

Honorable Dean S. Lum
Trial Date Feb. 11, 2008
9:00 a.m.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

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

Petitioners/Plaintiffs,

v.

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

Respondents/Defendants.

NO. 07-2-29402-3 SEA

OPENING BRIEF OF
RESPONDENT CONCERNED
NEIGHBORS OF WELLINGTON

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TABLE OF CONTENTS

I.	INTRODUCTION	4
II.	BACKGROUND FACTS	3
III.	REZONING: BOTH APPLICATIONS FOR REZONING WERE CORRECTLY DENIED	5
3.1	Burden of Proof Is on the Applicant for a Rezone	5
3.2	There Are No Changes in Circumstances Supporting this Rezone	6
1)	PUBLIC OPINION	6
2)	CHANGES IN LAND USE PATTERNS	7
3)	CHANGES ON THE SUBJECT PROPERTY	7
3.3.	The City Council Correctly Determined That Phoenix's Proposed Rezones Did Not Meet State or Local Rezone Criteria .	8
3.4	The Rezone Applications Do Not Meet the General Rezone Criteria in WMC 21.44.070	10
3.4.1	The Growth Board Decision In <i>Hensley v. City of Woodinville</i> Is Not Applicable to These Proceedings	10
3.4.2	There Is No Demonstrated Need for the Wood Trails or Montevillo Rezones	11
3.4.3	The City Council Correctly Found That the Zone Reclassifications of Wood Trails and Montevillo are Inconsistent and Incompatible with Uses and Zoning of the Surrounding Properties	17
3.4.4	The Property Is Practically and Physically Unsited for the Uses Allowed in the Proposed Zone Reclassification	19
3.5	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 Standard for R-4	22
3.5.1	Local Conditions and Discretion Control the Density of Development, Not a Brightline Arbitrary Standard	23
3.5.2	Maintenance of R-1 Zoning Is Appropriate Here Where Large Lot, Well Established Subdivisions Exist ..	24

1	3.5.3 Significant Area-wide Environmental Constraints	
2	Exist That Prohibit R-4 Zoning	26
3	3.6 The Rezones in Question Are Not Served by Adequate	
4	Roads and Other Needed Public Facilities and Services	29
5	3.6.1 Substandard Roads	29
6	3.6.2 Lack of Transit	30
7	3.6.3 Lack of Sidewalks	30
8	3.6.4 Lack of Available Parkland	30
9	3.7 The Proposal Is Inconsistent with the Terms of the City	
10	of Woodinville Comprehensive Plan	31
11	3.8 Conclusions re Rezoning	35
12	IV. A REVIEW OF PLATTING MATTERS IS NOT APPROPRIATE	
13	GIVEN THE DECISION OF THE CITY COUNCIL	37
14	V. CONCLUSION	38

1 **I. INTRODUCTION**

2 This is the responsive brief of Concerned Neighbors of Wellington (CNW) to
3 the opening brief filed by petitioners Phoenix Development, Inc., et al (collectively
4 "Phoenix"). Phoenix has filed this action under the Land Use Petition Act to
5 challenge decisions of the Woodinville City Council which denied rezoning and plat
6 applications for two properties in northwest Woodinville.

7 CNW is a local citizen organization composed of residents in the vicinity of
8 the proposed rezones and plats. CNW has been an active participant in the review
9 process for the Phoenix proposals going back to the original applications in 2004
10 and has provided extensive comments during the environment review process and
11 the preparation of the environmental impact statement for the proposals. They also
12 provided written comments on the proposal and, as described below, submitted
13 extensive written and oral testimony at the public hearings held on these proposals
14 before the substitute City of Woodinville Hearing Examiner. CNW also argued
15 before the Woodinville City Council during its consideration of the Hearing
16 Examiner's recommendation. CNW also filed an appeal of the contingent decision
17 of the Hearing Examiner to approve the plats if the zoning was approved.
18 Accordingly, CNW was appropriately named as a necessary party to these
19 proceedings by Phoenix in its land use petition.

20 The purpose of this memorandum is to summarize evidence and legal
21 arguments regarding both the rezone and the plat. As demonstrated herein, the
22 rezones are inconsistent with applicable standards established by the City of
23 Woodinville in its codes and its comprehensive plan. Because of this, the rezone
24 proposals were properly rejected by the Woodinville Council. Because the rezones
25 should be denied, there is no basis for further review of the preliminary plats and the
26 City correctly denied them.

1 Based on the foregoing, this memorandum will be divided into two general
2 parts, the first dealing with rezone issues and the second with platting issues. CNW
3 and the City have conferred regarding their responses to Phoenix's opening brief.
4 In an effort to reduce the length of briefing before the Court, CNW and the City have
5 agreed on issues that would be emphasized in the respective briefing by each party.
6 Accordingly CNW joins in, and incorporates by reference, the brief of the City and
7 will rely on it for arguments stated therein. Similarly, CNW joins in the motion to
8 strike certain sections of the Phoenix brief.

9 II. BACKGROUND FACTS

10 2.1 Plats Described.

11 The Wood Trails proposal requests the rezone of a 38.7 acre parcel
12 from the R-1 zone, allowing one dwelling unit per acre, to R-4 which would permit
13 four homes to the acre. If the rezone is granted, Phoenix would seek approval for
14 a preliminary plat to divide the parcel into 66 single family residential lots. The
15 Montevallo proposal is to rezone a separate 16.48 acre parcel from R-1 to R-4 and
16 plat it into 66 single family residential lots, with surplus density proposed to be
17 transferred from the Wood Trails site to this property. The general location of the
18 two parcels is found on record on Attachment A hereto.

19 Both properties are located in what is an exclusively single family residential
20 area in the northwest corner of the city. Historically, this area has been platted into
21 a variety of large lots, averaging about an acre in size. This is also shown on
22 Attachment A.

23 The Wood Trails proposal is located on a steep westerly facing hillside and
24 the Montevallo proposal has an extensive wetland on its west side. Both properties
25 are accessed by substandard east-west roads leading into the only arterial street
26 access to the area at 156th Avenue Northeast. See Attachment A.

2.2 CNW Analysis of Rezone Applications.

An important 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").¹ This document represents the basis for the opposition of CNW to the rezone and plats and contains more than 2,100 pages of materials. Volumes 1 and 2 of the CNW Analysis are provided to the Court with this brief. This Analysis was provided to demonstrate that the rezone proposals before the city did not meet city criteria, including the comprehensive plan and zoning code standards.

The CNW Analysis consists of reports by several licensed professionals concerning 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 each of the author's reports in the CNW Analysis as listed below. Each of them also provided testimony at the hearing, with a reference to their testimony also listed.

- Otto Paris, a licensed hydrologist and geologist with a Master's Degree in Geology. (Tr., March 15, 2007, pages 139-146.)
- 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 Bounty-Sanders has a Master's Degree in Geology and Geophysics. (Tr., March 15, 2007, pages 146-151; April 5, 2007, pages 90-92.)

¹This document provides information on both the Wood Trails and Montevallo rezones and plats and was assigned Exhibit 74 in the Montevallo record and Exhibit 101 in the Wood Trails record.

1 The CNW Analysis includes in Vol. 1, Section 2, written and detailed presentations
2 on Infrastructure in the Wellington Area, including subsections on Transportation
3 (the adequacy, capacity and traffic volumes in the area), Storm Water Drainage
4 (impacts of water runoff), Sanitary Sewer (the location and extension of sewers) and
5 Schools (capacity of local schools). Each of these sections has a written analysis
6 of the Wood Trails and Montevallo proposals, together with backup information and
7 studies.

8 Section 3 of the CNW Analysis provides detailed reports and presentations
9 on Zoning issues, particularly related to the rezoning criteria in the Woodinville
10 Zoning Code. Individual subsections under the Zoning section include discussion
11 of the city's "Buildable Lands Survey" showing the availability and utilization of land
12 within the city, addressing whether there is a need for the rezones, "Well
13 Established Subdivisions" trace the history of the development of the area and how
14 the rezone development of the Wellington community, and "Impacts" identify and
15 analyze the direct and cumulative impacts of the subdivision proposals.

