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J. RICHARD ARAMBURU

The Honorable Dean S. Lum
Trial Date: February 11, 2008

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND 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 RESPONDENT CITY OF WOODINVILLE'S RESPONSE TO OPENING BRIEF

I. SUMMARY 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

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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.

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II. INTRODUCTION

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

In this Land Use Petition Act appeal, Petitioner Phoenix Development, Inc. asks this court for relief that is virtually unprecedented in Washington case law, to wit: to require a local legislative body to amend the municipality's official zoning map for the sole purpose of accommodating a private developer's land use proposal. Dissatisfied with the Woodinville City Council's refusal to grant a four-fold increase in the residential density of the project sites at issue, Phoenix attacks the City of Woodinville's decision as "unlawful and erroneous." Phoenix contends that the City was legally required to approve the rezones upon request. Phoenix reaches this novel conclusion by a selective interpretation of the City's development regulations, by mischaracterization of evidence contained within the administrative record, by citation to inapplicable Growth Management Act principles, and by a near-complete disregard of the

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standards and procedures governing the law of zoning.

The introduction to Petitioner's Opening Brief[1] , brings to mind this famous quotation:

> *All men are liable to error; and most men are, in many points, by passion or interest, under temptation to it.*

JOHN LOCKE, Essay Concerning Human Understanding, 1690

Its passion for the subject matter is obvious, but the decision by Phoenix to introduce this LUPA case to the Court, from a "smart growth" land use planning prospective exposes at the outset, the weakness of its argument. The decision to be made by this court does not involve the review or collateral attack on the past legislative decisions of the Woodinville City Council that allow for and maintain R-1 residential zoning in the Leota and Wellington neighborhoods of Woodinville. *Woods v. Kittitas County*, ... P.3d ..., 2007 WL 4442396, Wash., December 20, 2007 (NO. 78331-4). 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 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.

The law of Washington State is now crystal clear that any claim that a city site-specific

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[1] Petitioner Phoenix Development Inc, et al will hereinafter be referred to as Phoenix.

[2] *See* City Land Use Goals and policies thereunder 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.

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

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rezone decision violates the GMA by allowing suburban sprawl in an urban area is not a an issue to be decided by a court in a LUPA review proceeding. *Woods v. Kittitas County*, supra.[6] The decision by Phoenix to ignore the clear holding of *Woods* and to include in its briefing lengthy argument appropriate only in a GMHB proceeding is confusing. That this inappropriate argument includes a lengthy quote from the dissenting opinion of a CPSGMHB Member[7] simply underscores that Phoenix lacks any substantial authority to advance in support of its arguments on the merits of this appeal.

B. Recommendations and Decision Making Authority.

The passion of the attorneys for Phoenix for advocating their client's position has also led them to make broad overstatements of fact, contradicted by the hearing record. For example, Phoenix boldly states at 27:23 of its Opening Brief that: "All parties concede that there is a changed circumstance in this case ..." To the contrary, both the City and CNW dispute this point. *See* the City Council Findings #6.e. and f in Appendix A and B. Phoenix also asserts that "the City's Planning Director and Public Works Director unequivocally recommended approval of the Wood trails and Montevallo zoning map amendment applications ...". The staff report rezone recommendation, however, was a qualified recommendation for approval.[8]

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[6] Since Phoenix did not serve and file its briefing until January 7, almost three weeks after entry of the Woods v. Kittitas Decision by our Supreme Court, it is disingenuous for Phoenix to focus on GMA and land use planning issues in support of its appeal.

[7] Opening Brief at 23:27 through 24:13.

[8] See Opening Brief at 16:7-10. However both M Ex. 1, p. 27 and WT Ex. 1, p. 32 cited by Phoenix state something different: "Rezone: Staff recommendation to the Hearing Examiner is for the approval of the applicant's requested rezone, but with the **following qualifier**. MWC 21.44.070(1) requires a rezone applicant to establish that "[t]here is a demonstrated need for additional zoning as the type proposed." Given that the City is currently meeting and/or exceeding its growth targets through approval of substantial residential development elsewhere within the City's jurisdiction, the extent to which a "demonstrated need" for additional R-4zoning exists is potentiall subject ot differing interpretations. While some code and Comprehensive Plan provisions can be construed as supporting further development within the Low Density Residential areas of the City, the extent, character and timing of any such development is not indelibly predetermined. The "need" criterion under WMC 21.44.070(1) ultimately requires an objective judgment by the Hearing Examiner and City Council based on relevant City plans, policies, goals and timeframes." This is hardly an "unequivocally recommended approval" as characterized by Phoenix.

