No. 07-2-29402-3 SEA

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,

Respondent.

BRIEF OF RESPONDENT CITY OF WOODINVILLE

Greg A. Rubstello
Attorney for Respondent City of Woodinville
OGDEN MURPHY WALLACE, P.L.L.C.
1601 5th Avenue, Suite 2100

Seattle, Washington 98101

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

A. INTRODUCTION

1. The Growth Management Act (GMA) and Land Use Planning Arguments in Petitioner's Opening Brief are Irrelevant to the Subject Matter of this Appeal.

The decision to be made by this court does not involve the review or collateral attack on the past legislative decisions[1] of the Woodinville City Council that allow for and maintain R-1 residential zoning in the Leota and Wellington neighborhoods of Woodinville. *Thurston County v. WWGMHB*, 164 Wn.2d 329, 190 P.3d 38 (2008); *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007). Maintenance of R-1 zoning in these neighborhoods remains a viable option for the City Council under the City's Comprehensive Plan.[2] The properties are currently zoned R-1 on the City's zoning map[3], consistent with the City's development regulations[4] and comprehensive plan. Whether or not the existing R-1 zoning designation for the Leota and Wellington neighborhoods encourages "sprawling, suburban one-acre development" as characterized

---

[1] Legislative decisions include both the adoption of Comprehensive Plan policies and development regulations codified in the Woodinville Municipal Code ("WMC").

[2] *See* City Land Use Goals and policies there under, Numbered: LU-1.1; LU-2; LU-3.4.1; 3.4.2. *See* Appendix C hereto.

[3] The City Zoning Map from the hearing record is attached hereto as Appendix D.

[4] *See* zoning regulations in Appendix E.

by Phoenix, or represents the appropriate zoning for the current level of public services as determined by the Woodinville City Council[5], is not a determination to be made by this Court in deciding this appeal.

2. Citizen Participation.

The introductory statement made by Phoenix are simply a passionate "setup" for their argument that the City Council bowed to intense neighborhood pressure, rejected smart growth and embraced sprawl. Phoenix argues that the City Council's unlawful and erroneous action must be reversed. The record, however, fails to demonstrate the rezone denial resulted from "public pressure" on the City Council. On the contrary, the record, as demonstrated by the Concerned Neighbors of Wellington (CNW) in their briefing, is replete with well-researched and verified oral testimony and documentary evidence submitted by members of CNW and other residents of the neighborhoods throughout the land use proceeding. **Public participation in land use matters is both encouraged and mandated by state statutes and local regulations.** *See* RCW 36.70A, RCW 36.70B, WMC Chapter 17.11 (Public Notice), and WMC Chapter 17.15 (Open Record Public Hearing). It is disingenuous for the attorneys arguing on behalf of their developer clients to consistently

[5] The Council's decision denying the rezones are included in Appendix A and B.

characterize responsible public participation as something "negative," tainting the decision making process. Public opposition is a factor that may be legitimately considered by the City Council; it just can't be the *sole* basis for its decision. *Henderson v. Kittitas County*, 124 Wn. App. 747, 755, 100 P.3d 842 (2004), citing *Tugwell v. Kittitas County*, 90 Wn. App. 1, 9, 951 P.2d 272 (1998).

3. Co-operation with CNW in briefing.

As stated by Counsel for CNW in their briefing, the City and CNW have collaborated in their briefing to this court, with the City's briefing emphasizing the municipal land use law issues and CNW emphasizing the substantial evidence in the hearing record supporting the decision of the City Council.

B. STATEMENT OF THE CASE

Phoenix proposes to rezone two properties from R-1 (1 unit per acre) to R-4 (4 units per acre). M Ex. 1 and WT Ex. 1. The properties are located in the City of Woodinville in the Leota Neighborhood and more particularly in the area of the neighborhood known as the Wellington

Hills. The FEIS at page 3.4-2 (Appendix G) describes the neighborhoods as follows:

> Leota Neighborhood
>
> The two proposals are located within the Leota neighbor hood. **The Leota neighborhood is predominately low-density single-family homes, many developed on 1-acre lots** and most without public sewer. There is a scattering of undeveloped properties throughout the neighborhood. There is an existing Neighborhood business area at the intersection of 156th Ave NE with Woodinville -Duvall Road. Lake Leota is a small lake surrounded by single-family residences located in the southeast portion of the Leota neighborhood. The Wellington Hills Golf Course **and large-lot single-family residential uses in unincorporated Snohomish County border the Leota neighborhood to the north**. Figure 3.4-2(b) shows land parcels by size.
>
> Wellington Hills
>
> The area in which the two proposal sites are located is commonly known as Wellington Hills, after the golf course immediately north of the neighborhood (in rural unincorporated Snohomish County). the Wellington Hills area is in the northwest corner of the larger Leota neighborhood.
>
> **Wellington Hills is a neighborhood of mostly large-lot (0.5 acre to 2-acre lots, zoned R-1), single-family residential homes** served by public water and individual on-site septic systems. **Many of the homes were built in the 1970s and the 1980s, though some are newer, and a few are older homes. Streets in Wellington Hills are typically paved but without curbs, gutter and sidewalks. Most of the**

> **neighborhood is heavily wooded, with open areas, particularly in the north-central part of the area.**
>
> Wellington Hills is bordered on the north by the City limits, which also is the King-Snohomish County line. Across the City line are the golf course and **larger-lot single-family development. To the west, a steep, wooded bluff separates** Wellington Hills from the North Industrial area. To the south and east, Wellington Hills is bordered by other parts of the larger Leota neighborhood. (emphasis added)

An FEIS was prepared for the proposed subdivisions. It contains a "SUMMARY OF IMPACTS, MITIGATION AND SIGNIFICANT UNAVOIDABLE ADVERSE IMPACTS" beginning at page 1-9. It notes that:

> ... All likely impacts could be mitigated by a redesign- by adopted City regulations and/or by elements incorporated into the design of the proposal -- to a level that is considered less than significant. Mitigation, as defined by SEPA, includes actions that can avoid, minimize, rectify, reduce, compensate for or monitor impacts (WAC 197-11-768). **However, some adverse impacts are considered "unavoidable" because they reflect a type of change that is inherent in the proposed development regardless of how it is designed.** Urban development, for example, unavoidably entails clearing of vegetation, creation of impervious surfaces, and conduct of human activities. This category of impacts is identified for each element of the environment in the EIS and is summarized in Section 1.5 below." (emphasis added)

See Appendix G hereto.

