SUPREME COURT NO. _____
COURT OF APPEALS NO. 62167-0-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

CONCERNED NEIGHBORS OF WELLINGTON'S PETITION FOR REVIEW

J. Richard Aramburu, WSBA 466
Aramburu & Eustis LLP
720 Third Avenue, Suite 2112
Seattle WA 98104
206/625-9515 fax 206/682-1376
Attorneys for Respondent
Concerned Neighbors of
Wellington

TABLE OF CONTENTS

TABLE OF CONTENTS CONT'D.

TABLE OF AUTHORITIES

Table of Cases

TABLE OF AUTHORITIES CONT'D.

Statutes

Rules and Regulations

A. IDENTITY OF PETITIONER

Concerned Neighbors of Wellington, a Washington nonprofit corporation ("CNW") respectfully requests this Court to accept review of the published Court of Appeals decision identified in Part B of this petition.

B. COURT OF APPEALS DECISION

The decision for which review is sought is *Phoenix Development, Inc., et al. v. City of Woodinville and Concerned Neighbors of Wellington*, No. 62167-0-I, entered by Division One of the Court of Appeals on November 2, 2009. The Court of Appeals denied the City's motion for reconsideration on January 21, 2010, and subsequently issued an order authorizing publication and modification of the decision on February 22, 2010. A copy of the Court of Appeals' decision terminating review is set forth in Appendix A at pages 1 to 27, together with the order modifying the opinion at Appendix B.

C. ISSUES PRESENTED FOR REVIEW

The following issues are presented for the Supreme Court's consideration:

1. In a review of a local government rezone decision, did the Court of Appeals err by improperly focusing on the FEIS and the recommendation of the hearing examiner with respect to that decision,

rather than the findings of fact and conclusions of law of the City Council, the actual decisionmaker on the rezone decision?

2. In a rezone decision where the findings of fact of the City Council are entitled to deference under the substantial evidence test, did the Court of Appeals err by failing to address the voluminous evidence submitted to the City Council, including expert testimony, supporting the City Council's findings and conclusions in denying the rezone?

D. STATEMENT OF THE CASE

1. Decision of the City of Woodinville.

The relevant factual and procedural history of this case is set forth in the decision of the Court of Appeals. The instant matter arises out of an application by Phoenix Development, Inc. ("Phoenix") to rezone and subdivide two undeveloped parcels located in Woodinville. The property at issue-known as the Wood Trails and Montevallo sites-has been classified as R-1 (one dwelling unit per acre) under the City's zoning code since Woodinville's incorporation. CP 20, 27.

In 2007, the Woodinville City Council voted unanimously to deny Phoenix's request to rezone the parcels from R-1 to R-4 (four dwelling units per acre) density levels. CP 20-25 (Montevallo), CP 27-32 (Wood Trails). The Council's decision followed an extraordinary amount of public input. There were five days of public hearings. Some 78 witnesses

spoke, 262 exhibits were received; the transcripts total 826 pages. See Exhibit 74. The FEIS done for the proposal is 486 pages and followed 900 individual comments by 116 sources of input. See FEIS at 4.4. A three volume analysis of the rezones, and their consistency with Woodinville rezone criteria was prepared by CNW, which was 2144 pages in length ("the CNW Analysis"). Exhibit 74. Included in this material was expert testimony from a licensed hydrogeologist, a licensed professional engineer, a licensed professional traffic engineer, and an individual with a master's degree in geology. Other testimony described the inconsistency and incompatibility of R-4 zoning with the uses and zoning of the surrounding R-1 properties.

The City Council's written decisions regarding each project included several pages of detailed findings and conclusions. CP 20-25, 27-32. The Council specifically found, *inter alia*, that: (i) the current R-1 zoning was appropriate for the Wood Trails/Montevallo project sites and was consistent with the City's comprehensive plan; (ii) there had been no substantial change in circumstances since the current R-1 zoning designation of the subject property was originally enacted; (iii) the envionmental impact statement for the projects had identified unavoidable adverse impacts to the City's transportation networks; and (iv) the City had made the deliberate policy decision to focus its near-term planning and

growth efforts-including capital infrastructure funding-within the downtown area rather than within the City's low-density residential neighborhoods; and (vi) the City's "sustainable development study", aimed at determining appropriate future land use strategies, was not yet complete.

