the Growth Board as described at page 2 of the Brief. If these properties were improperly zoned R-1 contrary to the terms of the *Hensley* case cited at pages 1-2, then Phoenix should have challenged that comprehensive plan and zoning decision at the time.

Phoenix's challenges to the R-1 zoning are just far too late under Washington caselaw. Comprehensive plan and development regulations not challenged within 60 days from adoption are deemed SEPA compliant and not appropriate for challenge. *Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 345, 190 P.3d 38 (2008). Rather than repeat the City's arguments, CNW incorporates them into this brief.

**3.3.2 There Is No Demonstrated Need for the Wood Trails or Montevallo Rezones.**

The first of the three criteria for the rezoning of property at WMC 21.44.070 is: "A) There is a demonstrated need for additional zoning of the type proposed." At pages 39 to 46 of its brief, Phoenix argues that there is a demonstrated need for its proposed R-4 zoning. However, the City correctly determined that this criteria was not met, based on solid and substantial evidence in the record.

As the staff report and City Council correctly conclude, current zoning, together with pending and issued permits, demonstrates that the City is meeting its GMA 20 year growth projection of 1,869 dwelling units. Wood Trails Staff Report (Wood Trails Exhibit 1, page 5). At pages 34-41 of its brief, Phoenix asserts that it "submitted additional factual and legal arguments in support of the demonstration of need for the proposed action." See page 35. It is true that Phoenix did submit certain factual and legal arguments. Indeed, much of their brief consists of citing to testimony and exhibits they present as a kind of trial court closing argument. However, it is not up to this Court to resolve the merits of these matters. The Court is not some super zoning body: "courts simply do not possess the power to . . . rezone a zoned area." *Teed v. King County*, 36 Wn.App. 635, 644, 677 P.2d 179 (1984). The issue is whether there was substantial evidence to

support the Council's decision.

Under the GMA, local governments are required to cumulatively apply the zoning in the community to provide "sufficient capacity of lands suitable for development":

**36.70A.115. Comprehensive plans and development regulations must provide sufficient land capacity for development**

Counties and cities that are required or choose to plan under RCW 36.70A.040 shall ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management.

(Emphasis supplied). The City Council specifically concluded at

Conclusion 6 of both decisions that:

According to past King County Buildable Lands Reports and the preliminary 2007 report, the City has excess capacity to accommodate its GMA housing allocation and is also meeting its employment growth target. The City is providing and supporting affordable housing for the Eastside through its participation in a coalition of east King County cities (ARCH).

This was based on the Findings in each decision (Wood Trails

Decision Finding 6(f), Montevallo Decision, Finding 6 (e):

a change in the zoning at the subject site is not needed or necessary to fulfill the City's

Comprehensive Plan or to implement the Land Use Element of the Plan. The Council does not construe its Comprehensive Plan or development regulations as requiring a rezone of this type.

As stated in Finding 7 in each decision:

7. Specific growth targets have been set for the City of Woodinville to meet by 2022 by King County consistent with the Growth Management Act (GMA) RCW 36.70A and the City of Woodinville is on track to meet these targets. It is not necessary for the City of Woodinville to approve of the Wood Trails development to meet these growth targets. Although the Applicant disputes the accuracy of the City staff's numbers, the Applicant has not demonstrated that the City is not on track to meet its targets.

This conclusion is supported by specific evidence from Ray Sturtz, the City Planning Director, as presented at the March 14, 2007 public hearing. TR, 3/14, page 38 ("The bottom line is the City does not need any residential rezones to meet its GMA obligation or comply with its Comprehensive Plan and meet the goals and visions stated therein.")

In addition to the specific conclusions of city staff, there is detailed information and backup information provided in CNW's Analysis at Volume 2, Section 3 entitled "Buildable Land Survey." Charts and other factual material provided demonstrate that the City is meeting all of its housing goals and that the Wood Trails and Montevallo rezones are not necessary to meet City housing goals.



See pp. 510-525, the City's Sustainable Development Study and the Well Established Subdivision section of the CNW analysis. See pp. 1318-1391.

The City Council's interpretation of its own ordinance is entitled to substantial weight. 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 its brief, applicant Phoenix takes issue with the staff description of "demonstrated need" by arguing that "demonstrated need" under Section 21.44.070 of the Woodinville code equates to "market demand." Brief at 36-37. This claim conflicts with the plain meaning of the City code.

Under the Growth Management Act, RCW 36.70A.110(2) identifies need in the context of growth projections:

2) Based upon the growth management population projections made for the county by the Office of Financial Management, the county and each city within the county shall include areas in density sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding 20 year period . . .