16 Section 4 of the CNW Analysis reviews and reports on the Environmental
17 Impacts of the proposals. Subsections under this analysis include "Critical Areas"
18 which discusses the environmental constraints found on the property including
19 erosion hazard, landslide hazard and other geologic criteria. The "Wildlife"
20 subsection includes the impacts of the rezones and plats on wildlife in the area.

21 Section 5 of the CNW Analysis provides a very detailed review of each
22 subdivision proposal providing technical analysis of the proposals.

23 As described in Phoenix's brief, the record in this case is substantial. Part
24 of the record is the verbatim transcript of proceedings before the Hearing Examiner
25 which as been certified to the court. The transcript will be referenced by the date
26 of the hearing and a reference to the page number, i.e. "Tr. 3/14, page _." In
27
28

1 addition to the CNW analysis, CNW will provide to the court other selected
2 additional materials from the written record that will be included in the Addendum
3 attached hereto. The key decision documents in this matter are the two decisions
4 of the Woodinville City council on this matter which are included in the Addendum
5 and will be referenced as Wood Trails or Montevallo Decisions.

6 **2.3 Counterstatement of Issues Before the Court.**

7 At page 5-6 of its brief, Phoenix sets forth its "Assignments of Error" and
8 "Issues Pertaining to Assignments of Error." Even a first glance at the "Issues"
9 statement demonstrates that Phoenix attempts to mislead the court as to the scope
10 and extent of its review. Under Issue 1 and its six subissues, Phoenix indicates it
11 wants the court to decide substantive issues regarding its rezones, e.g. "(c) are the
12 rezone proposals consistent with the Comprehensive Plan?" However, as the city
13 explains in its brief, under the Land Use Petition Act, the function of the court on
14 questions of fact as presented by Phoenix is deferential. In a LUPA review, the
15 court does not act as a fact finder, weighing the evidence. Rather the court can
16 reverse the local decision maker only if:

17 (c) The land use decision is not supported by evidence
18 that is substantial when viewed in light of the whole
19 record before the Court.

20 RCW 36.70C.130(1). On challenges to the application of law to the facts, LUPA
21 requires similar deference to local decision makers, allowing reversal of a local
22 government decision only if:

23 (d) The land use decision is a clearly erroneous
24 application of the law to the facts;

25 Id. Accordingly, the correct statement of the issues are as follows, using Phoenix
26 original list at page 5-6:

27 a) Is the decision of the City to deny the rezone based the failure of Phoenix
28 to show adequate services are available supported by evidence that is substantial
in light of the whole record before the court?

1 b) Is the decision of the City to deny the rezone because the Wood Trails site
2 is environmentally constrained supported by evidence that is substantial in light of
the whole record before the court?

3 c) Is the determination of the City that the proposals were inconsistent with
4 the comprehensive plan supported by evidence that is substantial in light of the
whole record before the court and is this determination "clearly erroneous"
5 applicagtion of the law to the facts?

6 d) Is the City Council's decision that Phoenix did not show a "demonstrated
need" for R-4 zoning supported by evidence that is substantial in light of the whole
7 record before the court?

8 e) Is the City Council's decision that the proposed rezones were incompatibile
and inconsistent with the uses and zoning of the surrounding properties supported
9 by evidence that is substantial in light of the whole record before the court?

10 f) Is the City Council's determination that the property proposed for rezones
are not "practically and physically" suited for R-4 zoning supported by evidence that
11 is substantial in light of the whole record before the court and is that determination
a "clearly erroneous" applicatin of the law to the facts before the Council?

12 Once the Court finds that there was substantial evidence is light of the whole record,
13 the Court's inquiry stops because it is not permitted to "second guess" the Council's
14 decision, even if the Court might have reached a contrary result. The additional
15 issues described in Section V of the City's brief are also appropriately considered
16 here.

17 In addition, and as described herein, Phoenix did not challenge other critical
18 findings of the City which were a part of its code and the basis for denial. These
19 include conclusions that there was "a lack of public facilities and services to support
20 the proposed R-4 development," "the absence of any substantial changed in
21 circumstances from which the original zoning determination was made" and the
22 "maintenance of the existing suburban neighborhood character." See Finding 6 in
23 both decisions. These are all criteria for review of rezone applications and the failure
24 to include them as issues requires the court to affirm the City Council's decision

25 **2.4. Phoenix's Extra-record Submissions and Failure to Provide**
26 **Evidence in Support of its Claims.**

27 A good deal of the basis for Phoenix's arguments come from material that

1 is either not in the record at all, or is improperly added. As the City's Motion to
2 Strike explains Phoenix has attempted to improperly inject argument and evidence
3 into the record before the court. We join in, and urge the Court to grant the City's
4 motion.

5 The attempts to bring in new evidence after the record is closed is particularly
6 galling in light of the almost unlimited opportunity that Phoenix had over the past 3
7 years to include evidence in the record. Further, since this material was never before
8 the City CNW never had an opportunity to object to the evidence or rebut it; of
9 course, it is impossible to judge the propriety of the City Council's decision based on
10 evidence it never saw.

11 In several places, Phoenix makes factual claims that are not accompanied by
12 any references to the record at all. For example there are no citations to the record
13 for the following fact statements in Phoenix's brief and accordingly the court should
14 ignore them:

15 a) "Every word in each document (the Draft and Final EIS was review and
16 approved by the City's own professional consultants. " Brief page 15, lines 4-6.

17 b) "Existing R-4 zoning, even according to the City, is less tahn 2.7% of the
18 City's land area. The Hearing Examiner concluded from this evidence that is was
likely significantly less." Brief , page 18 (lines19-22).

19 **III. REZONING: BOTH APPLICATIONS FOR REZONING WERE CORRECTLY** 20 **DENIED.**

21 **3.1 Burden of Proof Is on the Applicant for a Rezone**

22 The subject proposal is a rezone from R-1 to R-4. As described in the
23 background facts, the R-1 zone was set in the original comprehensive plan adopted
24 in 1996. The R-1 zone has not been modified since, then nor has the City engaged
25 in an all-inclusive city wide comprehensive plan revision. There is no evidence that
26 Phoenix has ever asked the City to change or amend its comprehensive plan or
27 zoning/development regulations to be consistent with Phoenix 's proposals.

1 The general rule for rezones have been recently stated by our Supreme
2 Court:

3 Three basic rules apply to rezone applications: (1) they
4 are not presumed valid, (2) the proponent of a rezone
5 must demonstrate that there has been a change of
6 circumstances since the original zoning, and (3) the
7 rezone must have a substantial relationship to the public
8 health, safety, morals, or general welfare. *Citizens for
Mount Vernon*, 133 Wn. 2d at 875, 947 P.2d 1208.
Kittitas County imposes seven additional criteria for
approval of a site-specific rezone application. Former
KCC 17.98.020(E) (1996).

9 *Woods v. Kittitas County*, __ Wn.2d __, 2007 WL 4442396 (December 20, 2007).

10 For the Court's ready reference a copy of the *Woods* decision is Attachment B
11 hereto. Thus a rezone applicant must meet both general rezone criteria and also
12 criteria set forth in the local code.

13 *Woods* also makes clear that in any challenge, as in this case, under RCW
14 36.70C.130(1)(c) is deferential to local government.

15 "Issues raised under subsection (c) challenge the sufficiency of the
16 evidence." *Benchmark Land Co. v. City of Battle Ground*, 146 Wn. 2d
17 685, 694, 49 P.3d 860 (2002). In a challenge for sufficiency of the
18 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.

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

21 **3.2 There Are No Changes in Circumstances Supporting this Rezone.**

22 *Bjarnson v. Kitsap County*, 78 Wn. App. 840, 845, 899 P.2d 1290 (1995) lists
23 the key criteria to be applied in establishing changed circumstances:

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

27 78 Wn. App. at 846-847.