2. The Superior Court's Dismissal of Phoenix's LUPA.

Phoenix appealed the City Council's decision by filing a LUPA petition in King County Superior Court under Ch. 36.70C RCW. CP 1-32. That Court concluded that Phoenix had failed to satisfy any of the criteria for granting judicial relief under RCW 36.70C.130 and dismissed Phoenix's petition. CP. 568-571.

3. Reversal by Court of Appeals.

Phoenix appealed the Superior Court's decision to the Court of Appeals. On November 2, 2009, the Court of Appeals issued an unpublished decision reversing the City Council's denial of the Wood Trails / Montevallo rezones and remanding for reconsideration of Phoenix's preliminary plat applications. *Phoenix Development, Inc. v. City of Woodinville*, No. 62167-0-I, 2009 WL 3535431 (Wn. App. Div. 1, Nov. 2, 2009).

E. ARGUMENT

Review of a Court of Appeals decision is warranted where, *inter alia*, the decision conflicts with existing Supreme Court precedent,

conflicts with another Court of Appeals decision, or presents a matter of substantial public interest. RAP 13.4(b)(1), (2) & (4). The *Phoenix* decision satisfies these criteria for the reasons stated herein.

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

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

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

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

Under LUPA, the burden of proof to show the lack of evidence is on the challenging party. See RCW 36.70C.130 ("The court may grant

relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met.") On appeal, the party who filed the LUPA petition bears the burden of establishing one of the errors set forth in RCW 36.70C.130(1), even if that party prevailed on its LUPA claim in the Superior Court. See *Tahoma Audubon Soc'y v. Park Junction Partners,* 128 Wn. App. 671, 681, 116 P.3d 1046 (2005).

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

> RCW 36.70C.130(1). "Issues raised under subsection (c) challenge the sufficiency of the evidence." *Benchmark Land Co. v. City of Battle Ground,* 146 Wash.2d 685, 694, 49 P.3d 860 (2002). In a challenge for sufficiency of the evidence, " '[w]e view inferences in a light most favorable to the party that prevailed in the highest forum exercising fact finding authority.' " *Id.* (quoting *Schofield v. Spokane County,* 96 Wn.App. 581, 588, 980 P.2d 277 (1999)). Therefore, we view the record and inferences in the light most favorable to CESS because they prevailed before BOCC.

Woods v. Kittitas County, 162 Wn.2d 597, 617, 174 P.3d 25 (2007). Further, the standard to be applied is deferential to the prevailing party. *Peste v. Mason County,* 133 Wn.App. 456, 477, 136 P.3d 140 (2006).

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

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

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

Washington caselaw is clear that a court reviewing a rezoning decision of local elected public officials does not weigh the evidence, a matter of judgment within the province of the local decision makers:

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

Bjarnson v. Kitsap County, 78 Wn.App. 840, 845, 899 P.2d 1290 (1995) (Emphasis supplied).

Thus judicial review is not to determine whether a witness, or a particular piece of evidence, is credible or not, but rather whether the record contains evidence that supports the decision. The deference given to local government decisions in LUPA review is substantially identical to

the deference given to fact finding by the trial court. *Batten v. Abrams,* 28 Wn.App. 737, 743, 626 P.2d 984 (1981) ("Findings of fact that are supported by substantial evidence, even if the evidence is conflicting, will not be disturbed on appeal."); *Grundy v. Brack Family Trust*, 151 Wn.App 557, 570, 213 P.3d 619 (2009) ("We defer to the finder of fact on issues of credibility and weight of the evidence. *Forbes v. Am. Bldg. Maint. Co. West*, 148 Wn. App 273, 287, 198 P.3d 1042 (2009).") Similarly, appellate courts do not substitute their judgment for that of the trial court. *Thorndike v. Hesperian Orchards, Inc.,* 54 Wn. 2d 570, 575, 343 P.2d 183, 186 (1959) ("If we were of the opinion that the trial court should have resolved the factual dispute the other way, the constitution does not authorize this court to substitute its finding for that of the trial court.")