The FEIS also identified the following Major Conclusions at 1-44:

- impacts to steep, potentially unstable and erosion prone slopes
- impacts to two wetlands, one on each site
- impacts of urban characteristics in a "rural character" setting
- and to a lesser extent impacts to roadways, with site distance problems

The FEIS also identified "SIGNIFICANT AREAS OF CONTROVERSY AND UNCERTAINTY at page 1-44:

> Controversy often arises from technical issues and personal preferences. Wood Trails and Montevallo are no exception. The following are significant areas of controversy surrounding these two proposals.
>
> Although the proposals (i.e., residential plats) are not particularly large or unique in nature, **their location in a low-density neighborhood (generally developed at an average of about 1 dwelling unit per acre) has generated controversy among nearby residents.** The controversy also reflects a more general concern regarding future infill development at urban densities from introduction of sewers. **As of this writing the City has applied a moratorium to new development within the R-1 zones of the City and is conducting a study of sustainable development to help determine future direction for these areas. The difficulty arises in the balance between urban growth with a city's boundary and maintaining natural environments and a low density zoning with a rural character.**

Major concerns raised by members of the community relate to development compatibility because of differing densities and loss of undeveloped land/open space, and the resulting change in character of the neighborhood. Issues regarding land use, density and neighborhood change are probably the most frequently raised and generate the most controversy. Proposed land uses are of the same type as surrounding development (i.e., single-family residences) and, although the proposed density is higher (4 dwelling units per acre) it is still considered low-density under the City's Comprehensive Plan.

- **Each proposal has direct impacts on the environment, some which could rise to the level of significant adverse.** Erosion hazard areas exist on Wood Trails. **Neighbors, technical experts and the general public differ in their views. Some contend that the slope are stable and can handle engineering solution, while others believe that slopes of this nature tend to create long-term erosion and stability problems, that are difficult to prevent.** The design of the proposal could be altered to minimize many of the potential effects.

- **A debate over urban design standards such as road widths is challenge.** Wider roads create more of a sense of urban character, yet increase impervious area. Narrower roads create amore rural character, but challenge the need for parking and safety on roads.

- **One wetland on each proposal site will be impacted. The one on Wood Trails would be eliminated and replaced with a detention**

> **facility and the one on Montevallo will potentially be drained. Debate is occurring over these two issues.** Removal of the wetland on Wood Trials may be logical for it location for the detention facility. (emphasis added)

> No significant uncertainty has been identified by the City in regard to the type or magnitude of impacts that are anticipated, with the exception of the controversy over density. All other issues can be mitigated. The City believes that the impact conclusions provided in the Final EIS are accurate assessments of the whether probable, significant adverse impacts would occur, and are consistent with the technical information considered in the environmental review.

In section 1.7 of the FEIS at 1-45, "ISSUES TO BE RESOLVED" the FEIS identified issues unresolved by the EIS and later decided by the City Council in their decisions denying the rezones:

> **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 about 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. Other issues involve design factors that will be resolved during City review of the subdivision applications, if the rezone and preliminary plat applications are approved. The following table, 1.8-1

> provides examples of some issues to be resolved. (emphasis added)

An open record hearing was conducted by a City Hearing Examiner where transportation, compatibility, environmental, need, and other issues were contested. Significant evidence was entered into the record representing the different points of view.

The City Council after receiving a recommendation from its Hearing Examiner to approve the two rezones, determined that infill residential development at four dwelling units per acre was in incompatible with the existing lower density residential development. The Council denied the rezone requests to maintain the current R-1 zoning. This appeal followed.

C. SUMMARY OF ARGUMENT

The City Council as the City's governing legislative body has the discretion to deny a rezone, regardless of how well an applicant may demonstrate compliance with the established common law and local rezone criteria. The courts will affirm the denial of a rezone, so long as there is any rational or reasonable basis to support the denial evident in the record. Under LUPA, the reasoning or rationale of the Council need only be supported by substantial evidence. Here the rational or reasonable basis for the City Council's denial of the rezone is set forth in its extensive

written findings and conclusions. *See* Appendixes A and B. These findings and conclusions, as further referenced in this brief and in the brief of the concerned Neighbors of Wellington (CNW), are amply supported by the record.

The City Council's findings and conclusions recognize that Phoenix Development, Inc. (Phoenix) failed to demonstrate compliance with both the established common law and local rezone criteria. Specifically, Phoenix failed to:

1.1 Demonstrate a substantial change of circumstances since the original zoning; or to demonstrate a need to rezone the properties in order to implement a change in zoning called out for in the City's Comprehensive Plan; and

1.2 Demonstrate that the proposed rezones bore a substantial relationship to the public health, safety and welfare; and

1.3 Demonstrate a substantial need for the rezone; and

1.4 Demonstrate that the proposed zone reclassification is consistent and compatible with uses and zoning of the surrounding properties.

The current R-1 zoning designation for the subject properties is consistent with the comprehensive plan's future land use map, with the

guidelines for determining the appropriateness of R-1 zoning in WMC 21.04.080(2)(a), and with meeting the City's 20 year planning obligations consistent with the county's buildable lands survey. The City Council's denial of the rezone applications was a reasonable exercise of City Council discretion. A change in zoning for the two properties was determined by the Council to be unnecessary at this time. The validity of this decision is, at minimum, "fairly debatable", and must be sustained under the applicable standard of judicial review.

D. ARGUMENT

1. Standards and Procedures Governing Zoning Law.

a. Courts do not rezone property. City Councils decide whether or not to rezone property.