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The Hearing Examiner recommended approval of the rezone. It was his job to make a recommendation on the rezone application. It was the City Council's job to make a site-specific rezone decision, after a closed record review. The City Council was not obliged to "rubber stamp" the hearing examiner's recommendation, as argued by Phoenix. The staff indicated compliance with only two of the three rezone criteria listed in Section 21.44.070 of the Woodinville Municipal Code (WMC). See the Hearing Transcription from March 14, 2007 at 42:3-7. Appendix F. City consultants made no recommendation for approval or denial of the rezone. Their determinations that certain re-zone criteria had been met or that adverse environmental impacts could be adequately mitigated do not amount to recommendations for approval of the rezone. As explained below, even if recommendations had been made, the Council was not any more obligated to follow the recommendations of its planning and engineering staff then it was to follow the recommendation of the Hearing Examiner. **The law does not authorize the City to empower the Hearing Examiner with the authority to make a site-specific rezone decision. Only the City Council is authorized to make a rezone decision.** RCW 35A.63.170.

C. Citizen Participation.

The introductory arguments made by Phoenix are simply a passionate "setup" for their conclusion that the City Council bowed to "...intense neighborhood pressure, rejected smart growth and embraced sprawl." Phoenix argues that "[T]he 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, 36.70B,WMC Chapter 17.11 (Public Notice), and WMC

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Chapter 17.15 (Open Record Public Hearing). It is disingenuous for the attorneys arguing on behalf of developer clients to consistently 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).

D. City Council Discretion in Deciding a Site-Specific Rezone Request.

Turning now to the City's legal argument in support of the City Council decision to deny the requested rezone applications, the City's argument in Section V will begin with a discussion of the standards and procedures governing the law of zoning. This critical subject matter is conspicuously absent from the Petitioner's Opening Brief. Central to the subject matter of a rezone is the City Council's discretionary authority to deny a site-specific rezone, even if there are facts in the record that could support a decision to approve the rezone.[9] Case law cited in Section V. consistently holds that Courts do not order the site-specific rezoning of property in LUPA appeals. The criteria for a site specific rezone only need to be supported by the record, if a rezone is granted. A City Council decision to deny a site specific rezone needs only to have a reasonable or rational basis, supported by substantial evidence. The City Council need only determine that any one or more of the rezone criteria is not demonstrated by the record. The City Council may, in the exercise of its discretion, find as it did here, that the rezone request does not bear a substantial relationship to the public health, safety and welfare because it is inapposite to

[9] Anderson's American Law of Zoning, §5.07 (4th Ed) states that: "A legislative body is not required to amend the zoning ordinance to comly with a comprehensive plan adopted after enactment of the ordinance. Similarly, a change in the comprehensive plan does not mandate amendment to the zoning ordinance. A request for a zone change which would be consistent with a revised comprehensive plan may be denied. A request for an amendment may be refused where the existing ordinance is consistent with the plan. ..." citing *Clinkscales v Lake Oswego*, 47 Or App 117, 615 P2d 1164 (1980), where the fact that a comprehensive plan indicated that property might eventually be used for multi-family residential purposes did not mean that the city was required to grant a requested zone change for that property.

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Council policies and goals.[10] Well established law case law recognizing City Council discretion and the deference to be given their interpretation of City development regulations and policies was ignored by Phoenix in its briefing because the law of Washington State completely undermines any argument made by Phoenix in support of this appeal. American zoning law is based upon the principle that if the validity of the legislative authority's classification for zoning purposes is fairly debatable, it will be sustained. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

III. STATEMENT OF FACTS

Phoenix proposes to rezone to 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.

[10] *See* Council findings numbered 20 through 26.

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> **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:

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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

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> 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, decided to deny the rezones and maintain the current R-1 zoning. This appeal followed.