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

First, the substantial evidence test is to be applied to the decision of the "highest forum that exercised fact-finding authority." See *Woods,* 162 Wn.2d at 617. See also RCW 36.70C.020(2) (A land use decision is "a final determination by a local jurisdiction's body ... with the highest level of authority to make the determination, including those with authority to hear appeals on ... [a]n application for a project permit. . ."). Preliminary review by staff or administrative bodies making

recommendations are not reviewed. Despite this rule, in the present case the Court spends considerable time relying on the recommendation of the City of Woodinville Hearing Examiner. See Slip Opinion, pages 5-6, 17, 18-19, 20. But reliance on the Hearing Examiner's decision is misplaced for two reasons: a) he does not make the final decision, he only makes a recommendation to the City Council; and b) the "highest forum that exercised fact finding authority" is the City Council, not the Hearing Examiner.

Second, the court must review the "whole record before the court." This is to assure that the court examines all the evidence before the local decision maker to assure that pertinent supporting evidence is not overlooked. In the present case, the court rested its decision principally on only two items of evidence, the FEIS[1] and the decision of the Hearing Examiner. As described on pages 2-3 herein, a virtual mountain of expert and lay evidence was submitted by members of the public, including CNW, and was reviewed by the Woodinville Council. As is described herein, the 2144-page CNW Analysis was a set of fact-intensive materials prepared by qualified expert witnesses. This evidence is mentioned only

[1] Even the FEIS says it is not a decision document:

> The EIS itself is not a record of a land use decision and does not recommend approval or denial of proposals.

FEIS, page 4-66.

in passing by the Court at page 5 of the Slip Opinion.

In the land use context, the courts accept the fact finder's determination of the credibility of the witnesses and of the weight given to reasonable but competing inferences are weighed in favor of the prevailing party. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn. 2d 22, 34, 891 P.2d 29 (1995).

Not only is the substantial evidence test used in LUPA and reviewing trial court findings, it is used in many other areas of Washington law. It is one of the standards for judicial review under the Washington Administrative Procedures Act (APA). See RCW 34.05.570(3)(e) ("The order is not supported by evidence that is substantial when viewed in light of the whole record before the court"). Judicial review under RCW 34.05.570(3)(e) is also deferential:

> "Local governments have broad discretion in developing [comprehensive plans] and [development regulations] tailored to local circumstances." *Diehl*, 94 Wauchope. at 651, 972 P.2d 543.

King County v. Central Puget Sound Growth Management Hearings Board., 142 Wn. 2d 543, 561, 14 P.3d 133, 142 (2000). The substantial evidence test is also the rule applied in criminal matters. *State v. Hill*, 123 Wn. 2d 641, 644, 870 P.2d 313 (1994). ("Substantial evidence is evidence sufficient to persuade a rational person that the finding is true.").

In summary, the substantial evidence test requires a complete review of all evidence presented to the finder of fact.

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

a. Introduction. The Court concluded that the Woodinville Council lacked substantial evidence to support several findings supporting denial of the subject rezones. However, in its opinion, the *Phoenix* court overlooked a significant amount of evidence presented by CNW and others during the public review process. In addition, the Court concluded that mandatory rezoning criteria were not met, without citation of error or evidence in the record.

b. The Court's Opinion Fails to Resolve a Mandatory Requirement of Woodinville Zoning that the City Council Concluded Was Not Met. The opinion of the Court correctly notes that there are three basic criteria that must be met for approval of a rezone in Woodinville, one of which is the City's own criteria for approval of rezones found in WMC 21.44.070. Slip Opinion at pages 10-11. Under the Woodinville code, all of these criteria must be met before a rezone can be approved, but the Woodinville City Council found none of them were met.[2]

[2] The rezone criteria in WMC 21.44.070 have been apart of the code for years and have never been challenged nor has appellant Phoenix

