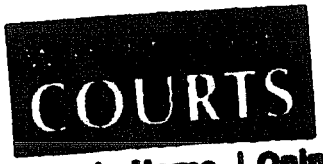
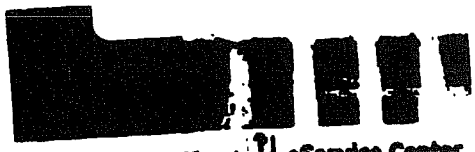
Exhibit Q
Court Cases





Court of Appeals Division III State of Washington

Opinion Information Sheet

Docket Number:	22603-4-III
Title of Case:	Jerry Henderson, et vir, et al v. Kittitas County, et al
File Date:	11/16/2004

SOURCE OF APPEAL

Appeal from Superior Court of Kittitas County
Docket No: 03-2-00383-5
Judgment or order under review
Date filed: 12/01/2003
Judge signing: Hon. Michael E Cooper

JUDGES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JERRY and VERL HENDERSON, CHRISTINE CHARBONNEAU, and) No. 22603-4-III

Appellants,	) Division Three) Panel Seven
v.	)
KITTITAS COUNTY, and INSTITUTE OF NORTHWEST PASSAGES, INC.,	) PUBLISHED OPINION
Respondents.	)

SCHULTHEIS, J. -- The Institute of Northwest Passages, Inc. (INP) applied for rezoning of over 100 acres of land in Kittitas County from forest and range land with minimum 20-acre lots to agricultural land with minimum 3-acre lots. The board of county commissioners (board) adopted an ordinance approving the rezone. Several neighboring landowners petitioned for review to the superior court, which affirmed. On appeal, the neighboring landowners contend the rezone does not comply with state law or the county code. We disagree and affirm.

Facts

Jerry and Verl Henderson, Christine Charbonneau, and David and Diane Lepsig (hereafter the Hendersons) own parcels of land in an area of Kittitas County zoned 'forest and range' in chapter 17.56 Kittitas County Code (KCC). The purpose of this zone is to provide areas in the county where 'natural resource management is the highest priority.' KCC 17.56.010. Minimum lot sizes in this zone are 20 acres, and permitted uses include agriculture, forestry, mining, excavation, and single family residences. KCC 17.56.020, .040. INP owns 100.52 acres of land in the same forest and range zone.

Across the highway from INP and the Hendersons are zones labeled AG-3 and AG-20: agricultural zones of minimum 3-acre and 20-acre lots. Another area zoned AG-3 lies southeast of the parcels owned by INP and the Hendersons. The purpose of the AG-3 zone 'is to provide for an area where various agricultural activities and low density residential developments co-exist compatibly.' KCC 17.28.010. Permitted uses include agriculture, livestock, forestry, and any use permitted in the residential or suburban zones. KCC 17.28.020.

In February 2003, INP applied for a rezone of its 100.52 acres from forest and range to AG-3. Notice of INP's application was published in the local newspaper and a public hearing before the county planning commission was scheduled for April 2003. The Hendersons and other interested parties testified they were concerned that increased density and development of the INP land would create a fire hazard and lower their property values. Roger Weaver, authorized agent for INP, testified the actual lots would be somewhere between 5 and 10 acres each. Noting that this area is designated 'Rural' in the county comprehensive plan, the planning commission found that the rezone is consistent with the comprehensive plan and the surrounding zoning. Clerk's Papers (CP) at 156. The commission also found that the rezone satisfied the six relevant rezoning criteria found in KCC 17.98.020. Ultimately the commission voted three to two to recommend approval of the rezone by the board.

On June 17, 2003, the board approved the rezone by county ordinance 2003-07. The Hendersons filed a petition for review to the superior court on June 27. After oral argument in November 2003, the trial court affirmed the decision of the board to rezone INP's land from forest and range to AG-3. The Hendersons timely appealed to this court.

Rezoning

Review of a land use decision is governed by the Land Use Petition Act (LUPA), chapter 36.70C RCW. City of Univ. Place v. McGuire, 144 Wn.2d 640, [illegible] 453 (2001). Relevant to this appeal, the Hendersons sought to

establish that the board's decision was not supported by sufficient evidence or was clearly erroneous. Id.; RCW 36.70C.130(1)(c), (d).1 'Errors of law are reviewed de novo.' McGuire, 144 Wn.2d at 647. In determining the sufficiency of the evidence, we view the record and the inferences in the light most favorable to the party that prevailed in the highest fact-finding forum. Benchmark Land Co. v. City of Battle Ground, 146 Wn.2d 685, 694, 49 P.3d 860 (2002). Consequently, we view the record in the light most favorable to INP. We will find that the board made a clearly erroneous application of law only if we are left with the firm conviction that it made a mistake.2 Lakeside Indus. v. Thurston County, 119 Wn. App. 886, 894, 83 P.3d 433 (2004), review denied (Wash. Oct. 6, 2004). On review of a superior court's decision on a land use petition, we stand in the same position as the superior court and apply the above standards to the record created before the board. Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 751, 49 P.3d 867 (2002); Lakeside, 119 Wn. App. at 893.