IV. STANDARD OF REVIEW

A. LUPA Standards for Granting Relief.

The preliminary plat applications and rezone requests at issue in this matter are site-specific development proposals and thus constitute "project permits" and "land use decisions" under state law. *See* RCW 36.70B.020(4); RCW 36.70C.020(1)(a); *Woods v. Kittitas County,*

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As such, the challenged Woodinville City Council decisions are appropriately subject to judicial review under the Land Use Petition Act (LUPA) codified at Chapter 36.70C RCW. *See Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 178-80 & n.1, 4 P.3d 123 (2000). "Under LUPA, a court may grant relief from a local land use decision only if the party seeking relief has carried the burden of establishing that one of the six standards listed in RCW 36.70C.130(1)." *Wenatchee Sportsmen*, 141 Wn.2d at 175. The six LUPA standards are as follows:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).[11]

A. LUPA Review is Deferential.

The standard of review under LUPA is deferential. "RCW 36.70C.130(1) reflects a clear legislative intention that. . . court[s] give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulation." *City of Medina v. T-*

[11] Standards (a) and (e) above are inapplicable to the instant case, as Phoenix does not allege that the City of Woodinville engaged in an unlawful procedure, failed to follow a prescribed process, or that the challenged decision was beyond the City Council's authority.

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Mobile USA, Inc., 123 Wn. App. 19, 24, 95 P.3d 377 (2005) (internal punctuation omitted).

Standard (b) under RCW 36.70C.130(1) presents a question of law which is subject to *de novo* review by the court. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Under this standard, courts will not reverse a local government's land use decision unless it finds that the decision was clearly erroneous. *Mason v. King County*, 134 Wn. App. 806, 810, 142 P.3d 637 (2006). "A decision is clearly erroneous only when the court is left with the definite and firm conviction that a mistake has been made." *City of Medina*, 123 Wn. App. at 24. The same test applies to whether the challenged land use decision was a clearly erroneous application of the law to facts pursuant to RCW 36.70C.130(1)(d). *See, e.g., Citizens to Preserve Pioneer Park L.L.C. v. City of Mercer Island*, 106 Wn. App. 461, 473, 24 P.3d 1079 (2001).

Standard (c) applies to any factual determination that the court must review "for substantial evidence supporting it." *Cingular*, 131 Wn. App. at 768. "Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." *Nagle v. Snohomish County*, 129 Wn. App. 703, 709, 119 P.3d 914 (2005).

B. The City Council is the Highest Forum Exercising Fact-Finding Authority.

RCW 36.70C.130(1)(c) requires the court to determine whether a challenged land use is supported by substantial evidence contained within the administrative record. In this regard, it is well-established that "[a] reviewing court must be deferential to factual determinations made by the highest forum below that exercised fact-finding authority." *Citizens*, 106 Wn. App. at 474. The court must also "review the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority." *Nagle*, 129 Wn. App. at 709.

This distinction is critical in the instant case in light of Phoenix's attempt to characterize

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the City of Woodinville's Hearing Examiner — rather than the City Council — as the City's highest fact-finding authority for the Wood Trails and Montevallo rezone decisions. *See Brief of Petitioner at 25, 32, 40.* Phoenix contends that because "the Council did not by ordinance afford itself independent fact-finding authority" the court must defer to the Hearing Examiner's factual findings and view the record evidence in favor of Phoenix as the party which "prevailed" during the Hearing Examiner proceedings. *Brief of Petitioner at 25.* The extensive findings entered by the Woodinville City Council are, according to Phoenix, "mere surplusage." *Brief of Petitioner at 25-26.*

"In order to give proper deference on factual issues, it is necessary to determine whether each tribunal below had original or appellate jurisdiction." *Storedahl & Sons, Inc. v. Cowlitz County*, 125 Wn. App. 1, 7, 103 P.3d 802 (2004). "A tribunal with original jurisdiction has authority to make findings of fact", while a body with only appellate jurisdiction is prohibited from entering its own findings. *Id.* at 7-8. "[T]he scope and nature of an administrative appeal or review must be determined by the provisions of the statutes and ordinances which authorize them." *Citizens,* 106 Wn. App. at 471-72.

Phoenix's argument that the Woodinville City Council lacked the authority to enter its own findings in the instant case collapses under even a cursory review of the state statutes and local ordinances governing the rezone process. City councils are legally prohibited from delegating ultimate decisional authority over rezones to a hearing examiner, and must instead render the "final decision" on such applications. *See* RCW 35A.63.170(2)(c); *Lutz v. City of Longview*, 83 Wn.2d 566, 570, 520 P.2d 1374 (1974) ("the state has vested the authority to zone and rezone solely in the city council"); *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 889, 795 P.2d 712 (1990). State law is equally clear in the context of rezones "that findings of fact be made and conclusions or reasons based thereon be given for the action taken *by the deciding entity.*" *Parkridge v. City of Seattle*, 89 Wn.2d 454, 464, 573 P.2d 359 (1978) (emphasis added); *see also Johnson v. City of Mount Vernon,* 37 Wn. App. 214, 219, 679 P.2d 405 (1984)

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(acknowledging requirement for city councils and county commissioners to adopt written findings of fact in rezone decisions). As the only body authorized by RCW 35A.63.170(2)(c) to issue a final decisions on rezone applications, the Woodinville City Council was clearly the "deciding entity" in this context.