In the context of the Wood Trails and Montevallo rezones, the key issue was whether the proposals met the criteria of WMC 21.44.070(2) which requires:

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

The City Council concluded that the R-1 zone should not be changed for the Montevallo and Wood Trails projects because of the long established residential setting in which the property was located and the "maintenance of the existing suburban neighborhood character." Wood Trails decision at Finding 6(a) and (b). The Council found that both the Wood Trails and Montevallo rezones were: "not in character with the surrounding R-1 neighborhoods and properties." Wood Trails Finding 12 and Montevallo Finding 10. Indeed the FEIS indicated that existing neighborhood character was the "major issue" that needed to be resolved by the City Council:

> The EIS identifies many issues that will be resolved during City review of the proposal. The major issue regarding the proposals is the compatibility of infill residential development (at 4 dwelling units per acre) with existing lower-density residential development (averaging 1 dwelling unit per acre), and the acceptability to the community of the change associated with this infill. The City will need to resolve that issue when it considers the

---

challenged the criteria adopted by the code.

proposed rezones.

FEIS, page 1-45 (emphasis supplied). The City resolved that issue in favor of retaining the long established R-1 zoning.

However, the Court's treatment of the "major issue regarding these proposals," is cryptic and conclusory:

> The rezones are also consistent and compatible with uses and zoning of the surrounding properties . . .as required by WMC 21.44.070.

Slip Opinion at page 25. No basis in the record is stated for this sweeping statement. No error is assigned to the City's conclusions on these matters and no rationale is given. No evidence is cited that supports the conclusion. No effort is even made to even suggest which criteria in the LUPA "standards for granting relief" (RCW 36.70C.130) the City has violated, though it might be presumed that the substantial evidence test was applied. Moreover, the criteria adopted by the City under WMC 21.44.070 are criteria involving discretion and require the City Council's sensitivity and familiarity with the community it governs. It is indeed hard to imagine a more blatant invasion of the discretion provided to local government in community planning than the court simply stepping in to do its own rezoning. Indeed, the Court takes the imperious step, in the next sentence of its opinion, of ordering the rezones: "We reverse the City Council's denial of the rezones and remand to the city to grant the

rezones." (Emphasis supplied).

c. Abundant Evidence Supports the Council's Conclusion That There Are No Changed Circumstances Supporting a Rezone. The Court's opinion correctly notes (Slip Opinion, p. 10) that a rezone must be supported by a "change in circumstances."

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

However, the *Phoenix* court misapplies the *Bjarnson* case and the current case. In *Bjarnson*, Kitsap County had changed its comprehensive plan specifically to provide for a regional shopping center, but had not yet changed the zoning to be consistent with this "newly adopted" comprehensive plan designation. Here the Woodinville Comprehensive Plan was adopted in 1995. See Wood Trails and Montevallo Finding 3. As Finding 3 indicates, the R-1 zoning was a continuation of the prior King County zoning and that zoning was adopted after the comprehensive plan was adopted. Thus the question is whether there were "changed circumstances" that indicated R-1 zoning (consistent with the comprehensive plan) should be changed to R-4. Wood Trails and Montevallo Finding 6(e) clearly states there were no changed

circumstances and this finding was not challenged. The Court of Appeals decision does not find or conclude that there were any changed circumstances.

Under this criteria, where the existing zoning is consistent with the comprehensive plan, then there must be showing that conditions in the area had changed. For example, in *Henderson v. Kittitas County,* 124 Wn.App. 747, 755, 100 P.3d 842, 845 (2004) there was clear evidence that the neighborhood character had changed: "in testimony and the findings indicate changes in local land use patterns from largely agricultural to residential on diverse sizes of lots.. . ." Here the City Council, familiar with the local community, concludes R-1 zoning is more appropriate in consideration of:

> e. 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.

Montevallo and Wood Trails Finding 6(e). As with the decision regarding consistency with surrounding uses and zoning, the Court does not explain what changes in circumstances have occurred and why substantial evidence does not support the finding. The Court has simply established itself as the super zoning authority.