(Emphasis supplied.) Note that GMA is not specific about what intensity of zoning is required. As may be seen from the staff reports on both Wood Trails and Montevallo, the City has already identified "areas and densities sufficient to permit the urban growth" projected over the 20-year period. Indeed the analysis prepared by CNW factually supports Mr. Sturtz's findings; the chart at page 3 of the Buildable Lands section of the CNW Analysis shows that growth targets within the city are being exceeded and this data shows that the City has an excess of 477 units of housing over the 20-year planning period. See CNW Analysis, Volume 2, Buildable Lands Survey, pp. 516-523.

Based on the foregoing, the argument that "demonstrated need" under WMC 21.44.070 should be read to be "market demand" is not consistent with the Code.

Phoenix presents cases using the term "demonstrated need" and has cited them at pages 42-46 of its memorandum. However, these few cases illustrate why the term "demonstrated need," as interpreted by Phoenix, does not apply here.

Each of the cases cited by Phoenix (Brief at 42-45) references not market demand, but shortages in the commodity or activity analyzed. Thus in *Trisko v. City of Waite Park*, 566 NW 2<sup>nd</sup>

349 (1997) the Minnesota Court of Appeals dealt with the denial of a conditional use for a rock quarry. But as Phoenix admits, in *Trisko* without the new rock quarry there would be insufficient granite for public purposes, creating a shortage. The same is true in *1000 Friends of Oregon v. Marion County*, 116 Ore. App. 584, 842 P.2d 441 (1992) in which the court identified a shortage of RV spaces because customers were being turned away. In *Blaker v. Zoning and Planning Commission of the Town of Fairfield*, 212 Conn. 471, 484, 562 Atl.2d 1093 (1989) the court again focused on a limited market of affordable housing. The same is true of *Eveline Township v. H&D Trucking Company*, 81 Mich. App. 25, 448 N.W.2d 727 (1989). The *Eveline Township* case dealt with a specific, and frequently litigated provision of Michigan state law that stated:

A zoning ordinance or zoning decision shall have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or the surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.

In that case, the question was whether or not a port facility proposed by the applicant was properly denied by the local township. However, there the evidence was that "there were no

available port sites in the area and that the action of the township ordinance regarding port sites . . . does have the effect of totally prohibiting commercial ports like defendant's from the township." 448 N.W. 2d at 730.

These cases deal with the identified shortages or prohibition of a use. However, in the instant case all that Phoenix has demonstrated, if it has, is that there is a "market demand" for R-4 housing. That there is market demand does not mean that there are shortages or that such uses are being excluded from the city of Woodinville.

At pages 43-44 of its brief Phoenix points out that "sound planning principles" suggest the need for R-4 housing, citing a report done for Phoenix by its own retained planner. This planner made certain "observations" (Brief page 43) concerning plans of the Puget Sound Regional Council, decisions of Growth Management Hearings Board, and consistency with the "Smart Growth Project of the Environmental Projection Agency." None of the plans, decisions or projects are listed as criteria for rezoning decisions or adopted as standards by the City. As the Supreme Court recently made clear in the *Woods* decision, attempts to challenge rezone decisions for noncompliance with the

GMA, or other extraneous criteria are not permissible.

At page 37, Phoenix argues that provisions in the code regarding four units per acre when “urban services” are provided trump all other code sections. However, the structure of the Woodinville rezone provisions are hierarchical. First, an applicant must demonstrate that the general rezone criteria are met as found in WMC 21A.04.070. If those criteria are met, then issues arise concerning consistency with the residential zoning guidelines under the next code, WMC 21A.04.080(2). This argument is largely abstract because, based on substantial evidence, the City Council found and concluded that “adequate services” cannot be provided to the Montevallo or Wood Trails properties and that conclusion is supported by more than substantial evidence. See Sections 3.4.3-3.4.7 of this brief *infra*.

At page 44 of its brief Phoenix argues that “Instead, GMA requires urban densities of at least R-4 in this area.” However, *Woods* makes clear “that a site-specific rezone cannot be challenged for compliance with the GMA.” 162 Wn. 2d at 614.

In summary, the City of Woodinville has set aside sufficient land to more than meet its housing goals and there is no “demonstrated need” for increased densities over the 20 year

planning period described by GMA. Between the careful analysis of the City and the data and information presented in the CNW analysis, there is abundant evidence to support the City Council's conclusions that Phoenix failed in its burden to show a "demonstrated need" for its rezone. Phoenix's claims that the Council erred are without merit.