At its core, Phoenix's argument attempts to characterize the requested rezones as essentially ministerial decisions to which any developer is unequivocally entitled. Contrary to Phoenix's contentions, however, the decision to rezone — or *not* to rezone — a particular parcel falls within the broad, exclusive discretion of the local legislative body. Washington law is clear that "[c]ourts 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). For this reason, courts "cannot and should not invade the legislative arena or intrude upon municipal zoning

determinations, absent a clear showing of arbitrary, unreasonable, irrational or unlawful zoning action or inaction." *Id.*

The Woodinville City Council's unanimous decision to retain the current zoning designation for the Wood Trails and Montevallo project sites in the instant case easily satisfies this deferential standard. After an extensive hearing and review process, the City Council entered detailed findings and conclusions in support of its decision. The Council carefully considered Phoenix's request under the City's locally codified rezone standards and ultimately determined that the proposal (1) was inconsistent with relevant comprehensive plan provisions, (2) would be out of character with the surrounding neighborhood, (3) would cause unmitigatable impacts to local transportation systems, and (4) was unnecessary in order to implement relevant City plans, goals, timeframes and policies. These findings and conclusions are demonstrably supported by the administrative record as documented below.

Phoenix seeks reversal of the Woodinville City Council's decision refusing to rezone the Wood Trails and Montevallo project sites from R-1 to R-4 residential densities. Appellant's Brief at 4. The crux of Phoenix's argument in this regard is that "the Wood Trails and Montevallo proposals clearly meet all of the City's rezone criteria." Appellant's Brief at 47. As

explained *infra*, this contention is erroneous in light of the substantial record evidence demonstrating that there have been no changed conditions from the time of the original zoning, no demonstrated need by the city for the increased residential density at this time and in this location, the difference in neighborhood character between R-1 and R-4 density zoning, and the lack of adequate public services to support the increased density (including roads built to current standards, public parks, public transit, and existing public sewer services).

b. The City Council decision to rezone property is inherently discretionary.

It is a basic precept of municipal law that "[z]oning is a *discretionary* exercise of police power by a legislative authority." *Anderson v. Island County*, 81 Wn.2d 312, 317, 501 P.2d 594 (1972) (emphasis added). For this reason, a local government's decision regarding a rezone is entitled to deference on review. *See, e.g., Bassani v. Bd. of County Cm'rs for Yakima County*, 70 Wn. App. 389, 393, 853 P2d 945 (1993). "If the validity of the legislative authority's classification for zoning purposes is fairly debatable, it will be sustained." *Anderson,* .81 Wn. App. at 317.

This judicial deference results from the unique status of municipal zoning power. Unlike other categories of local land use approvals,

rezoning is non-delegable, *see* RCW 35A.63.170(2)(c); may be exercised only by the local legislative body of the municipality, *see Southwick, Inc. v. Lacey,* 58 Wn. App. 886, 889, 795 P.2d 712 (1990); must be effected by ordinance, *see* 17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Property Law §4.16, at 240 (2d ed. 2004); and is not subject to local referendum. *See Leonard v. City of Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976). And site-specific rezones are one of the few categories of land use procedures in which applicants are not protected from future regulatory amendments under the "vested rights doctrine". *See Teed*, 36 Wn. App. at 645.

Washington courts have developed a multi-faceted standard for reviewing local rezone decisions:

> (1) there is no presumption favoring the action of rezoning; (2) the proponents of the rezone have the burden of proof in demonstrating that conditions have substantially changed since the original zoning. . . ; and (3) the rezone must bear a substantial relationship to the public health, safety and welfare.

Parkridge v. City of Seattle, 89 Wn.2d 454, 462, 573 P.2d 359 (1978).[6]

---

[6] Under current caselaw, proponents of a rezone are no longer required to satisfy the "changed conditions" criterion of the *Parkridge* test if the rezone would implement relevant policies of the municipality's comprehensive plan. *See Bjarnson v. Kitsap County*, 78 Wn. App. 840, 846, 899 P.2d 1290 (1995).

Courts have occasionally employed the *Parkridge* criteria to reverse local decisions *approving* a rezone proposal. *See, e.g., Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 875, 947 P.2d 1208 (1997). Significantly, however, no recorded Washington case has ever used them to grant the type relief sought by Phoenix in the present case: overturning a local legislative body's decision to *deny* a requested rezone.

Indeed, Washington courts have repeatedly emphasized precisely the opposite principle — that a municipality cannot be judicially forced to rezone property even where a developer has in fact satisfied the *Parkridge* standards. "The approval or disapproval of a rezone or reclassification of a particular parcel or property is a discretionary legislative act which cannot be compelled[.]" *Teed*, 36 Wn. App. at 642-43. *See also Balser Investments, Inc. v. Snohomish County*, 59 Wn. App. 29, 40, 795 P.2d 753 (1990) (noting that applicant's satisfaction of rezone criterion "certainly did not mandate that a zoning official *must* grant a rezone") (superseded by statute on other grounds, *Freeburg v. City of Seattle*, 71 Wn. App. 367, 370, 859 P.2d 610 (1993)) (emphasis added).

Phoenix cites *J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn. App. 920, 931, 180 P.3d 848 (2008), to establish that site-specific rezone

decisions are quasi-judicial in nature, and therefore, the Council's discretion is limited by legislatively established criteria. In *Storedahl*, the Council was directed to approve a rezone where the Council failed to base its decision, reversing the Hearing Examiner, on the legislatively established criteria for granting rezones set forth in CCC 40.510.030.

Woodinville does not dispute that site-specific rezone requests are quasi-judicial in nature and that the Council must apply the applicable code provisions relating to granting or denying rezone requests in making its decision. In this case, the Council applied WMC 21.44.070 in determining that a zone reclassification should not be granted, and thus, did not run afoul of *Storedahl*. *Storedahl* does not support the proposition that the Council is obligated to grant a rezone, even if the applicant has met the code requirements. If substantial evidence exists demonstrating that the Council could also deny the rezone based on the legislatively established criteria, the Council has discretion to choose, in its legislative capacity, the zoning classification that would best suit the community.

c. Local Authority to impose zoning criteria.

Separate from the *Parkridge* standards discussed above, municipalities may adopt and enforce their own local criteria for zoning map amendments. *See, e.g., Woods v. Kittitas County*, 162 Wn.2d 597,

174 P.3d 25 (2007); *Henderson v. Kittitas County*, 124 Wn. App. 747, 753, 100 P.3d 842 (2004). The City of Woodinville's standards governing site-specific rezones are codified at WMC 21.44.070. See Appendix F. In addition to demonstrating compliance with the City's Comprehensive Plan, a rezone proponent must establish that:

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

WMC 21.44.070.[7]

Phoenix contends that the Woodinville City Council misapplied these criteria in denying the Wood Trails and Montevallo rezone proposals. As demonstrated below, however, Phoenix's argument is without merit. The City Council's decisions were based upon substantial record evidence, a commonsensical interpretation of the Woodinville Municipal Code, and a reasonable exercise of its legislative discretion in determining the appropriate location, character and timing of future residential growth within the Woodinville community.