The City Council was thus not merely authorized to enter findings for the Wood Trails and Montevallo decisions, it was effectively *required* to do so. The well-established requirement for written findings of fact and conclusions was imposed on city councils and county commissioners by the Supreme Court in the seminal *Parkridge v. Seattle* case discussed *supra.* Indeed, failure to enter findings of fact and conclusions of law in a rezone action constitutes arbitrary and capricious action. *See, e.g,, Johnson v. City of Mount Vernon*, 37 Wn. App. at 219.

The relevant Woodinville Municipal Code (WMC) provisions essentially track the state law in this regard. Pursuant to WMC 21.42.110(2), the Hearing Examiner is authorized to hold an open record public hearing on any requested rezone and to forward a recommendation to the City Council in accordance with the City's "Type III" project permit procedures. WMC 17.07.030 and WMC 17.17.050 clarify that the City Council retains the final decision for applications of this type, and that the City Council's decision must be based upon the record that was created before the Hearing Examiner.

Phoenix seizes on the absence of any express provision in the Woodinville Municipal Code granting fact-finding authority to the City Council. *Brief of Petitioner at 25.* But this argument has already been rejected by Washington courts. In *Citizens to Preserve Pioneer Park, LLC v. City of Mercer Island, supra*, the Court of Appeals addressed an argument essentially identical to the one proffered by Phoenix in the instant case — i.e., that "the planning commission was the highest forum exercising fact-finding authority and that the city council 'usurped' the commission's fact-finding role when it entered its own findings." *Citizens*, 106 Wn. App. at 474. The court dismissed this argument, concluding that the city council's power to modify the planning commission's decision necessarily implied the ability to alter the

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commission's findings of fact. *Id.* at 474. Likewise, in *Bjarnson v. Kitsap County*, the challenger alleged that a local legislative body considering a rezone application erred by entering its own findings of fact and "had no authority to substitute its judgment for that of the Hearing Examiner." 78 Wn. App. 840, 843, 899 P.2d 1290 (1995). The *Bjarnson* court rejected this contention, noting that the Hearing Examiner's "decision" was only a recommendation that could be declined at the legislative body's discretion. *Id.* at 843-44. As the court concluded:

> The Board was not acting as an appellate body; it had the authority to substitute its judgment for that of the hearing examiner. The Board acted within its power to enter findings and conclusions.

Id. at 844. *See also Schofield v. Spokane County,* 96 Wn. App. 581, 588, 980 P.2d 277 (1999) (characterizing county Board of Commissioners, rather than Hearing Examiner, as the "highest forum exercising fact-finding authority" in rezone proceeding).

The inherent nature of a rezone proceeding reserves final decision-making authority in the local legislative body. The Hearing Examiner's findings and conclusions regarding the Wood Trails and Montevallo rezone proposals were contained within a recommendation that the Woodinville City Council could, in its exclusive discretion, accept, reject or modify. As the only entity authorized to render a final decision in this context, the City Council's own findings of fact are entitled to judicial deference pursuant to RCW 36.70C.130(1)(c). Phoenix's argument to the contrary is without merit.

V. ISSUES

4.1 Did the City Council have discretion to deny Phoenix's requested rezones, even if there is evidence in the record that could have been used by the City Council to support the rezone?

4.2 If so, is the Council's exercise of discretion reasonable and supported by

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substantial evidence?

VI. ARGUMENT

A. Standards and Procedures Governing Zoning Law.

1. 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's purported entitlement to approval of the Wood Trails and Montevallo rezone proposals finds no support in either the City's development regulations or state law. The Woodinville City Council's decisions denying these proposals reflects a commonsensical policy

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judgment regarding the desired character and development of the Woodinville community, was amply justified by record evidence, and was well within the Council's discretion.