The proponent of a rezone must show a substantial change in circumstances since the last zoning and that this change justifies a rezone for the public health, safety, morals, or general welfare. Parkridge v. City of Seattle, 89 Wn.2d 454, 462-63, 573 P.2d 359 (1978); Tugwell v. Kittitas County, 90 Wn. App. 1, 8, 951 P.2d 272 (1998). Additionally, Kittitas County requires the rezoning proponent to establish the following criteria:

a. The proposed amendment is compatible with the comprehensive plan; and

b. The proposed amendment bears a substantial relation to the public health, safety or welfare; and

c. The proposed amendment has merit and value for Kittitas County or a sub-area of the county; and

d. The proposed amendment is appropriate because of changed circumstances or because of a need for additional property in the proposed zone or because the proposed zone is appropriate for reasonable development of the subject property; and

e. The subject property is suitable for development in general conformance with zoning standards for the proposed zone; and

f. The proposed amendment will not be materially detrimental to the use of properties in the immediate vicinity of the subject property; and

g. The proposed changes in use of the subject property shall not adversely impact irrigation water deliveries to other properties.

KCC 17.98.020(5).

The Hendersons contend INP failed to establish changed circumstances; a substantial relationship to the public health, safety, morals, or general welfare of the community; or any of the six relevant criteria of KCC 17.98.020(5). (Requirement g of KCC 17.98.020(5) is not applicable because INP's property is not in an irrigation district.) They contend the findings adopted in the ordinance are not supported by substantial evidence or are inadequate to support the requirements for a rezone. Additionally, they assign error to the superior court's findings and conclusions. Because our review is of the board's decision, the superior court's findings are irrelevant on appeal. Isla Verde, 146 Wn.2d at 751. The findings and conclusions of the board, although they do not always specifically cite the requirements of KCC 17.98.020(5), adequately address the factual disputes raised at the hearing. Hayden v. City of Port Townsend, 28 Wn. App. 192, 195, 622 P.2d 1291 (1981). As noted in Hayden, at 195, too much formality in the adjudication of zoning matters would unduly complicate these proceedings. The findings adopted in the ordinance, considered with the evidence before the board, provide this court sufficient record for review.

I. Changed circumstances. Generally the proponent of a rezone must show a substantial change in circumstances since the last zoning or amendment unless the proposed rezone implements policies of the comprehensive plan. Bjarnson v. Kitsap County, 78 Wn. App. 840, 846, 899 P.2d 1290 (1995). A variety of factors may indicate a substantial change in circumstances, including changes in public opinion, in local land use patterns, and on the property itself. Id. at 846-47.

Evidence presented by INP indicated that its property had been used for grazing for decades and had been logged in prior years. At one time, only 20-acre parcels existed in the area. From 1990 to 1992, the zoning was changed to allow one-acre lots in the forest and range area. The zoning was changed back to 20-acre parcels in 1992. Due to the changes in zoning, several parcels in the area were smaller than 20 acres. Development on these lots around INP's property reportedly interfered with its marketability as a private retreat. Based on this evidence, the planning commission found that '(t)he proposed amendment is appropriate because of changed circumstances due to the fact that once the area was used as a cattle ranch grazing area and over a period of time residential areas have grown up around it.' CP at 143. The board found that the property's lack of harvestable timber and the fact that it had not been designated a resource land of long-term commercial significance demonstrated a change of circumstances supporting the rezone to AG-3.

The testimony and the findings indicate changes in local land use patterns from largely agricultural to residential on diverse sizes of lots. These changes reportedly affected the marketability and use of INP's property. Several owners of neighboring properties, including the Hendersons, testified in opposition to the rezone and asserted the smaller lot sizes would reduce wildlife in the area, create more fire hazards, and lower property values. Although the Hendersons claim this testimony proves that there has been no substantial change in circumstances in the area of INP's property, 'neighborhood opposition alone may not be the basis of a land use decision.' Tugwell, 90 Wn. App. at 9. Viewed in the light most favorable to INP, the evidence supports a substantial change in circumstances since the last rezone.

Additionally, the rezone appears to implement policies of Kittitas County's comprehensive plan. In a section entitled 'Current Land Use Patterns--A Review of Existing Zoning,' the plan reveals a concern with the effects of large rural lots:

> The aforementioned range of rural densities and uses has created and contributed to a successful landscape which contributes to an attractive rural lifestyle. The exception to this landscape can be seen in areas where individuals have had to acquire larger lots than desired in order to obtain a building site. This has created the effect of 'rural sprawl.'

CP at 429. In its introduction to the rural lands section, the comprehensive plan further describes the problem:

> State planners are concerned about 'urban sprawl' with less than five acre minimum lot sizes. However, over the past fifteen to twenty years Kittitas County has experienced 'rural sprawl' through the adoption of 20 acre minimum lot sizes, which has caused the conversion of farm land into weed patches. Small lot zoning with conservation easements for agriculture, timber, or open space may be preferable to the wasteful 'sprawl' developments of large lot zoning and could be more conducive to retaining rural character.