**3.3.3 The City Council Correctly Found That the Zone Reclassifications of Wood Trails and Montevallo are Inconsistent and Incompatible with Uses and Zoning of the Surrounding Properties.**

At page 46 of its brief, Phoenix argues that the proposed rezones are compatible with the surrounding area. The general rezone criteria provides that a zone reclassification is granted "only if" the application is consistent with the comprehensive plan and meets three criteria, the second of which is:

The zone reclassification is consistent and compatible with the uses and zoning of the surrounding properties.

In this regard, the City Council found, for each rezone, that the development "as proposed is not in character with the surrounding R-1 neighborhoods and properties." Wood Trails Finding 12; Montevallo Finding 10. Similarly, Conclusion 10 in each decision states: "The current underlying zoning of the property at R-1 is

inconsistent with the proposed density of the preliminary plat application." These findings and conclusions are again amply supported in the record.

All properties that surround the Wood Trails and Montevallo proposals are zoned R-1 and are currently developed with single family homes on lots that average just less than one acre. As shown in the CNW Analysis, Vol. 2, at the "Well-Established Subdivision of the Same Density" section, principal development of this area took place in the 1970's and 1980's and is unchanged since then. Data from the CNW analysis shows charts, graphs, overhead photographs, lot size comparisons and other documentary evidence showing the inconsistency and incompatibility with both uses and zoning in the surrounding area. See CNW Analysis Vol. 2, Well Established Subdivisions, pp. 602-629.

These conclusions are confirmed and reinforced by the staff report for Ordinance 431, which concluded:

an evaluation of existing neighborhoods in the R-1 area . . . found that several neighborhoods' housing stock, character and vitality would best be preserved by lower density zoning.

Staff Report for Ordinance 431, CNW Analysis, pp. 565-566.

In summary, there is overwhelming statistical and

demonstrative evidence showing in detail that Phoenix's proposed R-4 rezones are inconsistent and incompatible with the uses and zoning of the adjacent properties in the Wellington neighborhood. Phoenix's improper invitation to the Court take over as a zoning agency is inconsistent with the entire scheme of Washington land use law and must be rejected.

**3.3.4 The Property Is Practically and Physically Unsited for the Uses Allowed in the Proposed Zone Reclassification.**

Neither the Wood Trails nor the Montevallo properties are suited for the uses proposed under the rezone, i.e. subdivisions of densities that are R-4 despite Phoenix' claims at page 46 of its brief.

CNW presented clear evidence in its analysis, and in hearing testimony, that the physical circumstances of the properties proposed for rezones were ill-suited for the development proposed.

One of the principal issues, particularly with the Wood Trails proposal, is the presence of geologic hazard areas. That issue will be discussed in full at Section 3.4.2 of this brief. As that section describes, the existence of large areas of landslide and erosion hazard areas make the Wood Trails rezone area show that property is not "practically or physically suited" for more intense



development that might be permitted in an R-4 rezone. The detailed review of the physical incompatibilities of the proposed rezone property found in the CNW Analysis, Volume 2, Critical Areas, prepared by CNW's experts in geology and hydrogeology, shows the severe limitations of the rezone properties to various geologic hazards. See CNW Analysis, Vol. 2, pp. 1078-1093. This data included detailed maps showing the serious geologic hazards that exist in the area of the rezones. See pp. 1091-93.

In addition, there are other constraints that make the area unsuitable for more dense development.

First, there is no public transportation to the area. Findings, Section 6(c) (both Decisions). As described by CNW's expert traffic engineer, Roger Mason, there is no transit service anywhere near either the Wood Trails or the Montevallo proposals; the nearest minor arterial, 156<sup>th</sup> Avenue N.E., has no bus service and there are no plans by Metro to bring service to this area. CNW Analysis, Vol. 1, at p. 40. Residents in any new R-4 housing will be completely dependent on automobiles for all work, shopping, recreation and other trips outside the home. As noted herein, the lack of transit also demonstrates that the area has inadequate public services and facilities under the residential rezone criteria in WMC

21.04.080 for an R-4 rezone.

Second, the roads in the area are substandard. As outlined in detail in the CNW Analysis, all of the local access roads, N.E. 195<sup>th</sup>, N.E. 198<sup>th</sup>, N.E. 201<sup>st</sup>, and N.E. 202<sup>nd</sup> do not meet commonly accepted transportation engineering standards, having been constructed more than 30 years ago.