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. *Brief of Petitioner at 26-45.* 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." *Brief of Petitioner at 45.* 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). **More fundamentally, however, Phoenix's argument disregards the essential nature of a municipal zoning determination as a wholly discretionary decision by a local legislative body**. The Woodinville City Council's amply-supported exercise of this discretion in the instant case does not, as a matter of law, form the basis for reversal.

2. 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

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other categories of local land use approvals, rezoning is nondelegable, *see* RCW 35A.63.170(2)(c); may be exercised only by the local legislative body of the municipality, *see Southwick,* 58 Wn. App. at 889; 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).[12]

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

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

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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's failure to cite any Washington precedent involving the compulsory rezoning of property should effectively concede this point.

3. 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*, -- P.3d -- , 2007 WL4442396; *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.[13]

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

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[13] As discussed in Part V.D., *infra*, Phoenix erroneously contends that the purpose statement contained in WMC 21.04.080 is a "rezone criteria". *Brief of Petitioner at 26.*

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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.

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

Phoenix places great emphasis upon the fact that the Hearing Examiner recommended approval of the Wood Trails and Montevallo rezone proposals. *See Brief of Petitioner at 3, 16, 18-20.*[14] 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.*

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

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[14] 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.

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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.

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

1. 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). *Brief of Petitioner at 13.* 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. *Brief of Petitioner at 38-39.*

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.

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> 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. **It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.**
>
> *Ashe*, [397 U.S. at 443]. Under this doctrine, a *civil* proceeding may bar a criminal action if it resolved similar issues. *Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064, 1085, 1 L. Ed. 2d 1356 (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 2151, 57 L. Ed. 2d 1 (1978).
>
> 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.[15] 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*, 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

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

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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 should be dismissed.

For this reason and the further reasons explained below, *Hensley* is inapplicable to the instant proceeding, and Phoenix's collateral estoppel argument should be rejected by this court.

2. 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. *Brief of Petitioner at 36-37.* A recent Washington Supreme 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[.]" *Woods v. Kittitas County,* -- P.3d -- , 2007 WL4442396 at 8. 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 7 (emphasis added). A superior court lacks subject matter jurisdiction to consider arguments of this type. *Id.* at 8.

With respect to the urban density issue of the Woodinville community, the CPSGMHB's 1997 *Hensley* decision was based entirely upon the Growth Board's interpretation of the Growth Management Act. *Hensley v. City of Woodinville*, CPSGMB Case No. 96-3-0031, Final Decision and Order (February 25, 1997), at 8-9 & n.1. Phoenix's attempt to inject this GMA

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theory into the instant LUPA proceeding directly contradicts the Supreme Court's holding in *Woods*. As a matter of law, the Superior Court lacks jurisdiction over this issue, and the court should reject Phoenix's argument accordingly. Application of the doctrine would work an injustice, violating element (4) of the test for collateral estoppel.

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

The jurisdictional issue discussed above should be dispositive with respect to Phoenix's estoppel argument. But Phoenix's theory collapses even if the substance of the CPSGMHB's *Hensley* decision is considered. 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 v. Holm*:

> Viking's claim that the GMA imposes a "bright-line" minimum of four dwellings per acre is erroneous. In making this claim, Viking relies upon a 1995 decision of the CPCGMHB. *See Bremerton v. Kitsap County*, CPSGMHB No. 95-3-0039, (October 6, 1995). However, the growth management hearings boards do not have the authority to make "public policy" even within the limited scope of their jurisdictions, let alone to make *statewide* public policy. The hearings boards are quasi-judicial agencies that serve a limited role under the GMA, with their powers restricted to a review of those matters specifically delegated by statute. . . . Viking's argument fails to account to for the fact that the GMA creates a general "framework" to guide local jurisdictions instead of "bright-line" rules.

Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 118 P.3d 322 (2005) (internal citation omitted).

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The *Viking* decision fatally undermines Phoenix's reliance upon *Hensley*. Not only are GMA principles wholly inapplicable in a site-specific rezone proceeding, but the CPSGMHB's central premise in *Hensley* has been conclusively discredited. As a result of *Viking*, the four-unit-per-acre density standard upon which the relevant *Hensley* dicta was based is now defunct. Phoenix's attempt to resurrect this invalidated principle as part of its collateral estoppel argument is without merit and would work an injustice.

4. 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.

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D. 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.