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

3 1) PUBLIC OPINION. Public opinion has strongly changed since 1996
4 in favor of retaining, not eliminating, the R-1 zone in this area. The numerous
5 comments on the EIS (substantially all in support of retaining the R-1 zone) and at
6 the transcript of the public hearings on the two rezones essentially indicate no public
7 support for the proposed rezones. Indeed, a review of the transcript before the
8 Hearing Examiner shows that only one or two persons actually spoke in favor of the
9 rezone.²

10 2) CHANGES IN LAND USE PATTERNS. There has been no change in
11 land use in the local area. As described in materials submitted, the Wellington
12 neighborhood has a long established pattern of larger lots and single family
13 residential uses. The neighborhood consists of subdivisions developed over several
14 years and demonstrates a very stable use for at least the past 20-30 years. This is
15 true as well for the adjacent land uses in all directions.

16 What has changed in the city is that it is clearly meeting its obligations for new
17 housing units. See Wood Trails Staff Report, page 5 (Wood Trails Exhibit 1).
18 Zoning changes and development in other parts of the city have created housing
19 opportunities in commercial zones and tourist business zones and new housing is
20 being developed there. Indeed, it is "the City's longstanding goal to develop
21

22 ²Phoenix claims that the City Council succumbed to "intense public pressure" in
23 reaching its decision. This rhetorical flourish comes without any factual support or
24 references to the record, predictably because there is no basis for this claim. As the
25 City brief makes clear, modern land use law requires the City to consider, and
26 indeed solicit, public opinion. That the public reaction to the rezone proposals was
27 intense, and backed by strong technical argument, is testimony to how
ill-considered the proposals were. Indeed, the Council decision was unanimous.
Importantly, there were no challenges in Phoenix's petition that the decisions were
improper because of conflicts of interest with respect to any councilmembers.

1 pedestrian-oriented development in and around the commercial areas of the city that
2 accommodate over 3 dozen wineries." Ordinance 431, §13(b), Wood Trails Exhibit
3 83.

4 3) CHANGES ON THE SUBJECT PROPERTY. The subject property has
5 not changed over the years. Both the Montevallo and Wood Trails properties have
6 been in the same uses for at least 30 years. Indeed, the entire neighborhood is
7 stable, with well maintained housing stock.

8 Indeed, the City Council addressed the change in circumstances in its
9 decisions at Wood Trails Decision, Findings 6(e) and Montevallo Decision, Finding
10 6(d):

11 The absence of any substantial changes in the circumstances from
12 which the original zoning determination was made, including, but not
13 limited to land use patterns, public opinion, established neighborhood
14 character, substandard roadways, the absence of stores, sidewalks,
15 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.

16 Significantly, there are also no changes in public services to the property. Sewer
17 service has been available on adjacent property to the west for at least 20 years, well
18 before the current zoning on the property was adopted. The CNW Analysis at
19 Volume 1, Section 2 "Infrastructure" in the "Sanitary Sewer" section describes the
20 history of the sanitary sewer connection.

21 **3.3. The City Council Correctly Determined That Phoenix's**
22 **Proposed Rezones Did Not Meet State or Local Rezone Criteria.**

23 As *Woods, supra*, makes clear, there is no presumption of validity that applies
24 to rezone applications. It is up to the applicant to demonstrate that all applicable
25 criteria are met. As applied here, CNW has already demonstrated that there are no
26 changed circumstances applicable to the rezone proposals, as the Wellington area
27 has not undergone any significant change in circumstances since it was zoned R-1

1 in the city's original comprehensive planning and zoning in 1996. The third criteria
2 in *Woods* for a rezone requires the applicant to demonstrate that the rezone has "a
3 substantial relationship to the public health, safety, morals or general welfare." The
4 Woodinville City Council concluded that the application did not meet these criteria:

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

9 Wood Trails and Montevallo Decisions, Conclusion 1.

10 As will be discussed below, Phoenix's attack on the City Council's decision
11 is to pick and choose amongst the evidence before the Council to paint a picture
12 favorable to it. However, the LUPA standard is not a preponderance of the evidence
13 test. Rather, Phoenix must show that the Council's decision is "not supported by
14 evidence that is substantial viewed in light of the whole record before the court."
15 RCW 36.70C.130(1)(c). Again, as will be demonstrated below, there was
16 overwhelming evidence that the rezone proposal was not consistent with public
17 health, safety or general welfare and that it was inconsistent with long established
18 criteria for rezones.

19 Much of Phoenix's brief attempts to argue the consistency of its application
20 with the Growth Management Act and how the Woodinville Council decision is
21 inconsistent with it. However, the recent *Woods* decision makes clear that
22 inconsistency with GMA is not a ground for challenging a site specific rezone:

23 As noted above, a comprehensive plan or development regulation's
24 compliance with the GMA must be challenged within 60 days after
25 publication. RCW 36.70A.290(2). Once adopted, comprehensive plans
26 and development regulations are presumed valid. RCW
27 36.70A.320(1). Thus, if a project permit is consistent with a
28 development regulation that was not initially challenged, there is the
potential that both the permit and the regulation are inconsistent with
the GMA. While this is problematic, the GMA does not explicitly apply
to such project permits and the GMA is not to be liberally construed.
Skagit Surveyors, 135 Wash.2d at 565, 958 P.2d 962. This court's
"role is to interpret the statute as enacted by the Legislature ... we will

1 not rewrite the [GMA]." Id. at 567, 958 P.2d 962. Because the GMA
2 does not provide for it, we hold that a site-specific rezone cannot be
challenged for compliance with the GMA.

3 *Woods v. Kittitas County*, 2007 WL 4442396, 7 (2007).³ Accordingly, the Court
4 should disregard claims concerning consistency with the GMA and instead review
5 the record based upon application of the long established and unchallenged
6 provisions of the Woodinville code that set criteria for rezones.

7 The City has established two sets of criteria for evaluation of rezone
8 applications. First, there are general rezone criteria, applicable to any rezone
9 application within the City. See WMC 21.44.070. In Section 3.4 of this brief, CNW
10 will show that the City Council correctly determined that the Phoenix application did
11 not meet these general criteria. Second, there are guidelines as to when R-1 (the
12 current zone) and R-4 (Phoenix's requested rezone) are to be applied. See WMC
13 21.04.080(2). In Section 3.5 of this brief CNW will demonstrate that there was
14 substantial, indeed overwhelming evidence that the request for R-4 zoning was not
15 consistent with these criteria.

16 **3.4 The Rezone Applications Do Not Meet the General Rezone Criteria** 17 **in WMC 21.44.070.**

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

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

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

26 ³Phoenix's brief was written after the *Woods* decision and makes reference to
27 it for other purposes at page 46-47.

1 uses allowed in the proposed zone reclassification.
2 (Emphasis supplied). The code is clear that the burden of proof is on the applicant
3 to meet these criteria. (i.e., rezone grant "only if the applicant demonstrates. . .")

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

7 **3.4.1 The Growth Board Decision In *Hensley v. City of***
8 ***Woodinville* Is Not Applicable to These Proceedings.**

9 Phoenix relies extensively in its brief on the decision of the Central Puget
10 Growth Management Hearings Board in *Hensley v. City of Woodinville*, Case No.
11 96-3-0031 (February 25, 1997). For the reasons stated by the City in its brief, the
12 *Hensley* case is not applicable to these proceedings. Rather than repeat the City's
13 argument, CNW incorporates those arguments into this brief.

14 **3.4.2 There Is No Demonstrated Need for the Wood Trails or**
15 **Montevallo Rezones.**

16 The first of the three criteria for the rezoning of property at WMC 21.44.070
17 is: "A) There is a demonstrated need for additional zoning of the type proposed."
18 This criteria is not met.