---

[7] Phoenix erroneously contends that the purpose statement contained in WMC 21.04.080 is a "rezone criteria". Appellant's Brief at 23.

2. The Woodinville City Council is not bound by the Hearing Examiner's recommendation.

Phoenix places emphasis upon the fact that the Hearing Examiner recommended approval of the Wood Trails and Montevallo rezone proposals. Appellant's Brief at 16, 48. [8] But the Hearing Examiner's recommendation to the Woodinville City Council was just that — a mere recommendation. *See* WMC 17.07.030; WMC 21.42.110(2). As the final decision-maker for any rezone proposal, the City Council retained broad latitude to accept or deny the proposed Wood Trails and Montevallo zoning map amendments:

> [R]ezoning involves two necessary steps, a recommendation from the local planning commission, 'planning agency', or hearing examiner to the local legislative body and legislative action by that body. The planning commission, etc. must hold at least one public hearing on a proposed rezoning, *Of course, the local legislative body does not have to adopt a rezoning ordinance that is consonant with the planning agency's action; that action is only recommendatory. The legislative body may adopt a different ordinance or may refuse to adopt any ordinance.*

[8] As noted at page 6, *supra*, the "recommendation" of the City's Planning Department was at best a highly qualified endorsement of the applicant's rezone requests.

17 Stoebuck & Weaver, Washington Practice §4.16, at 240, *supra*, (emphasis added) (internal citation omitted). *See also Tugwell*, 90 Wn. App. at 8.

The Woodinville City Council's refusal to approve the Wood Trails and Montevallo rezone requests was consistent with this well-established discretion. The City Council was not bound by the Hearing Examiner's recommendations, and was instead free to render its own conclusions regarding the extent to which Phoenix's proposals satisfied the zone reclassification criteria codified at WMC 21.44.070.

3. The Woodinville City Council is not collaterally estopped from denying the Wood Trails and Montevallo rezone proposals.

a. The Elements for the Test to Establish the Application of Collateral Estoppel Cannot be Met.

Phoenix alleges that it submitted its development applications for the Wood Trails and Montevallo projects at least in part in reliance upon *Hensley v. City of Woodinville*, a 1997 decision of the Central Puget Sound Growth Management Hearings Board (CPSGMHB). Appellant's Brief at 44. Focusing heavily on dicta from the CPSGMHB's *Hensley* decision, Phoenix contends that the Woodinville City Council is collaterally estopped from denying the Wood Trails and Montevallo rezone proposals. Appellant's Brief at 44.

Hensley involved a challenge to the City's initial Comprehensive Plan. *Hensley v. City of Woodinville*, CPSGMB Case No. 96-3-0031, Final Decision and Order (February 25, 1997), at 1-3. One of the Comprehensive Plan policies challenged in the proceeding was Policy LU-3.6, under which the City would "[a]llow densities higher than one dwelling unit per acre only when adequate services and facilities are available to serve the proposed development." *Id.* at 8. Citing previous Growth Board decisions that had imposed a *bright line* GMA standard of four dwelling unit per acre for urban residential density, the CPSGMHB invalidated Policy LU-3.6 as inconsistent with this mandate. *Id.* at 8-9 & n.1 (citing *Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039, Final Decision and Order (October 6, 1995), at 50). There was no Growth Board challenge in *Hensley* to the allowance for R-1 residential zoning within the comprehensive plan or to the zoning of the Wellington and Leota neighborhoods as R-1 or to the failure of the City to rezone the properties from R-1 to R-4. The doctrine of collateral estoppel cannot based upon *Hensley* cannot be applied to prevent the City Council from denying the rezones.

> The party asserting collateral estoppel bears the burden of proof, *McDaniels v. Carlson*,

> 108 Wn.2d 299, 303, 738 P.2d 254 (1987), and four requirements must be met:
>
> **(1) the issue decided in the prior adjudication must be identical with the one presented in the second;** (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and **(4) application of the doctrine must not work an injustice.**
>
> *Williams*, 132 Wn.2d at 253-54 (emphasis added).

State v. Gary, J.E., 99 Wn. App. 258, 262, 991 P.2d 1220 (2000).

Elements (1) and (4) of the test for collateral estoppel cannot be met. As demonstrated above, the issue decided in *Hensley*— i.e., whether or not a City Comprehensive Plan policy prohibiting residential densities higher than R-1 unless adequate services and facilities are available to serve the proposed development — is hardly "identical" to the central issue implicated in the instant LUPA appeal: whether or not specific properties validly zoned R-1 should be rezoned to R-4.[9] In order for collateral estoppel to apply, "the issue to be precluded must have been actually litigated and necessarily determined in the prior action." *City of Arlington v. Central Puget Sound Growth Management Hearings Board*,

---

[9] WMC 21.04.080(2)(a) and WMC 21.04.080(2)(b) which on their face conflict with the decision in *Hensley*, were not appealed to the Growth Board when adopted by the City Council.

138 Wn. App. 1, 25, 154 P.3d 936 (2007) (citation omitted). The CPSGH's dicta in *Hensley* regarding urban densities was framed exclusively in the context of a since-repealed Comprehensive Plan provision; the Growth Board did not — and lacked authority to — address the site-specific, quasi-judicial issues implicated by the Wood Trails and Montevallo rezone requests. *See, e.g., Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 178-79, 4 P.3d 123 (2000) (GMHB lacks jurisdiction to review site-specific rezone decisions). Because these issues clearly were not "actually litigated and necessarily determined" in *Hensley*, Phoenix's collateral estoppel argument is without merit.

b. Growth Management Act principles — including the density standard espoused in *Hensley* — are inapplicable in LUPA proceedings.

At its core, Phoenix's estoppel theory — as well as its "sound planning principals" argument — attempts to graft growth management policy principles onto the decisional framework for a site-specific rezone proceeding.[10] Appellant's Brief at 44. A recent Washington Supreme

[10] Phoenix also attempts to graft GMA principles onto the framework for deciding a site-specific rezone request when, at page 25, they argue that parks, roads, and walkways are not "urban services" as defined in the GMA, and therefore, their adequacy should not be considered in the Council's decision. Because *Woods* dismissed the argument that GMA planning requirements could form the basis for reversing a rezone decisions, Phoenix's argument is moot even if their interpretation of the statute defining "urban services" is correct.