CP at 428. Because the proposed rezone here from forest and rural 20-acre minimum lot sizes to agricultural 3-acre minimum lot sizes implements the express policy of the comprehensive plan, this fact alone would justify the rezone. Bjarnson, 78 Wn. App. at 846.

II. Public health, safety, morals, or general welfare. The above

substantial change in circumstances (or implementation of the policies of the comprehensive plan) must justify a rezone for public health, safety, morals, or general welfare. Parkridge, 89 Wn.2d at 462-63. The planning commission admitted some difficulty in understanding this requirement and continued its public hearing on the rezoning petition in order to seek legal advice on this issue. Eventually the commission concluded that smaller parcels on INP's land would result in more tax money to provide additional services to the area, such as fire and police protection.

In the ordinance, the board appears to find that the rezone meets the public health, safety, morals, or general welfare requirement because the rezone will have no immediate adverse impact on the area and any future development will have to comply with standards for construction, road building, and water rights. However, more than a finding of no adverse impact is required. The rezone must 'bear a substantial relationship to the public health, safety, morals, or welfare.' Schofield v. Spokane County, 96 Wn. App. 581, 587, 980 P.2d 277 (1999). More tax money to provide additional services to the community is a benefit to the public health, safety, and welfare. The primary benefit of the rezone, however, is that it furthers the goals of the comprehensive plan to increase diverse uses of rural county lands and to decrease 'rural sprawl.' CP at 428. Viewed in its entirety, the record supports the board's finding that the proposed rezone has a substantial relation to the public health, safety, and welfare.

III. Criteria of KCC 17.98.020(5). Citing the opposition testimony of neighboring landowners, the Hendersons contend INP failed to satisfy the six relevant criteria of KCC 17.98.020(5). Most of the criteria deal with the general requirements of changed circumstances; compatibility with the comprehensive plan; value to Kittitas County; and a substantial relationship with public health, safety, or welfare. KCC 17.98.020(5)(a)-(d). As discussed above, INP presented evidence to meet these first four criteria. The fifth criterion is also met here. There is no real dispute that INP's property is suitable for development in conformance with the AG-3 zone, which permits any residential and customary agricultural use. KCC 17.28.020; KCC 17.98.020(5)(e).

Finally, there is insufficient evidence that the rezone will 'be materially detrimental to the use of properties in the immediate vicinity.' KCC 17.98.020(5)(f). Although the neighboring landowners opined that rezoning INP's property to three-acre minimum lot sizes would reduce privacy as well as water and sewer resources, most of this testimony concerned prospective development of the property. As noted in Tugwell, 90 Wn. App. at 11-12, the issue at hand is the application for a rezone, not for approval of a subdivision. 'Examination of the potential impacts (of a development) at this point necessarily would be speculative. . . . (T)here is simply nothing to consider, because there are no specific plans to review and the impacts are therefore unknown.' Id. at 12. In their reply brief, the Hendersons respond that the immediate effect of this increase in lot density is haphazard use by new landowners with trailers, campers, and temporary shelters--people who are unable or unwilling to install septic systems or to obtain building permits. Not only is this assertion speculative, but it is unsupported by evidence in the record.

The fact that the Hendersons are unable to show that the rezone will be immediately detrimental to the use of neighboring properties also undermines their claim that the rezone is an illegal spot zone. Spot zoning is an action by which an area is carved out of a larger area and specially zoned for a use totally different from, and inconsistent with, the surrounding land and not in conformance with the comprehensive plan. Save a Neighborhood Env't v. City of Seattle, 101 Wn.2d 280, 286, 676 P.2d 1006 (1984). A spot zone grants a discriminatory benefit to some landowners to the detriment of their neighbors or of the community at large. Id. (quoting Save Our Rural Env't v. Snohomish County, 99 Wn.2d

363, 368, 662 P.2d 816 (1983)). Here, properties to the north and the southeast of INP's land are already zoned AG-3. And it has been shown that rezoning INP's property as AG-3 is consistent with the policies of the comprehensive plan. Accordingly, the rezone is not an illegal spot zone.

For the above reasons, we conclude that the record, considered in the light most favorable to INP, supports the board's decision to grant the proposed rezone from 20-acre minimum forest and range to AG-3.

Attorney Fees

INP requests attorney fees on appeal pursuant to RCW 4.84.370, which mandates fees to the prevailing party who appeals a decision by a town, city, or county to issue or deny a development permit involving a site-specific rezone. The prevailing party must have substantially prevailed before the county or city and in all prior judicial proceedings. As in Tugwell, 90 Wn. App. at 15, this case involves a rezoning, not a development permit, so RCW 4.84.370 is not applicable. Further, a LUPA appeal does not give rise to attorney fees. Schofield, 96 Wn. App. at 590. Consequently, the request for attorney fees is denied.

Affirmed.

Schultheis, J.

WE CONCUR:

Kato, C.J. Kurtz, J.

1 In a review of a land use decision, the party seeking relief must show that at least one of the following standards has been met:

(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).