19 As the staff report and City Council conclude, a combination of current zoning,
20 together with pending and issued permits, demonstrates that the City is meeting its
21 GMA 20 year growth projection of 1,869 dwelling units. Wood Trails Staff Report
22 (Wood Trails Exhibit 1, page 5). At pages 34-41 of its brief, Phoenix asserts that it
23 "submitted additional factual and legal arguments in support of the demonstration of
24 need for the proposed action." See page 35. It is true that Phoenix did submit
25 certain factual and legal arguments. However, it is not up to this Court to resolve the
26 merits of these matters. The Court is not some super zoning body, indeed: "courts
27 simple do not possess the power to . . . rezone a zoned area." *Teed v. King County*,
28

1 36 Wn.App. 635, 644, 677 P.2d 179 (1984). As the City points out in its brief, the
2 decision to rezone or not is up to the City Council of the City of Woodinville; this
3 Court can only overturn the City's decision if it finds that the Council's decision "is not
4 supported by evidence that is substantial when viewed in light of the whole record
5 before the court." RCW 36.70C.130(1)(c). As is demonstrated below, there was
6 abundant evidence before the Council that there was no demonstrated need for the
7 project. Once the Court decides that there was substantial evidence, this Court's
8 inquiry ends.

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

12 **36.70A.115. Comprehensive plans and development regulations**
13 **must provide sufficient land capacity for development**

14 Counties and cities that are required or choose to plan under RCW
15 36.70A.040 shall ensure that, taken collectively, adoption of and
16 amendments to their comprehensive plans and/or development
17 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.

18 (Emphasis supplied). The City Council specifically concluded at Conclusion 6 of
19 both decisions that:

20 According to past King County Buildable Lands Reports and the
21 preliminary 2007 report, the City has excess capacity to accommodate
22 its GMA housing allocation and is also meeting its employment growth
23 target. The City is providing and supporting affordable housing for the
24 Eastside through its participation in a coalition of east King County
25 cities (ARCH). The City of Woodinville Capital Facilities planning and
CIP are addressing the City's infrastructure deficiencies and commits
the City to extending infrastructure and services to support urban
development with the intent of maximizing the benefit from capital
projects relative to costs and resources and in an efficient manner.

26 This was based on the Findings in each decision (Wood Trails Decision Finding 6(f)
27 Montevallo Decision, Finding 6 (e):

1 a change in the zoning at the subject site is not needed or necessary
2 to fulfill the City's Comprehensive Plan or to implement the Land Use
3 Element of the Plan. The Council does not construe its
4 Comprehensive Plan or development regulations as requiring a rezone
5 of this type.

6 As stated in Finding 7 in each decision:

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

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

20 In addition to the specific conclusions of city staff, there is detailed information
21 and backup information provided in CNW's Analysis at Volume 2, Section 3 entitled
22 "Buildable Land Survey." Charts and other material provided demonstrate that the
23 City is meeting all of its housing goals and the Wood Trails and Montevallo rezones
24 are not necessary to meet City housing goals. This material shows there is no
25 "demonstrated need."

26 Other testimony at the hearings supported the lack of need for more R-4 lots.
27 Lisa Rhodes, an experienced real estates salesperson with Windermere in the
28 Woodinville area testified that in fact there is a shortage of R-1 properties, not R-4
lots. As she said:

As a realtor, I have a shortage of R-1 homes to show potential buyers.
There are numerous R-4 developments sprawling all over areas of Bothell
and Mill Creek and if a buyer is looking for that type of home on the east side,
there's no shortage. The shortage is in the R-1 homes and the need is for
more R-1 homes. The supply is diminishing compared to R-4s.

1 Tr. 4/6, page 43-45. Ms. Rhodes also submitted a letter containing her analysis. See
2 Exhibit 106. A specific analysis of need based on the review of actual sales and
3 listings of houses for sale also failed to demonstrate any need for new R-4
4 properties. See Wood Trails Exhibits 108 and 109.

5 The City Council's interpretation of its own ordinance is entitled to substantial
6 weight. As stated in *Neighbors of Black Nugget Road v. King County*, 88 Wn. App.
7 773, 778, 946 P.2d 1188 (1997):

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

12 In its brief, applicant Phoenix takes issue with the staff description of
13 "demonstrated need" by arguing that "demonstrated need" under Section 21.44.070
14 of the Woodinville code equates to "market demand." Brief at 36-37. This is an
15 incorrect reading of applicable law.

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

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

23 (Emphasis supplied.) Note that GMA is not specific about what intensity of zoning
24 is required. As may be seen from the staff reports on both Wood Trails and
25 Montevallo, the City has already identified "areas and densities sufficient to permit
26 the urban growth" projected over the 20-year period. The City's determination that
27 these areas are sufficient to meet City goals shows that there is a lack of
28 "demonstrated need" for additional densities, including R-4. Indeed the analysis
prepared by CNW factually supports Mr. Sturtz's findings; the chart at page 3 of the

1 Buildable Lands section of the CNW Analysis shows that growth targets within the
2 city are being exceeded. *Id.* This data shows that the City has an excess of 477
3 units of housing over the 20-year planning period. This is based in part on recent
4 rezoning in the city's downtown and tourist zones as set forth in findings of the City
5 in its sustainable development survey. See CNW Analysis, Volume 2, Buildable
6 Lands Survey, pages 5-7.

7 Based on the foregoing, the argument that "demonstrated need" under WMC
8 21.44.070 should be read to be "market demand" is not consistent with the Code.

9 Phoenix has apparently undertaken an electronic legal search for other cases
10 using the term "demonstrated need" and has cited them at pages 4-6 of its
11 memorandum. However, these few cases illustrate why the term "demonstrated
12 need," as interpreted by Phoenix, does not apply here.

13 Indeed, each of the cases cited by Phoenix (Brief, pp.35-36) references not
14 market demand, but shortages in the commodity analyzed. Thus in *Trisko v. City of*
15 *Waite Park*, 566 NW 2nd 349 (Minn. Ct. App. 1997) the Minnesota Court of Appeals
16 dealt with the denial of a conditional use for a rock quarry. But as Phoenix admits,
17 without the new rock quarry there would be insufficient granite for public purposes,
18 creating a shortage. The same is true in *1000 Friends of Oregon v. Marion County*,
19 116 Ore. App. 584, 842 P.2d 441 in which the court identified a shortage of RV
20 spaces because customers were being turned away. In *Blaker v. Zoning and*
21 *Planning Commission of the Town of Fairfield*, 212 Conn. 471, 484, 562 Atl.2d 1093
22 (Conn., 1989) the court again focused on a limited market of affordable housing.
23 The same is true of *Eveline Township v. H&D Trucking Company*, 81 Mich. App. 25,
24 448 N.W.2d 727 (Mich. Court of Appeals 1989). The *Eveline Township* case dealt
25 with a specific, and frequently litigated provision of Michigan state law that stated:

26 A zoning ordinance or zoning decision shall have the effect of totally
27 prohibiting the establishment of a land use within a township in the

1 presence of a demonstrated need for that land use within either the
2 township or the surrounding area within the state, unless there is no
3 location within the township where the use may be appropriately
4 located, or the use is unlawful.

5 In that case, the question was whether or not a port facility proposed by the applicant
6 was properly denied by the local township. However, there the evidence was that
7 "there were no available port sites in the area and that the action of the township
8 ordinance regarding port sites . . . does have the effect of totally prohibiting
9 commercial ports like defendant's from the township." 448 N.W. 2d at 730.

10 These cases highlight the fact that each either deals with the identification of
11 shortages or a complete denial of a use within the area. However, in the instant
12 case all that Phoenix has demonstrated, if it has, is that there is a "market demand"
13 for R-4 housing. That there is market demand does not mean that there are
14 shortages of such uses or that such uses are being excluded from the city of
15 Woodinville.

16 In addition, there is a pervasive market for housing in the region and in the
17 state as a whole. Material submitted by CNW during the hearing, and through the
18 extended public comment period, indicates that there is a substantial supply of R-4
19 zoned property and homes available in Woodinville and the nearby community and
20 no shortage exists. See CNW Analysis, Volume 2, Buildable Lands Survey, pages
21 7-9. If, for example, Phoenix's application was for industrial zoning, and it was
22 demonstrated that no industrial zoning was allowed in the city or that there was a
23 shortage of industrial land, the Phoenix argument might make sense.