Third, 156<sup>th</sup> Ave N.E., the only north-south arterial in the area, has serious engineering and safety problems as shown in the CNW Analysis in the Infrastructure Section, Transportation subsection, also prepared by Mr. Mason. See pp. 22-40. This route is also physically substandard with serious sight distance limitations. This section of Mr. Mason's report was also richly detailed, again with comparison charts and photographs of the dangerous conditions. See e.g. pp. 3-34. There are also serious congestion problems on this street, where traffic volumes are growing at rates substantially higher than anticipated. See pp. 27-38.

Fourth, the same Ordinance 431 staff report noted that:

An R-4 rezone of the subject area would likely have a negative effect on the City's resources in the context of capital improvement plans, particularly in regards to addressing traffic . . . .

CNW Analysis at p. 719. This confirms that providing the necessary

transportation infrastructure will be expensive for the city.

In summary, the Wood Trails and Montevallo properties are not practically and physically suited for R-4 uses and hence do not qualify for these rezones. Once again, Phoenix's challenges to the carefully considered, and fully documented, findings and conclusions of the City are without merit.

**3.4 Under the Terms of WMC 21.04.080(2), the Criteria for Residential Zones, the Property Is Correctly Zoned R-1 and Is Not Consistent with the Criteria for Rezone to R-4.**

The second general criteria for rezones are the standards established for the various zones under the City of Woodinville code at WMC 21A.04. Here the criteria are set forth for residential zones in general, and for R-1 and R-4 in particular. These criteria are as follows:

**21.04.080 Residential zones**

(2) Use of this zone is appropriate in residential areas designated by the Comprehensive Plan as follows:

(a) The R-1 zone on or adjacent to lands with area-wide environmental constraints, or in well-established subdivisions of the same density, which are served at the time of development by public or private facilities and services adequate to support planned densities;

(b) The R-4 through R-8 zones on urban lands that are predominantly environmentally unconstrained and are served at the time of development, by adequate public sewers, water supply, roads and

other needed public facilities and services; and . . .

As with the general rezone criteria, the applicant bears the burden of proof to demonstrate consistency with these requirements.

In this section we will first describe the broad discretion that the City has in making planning decisions under the GMA. CNW will then describe why the Wood Trails and Montevallo properties are correctly zoned R-1 and how they fail to meet criteria for rezone to R-4.

#### **3.4.1 Maintenance of R-1 Zoning Is Appropriate Here Where Large Lot, Well Established Subdivisions Exist.**

The Wellington area is the site of well-established residential subdivisions. These larger lots were created, in most cases, more than thirty years ago.

Both the Wood Trails and Montevallo proposals are located within a neighborhood that includes established subdivisions with densities that comport with the R-1 zone.

The "Well Established Subdivisions of the Same Density" subsection of the CNW Analysis contains 43 pages of detailed information that describe the history of development in the Wellington community. See pp. 592-631. This section shows the incompatibility of the new proposed development with the existing

lots and developments. Once again, CNW provides analysis of the well established subdivisions through statistical material and aerial, and ground level, photographs of the neighborhood. *Id.* at pages 601-609. Examples of other developments, by the same developer (Phoenix), are also shown demonstrating incompatibility. See pages 613-618. This material describes in detail how the Wellington neighborhood is built out with mature lots of densities consistent with R-1 zoning. See CNW Analysis, at pages 607-608. This includes aerial photographs found at pages 599-600 that show the deviation between existing development and proposed development with R-4 zoning. *Id.*

It is also important here to recognize the precedential and cumulative effect the Wood Trails and Montevallo rezone decisions will have. Given the isolation of these proposals in a virtual sea of lower density R-1 zoning, it is inescapable that there may be no basis to deny other R-4 applications if these areas are rezoned. Given that the one acre parcel size of existing parcels can easily be short platted into smaller lots, it is likely that individual rezones and short plats will be sought by property owners seeking to maximize value in their property. The practical impact of such developments is described in detail in the "Cumulative and Secondary Impacts"

section of CNW's Analysis, Vol. 2, see especially pages 744-833.

Such impacts will be significant because the Wellington neighborhood has a unified character, featuring preservation of vegetation, privacy, large setbacks and generous open space on each lot. It is no wonder that the Sustainable Development Study and the staff report on Ordinance 431 made conclusions supportive of maintaining R-1 zoning, as follows:

- An R-4 up-zone to a large area of the City could have a negative impact on the city image and sense of unique identity, recognized since incorporation as a Woodland Character Community

CNW Analysis at 719.

- Staff has prepared a study of the existing neighborhoods in the R-1 area and therein found that several neighborhoods' housing stock, character and vitality would best be preserved by lower density zoning

*Id.* page 718.