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

Section 21.44.070 of the Woodinville Municipal Code (Appendix I) sets forth the criteria that must be demonstrated should the City Council, in its discretion, decide to grant a rezone application.[16] The code section provides as follows:

> **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

[16] 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. 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).

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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 flagrantly mischaracterized by Phoenix in its Opening Brief at 26:9-10 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[17] cannot be provided;

[17] "Services" is an undefined term in WMC Chapter 21.06 or in Chpater 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, Ch. 3.36 WMC (Appendix I) requires Park Impact fees to be paid because parks are an essential municipal service. Section 3.36.110 allows an impact fee credit if the developer actually provides park system improvements with their development.

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[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. Petitioner'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 Petitioner's imagination:

- Petitioner 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.[18]

2. 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 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.Hl,* 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.

[18] 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.

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App. 536, 540, 648 P.2d 914 (1982).

3. The Interpretation by Phoenix Conflicts with the Core Principles of Zoning Law.

An interpretation that WMC 21.04.080(1)(a) is a mandatory direction to the City Council to rezone property from R-1 to all R-4 in all cases where sewer will be extended conflicts with the following core principles of zoning law:

- The discretionary decision making authority of a City Council in making a rezone interpretation; and
- The City Council's responsibility to determine if there has been a substantial change of circumstances since the original zoning action was approved; and
- The City Council's responsibility to determine if the rezone is in the interest of the public health, safety, morals, or welfare.

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

1. 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.[19] They are both located within an area designated for "Low Density" Residential Zoning by the Comprehensive Plan. They are served by both public and

[19] *See* Section III.

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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 environmental constraints.[20]

The findings are supported amply in the hearing record.[21]

2. 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

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[20] 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.

[21] *See* Section III of this Brief and the Briefing and Exhibits cited by CNW.

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

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

1. 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. 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

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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.

2. 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. 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.

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

1. 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.[22] 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.[23] In addition, City Council findings 11 through 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

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

[23] 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.

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policy[24] 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 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.

H. 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 to determine 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.

[24] 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)

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I. 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. 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

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

J. Finding #6 in both rezone decisions is neither "anomalous" nor "inapt".

Finding # 6 reads 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)
>
> a. The development history of the area in which the property is located.
>
> b. The maintenance of the existing suburban neighborhood character.
>
> c. The lack of adequate public facilities and services to support the proposed R-4 development, including, but not limited to the substandard arterial roads and pedestrian walkways providing access to and from the subject property, the absence of any City parklands within walking distance of the subject property, and the absence of public transit services servicing the neighborhood area. Developments with R-4 densities are inappropriate in areas of the City where adequate public facilities and services cannot be provided at eh time of development. See the statement of purpose in WMC Section 21.04.080(1)(a).
>
> d. The absence of any substantial changes in the circumstances from which the original zoning determination was made, including, but not limited to land use patterns, public opinion, established neighborhood character, substandard roadways, the absence of stores, sidewalks, and community parks (footnote omitted). 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 plant application. The Applicant would connect to public sewer at locations that have existed and been available for sewer connection since the mid 1990's.
>
> e. Although the proposed rezone is arguably consistent with several policies of the City's Comprehensive Plan, a change in the zoning at the subject site is not needed or necessary to fulfill the City's Comprehensive Plan or to implement the Land Use Element of the Plan. (footnote omitted)
>
> f. The well established R-1 subdivisions of the same R-1 density served by public and private facilities and services

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> inadequate to support the planned R-4 densities. See the statement of purpose in WMC Section 21.04.080(2)(a) and (b).

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 legislation 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).

Washington law is consistent with the general zoning law throughout the United States.

> Municipal authorities have broad discretion, subject to provisions of zoning statutes, with respect to a zoning plan, classification and establishment of use districts. Discretion in this context is legislative in character and usually vested in the municipal legislative body, which can delegate it neither to administrative boards or officials nor to private parties.

McQuillin Mun Corp §25.77 (3rd Ed).

> 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 Am Law of Zoning, §4.29 (4th Ed).

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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. There is nothing inapt about the finding of fact # 6. The failure of Petitioner's counsel to recognize basic rezone law is baffling considering his years of experience in zoning matters. The argument appearing at 43:21 through 44:8 of the Petitioner's Brief is inapt.

K. 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 Opening 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.

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VII. CONCLUSION

The decisions of the City Council should be sustained and the appeals dismissed. [25]

DATED this 17th day of January, 2008.

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By _____

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Petitioner 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.

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