24 At pages 36-37 of its brief Phoenix points out that "sound planning principles"
25 suggest the need for R-4 housing, citing a report done for Phoenix by a planner.
26 This planner made certain "observations" (Brief page 36, line 16) concerning plans
27 of the Puget Sound Regional Council, decisions of Growth Management Hearings
28 Board, and consistency with the "Smart Growth Project of the Environmental

1 Projection Agency.” These materials were never before the Council, are not included
2 in the record certified by the City and are thus not properly considered by the Court.
3 We join in the City’s motion to strike such materials. However, none of the plans,
4 decisions or projects are listed as criteria for rezoning decisions or adopted as
5 standards by the City. As the Supreme Court recently made clear in the *Woods*
6 decision, attempts to challenge rezone decisions for noncompliance with the GMA,
7 or other extraneous criteria are not permissible.

8 At page 37, Phoenix argues that provisions in the code regarding four units
9 per acre when “urban services” are provided trump all other code sections.
10 However, the structure of the Woodinville rezone provisions are hierarchical. First,
11 an applicant must demonstrate that the general rezone criteria are met as found in
12 WMC 21A.04.070. If those criteria are met, then issues arise concerning
13 consistency with the residential zoning guidelines under the next code, WMC
14 21A.04.080(2). This argument is largely abstract because, based on substantial
15 evidence, the City Council found and concluded that “adequate services” cannot be
16 provided to the Montevallo or Wood Trails properties and that conclusion is
17 supported by more than substantial evidence. See Section 3.6 of this brief *infra*.

18 On pages 39 and 40 of its brief Phoenix argues that the decision must be
19 “consistent with the GMA” (page 39) and that “the Court is bound to interpret the City
20 zoning code in a manner consistent with GMA.” (Page 40). It further argues that
21 “GMA does not permit zoning decisions to be made on the desire to preserve
22 neighborhood character or due to community opposition.” However, *Woods* makes
23 clear “that a site-specific rezone cannot be challenged for compliance with the GMA.”
24 Slip Opinion, *supra*, page 9.

25 In summary, demonstrated need relates to complying with growth
26 management requirements, not market need as claimed. Because the City of
27

1 Woodinville has set aside sufficient land to more than meet its housing goals under
2 the GMA, there is no "demonstrated need" for increased densities over the 20 year
3 planning period described by GMA. Between the careful analysis of the City and the
4 evidence presented in the CNW analysis, there is abundant evidence to support the
5 City Council's conclusions that Phoenix failed in its burden to show a "demonstrated
6 need" for its rezone. Phoenix's claims that the Council erred are without merit.

7 **3.4.3 The City Council Correctly Found That the Zone**
8 **Reclassifications of Wood Trails and Montevallo are**
9 **Inconsistent and Incompatible with Uses and Zoning of**
10 **the Surrounding Properties.**

11 At pages 41-42 of its brief, Phoenix argues that the proposed rezones are
12 compatible with surrounding area. The general rezone criteria provides that a zone
13 reclassification is "granted only if" the application is consistent with the
14 comprehensive plan and meets three criteria, the second of which is:

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

17 In this regard, the City Council found, for each rezone, that the development "as
18 proposed is not in character with the surrounding R-1 neighborhoods and
19 properties." Wood Trails Finding 12; Montevallo Finding 10. Similarly, Conclusion
20 10 in each decision states: "The current underlying zoning of the property at R-1 is
21 inconsistent with the proposed density of the preliminary plat application." These
22 findings and conclusions are again amply supported in the record.

23 All properties that surround the Wood Trails and Montevallo proposals are
24 zoned R-1 and there are no pending proposals to change these properties. These
25 surrounding properties are currently developed with single family homes on lots that
26 average just less than one acre. As shown in the CNW Analysis, Vol. 2, at the "Well-
27 Established Subdivision of the Same Density" section, principal development of this
28 area took place in the 1970's and 1980's and is unchanged since then. Data from

1 the CNW analysis shows charts, graphs, overhead photographs, lot size
2 comparisons and other demonstrable evidence showing the inconsistency and
3 incompatibility with both uses and zoning in the surrounding area. See CNW
4 Analysis (Exhibit 74), Volume 2, Well Established Subdivisions, pages 12-18.
5 Recent work by the City in its Sustainable Development Protect analyzed the
6 character and desirability of various neighborhoods within the City. This report is
7 also found in the "Well-established Neighborhoods" section of CNW Analysis, Vol.
8 2. The Northwest Wellington neighborhood was identified in that report as one of the
9 highest rated neighborhoods in the city as judged by such factors as vegetation
10 cover, viewshed, cohesive block configuration, patterns of lot sizes, cohesive street
11 presence, building rhythm and order. See *Id*, page B-16.

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

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

16 Staff Report for Ordinance 431, Wood Trails Exhibit 71.

17 In summary, there is overwhelming statistical and demonstrative evidence
18 showing in detail that Phoenix's proposed R-4 rezones are inconsistent and
19 incompatible with the uses and zoning of the adjacent properties in the Wellington
20 neighborhood. Phoenix's improper invitation to the Court take over as a zoning
21 agency is inconsistent with the entire scheme of Washington land use law and must
22 be rejected.

23 **3.4.4 The Property Is Practically and Physically Unsited for**
24 **the Uses Allowed in the Proposed Zone Reclassification.**

25 Neither the Wood Trails nor the Montevallo properties are suited for the uses
26 proposed under the rezone, i.e. subdivisions of densities that are R-4.

27 Phoenix boldly states at page 42 of its brief that: "all parties concede it is

1 practically and physically suited for R-4." Nothing is farther from the truth. CNW
2 presented clear evidence in its analysis, and in hearing testimony, that the physical
3 circumstances of the properties proposed for rezones were ill-suited for the
4 development proposed.

5 One of the principal issues, particularly with the Wood Trails proposal is the
6 serious issue with geologic hazard areas. That issue will be discussed in the
7 following sections of this memorandum in detail as this is an area that is
8 "environmentally constrained." See Section 3.5.3. As that section of the brief points
9 out, the existence of large areas of landslide and erosion hazard areas make the
10 Wood Trails rezone area show that property is not "practically or physically suited"
11 for more intense development that might be permitted in an R-4 rezone. The
12 detailed review of the physical incompatibilities of the proposed rezone property is
13 discussed in detail in the CNW Analysis, Volume 2, Critical Areas. This material
14 prepared by CNW's experts in geology and hydrogeology shows the severe
15 limitations of the rezone properties to various geologic hazards. See CNW Analysis,
16 Volume 2, pages 7-18 and Wood Trails Exhibit 74. This data included detailed maps
17 showing the serious geologic hazards that exist in the area of the rezones. *Id.* As
18 the Council concluded in the Wood Trails decision:

19 d. Area-wide environmental constraints imposed by steep slopes
20 and erosion hazard areas make R-1 zoning particularly appropriate for
21 the site by minimizing the significant unavoidable adverse impacts of
22 residential development of the property.

23 Wood Trails decision, Finding 6(d).

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

26 First, there is no public transportation to the area. Findings, Section 6(c) (both
27 Decisions). There is no transit service anywhere near either the Wood Trails or the
28 Montevallo proposals; the nearest minor arterial, 156th Avenue N.E., has no bus

1 service. CNW's traffic engineer Roger Mason made clear that there was no public
2 transit near either of the rezone properties and no plans by Metro to bring service to
3 this area. CNW Analysis (Exhibit 74), Volume 1, Section 2 under Transportation at
4 page 19.⁴ Residents in any new R-4 housing will be completely dependent on
5 automobiles for all work, shopping, recreation and other trips outside the home.

6 Second, the roads in the area are substandard. As outlined in detail in
7 Montevallo Exhibit 74 in the Infrastructure Section, Transportation subsection, all of
8 the local access roads, N.E. 195th, N.E. 198th, N.E. 201st, and N.E. 202nd do not meet
9 commonly accepted transportation engineering standards, having been planned and
10 constructed 30 years ago or more. The material on transportation was prepared by
11 Roger J. Mason, a licensed professional transportation engineer and Vice President
12 with CH2M Hill. See the Resumé section of the CNW Analysis (at the end of Volume
13 2). Mr. Mason also testified at the March 16 hearing summarizing the notebook
14 material. Tr. 3/15 - pages 104-118, Tr. 4/5, pages 86-90. The Wood Trails rezone
15 will put increased traffic volumes on these roads.