Based partially on CNW's submissions, the Woodinville City

Council found that:

3. The subject site is currently zoned R-1 and has been zoned R-1 since incorporation of the City. The zoning designation was at the time of incorporation a continuation of the applicable King County zoning designation under which the land had been subdivided and developed as part of unincorporated King County. City development regulations allow the property to be developed consistent with its R-1 designation.

The City's decision to deny the Montevallo and Wood Trails rezone proposals based on this criteria has overwhelming support in the record. There is no basis on which to conclude that the City did not have substantial evidence in solid support of its decision.

#### **3.4.2 Significant Area-wide Environmental Constraints Exist That Prohibit R-4 Zoning.**

Under WAC 21.04.080(2) the burden of proof is again on the applicant to demonstrate that the property under consideration is "predominantly environmentally unconstrained" to qualify for an R-4 rezone. In reviewing the evidence here, the Court must pay particular attention to the text of residential rezone criteria. The City uses the terms "constrained" and "unconstrained." The use of this language means that R-1 is appropriate where there are limitations on use - "constraints" - not that the land is somehow unbuildable or unsafe. This language chosen indicates a broad standard of protection. Further, it must be demonstrated that the property is "predominately" unconstrained to qualify for R-4 zoning. The syntax here is clear: the applicant must show that most of the property is unconstrained to receive R-4 zoning. In addition, the modifier that the environmental constraint must be "area-wide," found in the criteria for the R-1 zone, is missing from the R-4

criteria.<sup>6</sup>

Phoenix devotes a short section of its brief (pages 31-32) to a claim that its properties are not environmentally constrained.

This is an attempt to dispute the clear findings by the City in its

Wood Trails decision that:

d. Area-wide environmental constraints imposed by steep slope and erosion hazard areas make R-1 zoning particularly appropriate for the site by minimizing the significant unavoidable adverse impacts of residential development of the property. See Statement of purpose in WMC Section 21.04.080(2)(a) and (b).

Wood Trails decision, Section 6.

Here the evidence demonstrates that the rezone proposals, particularly Wood Trails, are not “predominately environmentally unconstrained” as required for an R-4 zone. There are multiple environmental constraints for that property as shown by the various critical areas that apply to it as set forth in CNW’s Analysis. In addition, the property continues to meet the criteria for R-1, i.e., “lands with area-wide environmental constraints.” For R-1, the code ties two criteria together by the disjunctive conjunction “or” indicating that if either criteria, “area wide environmental

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<sup>6</sup> These code criteria have been part of city codes since the City was incorporated. Comprehensive plan and development regulations are deemed legally compliant if not challenged within 60 days of their adoption. *Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn. 2d 329, 334-345, 190 P.3d 38 (2008).



constraints" or "in well established subdivisions of the same density" is met the property must be zoned R-1. Note as well that the R-1 zone is not required to actually be on areas of such environmental constraints, rather such land only need to be "adjacent to" such lands. Again, these criteria have been an unchallenged part of the code since the applicants first owned the property.

As to these criteria, the CNW Analysis demonstrates that the Wood Trails property has broad scale, area wide environmental constraints, most notably geologic limitations for steep slopes, erosion hazards and landslide hazards. This material is found in Volume 2, of the CNW Analysis Exhibit under "Critical Areas" at pages 1076-1093. The material here was prepared by Otto Paris (a licensed professional hydrogeologist and geologic consultant) and by Susan Boundy-Sanders, another highly qualified geologist who spoke at the hearings. Additional materials on this subject were submitted by Robert Harmon, a highly qualified geologist, who also spoke at the hearing. See Exhibit 94, Tr. 3/14. p. 109-112; Tr. 4/5 p. 10-20.

This section of CNW's Analysis shows that recent information concludes that the entire "Hillside Drainages Area",

which includes the Wood Trails property, should be classified as a Landslide Hazard area. See CNW Analysis at p. 1091. This is in addition to the area being identified as an erosion hazard area. These geologic constraints are "area wide," extending both to the north and south from the Wood Trails plat. *Id.* Again the CNW Analysis on Critical Areas was richly detailed, with full color diagrams and maps of the area showing where the environmental constraints were found, in many cases, referencing existing data and reports from the city. *Id.*

In summary, the Wood Trails proposal is not consistent with the criteria for R-4 zoning because these lands are not "predominately environmentally unconstrained."

After reviewing this evidence, the City Council, in its Wood Trails decision, found that:

6d. Area-wide environmental constraints imposed by steep slopes and erosion hazard areas make R-1 zoning particularly appropriate for the site by minimizing the significant unavoidable adverse impacts of residential development of the property. See the statement of purpose in WMC Section 21.04.080(2)(a) and (b).