2 To obtain relief from a land use decision, it is no longer necessary to show that the decision was arbitrary and capricious. RCW 36.70C.130(2) (enacted 1995); Tugwell v. Kittitas County, 90 Wn. App. 1, 13, 951 P.2d 272 (1998). This court in Ahmann-Yamane, L.L.C. v. Tabler, 105 Wn. App. 103, 111, 19 P.3d 436 (2001) incorrectly applied the arbitrary and capricious standard to a land use decision reached after enactment of RCW 36.70C.130(2). To the extent that Ahmann-Yamane applied the incorrect standard of review, it is overruled.

90 Wn. App. 1, TUGWELL v. KITTITAS COUNTY

[No. 16026-2-III. Division Three. December 16, 1997.]

THOMAS TUGWELL, ET AL., Plaintiffs, THE CITY OF ELLENSBURG, Appellant, v. KITTITAS COUNTY, ET AL., Respondents.

[1] Zoning - Rezoning - Judicial Review - Statutory Provisions. Judicial review of a rezoning decision is governed exclusively by RCW [illegible] of the Land Use Petition Act.

[2] Zoning - Judicial Review - Planning Commission Recommendation. A planning commission's official recommendation to a higher level agency having decision-making authority is not a land use decision subject to review under the Land Use Petition Act (RCW [illegible]).

[3] Zoning - Judicial Review - Land Use Petition Act - Procedural Error - Harmless Error - Advisory Recommendation. For purposes of RCW [illegible](1)(a) of the Land Use Petition Act under which a court may grant relief to a party aggrieved by a land use decision if the agency that made the decision engaged in an unlawful procedure or failed to follow a prescribed process, unless the error was harmless--any procedural error made by a decision-making agency is harmless if the decision involves only a recommendation that is merely advisory.

[4] Zoning - Rezoning - Changed Circumstances - Burden of Proof. A party seeking the rezoning of a parcel of land has the burden of demonstrating that circumstances have substantially

changed since the last time the parcel was zoned and that the rezoning bears a .substantial relationship to the public health, safety, morals, or general welfare.

[5] Zoning - Rezoning - Comprehensive Plan - Effect. The validity of a rezoning decision does not depend on whether it complies with a comprehensive plan; only "general conformance" with the comprehensive plan is required.

[6] Zoning - Rezoning- Changed Circumstances - Factors. In deciding if changed circumstances are sufficient to justify a rezoning, a court considers a variety of factors, including changes in public opinion, changes in land use patterns in the area of the proposed rezone, and changes in the property itself.

[7] Zoning - Rezoning - Community Displeasure - Effect. A rezoning request may not be denied on the basis of community opposition alone.

[8] Zoning - Rezoning - Other Rezoning Requests - Effect. A government agency deciding a rezoning request is not required to consider the potential cumulative effects of other rezoning requests in the area.

[9] Zoning - Rezoning - Subdivision Requirements - Effect. A rezoning does not have to satisfy statutory subdivision requirements. An examination of the potential impacts of an unproposed development would be speculative at the rezoning stage.

[10] Zoning - Judicial Review - Land Use Petition Act - Procedural Error - Harmless Error - Incomplete Findings of Fact - Implied Conclusions. For purposes of RCW [illegible](1)(a) of the Land Use Petition Act--under which a court may grant relief to a party aggrieved by a land use decision if the agency that made the decision engaged in an unlawful procedure or failed to follow a prescribed process, unless the error was harmless --the failure of a government agency making a land use decision to include a "statement setting forth the factors considered at the hearing and its own analysis of findings considered by it to be controlling," as required by RCW 36.70.930 of the Planning Enabling Act of the State of Washington, constitutes harmless error if the agency's conclusions on the major issues involved in the case are clearly implied by its findings.

[11] Zoning - Judicial Review - Administrative Findings - Sufficiency - Test. A government agency's findings of fact entered in support of a land use decision are sufficient to permit meaningful judicial review if they address and resolve the factual disputes raised in the proceedings and are not so vague and incomplete as to preclude full and complete judicial review.

[12] Building Regulations - Land Use Regulations - Judicial

Review - Appellate Review - Attorney Fees - "Development Permit" - Rezoning. For purposes of RCW 4.84.370, which provides for the award of attorney fees on appeal in cases involving development permits, a rezoning is not a "development permit."

Nature of Action: Neighboring property owners and a city sought judicial review of a county's decision to rezone 115 acres of agricultural land to allow higher density residential development than under prior zoning.

Superior Court: The Superior Court for Kittitas County, No. 95-2-00374-8, Richard W. Miller, J., on August 7, 1996, entered a judgment upholding the county's decision.

Court of Appeals: Holding that the county's decision was supported by substantial evidence in the record and that any procedural errors by the county were harmless, the court affirms the judgment.

James D. Maloney III of Weeks & Skala, for appellant. Greg Zempel, Prosecuting Attorney, and James E. Hurson, Deputy; and Erin L. Anderson of Cone, Gilreath, Ellis & Cole, for respondents.

KATO, J. - The City of Ellensburg appeals a superior court order affirming the Kittitas County Board of Commissioners' approval of Herbert and Shirley Snowden's rezoning request. The City contends the record and the Board's findings fail to support the Board's action, and irregularities in the County's planning process require reversal. We affirm.