16 Third, 156th Ave N.E., the only north-south arterial in the area, has serious
17 engineering and safety problems as well as shown in the CNW Analysis in the
18 Infrastructure Section, Transportation subsection, also prepared by Mr. Mason. See
19 pages 11-19. This route is also substandard, with below standard sight distance
20 limitations. This section of Mr. Mason's report was also richly detailed, again with
21

22 ⁴An example of the failure of Phoenix's argument is found at page 28 of its brief
23 where it argues:

24 It is commonly understood that in order for transit to be successful,
25 cities must authorize densities at least six units per acre. Build to that
26 density, and King County Metro transit will come.

27 Brief page 28, lines 25-27. But this is simply argument of Phoenix's counsel; there
28 is no citation to the record or any other report for this statement. Contrast this resort
to unsubstantiated generalities with the careful consideration found in CNW's
analysis.

1 comparison charts and photographs of the dangerous conditions. *Id.* There are also
2 serious congestion problems on this street, where traffic volumes are growing at
3 rates substantially higher than expected; this was discussed extensively at the
4 hearing. *Id.*

5 Fourth, the same Ordinance 431 staff report noted that:

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

8 Staff Report for Ordinance 431, page 8 as attached to Montevallo Exhibit 71. This
9 confirms that providing the necessary transportation infrastructure will be expensive
10 for the city.

11 Fifth, one of the goals under GMA is to assure the availability of housing
12 within the community that is diverse.

13 (4) Housing. Encourage the availability of affordable housing to all
14 economic segments of the population of this state, **promote a variety**
of residential densities and housing types, and encourage
15 preservation of existing housing stock.

16 RCW 36.70A.020. [Emphasis supplied.] As the staff report for Ordinance 431
17 states:

18 Changing R-1 to R-4 is counter to the City's economic and residential
19 growth plans to encourage housing in the downtown where people can
20 live in proximity to work opportunities, shopping, mass transit and other
services, which not only supports the local economy, but also reduces
vehicle trips.

21 As described above, the proposed rezones are in an area where there is no
22 transit service of any kind and no plans for provisions for transit. The lack of transit
23 and pedestrian facilities indicates there is a lack of "adequate . . . needed public
24 facilities and services" under this criteria and accordingly the proposals are not
25 suitable for rezoning.

26 In summary, the Wood Trails and Montevallo properties are not practically and
27 physically suited for R-4 uses and hence do not qualify for these rezones. Once
28

again, Phoenix's challenges to the carefully considered, and fully documented, findings and conclusions of the City is without merit.

3.5 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 Standards for 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 how the Wood Trails and Montevallo properties meet the criteria for R-1 zoning and how they fail to meet criteria under WMC 21.04.080 for a rezone to R-4.

3.5.1 Local Conditions and Discretion Control the Density of Development, Not a Brightline Arbitrary Standard.

In planning for development within its borders, the City of Woodinville, like other communities, is primarily responsible for developing plans that best fit the local community. This is stated in RCW 36.70A.3201 which expresses legislative intent under the GMA:

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

8 (Emphasis supplied).

9 This approach is approved in recent Washington cases:

10 GMA was not intended to be a top-down approach with state agencies
11 (or GMA Boards) dictating requirements to local entities. Thus, in
12 accordance with the legislative language of the act, we have held that
13 the GMA does not prescribe a single approach to growth management.
14 RCW 36.70A.3201; *Viking Props. v. Holm*, 155 Wn. 2d 112, 125-26,
15 118 P.3d 322 (2005) ("the ultimate burden and responsibility for
16 planning, harmonizing the planning goals of [the GMA], and
17 implementing a county's or city's future rests with that community."'
18 (alteration in original) (quoting RCW 36.70A.3201)).

19 Thus, the GMA is implemented exclusively by city and county
20 governments and is to be construed with the flexibility to allow local
21 governments to accommodate local needs. *Viking Props.*, 155 Wn. 2d
22 at 125-26, 118 P.3d 322.

23 *Lewis County v. Western Washington Growth Management Hearings Board*, 157
24 Wn. 2d 488, 511-512, 139 P.3d 1096 (2006). (Emphasis supplied).

25 Accordingly, the City Council must determine what is best for the community,
26 based on all pertinent factors, without applying a rigid "bright line" test for
27 development. Zoning code, comprehensive plan and rezone criteria demonstrate
28 that the property does not qualify for R-4 zoning, while code criteria for R-1 zoning
are met.

3.5.2 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 twenty 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 CNW Analysis has an entire section on this criteria found in the

1 Zoning Section, Buildable Lands Subsection. Code criteria for R-1 zones indicate
2 that such zoning is appropriate where the property in question "is in well-established
3 subdivisions of the same density. . ."

4 The "Well Established Subdivisions of the Same Density" subsection of the
5 CNW Analysis contains 43 pages of detailed information that describe the history of
6 development in the Wellington community. This section shows the incompatibility
7 of the new proposed development with the existing lots and developments. Once
8 again, CNW provides analysis of the well established subdivisions though statistical
9 material and aerial, and ground level, photographs of the neighborhood. *Id.* at pages
10 10-21. Examples of other developments, by the same developer (Phoenix), are also
11 shown demonstrating incompatibility. See pages 22-26. This material describes in
12 detail how the Wellington neighborhood is built out with mature lots of densities
13 consistent with R-1 zoning. See CNW Analysis, the Zoning Section on Well
14 Established Subdivisions, page 18. This includes aerial photographs found at pages
15 15-17 that show the deviation between existing development and proposed
16 development with R-4 zoning. *Id.* The history of area subdivision provided in that
17 section demonstrates how subdivisions in the area were developed over time. *Id.*
18 at p. 11.

19 It is also important here to recognize the precedential and cumulative effect
20 the Wood Trails and Montevallo rezone decisions will have. If these proposals are
21 approved, sewers will be installed all the way to the Montevallo proposal. Given the
22 isolation and separation of these proposals in a virtual sea of lower density R-1
23 zoning, it is inescapable that there may be no basis to deny other R-4 applications
24 if these areas are rezoned. Given that the one acre parcel size of existing parcels
25 can easily be short or long platted into smaller lots, it is likely that individual rezones
26 and short plats will be sought by property owners seeking to maximize value in their
27

1 property. The practical impact of such developments is described in detail in the
2 "Cumulative and Secondary Impacts" section of CNW's Analysis , Vol. 2, see
3 especially pages 11-19. Such impacts will be significant because the Wellington
4 neighborhood has a unified character, featuring preservation of vegetation, privacy,
5 large setbacks and generous open space on each lot. It is no wonder that the
6 Sustainable Development Study and the staff report on Ordinance 431 made
7 conclusions supportive of maintaining R-1 zoning, as follows:

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

10 Montevallo Exhibit 71, Attachment A, page 17.

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

13 *Id.* page 15.

14 Based partially on CNW's submissions, the Woodinville City Council found
15 that:

16 3. The subject site is currently zoned R-1 and has been zoned R-1 since
17 incorporation of the City. The zoning designation was at the time of
18 incorporation a continuation of the applicable King County zoning
19 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.

20 The City's decision to deny the Montevallo and Wood Trails proposals based on this
21 criteria has significant, if not overwhelming, support in the record. There is no basis
22 on which to conclude that the City did not have abundant evidence in solid support
23 of its decision.

24 **3.5.3 Significant Area-wide Environmental Constraints Exist That Prohibit R-4 Zoning.**

25 The City also has guidelines for determining residential zoning categories as
26 set forth in WMC 21.04.080(2):

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

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

7 (b) The R-4 through R-8 zones on urban lands that are predominantly
8 environmentally unconstrained and are served at the time of development by
9 adequate public sewers, water supply, roads and other needed public
10 facilities and services; and . . .