9. The Woodinville Municipal Code (WMC) Critical Areas Ordinance mapping showed evidence of area-wide environmental constraints as evidenced in the FEIS and exhibits.

10. The FEIS completed by the City of

Woodinville shows evidence of area-wide environmental constraints.

As described above, these conclusions are more than supported by substantial evidence from the expert opinion offered by CNW's witnesses. Phoenix's arguments on these points cannot be sustained.

**3.4.3 The Rezones in Question Are Not Served by Adequate Roads and Other Needed Public Facilities and Services.**

Under WMC 21.04.080(2) the applicant must show that the property offered for rezone is:

served at the time of development by adequate public sewers, water supply, roads, and other needed public facilities and services.

In the present case, strong evidence shows that both the Montevallo and Wood Trails properties are not served by "adequate public facilities and services."

**1. Substandard Roads.** The code requires that there be "adequate roads" to the development. In its analysis CNW presented a detailed traffic report that considered and reviewed the existing road system in the area. See CNW Analysis, Volume 1, Section 2 under Transportation at pages 20-40. This expert report was prepared by Roger Mason, a licensed professional engineer with 25 years experience in traffic engineering. His resumé is

found in the resumé section of Volume 2 of the CNW Analysis at pages 1298-1300. His conclusions, found at page 40 state:

- Local access roads do not meet commonly accepted standards, and added traffic volumes from development increase safety risk along all of these local roads.
- 156<sup>th</sup> Ave. N.E. does not meet a number of commonly accepted standards, and added traffic volumes from development is problematic at intersections, and increase safety risk for vehicles and pedestrians.

Mr. Mason also provided testimony as found at Tr. 3-15, pages 104-118.

The roads, built 30 or more years ago, have various geometric problems as well as serious sight distance problems which create safety issues. They have no curbs, gutters or sidewalks, as described by Mr. Mason.

The rezone proposals are not "served at the time of development by adequate . . . roads . . ." and accordingly do not qualify for rezoning to R-4.

**2. Lack of Transit.** Mr. Mason's report also analyzes another "needed public service," that of public transportation. At page 40 of the CNW Analysis Mr. Mason notes that there is no public transit service at all along the main arterial street leading to the two properties to be rezoned, 156<sup>th</sup> Ave. N.E. The closest

transit service is more than a mile away and is peak hour service only. *Id.* Mr. Mason notes there are no transportation or transit improvement projects even contemplated in the area. See discussion at Section 3.3.4 of this brief.

**3. Lack of Sidewalks.** Mr. Mason's Transportation report notes that there are no sidewalks in the community to allow for pedestrian movement. See page 34. Accordingly, the existing transportation systems are substandard under current city rules and thus inadequate.

**4. Lack of Available Parkland.** During the hearing several witnesses noted that there were no public parks within the vicinity of the two proposed rezone properties. The Final Environmental Impact Statement (FEIS) for the Phoenix proposals admitted that:

There are no existing City of Woodinville parks, recreation facilities or properties (developed or undeveloped) in the West Wellington neighborhood or within close walking distance.

FEIS, page 3.6-1.<sup>7</sup>

Based on this evidence, much of which was expert opinion, the City Council reached the following finding:

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<sup>7</sup> The FEIS is included with the attachment to Phoenix's brief.

6c. The lack of adequate public facilities and services to support the proposed R-4 development, including, but not limited to the substandard arterial 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 servicing the neighborhood area. Developments with R-4 densities are inappropriate in areas of the City where adequate public facilities and services cannot be provided at the time of development. See the statement of purpose in WMC Section 21.04.080(1)(a).

(Emphasis supplied.) This finding led to the following conclusion:

2. Approval of the proposed rezone is inappropriate at this time due to the deficient public facilities and services (other than sewer) in the area where the property is located and the currently ongoing sustainable development study.

These findings and conclusions are supported by strong evidence in the record as described above. Phoenix's claim to the contrary is without merit and should be rejected.

### **3.5 The Proposal Is Inconsistent With the Terms of the City of Woodinville Comprehensive Plan.**

The final rezoning criteria is whether the proposal is consistent with the terms of the comprehensive plan as described in WMC 21.44.070, zone reclassification criteria.

A zone reclassification shall be granted only if the applicant demonstrates that the proposal is consistent with the Comprehensive Plan

The Woodinville City Council found that Phoenix had not

demonstrated that the proposal was consistent with the city's comprehensive plan. As the Council said:

The City Council finds that, a site specific rezone of the property to R-4 density would be inconsistent with significant Comprehensive Plan Policies and does not bear a substantial relationship to the public health, safety, morals or welfare.