The Snowdens own approximately 115 acres of agricultural land in Kittitas County just southwest of Ellensburg.

4 TUGWELL v. KITTITAS COUNTY Dec. 1997
90 Wn. App. 1, 951 P.2d 272

In 1980, the land was zoned AG-20, which is designated for agricultural use with minimum lot sizes of 20 acres. Neighboring properties to the north and east of the Snowdens' land are zoned AG-3, which is designated for agricultural and low-density residential use with minimum lot sizes of three acres.«1» Properties to the west and south of the Snowdens' land are zoned AG-20, although some of those properties have been divided into nonconforming parcels of less than 20 acres. The County's comprehensive plan designates most of the Snowdens' land as agricultural, but the far eastern portion is designated for suburban use.

In April 1994, the Snowdens applied to rezone their property from AG-20 to AG-3. Under the existing zoning designation, they could have divided their property into 10 parcels; the rezoning would permit them to create an estimated 35 residential parcels of approximately three acres each. Although no development project was proposed at the time, the County's planning department examined the potential environmental effects of a development at the site and issued a mitigated determination of nonsignificance«2» pursuant to RCW 43.21C.030(2)(c).

The County's planning commission then conducted public hearings on the Snowdens' application in August and September 1994. The planning commission recommended approval of the rezoning by a vote of three to one, with one abstention. The commission made the following findings:

1. The Kittitas County Comprehensive Plan designates a portion of the subject property as Suburban.

2. The area to the north, east, and south is characterized by smaller parcels.

3. The property is bordered on the north and east by Agriculture-3 zoning.

«1» Permitted uses in the two zones are identical, except for two activities not relevant to this case. The critical difference is the minimum allowable lot size.

«2» The department ordered mitigation measures to protect water quality and fish and wildlife habitat, and to reduce traffic on a public road bordering the property.

4. Technical data-including extensive financial records-- submitted show this is marginal farm land.

5. The subject property has access to two main arterials.

6. Traffic generated from potential development will not result in a negative impact.

7. The Kittitas County Subdivision Code addresses small parcel irrigation systems and will alleviate irrigation concerns.

The proposal then went to the Kittitas County Board of Commissioners, which conducted another public hearing in November 1994 and received additional written comments for another month. The Board postponed action on the rezoning until August 1995 to allow a group of residents to complete its recommendations for modification of the County's comprehensive plan pursuant to the Growth Management Act, RCW 36.70A. After considering a draft version of the modification, the Board unanimously approved the rezoning, subject to various conditions, and made the following findings:

1. The Board finds that on April 13, 1994 Herb and Shirley Snowden applied for rezone of an approximately 115 acre site from Agriculture-20 zoning to Agriculture-3 zoning by submittal of a complete rezone application (file Z-94-04) with SEPA Environmental Checklist per Chapter 17.98 and Section 15.04.110 of the Kittitas County code.

2. The Board finds that the permitted uses and conditional uses within the Agriculture-20 and Agriculture-3 zones are very similar with two exceptions. The AG-20 zone lists as an additional permitted use "hay processing and container storage" (17.29.020[B]), and an additional conditional use "farm implement repair and maintenance business of a commercial nature, not to include automobiles, trucks or bikes" (17.29.030[B]).

3. The Board finds that the minimum lot size with the requested zoning district (Ag-3) is three acres; the present zoning district (Ag-20) is twenty acres with exceptions that allow some lots as small as three acres.

4. The Board finds the present zoning of the vicinity is

Agriculture-20 to the west of Umptanum Road and Agriculture-3 to the east of Umptanum Rd.; the requested rezone by the applicant is for extension of the Ag-3 zone boundary line west across Umptanum Rd. to include the subject site.

5. The Board finds that the State Environmental Policy Act (SEPA) was complied with and a Mitigated Determination of Non-Significance was filed on August 4, 1994 and appropriate Notice of Action published with the paper of record per Kittitas County Code Section 15.04.160.

The rezoning ordinance also incorporated the Planning Commission's earlier findings.

Opponents of the rezoning, including the City of Ellensburg, petitioned for judicial review pursuant to the Land Use Petition Act, RCW [illegible]. After reviewing the record, the superior court concluded in a memorandum decision that the Board's findings were adequate; that the planning commission's actions did not violate procedural requirements; that substantial evidence established there had been a substantial change in circumstances and the rezoning was in the interest of public health, safety, morals, and welfare; and that the rezoning did not conflict with the Growth Management Act. The court entered an order affirming the rezoning. The City appeals this order.

[1] Judicial review of a rezoning decision is governed by RCW [illegible]«3» which provides:

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW [illegible]. 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. The standards are:

(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;

«3» The statute was enacted in 1995. See LAWS OF 1995, ch. 347, § 714. It became effective on July 23, 1995, before the Board's action on August 15, 1995.

(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.

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.

The City first contends the planning commission violated RCW [illegible]«4» and RCW [illegible].«5» We need not resolve these issues for two reasons.