3. As a Matter of Substantial Public Interest, the Court Should Accept Review to Clarify the Application of the Substantial Evidence Test.

The *Phoenix* decision represents a substantial departure from well settled Washington law regarding the proper role of trial and appellate court review decisions of fact finders, whether in the land use, administrative review or criminal context. Washington courts have adopted the rule that findings of fact will not be disturbed, if the evidence would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. The longstanding rule is that Washington appellate courts do not retry factual matters. Once substantial evidence is found, the inquiry under the substantial evidence test essentially ends. In the land use context under LUPA, there are added the rules that: a) considerable deference is given to a local government's interpretation of its own regulations; and b) that competing inferences are weighed in favor of the prevailing party, in this case CNW.

Against this background, the *Phoenix* case presents a complete deviation from these longstanding rules. Instead of deferring to the local decision maker, the *Phoenix* court conducts its own independent review of the record. Out of hours of testimony, and hundreds of exhibits, with thousands of pages, the opinion overturns the unanimous decision of the Woodinville City Council on substantial evidence grounds based on just

two exhibits, the Hearing Examiner decision and the FEIS. Further the opinion overturns the rezone decision largely without analyzing mandatory code criteria that the Council carefully concluded were not met.

If allowed to stand, the *Phoenix* decision will mandate to both trial courts and appellate courts that they can, and indeed should, engage in independent fact finding. The wide ranging and independent review engaged in by the *Phoenix* court is not limited to the land use context. Given the broad application of the substantial evidence test, the *Phoenix* opinion is likely to encourage courts reviewing criminal matters, administrative decisions and even garden variety trial court findings to make independent reviews of the evidence. It is certainly the case that if *Phoenix* is not reversed, attorneys will be citing the case as the precedent to have reviewing courts engage in such *ad hoc* reviews. In the land use context, the discretion and deference give to an agency's interpretation of its codes is likely to be a thing of the past.

One of the problems presented by *Phoenix* is that no limits or bounds are set forth by that opinion. Trial and appellate courts may read the discretion represented by the case differently, resulting in differential results. This will lead to a lack of certainty to all parties in land use cases and administrative reviews. Formerly, a record with strong proofs, extensive expert opinions and solid evidence would surely survive review

under the substantial evidence test, be it a land use, administrative, criminal or simple challenge to the findings of a trial court. After *Phoenix*, where all of that solid evidence was abundant, there will be little certainty if a reviewing court can simply pick out isolated evidence, ignore other persuasive evidence, and make its own findings. If the overruling of the city decision regarding the compatibility and consistency of the new zoning with the surrounding neighborhoods is any indication, court will not even have to explain their reasoning, much less cite to any evidence. While *Phoenix* dealt with the overturning of a rezone denial, the reasoning of the case could equally be applied to the overturning of a rezone approval.

CNW suggests that this is a role that courts should avoid for several reasons. First, trial and appellate judges may lack the background to tell what evidence is substantial and which is not in a complex land use or administrative matter. Second, the process ignores that the trier of fact, be it a trial court, administrative law judge or city council is the one close to the facts and local circumstances; in short they are "on the ground." City councils are elected and accept the responsibility to act in the best interests of their communities and need to know how their decisions will be reviewed. Trial and appellate courts have different responsibilities but usually will know little about the community which is effected by the

decision. Third, allowing the kind of standardless decision making evident in *Phoenix* opens the review to personal and political preferences of the courts.

For the reasons stated above, this Court should accept review to clarify the use and limits of the substantial evidence test. It is a matter of substantial public interest as it relates to the very role of the trial and appellate courts interfacing with triers of fact in several areas of the law. Without setting firm rules for use of the substantial evidence test, the public, as well as litigants and lawyers, will have little certainty in decision making.

F. CONCLUSION

The Court should accept review of the *Phoenix* case as meeting the standards of RAP 13.4 and ultimately reverse the Court of Appeals decision.

DATED: _____

Respectfully submitted,

ARAMBURU & EUSTIS LLP

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