Court decision has expressly rejected this approach. In *Woods v. Kittitas County*, the Court reiterated that "a challenge to a site-specific land use decision can only be for violations of the comprehensive plan and/or development regulations[.]" The *Woods* Court explicitly considered and dismissed the argument that GMA planning requirements could form the basis for reversing a local jurisdiction's rezoning decision, holding that "*a site-specific rezone cannot be challenged for compliance with the GMA.*" *Id.* at 614 (emphasis added). A superior court lacks subject matter jurisdiction to consider arguments of this type. *Id.* at 615.

c. The urban density standard espoused in *Hensley* has been overruled.

The Growth Board's dicta in *Hensley* regarding appropriate urban densities under the GMA was based upon the so-called "bright line rule", a four-unit-per-acre standard developed by the CPSGMHB in prior decisions. *Hensley v. City of Woodinville*, CPSGMB Case No. 96-3-0031, Final Decision and Order (February 25, 1997), at n.1. Critically, however, the bright-line rule — as well as the Growth Board's authority to impose a numerical density standard under the GMA — was rejected by the Washington Supreme Court in *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005) (internal citation omitted).

The *Viking* decision, recently confirmed Thurston County v. WWGMHB, supra, fatally undermines Phoenix's reliance upon *Hensley*.

d. Phoenix's "reliance" on *Hensley* was a calculated — albeit ultimately unsuccessful — business risk.

Phoenix's decision to submit a combined rezone/preliminary application for the Wood Trails and Montevallo proposals, respectively, was hardly inadvertent. Unlike applications for building permits, preliminary plats and other categories of land use approvals, a rezone application does not "vest" a proponent to the local municipality's current development regulations. *See, e.g., Hale v. Island County*, 88 Wn. App. 764, 771, 946 P.2d 1192 (1997). Washington courts have, however, recognized a limited exception to this rule where a developer simultaneously submits a rezone request together with a preliminary plat application. *See, e.g., Schneider Homes, Inc. v. City of Kent*, 87 Wn. App. 774, 779-80, 942 P.2d 1096 (1997). Phoenix took advantage of this opportunity by making the strategic decision to file the Wood Trails and Montevallo rezone proposals together with the preliminary plat applications for each project. This decision by Phoenix was apparently based upon Phoenix's novel interpretation of WMC 21.04.080(1)(a) i.e.,

that the Woodinville City Council was *required* to upzone the Wood Trails and Montevallo project sites upon demand. But, as explained at length *supra*, both state law and the Woodinville Municipal Code preserved the City Council's discretion to grant or deny these — or any other — rezone proposals. Phoenix's alleged "reliance" under these circumstances was thus objectively unreasonable, as it depended entirely upon an outcome (rezone approval) that was wholly speculative. Estoppel against the City clearly cannot apply to rescue Phoenix from such a self-created hardship.

4. Neither WMC 21.04.080(1)(a) nor any other provision of the Woodinville Municipal Code ("WMC") mandates or requires the City Council to approve an application to up-zone property zoned residential R-1 to residential R-4, even if adequate public services can be provided.

   a. The provisions of WMC 21.04.080(1) are not part of the rezone criteria adopted by Ordinance of the Woodinville City Council.

WMC 21.44.070 (Appendix I) sets forth the criteria that must be demonstrated should the City Council, in its discretion, decide to grant a rezone application.[11] The code section provides as follows:

[11] The three criteria are in addition to the well-established law providing that a rezone will be upheld only if there is substantial evidence indicating that conditions have substantially changed since the original zoning; and the rezone must bear a substantial relationship to the public health, safety, morals, or welfare. *Parkridge v. City of Seattle*, 89 Wn.2d 454, 462, 573 P.2d 359 (1978); and *Belchar v. Kitsap County*, 60 Wn. App. 949, 952, 808 P.2d 750 (1991).

21.44.070 Zone reclassification.

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 the additional zoning as the type proposed.

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

(3) The property is practically and physically suited for the uses allowed in the proposed zone reclassification.

(Emphasis added).

There is no reference in WMC 21.44.070 to WMC 21.04.080 (Appendix E)or to any other section of the WMC for additional criteria required to be met in order for a requested zone reclassification to be approved. WMC 21.04.080 — upon which Phoenix strenuously (and selectively) relies — is not designated as rezone criteria, but is instead specifically framed as a mere *"purpose statement"* for the Residential Zones designated in the chapter and on the City zoning map. WMC 21.04.020, the code section immediately proceeding the purpose statements for all city zone designations (including WMC 21.04.080) for residential zones, states as follows:

21.04.020 Zone and map designation purpose.

> The purpose statements for each zone and map designation set forth in the following sections shall be used **to guide** the application of the zones and designations to all lands in the City of Woodinville. The purpose statements also **shall guide** interpretation and application of land use regulations within the zones and designations, and any changes to the range of permitted uses within each zone through amendments to this title. (emphasis added)

There is no indication that the purpose statements should be used by the City Council in the making of site specific rezone determinations or that they supplement the rezone criteria specifically set forth in WMC 21.44.070.

WMC 21.04.080(1)(a), is mischaracterized by Phoenix in its Appellate Brief at 23 and 44 as one of two provisions of the WMC which sets forth "rezone criteria," states in pertinent part (relating to the "low-density zones") as follows:

21.04.080 Residential

> (1) The **purpose** of the Urban Residential zones (R) is to implement Comprehensive Plan goals and policies for housing quality, diversity and affordability, and to efficiently use residential land, public services and energy. These **purposes** are accomplished by:
>
> (a) Providing, in the low-density zones (R-1 through R-4), for

> predominately single-family detached dwelling units. Other development types, such as duplexes and accessory units, are allowed under special circumstances. Developments with densities less than R-4 are allowed only if adequate services[12] cannot be provided;
>
> [subsection (b) R-5 through R-8, subsection (c) R-9 through R-18 and (d) subsection R-9 through R-18 are omitted]