11 (Emphasis supplied). Note that the burden of proof is again on the applicant to
12 demonstrate that the property under consideration is "predominantly environmentally
13 unconstrained" to qualify for an R-4 rezone. In reviewing the evidence here, the
14 Court must pay particular attention to the text of this ordinance. The City uses the
15 terms "constrained" and "unconstrained." The use of this language means that R-1
16 is appropriate where there are limitations on use - "constraints" - not that the land is
17 somehow unbuildable or not safe. This language chosen indicates a broad standard
18 of protection. Further, it must be demonstrated that the property is "predominately"
19 unconstrained to qualify for R-4 zoning. The syntax here is clear: the applicant must
20 show that most of the property is unconstrained. In addition, the modifier that the
21 environmental constraint must be "area-wide," found in the criteria for the R-1 zone,
22 is missing from the R-4 criteria.

23 Phoenix devotes a short section of its brief (pages 31-32) to a claim that its
24 properties are not environmentally constrained. This is an attempt to dispute the
25 clear findings by the City in its Wood Trails decision that:

26 d. Area-wide environmental constraints imposed by steep slope and erosion
27 hazard areas make R-1 zoning particularly appropriate for the site by
28 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.

While there may be some evidence that supports Phoenix's position, there is

1 much stronger evidence found in the expert reports from the CNW Analysis
2 described below that shows there are multiple environmental constraints found on
3 these properties. Again, under the caselaw cited in the City's brief, this Court is not
4 to weigh the evidence and then become the super-zoning body, but rather to
5 determine whether the record, taken as a whole, has substantial evidence to support
6 the decision.

7 Here the evidence demonstrates that the rezone proposals, particularly Wood
8 Trails, are not "predominately environmentally unconstrained" as required for an R-4
9 zone. There are multiple environmental constraints for that property as shown by the
10 various critical areas that apply to it as set forth in CNW's Analysis. In addition, the
11 property continues to meet the criteria for R-1, i.e., "lands with area-wide
12 environmental constraints." For R-1, the code ties two criteria together by an "or"
13 indicating that if either criteria, "area wide environmental constraints" or "in well
14 established subdivisions of the same density" is met the property must be zoned R-
15 1. Note as well that the R-1 zone is not required to actually be on areas of such
16 environmental constraints, rather such land only need to be "adjacent to" such lands.
17 These criteria have been a part of the code since the applicants first owned the
18 property and were never challenged by them.

19 As to these criteria, the CNW Analysis demonstrates that the Wood Trails
20 property has broad scale, area wide environmental constraints, most notably
21 geologic limitations for steep slopes, erosion hazards and landslide hazards. This
22 material is found in Volume 2, Section 4 of the CNW Analysis Exhibit under "Critical
23 Areas." The material here was prepared by Otto Paris, a licensed professional
24 hydrogeologist and geologic consultant (his resumé is in the Resumé' section of the
25 CNW Analysis. Mr. Paris also spoke at the public hearings, summarizing his work.
26 CNW's data and report on geologic hazards were also supported by Susan
27
28

1 Boundy-Sanders, another highly qualified geologist who spoke at the hearings. (Her
2 resumé is also provided.) See Wood Trails Exhibit 75. Additional materials on this
3 subject were submitted by Robert Harmon, a highly qualified geologist, who also
4 spoke at the hearing. See Exhibit 94, Tr. 3/14. p. 109-112; Tr. 4/5 p. 10-20.

5 This section of CNW's Analysis shows that recent information concludes that
6 the entire "Hillside Drainages Area", which includes the Wood Trails property, should
7 be classified as a Landslide Hazard area. This is in addition to the area being
8 identified as an erosion hazard area. These geologic constraints are "area wide,"
9 extending both to the north and south from the Wood Trails plat. Again the CNW
10 Analysis on Critical Areas was richly detailed, with full color diagrams and maps of
11 the area showing where the environmental constraints were found, in many cases,
12 referencing existing data and reports from the city. *Id.*

13 In summary, the Wood Trails proposal is not consistent with the criteria for R-
14 4 zoning because these lands are not "predominately environmentally
15 unconstrained." The Wood Trails property does meet the standard for R-1 because
16 the property is "on or adjacent to land with area-wide environmental constraints..."
17 The rezone proposal is inconsistent with R-4 criteria and must be rejected.

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

20 6d. Area-wide environmental constraints imposed by steep
21 slopes and erosion hazard areas make R-1 zoning particularly
22 appropriate for the site by minimizing the significant unavoidable
23 adverse impacts of residential development of the property. See the
24 statement of purpose in WMC Section 21.04.080(2)(a) and (b).

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

25 10. The FEIS completed by the City of Woodinville shows
26 evidence of area-wide environmental constraints.

27 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.

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

As noted above R-4 zoning is allowed under the City of Woodinville codes if the land is "predominately environmentally unconstrained." However, the applicant must make an additional showing, i.e. that the property 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 do not meet this criteria in multiple areas.

3.6.1 Substandard Roads.

The code requires that there be "adequate roads" to the development. However, 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. This expert report was prepared by Roger Mason, a licensed professional engineer with 25 years experience in traffic engineering. His resumè is found in the resumè section of Volume 2 of the CNW Analysis. His conclusions, found at page 19 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.

-156th Ave. N.E. does not meet a number of commonly accepted standards, and added traffic volumes from development is problematic at intersection, 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

1 . . . roads . . . " and accordingly do not qualify for rezoning to R-4.

2 **3.6.2 Lack of Transit.**

3 Mr. Mason's report also analyzes another "needed public service" that of
4 public transportation. At page 19 of his analysis, Mr. Mason notes that there is no
5 public transit service at all along the main arterial street leading to the two properties
6 to be rezoned, 156th Ave. N.E. The closest transit service is more than a mile away
7 and is peak hour service only. *Id.* Mr. Mason notes there are no transportation or
8 transit improvement projects even contemplated in the area.

9 **3.6.3 Lack of Sidewalks.**

10 Mr. Mason's Transportation report notes that there are no sidewalks in the
11 community to allow for pedestrian movement. See page 13. Accordingly, the
12 existing transportation systems are substandard under current city rules and thus
13 inadequate.

14 **3.6.4 Lack of Available Parkland.**

15 During the hearing several witnesses noted that there were no public parks
16 within the vicinity of the two proposed rezone properties. Accordingly, there are no
17 places for recreation for either adults or children. The Final Environmental Impact
18 Statement (FEIS) for the Phoenix proposals admitted that:

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

21 FEIS, page 3.6-1.⁵ Indeed, the City's 2005 Parks, Recreation and Open Space
22 (PRO) Plan which inventories available resources discusses these issues for the
23 Wellington neighborhood in which these proposed rezones are found:

24 The 2005 PRO plan notes that the Wellington
25 neighborhoods have poor access to the City Hall area
complex, which is the only existing City resource that

26
27 ⁵ The FEIS is included with the attachment to Phoenix's brief.

1 meets the definition of a community park.

2 FEIS, page 3.6-3. The FEIS further notes that there are no plans or available
3 properties in the vicinity that will be available for parks within the near (or distant)
4 future. *Id.*

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

7 6c. The lack of adequate public facilities and services to support the
8 proposed R-4 development, including, but not limited to the
9 substandard arterial roads and pedestrian walkways providing access
10 to and from the subject property, the absence of any City parklands
11 within walking distance of the subject property, and the absence of
12 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).

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

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

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

19 **3.7 The Proposal Is Inconsistent with the Terms of the City of**
20 **Woodinville Comprehensive Plan.**

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

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

26 The Woodinville City Council found that Phoenix had not demonstrated that
27 the proposal was consistent with the city's comprehensive plan. As the Council said:

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

4 Both decisions, Conclusion 1.

5 At pages 32-34 of its brief, Phoenix argues that its rezone proposals do meet
6 comprehensive plan policies, citing the decision of the Hearing Examiner for support.
7 However, the Hearing Examiner only makes recommendations and the City Council,
8 in the exercise of its discretion, can decline to accept the Hearing Examiner's view,
9 as they have here. Phoenix also contends that the Council had the responsibility to
10 set forth each particular finding. However, the Hearing Examiner set forth certain
11 comprehensive plan policies in his recommendation and it is obvious that the Council
12 disagreed with his position on these matters.