Both decisions, Conclusion 1.

At pages 32-34 of its brief, Phoenix argues that its rezone proposals do meet comprehensive plan policies, citing the decision of the Hearing Examiner for support. However, the Hearing Examiner only makes recommendations and the City Council, in the exercise of its discretion, can decline to accept the Hearing Examiner's view, as they have here.

As described above, the current R-1 zoning was adopted pursuant to the current zoning code and comprehensive plan and is thus presumed correct. The applicant has the burden of showing that the proposal is consistent with the comprehensive plan. As will be shown, both rezones requests to R-4 are inconsistent with key elements of the comprehensive plan, which support retaining the current R-1 zoning.

The significant sections of the comprehensive plan at issue

here are as follows:<sup>8</sup>

**A) LU-1.1 Preserve the character of existing neighborhoods in Woodinville while accommodating the state's 20-year growth forecasts for Woodinville.**

The very first section of the land use element emphasizes the preservation of the character of existing neighborhoods. The subject proposals do not preserve the character of the existing neighborhood for the reasons identified above. As noted by the sustainable development study, the north Wellington neighborhood ranks among the most desirable in the city. As described in the sustainable development study and the staff report on Ordinance 431, the "character" of this neighborhood is best preserved "by lower density zoning." See CNW Analysis at p. 718. The analysis and assessment of neighborhood character is found in the "Well Established Subdivisions" section of the CNW Analysis, Vol. 2, Section 2. See pp. 692-700.

Further, as described and admitted by staff, the character of the Wellington neighborhood can be preserved "while accommodating the state's 20-year growth forecasts for Woodinville" because according to staff there is sufficient land

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<sup>8</sup> The text of the Comprehensive Plan is Appendix D to the Phoenix brief.



available, at suitable densities, to meet projections. staff report for Ordinance 431, §3(b), CNW Analysis at pages 717-718.

**B) 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),**

(Emphasis supplied). This policy states that development should only be allowed in those areas that have available public services and facilities or where they can be "cost effectively provided." As described by Mr. Mason, the cost of upgrading streets in the community for benefit of the Wood Trails and Montevallo rezones is substantial. Exhibit 74, CNW Analysis, Vol. 1, Transportation, at pp. 39-40.

Based on this sound and substantial evidence the City Council concluded that:

The City must proactively direct development to occur in appropriate locations and concurrent with the availability and provision of adequate public facilities and services. Planning comprehensively ensures the integrity of the City's growth strategy. Development which the City cannot readily and efficiently provide services to is clearly premature and is not consistent with the City of Woodinville Comprehensive Plan.

Claims that the Council did not have substantial evidence to support its finding and conclusions must be denied.

- C) ***GOAL LU-2: To establish land use patterns, densities, and site designs that encourage less reliance on single-occupant vehicle travel.***

R-4 zoning is inconsistent with this policy. There are no transit routes that serve this area and no sidewalks or bicycle routes in place on nearby streets. There are no nearby shopping, business, job or recreational opportunities. Prospective residents of these areas will be completely reliant on vehicles for access to all destinations. See page 28 of this brief.

- D) ***GOAL ENV-3: To preserve and enhance aquatic and wildlife habitat. ENV-3.3 Maintain a standard of no net loss in the functions and values of sensitive habitat features, including wetlands, streams, lakes and shoreline areas.***

Wildlife is abundant in the current wooded and well vegetated R-1 neighborhood, as described at the hearing, but will be adversely affected by R-4 housing that will eliminate available habitat. As identified in the CNW Analysis, Section 2, Infrastructure, Storm Water Drainage (pp. 290-93) and Wildlife (pp. 1162-1189) there will be obvious impacts on streams and their habitat from increased flows and the elimination of water infiltration robbing streams of base flows during the dry season, increasing temperature and adding pollutants. The rezone for the Montevallo proposal will adversely affect wetlands by increasing impervious

surfaces, minimal pollution treatment and effects on the hydrology of the adjacent wetland. *Id.*

### **3.6 Conclusions re Rezoning.**

In this section CNW has proven that the applicant has not met the requirements for a rezone, in particular:

**1. Caselaw Criteria.** The applicant has not met its burden of proof to show changed circumstances under applicable case law, including changed public opinion, changes in land use patterns or changes on the property itself.