Nothing in this section, including the underlined language relied upon by Phoenix, even remotely indicates that a site specific request to rezone property from R-1 to R-4 *must* be approved if the requestor can demonstrate that "adequate public facilities" exist or can be provided. WMC 21.04.080(1)(a) simply indicates **why** the Leota and Wellington neighborhoods are zoned R-1. Appellant's argument that WMC 21.04.080(1)(a) must be interpreted to require the City Council to approve the rezones because the Petitioner has included the extension of sewer to the subject properties is a creation of Appellant's imagination:

---

[12] "Services" is an undefined term in WMC Chapter 21.06 or in WMC Chapter 21.04. However, Chapter 21.28 (Appendix H) titled "Development Standards - Adequacy of Public Facilities and Services" provides a reasonable basis for the interpretation that services as used in the subject language, means at least those services identified in Chapter 21.28. those services include adequate sewage, water, roads, vehicular access, fire protection, and school concurrency. In addition, the ordinary meaning of the word services is broader than any one single municipal service and would seem to include all municipal service appropriate to an R-4 designation. For example, WMC Chapter 3.36 (Appendix I) requires Park Impact fees to be paid because parks are an essential municipal service. WMC 3.36.110 allows an impact fee credit if the developer actually provides park system improvements with their development.

- Appellant can cite to no statement from City Staff in the entire voluminous hearing record agreeing with this interpretation.
- There is no reference in the entire voluminous hearing record to any previous findings of fact adopted by the City Council approving a rezone from R-1 to R-4, simply because the applicant will extend sewer to the subject property.
- Even the two written recommendations of the City Hearing Examiner so highly praised by Phoenix, fail to recognize any such interpretation.[13]

b. A Purpose Statement is an Idicia of Legislative Intent and not a Regulatory Requirement.

It is also well settled law that the purpose section of an ordinance or statute cannot be interpreted as setting forth mandatory requirements. Legislative statements of policy and purpose do not give rise to enforceable rights in and of themselves. It is the substantive statutory sections that follow the statement of policy or purpose that provide the

[13] The Hearing Examiner did interpret the language of WMC 21.04.080(1)(a) differently than the interpretation given by the City Council. That difference in interpretation will be addressed later in this brief.

enforceability of certain rights or obligations. *Judd v. Am. Tel. & Tel. Co.*, 116 Wn. App. 761, 770, 66 P.3d 1102 (2003); and *In re Welfare of J.H.*, 75 Wn. App. 887, 891, 880 P.2d 1030 (1994). The purpose statement of a statute or an ordinance is simply an indicia of legislative intent. *See, e.g., Jeffery v. Weintraub*, 32 Wn. App. 536, 540, 648 P.2d 914 (1982).

5. WMC 21.04.080(2)(a) and WMC 21.04.080(2)(b) provide a rational basis for the City Council to deny the requested rezones.

a. WMC 21.04.080(2)(a)

WMC section 21.04.080(2)(a) makes the following statement of public policy providing a reasonable guideline for the City Council to consider when considering a request to upzone property in an R-1 zone to a higher residential density:

> (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;

The Wellington and Leota neighborhoods are both older, well-established neighborhoods with subdivisions of R-1 density.[14] They are both located within an area designated for "Low Density" Residential Zoning by the Comprehensive Plan. They are served by both public and private services that were adequate at the time of development, but are arguably deficient in some respects (roads, pedestrian facilities, parks, and transit) by today's standards. These recognized deficiencies required significant mitigation measures to be required in the FEIS for the R-4 rezone alternative. The Wellington neighborhood is also arguably environmentally constrained by steep slopes. The Council recognized these circumstances in its finding of fact number 6 in both rezone decisions. Finding 6 provides a rational basis for denial of the rezones. The current R-1 zoning is appropriate for the area in which the subject properties are located due to:

- Well established subdivisions of the same density; and
- Public and private services adequate for R-1 development; and
- In the case of the property proposed for the Wood Trails subdivision, the lands are adjacent to lands with

[14] *See* Statement of the Case.

environmental constraints.[15]

The findings are supported amply in the hearing record.[16]

b. WMC 212.04.080(2)(b).

> (b) The R-4 through R-8 zones [are appropriate] 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

City Council finding 6 recognizes that neither of the proposed rezone sites is currently served by adequate public sewers or roads and that other needed public facilities and services such as parks and transit are not currently present nor would they be present at the time of the proposed development of either the Wood Trails or Montevallo subdivisions. Public sewers would be required before R-4 development took place, but parks, transit, and roads built to current standards are not proposed in the subdivision proposals to be provided at the time of the proposed development of the properties. An R-4 zone classification is not appropriate for the subject properties at this time. The City Council's

---

[15] It is arguable based on the record whether or not mitigation measures adequately mitigate the adverse environmental effects of R-4 development on the steep slopes, however, it is not arguable that the steep slopes present environmental constraints.

[16] *See* Statement of the Case and the Briefing and Exhibits cited by CNW.

denial of the rezone applications is consistent with a reasonable interpretation and application of RCW 21.04.080(2)(b).

6. There has been no substantial change of circumstances since the original zoning of the property to R-1.

a. The Facts fail to Demonstrate Changed Circumstances.

The City Council found that there were had been no significant changed circumstances since the original zoning to justify the rezone requests. Council Findings #6.e. and f. Neighboring residential properties were still zoned R-1. Neighborhood sentiment had not changed to support higher density zoning. Sewer was still not extended, although Phoenix proposed to extend sewer from an existing mainline extending through the industrial area at the bottom of the steep slopes on the west end of the Wood Trails property. The mainline has been present and available for connection for a number of years. The roads servicing the area were identified as "sub-standard." by the FEIS. The City has not yet made infrastructure improvements to these neighborhoods. There were still no neighborhood parks. See Hearing Examiner Preliminary Plat Finding #14. The area was not yet served by public transit. See Hearing Examiner Preliminary Plat Finding #15. Changed circumstances must be demonstrated by a rezone proponent for a rezone to be lawful. *Parkridge*

v. City of Seattle, *supra* at 462. Before the Hearing Examiner and before the City Council, Petitioner argued that "changed circumstances" had been demonstrated because the Petitioner would bring sewer to the properties when it developed the two proposed subdivisions. What the Petitioner might do in the future does not satisfy the requirement that changed circumstances exist at the time of the rezone determination. A rezone of the properties does not guarantee Petitioner would ever build his proposed developments or extend sewer. The same is true for parks. Neighborhood parks have not been developed in this area to accommodate higher residential densities. The election by Phoenix as part of its preliminary plat applications to pay a parks impact fee instead of developing park and recreation land for the residents of the proposed developments does not ensure parks would be developed in the neighborhoods at any time in the foreseeable future.

b. A Rezone to R-4 is not Directed by the Comprehensive Plan or Necessary to Implement a Change in the Comprehensive Plan Since the Original Zoning.