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

19 The significant sections of the comprehensive plan at issue here are as
20 follows:

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

23 The very first section of the land use element emphasizes the preservation
24 of the character of existing neighborhoods. The subject proposals do not preserve
25 the character of the existing neighborhood for the reasons identified above. As
26 noted by the sustainable development study, the north Wellington neighborhood
27

28
OPENING BRIEF OF CONCERNED
NEIGHBORS OF WELLINGTON - 38

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1 ranks among the most desirable in the city. As described in the sustainable
2 development study and the staff report on Ordinance 431, the "character" of this
3 neighborhood is best preserved, "by lower density zoning." The analysis and
4 assessment of neighborhood character is found in the "Well Established
5 Subdivisions" section of the CNW Analysis, Vol. 2, Section 2. See in particular,
6 Attachment 4, beginning at page 43.

7 Further, as described and admitted by staff, the character of the Wellington
8 neighborhood can be preserved "while accommodating the state's 20-year growth
9 forecasts for Woodinville" because according to staff there is sufficient land
10 available, at suitable densities, to meet projections. Indeed, the Planning
11 Commission found that changing R-1 to R-4 is:

12 counter to the City economic and residential growth plans to
13 encourage housing in the downtown where people can live in proximity
14 to work opportunities, shopping, mass transit and other services, which
not only supports the local economy, but also reduces vehicle trips.

15 See Montevallo Exhibit 71, staff report for Ordinance 431, §3(b).

16 **B) LU-1.2 Encourage future development in areas:**

17 **1. With the capacity to absorb development (i.e., areas with**
18 **vacant or underdeveloped land and available utility, street,**
park, and school capacity, or where such facilities can be
cost effectively provided),

19 This policy states that development should only be allowed in those areas that
20 meet two criteria. First, that there be available public services and facilities within the
21 area to be rezoned. Here, as demonstrated above, there are not adequate roads,
22 sidewalks, public transit or parks, as established by expert testimony. Second,
23 facilities cannot be "cost effectively provided." As described by Mr. Mason, the cost
24 of upgrading streets in the community for benefit of the Wood Trails and Montevallo
25 rezones is substantial. Exhibit 74, CNW Analysis, Volume 1, Section 2,
26 Transportation, at page 18-19.

27 Based on this sound and substantial evidence the City Council concluded
28

1 that:

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

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

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

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

18 D) ***GOAL T-1: To establish and maintain a transportation system
19 which supports the land use plan and incorporates
20 transportation/land use linkages.***

21 This goal is not met by the rezone because it places a substantial number of
22 new homes far from any mass transit facilities as fully described above. In addition,
23 evidence in the hearings demonstrated that existing local access streets and the only
24 collector street in the community are not only substandard, but also suffering from
25 traffic congestion, particularly 156th Avenue N.E. Backups and delays are clearly
26 identified and no funding is in the capital improvement plan to remedy the situation.
27 Pedestrian/bicycle facilities in the area are nonexistent.

28 E) ***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

1 neighborhood as described at the hearing, but will be adversely affected by R-4
2 housing that will eliminate available habitat. As identified in the CNW Analysis,
3 Section 2, Infrastructure, Storm Water Drainage and Wildlife (Exhibit 74) there will
4 be obvious impacts on streams and their habitat from increased flows and the
5 elimination of water infiltration robbing streams of base flows during the dry season,
6 increasing temperature and adding pollutants. The rezone for the Montevallo
7 proposal will adversely affect wetlands by increasing impervious surfaces, minimal
8 pollution treatment and effects on the hydrology of the adjacent wetland. *Id.*

9 **3.8 Conclusions re Rezoning.**

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

12 a) the applicant has not meet his burden of proof to show changed
13 circumstances under applicable case law, including changed public opinion, changes
14 in land use patters or changes on the property itself.

15 b) the applicant has not met the general rezone criteria of WMC 21.44.070
16 to show demonstrated need, the consistency and compatibility with surrounding
17 properties, and that the properties are practically and physically suited for R-4
18 zoning;

19 c) the applicant has not shown that the residential zone criteria of WMC
20 21.04.080(2) are met, including showing that the R-4 zone is on lands that are
21 "predominately environmentally unconstrained" and have "adequate roads"; further
22 that the criteria for R-1 continue to be met, i.e. that the properties are in "well
23 established subdivisions of the same (R-1) density" and "on or adjacent to lands with
24 area-wide environmental constraints;"

25 d) the proposals are inconsistent with numerous provisions of the City of
26 Woodinville Comprehensive Plan.

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OPENING BRIEF OF CONCERNED
NEIGHBORS OF WELLINGTON - 41

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

4 **IV. A REVIEW OF PLATTING MATTERS IS NOT APPROPRIATE GIVEN THE**
5 **DECISION OF THE CITY COUNCIL.**

6 At pages 46-52, Phoenix contends that if the Court reverses the City's
7 decisions on the rezones, then it must also approve the preliminary plats proffered
8 by Phoenix. Given the failure of Phoenix to prove its LUPA case on the rezones,
9 there is no basis on which to review the plat decisions. However, even if the rezone
10 decisions are reversed, the Court cannot review or approve the plats until the City
11 Council acts on CNW's appeal.

12 Phoenix admits that its proposals for preliminary plats were completely
13 dependent on the rezoning to R-4; the densities shown on the plat are inconsistent
14 with R-1 zoning. Phoenix's plat applications were bets "on the come" that the
15 rezoning would be approved; nothing required Phoenix to combine the preliminary
16 plat and rezone. Under such Washington cases as *Loveless v. Yantis*, 82 Wn.2d
17 754, 761, 513 P.2d 1023 (1973), the rule is:

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

23 This rule has now been codified in RCW 58.17.195:

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

29 In the present case, Phoenix asks the Court to become the super zoning
30 agency and to make zoning decisions as described above. Similarly, Phoenix wants
31 the Court to become the super platting agency and make plat decisions. The Court

1 must reject this invitation. No decision has been made on the plat by the Woodinville
2 City Council and there is no basis for the Court to usurp the City's authority in this
3 regard. Indeed, the merits of CNW appeal of the approval of the preliminary plats
4 has never been heard or decided by the Woodinville City Council.

5 Phoenix argues that the recent Supreme Court case of *Woods v. Kittitas*
6 *County, supra*, allows this Court to begin making plat decisions. However, in *Woods*,
7 the Court reviewed issues properly a part of a LUPA petition after the Kittitas County
8 Board of Commissioners had approved the rezone. This case is completely different
9 inasmuch as the Woodinville City Council never even addressed any preliminary plat
10 issues. In any event, the CNW Analysis in Volume 2, Section 5 has a detailed set
11 of reasons why the preliminary plat cannot be approved.

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

16 **V. CONCLUSION.**

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

25 ///

26 //

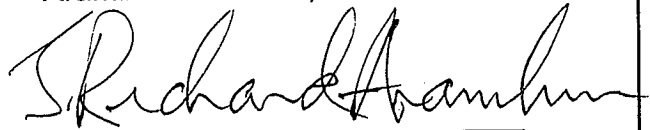
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The court should dismiss Phoenix's petition with prejudice.

DATED: January 28, 2008.

Aramburu & Eustis, LLP



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

DECLARATION OF SERVICE

I am an employee in the law offices of J. Richard Aramburu and Jeffrey M. Eustis, over eighteen years of age and competent to be a witness herein. On January 28, 2008, I served copies of the foregoing document to counsel of record by messenger to:

G. Richard Hill
McCullough Hill PS
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by email and ABC Messenger to:

Greg A. Rubstello
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Seattle WA 98101-1686

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

DATED: January 28, 2008


Kathleen McLemore