[2] First, RCW [illegible] is the exclusive means of obtaining judicial review of land use decisions. RCW [illegible]. A land use decision is defined as "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination . . . ." RCW [illegible](1). The planning commission is not Kittitas County's body with the highest level of authority on rezoning matters, so its recommendation in this case is not a land use decision subject to review under RCW [illegible].

«4» The planning commission's recommendation "shall be by the affirmative vote of not less than a majority of the total members of the commission." RCW [illegible]. It is undisputed that the Kittitas County Planning Commission has seven members. Only three of the Commission's members voted in favor of the Snowdens' rezoning request.

«5» When making its recommendation, a planning commission is required to include "a statement setting forth the factors considered at the hearing, and analysis of findings considered by the commission to be controlling." RCW [illegible]. The City contends the Planning Commission failed to include the required statement.

[3] Second, even if the planning commission's action were reviewable under RCW [illegible], the appropriate standard requires the court to determine whether the planning commission "engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless." RCW [illegible](1)(a). Any procedural errors by the planning commission in this case were harmless, because its recommendation was merely advisory and the Board retained authority to make the final determination. RCW [illegible].

[4, 5] The City also contends the rezoning was not supported by substantial evidence. In Washington, a rezoning proponent must show a substantial change in circumstances since the original zoning or amendment,«6» and must show that the rezoning bears a substantial relationship to the public health, safety, morals, or general welfare. Bassani v. Board of County Comm'rs, [illegible] 394, 853 P.2d 945, review denied, [illegible] (1993). Whether an application for rezoning complies with a comprehensive plan is not determinative; only "general conformance" with the comprehensive plan is required. Cathcart-Maltby-Clearview Community Council v. Snohomish County, [illegible] 212, 634 P.2d 853 (1981).

[6] Several factors are relevant to the question whether there has been a substantial change of circumstances, including changes in public opinion, in land use patterns,

«6» The Snowdens point out that a demonstration of changed circumstances is not required if the rezoning is consistent with an adopted comprehensive plan. Save Our Rural Environment v. Snohomish County, [illegible]

370-71, 662 P.2d 816 (1983) (SORE); Bjarnson v. Kitsap County, [illegible] 846-46, 899 P.2d 1290 (1995). The parties appear to agree here that the AG-3 zoning is consistent with the suburban use designation in Kittitas County's comprehensive plan. The SORE principle therefore applies to the far easternmost portion of the Snowdens' land that is designated for suburban use. The City contends this principle applies only if the comprehensive plan is newly adopted or amended. However, the reasoning adopted by the Supreme Court in SORE was that if changed circumstances always were required, the policies of a comprehensive plan would never be fulfilled. SORE, [illegible] This reasoning would apply regardless of whether the comprehensive plan was newly adopted or amended. At any rate, because only a small portion of the Snowdens' property was designated for suburban use in the comprehensive plan, it is unnecessary for us to resolve this issue here.

and in the property itself. Bjarnson v. Kitsap County, [illegible] 846-47, 899 P.2d 1290 (1995). In support of their application, the Snowdens submitted a map demonstrating that their property was virtually surrounded by parcels of less than 20 acres. Many of these parcels are to the north and east of the Snowdens' property, and thus are conforming uses in the AG-3 zone. However, several small parcels, including two to the south of less than three acres, are nonconforming lots in the AG-20 zone. The Snowdens also submitted information obtained from the assessor's office indicating many of these small parcels had been created since their property was zoned in 1980. This information alone is evidence that since 1980 the area generally has been divided into small rural lots, notwithstanding the AG-20 zoning to the west and south of the Snowdens' property.

The City contends that despite the parcelization of the neighboring property, there has not been a significant change of land use in the area since 1980. To demonstrate this, opponents submitted aerial slides that show little increase in the number of houses in the area. But as the County's planning director pointed out, each of the lots is at least a potential building site. The creation of small parcels, not large enough to accommodate agricultural activities, certainly demonstrates a trend toward residential development. The Snowdens provided proof of a substantial change in circumstances since their property was zoned in 1980.

[7] The City relies heavily on what it claims is a lack of evidence that public opinion or the circumstances on the Snowdens' own property had changed since 1980. It is true that a majority of the speakers at the public hearings opposed the rezoning. However, neighborhood opposition alone may not be the basis of a land use decision. Sunderland Family Treatment Servs. v. City of Pasco, 127 Wn.2d 782, 797, 903 P.2d 986 (1995); Indian Trail Property Owner's Ass'n v. City of Spokane, 76 Wn. App. 430, 439, 886 P.2d 209 (1994). And while the Snowdens' use of their

property apparently had not changed since 1980, the changing character of the neighboring property had an effect on their farm, such as increasing liability insurance costs and traffic. In light of the whole record before the court, there is substantial evidence that the circumstances had changed to support the rezoning.

There also was substantial evidence that the rezoning was in the interest of the public health, safety, morals, or general welfare. A "fundamental objective" of the County's 1993 comprehensive plan is "to preserve the agricultural base of the County and to conserve farmland by curtailing the haphazard pattern of suburban development." Among the policies of the plan is:

Non-agricultural development of farmlands in Kittitas County should be limited to suburban areas already partially subdivided and/or developed and to areas which, by virtue of size, slope or soil characteristics, are poorly suited to farming.