Phoenix argues to this court that "... by virtue of implementing the policies of the Comprehensive Plan, the proposed rezones met any applicable 'changed circumstances' requirement," citing *SORE v. Snohomish County*, 99 Wn.2d 363, 662 P.2d 816 (1983), and Finding No.

6 of the City Council's two decisions. Appellant's Brief at 39. Finding 6, however, simply indicates that "the proposed rezone is arguably consistent with several policies of the City's Comprehensive Plan." Phoenix fails to identify any specific direction in the Comprehensive Plan to zone the subject properties as R-4.

The cases cited by Phoenix do not support its argument or a rezone on the record facts. In *SORE v. Snohomish County*, the proposed rezone was necessary to implement changes made in a Comprehensive Plan calling for new industrial development. Likewise in *Bjarnson v. Kitsap County*, 78 Wn. App. 840, 845, 899 P.2d 1299 (1995) where the comprehensive plan at issue specifically provided for a future regional shopping center at the subject property, a substantial change of circumstances was not required to be demonstrated because the rezone implemented a specific direction in the comprehensive plan. There has been no changes to the Woodinville Comprehensive Plan calling for a change in the density of the residential zoning in the Leota and Wellington neighborhoods at this time. A change would in fact conflict with comprehensive plan policies discouraging more dense zoning before public services deemed adequate by the City Council have been provided

in the neighborhoods. *See* Comprehensive Plan Policies LU-1.2, and LU-1.3. *See* Appendix C.

7. There is substantial evidence in the hearing record supporting the City Council's finding that there is no demonstrated need for the rezone.

   a. The current "needs" of the City of Woodinville do not include R-4 Residential Development at the locations proposed for the rezones.

The Hearing Examiner made the conclusion on both rezone applications that the "need" criterion codified at WMC 21.44.070(1) has been meet based on the fact that the City has 30% of its zoning in R-1 and only 2.7% of its zoning in R-4.[17] Here, Phoenix argues the need criterion is met because of the demonstrated market demand for new R-4 housing units. The City Council disagreed with both the examiner and Phoenix on this criterion.

The City Council found that the comprehensive plan goal for diverse housing was being met by a multiple range of residential zoning designations in the City.[18] In addition, City Council findings 11 through

---

[17] See Hearing Examiner's Conclusions on Rezone Application, number 2.A. for both applications.

[18] City Council finding number 8 states: "The City of Woodinville currently has a diversity of housing within the R-1, R-4, R-6, R-12, R-48, and TB and Central Business District (CBD zoning designations that allow for a wide variety of housing types, incomes and living conditions.

21 demonstrate not only that there is no need for the requested zone changes to meet the City's planning goals or required 20 year housing planning, but also that the rezones — if approved — would conflict with City policies discouraging development ahead of the appropriate public infrastructure needed to support the development, and would provide undesired competition with planning policies prioritizing residential growth in the City's downtown where the appropriate infrastructure capacity and services exist without the need for mitigation. See Comprehensive Plan Goals LU-1 and LU-2 and the policies thereunder at Appendix K.

The "market demand" theory advanced by Phoenix has not been adopted by Washington law. The out-of-state cases cited by Phoenix to support its argument have no basis in Washington law. The cases interpret statutes and case law from other states. "Need" is defined by City policy[19] and objectives, not by the dictionary or by a market study convincing a developer that it can profit from a development requiring a rezone for construction. Following Phoenix's argument to its logical conclusion, all a developer needs to do is come to City Hall with a market study to establish

[19] See for example land use Goal LU-3: To attain a wide range of residential patterns, densities, and site designs consistent with Woodinville's identified needs and preferences. (emphasis added)

need for the rezone. The determination of "need" is within the police power of a City Council. It is within the police power of the City Council to determine where in the City the different densities of residential development should occur, as well as the timing of such development. It is within the police power of the City Council to determine that it wants to encourage residential development in the City downtown area before encouraging more dense residential development in the Leota and Wellington Hills neighborhoods. *See Hernandez v. City of Hanford*, 41 Cal.4th 279, 159 P.3d 33 (2007) for a good discussion and analysis of this issue, since we're looking at out of state cases. Appendix J.

The determination of need is within the discretion of the City Council by interpreting and applying adopted City policies and priorities, not a market study. See footnote 9.

8. There is substantial evidence in the hearing record supporting the City Council's finding that a site specific rezone of the property to R-4 density does not bear a substantial relationship to the public health, safety, and welfare.

The City Council's "conclusions" demonstrate why the Council's discretion to determine that the proposed rezones do not promote the public health, safety, and welfare. It is for the City Council to determine, in its discretion, how its Comprehensive Plan Goals and Policies are best

met and interpreted. Although arguably, the City Council could have concluded, as did the Hearing Examiner, that the Phoenix proposals are "reasonably compliant with the Woodinville Comprehensive Plan" it did not do so. Its reasons are supported by its findings and the comprehensive plan as extensively explained by CNW in its briefing.

9. There is substantial evidence in the hearing record supporting the City Council's finding that the zone reclassification is inconsistent and incompatible with the uses and zoning of the surrounding properties

As noted in the excerpts from the EIS in Appendix F and quoted in Section III of this brief, compatibility of R-4 residential density developments with the existing large lot residential uses was identified as an issue in controversy that would require eventual resolution by the City Council. Although both R-1 and R-4 densities were identified in the Comprehensive Plan as "low density" residential zones, the FEIS identified impacts from R-4 development either not present or less severe with R-1 development. Compatibility issues are addressed by CNW in its briefing and will not be analyzed in great detail here. However, the Council's finding 12 is that the proposed R-4 developments are not in character with the surrounding R-1 and neighborhoods and properties.