**2. General Rezone Criteria.** The applicant has not met the general rezone criteria of WMC 21.44.070 to show demonstrated need, the consistency and compatibility with surrounding properties, and that the properties are practically and physically suited for R-4 zoning.

**3. Specific Residential Rezone Criteria.** The applicant has not shown that the residential zone criteria of WMC 21.04.080(2) are met, including showing that the R-4 zone is on lands that are "predominately environmentally unconstrained" and have "adequate roads"; further that the criteria for R-1 continue to be met, i.e. that the properties are in "well established subdivisions of the same (R-1) density" and "on or adjacent to lands with area-

wide environmental constraints;"

**4. Comprehensive Plan.** The proposals are inconsistent with numerous provisions of the City of Woodinville Comprehensive Plan.

The evidence is overwhelming that the applicant has not met any of the criteria that it has a burden to meet. Phoenix's claims to have met these criteria must be rejected.

**3.7 A Review of Platting Matters Is Not Appropriate Given the Decision of the City Council.**

At page 49 of its brief, Phoenix contends that if the Court reverses the City's decisions on the rezones, then it must also approve the preliminary plats proffered by Phoenix. Given the failure of Phoenix to prove its LUPA case on the rezones, there is no basis on which to review the plat decisions. However, even if the rezone decisions are reversed, the Court cannot review or approve the plats until the City Council acts on CNW's appeal.

Phoenix admits that its proposals for preliminary plats were completely dependent on the rezoning to R-4; the densities shown on the plat are inconsistent with R-1 zoning. Brief at 48. Phoenix's plat applications were bets "on the come" that the rezoning would be approved; nothing required Phoenix to combine the preliminary plat and rezone. Under such Washington cases as *Loveless v.*

*Yantis*, 82 Wn.2d 754, 761, 513 P.2d 1023 (1973), the rule is:

Therefore, since any approval or modification by the reviewers of a preliminary plat is binding where infirmities appear that would preclude any possible approval (such as clear zoning violations), it is incumbent upon the planning body to reject the plat.

This rule has now been codified in RCW 58.17.195:

No plat or short plat may be approved unless the city, town, or county makes a formal written finding of fact that the proposed subdivision or proposed short subdivision is in conformity with any applicable zoning ordinance or other land use controls which may exist.

In the present case, Phoenix asks the Court to become the super zoning agency and to make zoning decisions as described above. The Court must reject this invitation. No decision has been made on the plat by the Woodinville City Council and there is no basis for the Court to usurp the City's authority in that regard. Indeed, the merits of CNW appeal of the approval of the preliminary plats has never been heard or decided by the Woodinville City Council.

In summary, this Court is not in a position to make a preliminary plat decision. If the Court determines that the rezone decisions should be reversed, then it should remand the matter of the CNW plat appeal to the City Council for a decision on the merits.

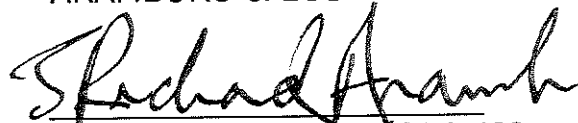
#### IV. CONCLUSION.

CNW submits that the City of Woodinville decisions to not rezone Phoenix's properties in the Wellington neighborhood should be affirmed. Under the strictures of LUPA, the Court does not act as a zoning agency, but only reviews local governmental decisions for a lack of substantive evidence or clearly erroneous decision making. This Court does not review local government decisions for compliance with the Growth Management Act. In the present case, there was overwhelming evidence that Phoenix application did not meet any of the long established standards for rezoning under caselaw and Woodinville codes.

The Court should affirm the decisions of the trial court and the City of Woodinville.

DATED: DEC. 10, 2008

Respectfully submitted,  
ARAMBURU & EUSTIS LLP

A handwritten signature in black ink, appearing to read "J. Richard Aramburu", written over a horizontal line.

J. Richard Aramburu, WSBA 466  
Attorney for Concerned  
Neighbors of Wellington

## DECLARATION OF SERVICE

The undersigned declares as follows:

I am an employee in the law offices of Aramburu & Eustis LLP, over the age of 18 years and competent to be a witness herein. On the date below written I caused copies of the foregoing document to be served via legal messenger on counsel of record herein as follows:

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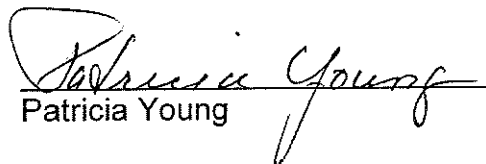
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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true to the best of my knowledge and belief.

Dated at Seattle Washington this 10 day of Dec. 2008.

  
Patricia Young