The comprehensive plan also notes:

The policy with regard to development in the Agricultural districts should not be interpreted to preclude all further development in these areas. The possibilities and benefits of satellite or cluster residential developments located on land poorly suited to agricultural use, due to size, slope or soil characteristics, should be considered.

In support of their application, the Snowdens submitted soil and agronomic studies and an economic evaluation of their property. An agricultural economist concluded:

Given its relatively small (115 acre) size, its shallow, rocky soils, and its patchwork of small fields, the Snowdens' Farm has been a marginal operation for quite some time. During the past four years it has operated at a net loss. This loss is in part a result of low yields which result from the marginal soils and a water supply system which is not highly reliable. The loss is also a result of higher than average costs of operation. These high operating costs reflect both the inefficiencies associated with the small size of the farm, but they also are increased by the conflicts associated with the proliferation of

small sized rural housing (A-3) plots in the surrounding area. The difficulty of managing the farm has also been increased thereby.

In light of this evidence that the property was poorly suited for agricultural use coupled with the County's policy favoring this type of property for residential development, the Board properly concluded the rezoning was in the public's interest.

[8, 9] The City nevertheless contends that the Board way required to consider various other potential effects of the Snowdens' anticipated development. It claims the Board should have considered the cumulative impact of this and two other rezoning applications apparently involving property in the area. And it asserts the Board failed to consider the potential impact on the City's facilities and services or on the small school district in which the property lies. The authority on which the City relies does not require, consideration of the potential cumulative effect of proposed rezonings. See Skagit County v. Department of Ecology, 93 Wn.2d 742, 613 P.2d 115 (1980). That case merely holds that the Shorelines Hearings Board did not act arbitrarily and capriciously by considering the cumulative detrimental effect of piecemeal development. Id. at 749-50.

More importantly, the City's argument misperceives the nature of the Board's action. The Snowdens applied for a rezoning, not approval of a subdivision. If and when the Snowdens begin the development process, their plans will be subject to, among other potential regulations, the subdivision requirements of RCW 58.17.110(1):

The city, town, or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine: (a) If appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds,

and shall consider all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) whether the public interest will be served by the subdivision and dedication.

Although much of the public debate over this rezoning related to the potential effects of development of the property, any rational consideration would refer to the precise development proposed. Examination of the potential impacts at this point necessarily would be speculative. While the City would prefer that the court consider them now, there is simply nothing to consider, because there are no specific plans to review and the impacts therefore are unknown.

Substantial evidence supports the Board's decision to approve the rezoning.

Finally, the City contends the Board's findings were insufficient. RCW 36.70.630 provides:

Official controls - Board to conduct hearing, adopt findings prior to incorporating changes in recommended control. If after considering the matter at a public meeting as provided in RCW 36.70.620 the board deems a change in the recommendations of the planning agency to be necessary, the change shall not be incorporated in the recommended control until the board shall conduct its own public hearing, giving notice thereof as provided in RCW 36.70.590, and it shall adopt its own findings of fact and statement setting forth the factors considered at the hearing and its own analysis of findings considered by it to be controlling.«7»

[10] Without reference to this statute, Washington cases have held that, to permit a full and complete review, rezoning decisions must be accompanied by findings of fact and conclusions or reasons for the action. Parkridge v. City of Seattle, 89 Wn.2d 454, 463-64, 573 P.2d 359 (1978); Johnson

«7» The parties apparently agree that, by imposing additional conditions for the rezoning, the Board made a change in the planning commission's recommendation. Neither the Snowdens nor the County contends the statute does not apply.

v. City of Mount Vernon, [illegible] 219-20, 679 P.2d 405 (1984). Those decisions apparently rested on the conclusion that failure to include findings and conclusions was arbitrary and capricious. See Johnson, [illegible] But relief from a land use decision is no longer dependent on a judicial conclusion that the decision was arbitrary and capricious. RCW [illegible](2). The appropriate standard of review is contained in RCW [illegible](1)(a), under which we must determine whether "[t]he 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." Under this standard, the initial inquiry here is whether the Board violated RCW [illegible], and, if so, whether the violation was harmless.

The Board certainly made findings, in addition to incorporating the planning commission's findings. The Board's ordinance, however, failed to include a "statement setting^ forth the factors considered at the hearing and its own analysis of findings considered by it to be controlling," as required by RCW 36.70.630.

But the Board's findings clearly imply its conclusions on the major issues involved: whether there was a substantial change in circumstances and whether the rezoning bore a substantial relationship to the public health, safety, morals, or general welfare. Specifically, the planning commission's finding No. 2 ("The area to the north, east, and south is characterized by smaller parcels.") implies the commission and the Board agreed the ownership patterns of the nearby property had changed substantially. And the commission's finding No. 4 (The Snowdens' property is "marginal farm land.") implies that the property is appropriate for residential development and the rezoning thus is consistent with the policies of the County's comprehensive plan. Moreover, various other findings and conditions imposed suggest the Board considered the public's health, safety and welfare, by addressing traffic, water and sewage concerns, and by requiring "sincere and meaningful negotiations" with fire and school districts.