Phoenix argues compatibility of character on the basis that both densities are low density residential zones under the comprehensive plan. Appellant's Brief at 46. R-1 is at the bottom and R-4 is the highest "low density" residential zone. However, Phoenix itself recognizes the significant differences between R-1 and R-4 residential zoning based upon all of the planning articles and argument Phoenix includes in its brief explaining why R-1 is inappropriate zoning. Phoenix is sounding like the Seattle Super Sonics in their quest to move to Oklahoma, by talking out of both sides of its mouth. Phoenix says R-4 development is compatible with the R-1 uses for purposes of meeting the rezone criteria, but also extensively argues that R-1 is not consistent with urban zoning while R-4 is consistent with urban zoning, for purposes of good land use planning and meeting the goals of GMA.

The City Council has the discretion to determine that R-4 residential development at the proposed sites is out of character with the large lot residential uses currently in the Leota and Wellington Hills neighborhoods. City Land Use Goal LU-1 is: "To guide the City's population growth in a manner that maintains or improves Woodinville's quality of life, environmental attributes, and Northwest woodland character." Policy LU-1.1 states: "Preserve the character of existing

neighborhoods in Woodinville while accommodating the state's 20-year growth forecasts for Woodinville."

10. Finding #6 in both rezone decisions is not "unlawful."

Finding # 6 begins as follows:

> 6. **In its legislative capacity, the City Council finds that he current zoning designation of R-1 is appropriate.** The R-1 designation is appropriately placed upon the property in consideration of: (bold emphasis added)

Although the closed record review performed by the City Council was a quasi-judicial proceeding requiring procedural due process and subject to the appearance of fairness doctrine, **the decision to rezone property is a discretionary act of the City Council.** *Teed v. King County*, 36 Wn. App. 635, 642, 677 P.2d 179 (1984). "The city council cannot be compelled to pass a rezoning ordinance, however fair, reasonable, and desirable it may be, as that represents **an exercise of legislative discretion.**" *Besselman v. Moses Lake*, 46 Wn.2d 279, 280, 280 P.2d 689 (1955) citing *State ex re. Ogden v. Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954). Due to the legislative nature of a rezone decision, **a rezone is the one land use development approval that cannot be delegated by a city council to a hearing examiner.** RCW 35A.63.170. *See Lutz v. Longview*, 83 Wn.2d 566, 570, 520 P.2d 1374 (1974); *Zehring*

v. Bellevue, 103 Wn.2d 588, 591, 694 P.2d 638 (1985); and *Southwick, Inc. v. Lacey*, 58 Wn. App. 886, 889, 795 P.2d 712 (1990).

> The courts do not possess the power to amend the zoning regulations. It is reasoned that the power to amend a zoning ordinance is **legislative in character**, and that it cannot be exercised by the courts where a denial of an application to rezone is discriminatory. ... (emphasis added)

Anderson's Am Law of Zoning, §4.27 (4th Ed).

The power of a municipal legislative body to amend the zoning regulations is legislative in character . . . . Anderson's Law of Zoning, §4.29 (4th Ed).

Finding of Fact #6 simply recognizes that the City Council was exercising its discretion as the legislative body of the City to deny the rezone. The argument appearing in Appellant's Brief at 47 is without merit.

Appellant's reliance upon *Storedahl* is misguided. As stated *supra* in Section 1(b), Woodinville's Council did not run afoul of *Storedahl* because it did not adopt new legislative policy, as alleged in Appellant's Brief at page 47. Rather, the Council applied the legislatively established criteria in WMC 21.44.070 in making the rezone decision, including consideration of demonstrated need, compatibility and consistency with

surrounding uses, and practical and physical suitability of the land for the proposed zone reclassification. Finding that substantial evidence in the record existed to conclude the Appellant's proposed rezone did not meet those criteria, the Council acted within its legislative discretion to deny the rezone.

11. Phoenix can develop the subject properties with R-1 subdivisions.

Significantly, *there is no evidence in the record suggesting —much less conclusively demonstrating — that Phoenix ever attempted to submit an application to develop the Wood Trails and Montevallo project sites at the R-1 densities currently designated by the City's zoning code.* As recognized in the EIS, R-1 development *is* an alternative to the R-4 rezone and development proposed by Phoenix. Although Phoenix did not argue such in their Appellate Brief, the Hearing Examiner concluded that WMC 21.04.080(1)(a) "stated that this property could not be developed as R-1 because utilities are available." The Hearing Examiner's conclusion is in error. First, as previously noted above, WMC 21.04.080(1)(a) is not a regulatory provision. In addition, the properties are clearly zoned R-1 on the City zoning map. Under the Residential Land Use Table at WMC 21.08.030 single detached residences are a permitted use in an R-1 zone.

Under the table for densities in WMC 21.12.030 the base density for an R-1 zone is 1 dwelling unit per acre. It is impossible to harmonize the interpretation of WMC 21.04.080(1)(a) made by the Hearing Examiner with the properties R-1 zoning designations and the uses allowed for properties designated R-1 in the Land Use Tables. WMC 21.02.060 titled "Interpretation - General" is applicable. It provides that in cases of inconsistency or conflict, regulations specific to a particular land use supersede regulations of a general application. The regulations in the land use tables are specific to the R-1 zone and clearly permit R-1 development on the properties. See Appendix E.

E. CONCLUSION

The decisions of the City Council should be sustained and the appeals dismissed. [20]

Appellant appeals the decisions denying both the rezones and the preliminary subdivision applications for its projects. The City Council reversed the Hearing Examiner and denied the preliminary plat applications due to its decisions to deny the rezones. Since the Hearing Examiner's approval of the preliminary plats was contingent upon approval of the rezones, it was unnecessary for the Council to make additional findings regarding the arguments made by the Concerned Neighbors of Wellington in support of their appeal of the approval of the preliminary plat applications by the Hearing Examiner. In the event the Court reverses the City Council on the rezone denials, it would be appropriate for the Court to remand with instruction to the Council reconsider its decision on the preliminary plat applications, as well as the rezone applications, considering all of the claims of error raised by CNW in its appeal. Here, the City's Response Brief address only the arguments in the Opening Brief concerning the rezone decision.

RESPECTFULLY SUBMITTED this 10th day of December, 2008.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By _____
Greg A. Rubstello, WSBA #6271
Attorneys for Respondent, City Of Woodinville