It thus appears the Board's failure, while technically a violation of RCW 36.70.630, was harmless. Nothing would be accomplished, other than further delay, by remanding the Board's decision for entry of more complete findings and conclusions.«8» The technical violation was harmless.

[11] A final consideration, under the authority of Parkridge and Johnson, is whether the Board's findings are so incomplete that they prevent meaningful judicial review. In Hayden v. City of Port Townsend, 28 Wn. App. 192, 194, 622 P.2d 1291 (1981), the city council failed to adopt formal findings of fact, but made some formal recitations of fact in the meeting minutes and in the amendatory ordinance, and concluded the rezoning was in the public interest. The court held:

[T]he council's findings, while minimal, are sufficient. They do address and resolve the factual disputes raised in the hearing. While more extensive findings, made in a more formal form, would be more useful, the findings made by the council in this case are sufficient. No particular formality is expressly mandated by the Parkridge rule, see South

of Sunnyside Neighborhood League v. Board of Comm'rs, 260 Ore. 3, 489 P.2d 1063 (1977), and too much formality would unduly complicate zoning matters.

Hayden, [illegible] Like the findings in Hayden, the findings here addressed and resolved the factual issues before the Board. Most importantly, they are not so vague and incomplete that they preclude full and complete judicial review.

The authority on which the City relies is distinguishable. See Weyerhaeuser v. Pierce County, [illegible] 873 P.2d 498 (1994). In that case, the hearing officer's decision consisted almost entirely of a summary of the evidence presented, "without any guidance as to how issues involving disputed evidence were resolved . . . ." Id. at 36. The

«8» he City urges us to reverse the Board's decision, which is one of the remedies authorized by RCW [illegible]. However, in light of our conclusion that the rezoning was supported by substantial evidence, there is no ground for reversal.

Board's findings in this case, by contrast, impliedly but clearly resolved the issues involved. There is no basis for reversing the rezoning on this basis.

[12] The Snowdens and the County seek attorney fees pursuant to RCW [illegible], which provides:

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

(Emphasis added.) This provision was enacted as part of the Land Use Petition Act. See LAWS OF 1995, ch. 347, § 718. That statute does not define the phrase "development permit" in subsection (1). This case involves a rezoning, not a development permit, so RCW [illegible] is inapplicable. The requests for attorney fees are denied.

Affirmed.

KURTZ and BROWN, JJ., concur.

16 STATE v. RALPH G. Jan. 1998
90 Wn. App. 16, 950 P.2d 971

Reconsideration denied February 10, 1998.

Court of Appeals Division III
State of Washington

Opinion Information Sheet

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Title of Case: Cecile B. Woods v. Kittitas County, et al
File Date: 11/29/2005

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JUDGES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CECILE B. WOODS,
Respondent,
v.
KITTITAS COUNTY, a political subdivision of the State of Washington, EVERGREEN MEADOWS LLC, and STUART RIDGE LLC, STEELE VISTA LLC, and CLE ELUM'S SAPPHIRE SKIES, LLC,
Appellants.

) No. 23692-7-III
) Division Three
) Panel Three
) PUBLISHED OPINION

SCHULTHEIS, J. -- In January 2004, three landowner-companies applied for a rezone of approximately 252 acres in Kittitas County from forest and range (allowing one dwelling per 20 acres) to rural-3 (allowing one dwelling per 3 acres). The Kittitas County board of commissioners approved the rezone and adopted Ordinance 2004-15 to implement it. Neighboring landowner Cecile Woods filed a land use petition challenging the rezone. In a December 2004 order, the Yakima County Superior Court granted the petition and reversed.

Kittitas County and the landowner-companies appeal, contending the superior court lacked jurisdiction to decide the petition and erred in concluding that the rezone was inconsistent with the Growth Management Act (GMA), chapter 36.70A RCW. Although we find that the superior court had jurisdiction over the land use petition, we conclude that the court erred in addressing the rezone's compliance with the GMA, and reverse.

Facts

Cle Elum's Sapphire Skies LLC, Evergreen Meadows LLC, Stuart Ridge LLC, and Steele Vista LLC (hereafter referred to collectively as CESS) own approximately 252 contiguous acres of land zoned forest and range in Kittitas County.1 The minimum lot size on forest and range land is 20 acres. Kittitas County Code (KCC) 17.56.040. Permitted uses include single family homes, mobile homes, cabins, duplexes, agriculture, forestry, mining, and approved 'cluster subdivisions.' KCC 17.56.020. Directly north of the CESS property is zoned rural-3, east and west of the property

is zoned forest and range, and south of the property is zoned commercial forest. The northern rural-3 and the eastern forest and range properties have been subdivided and developed for residential purposes.2

In January 2004, CESS applied for a rezone of its property from forest and range to rural-3. The minimum lot size in rural-3 zones is three acres for lots served by individual wells and septic tanks. KCC 17.30.040. As with the forest and range zone, the rural-3 zone allows one-half acre lots in platted cluster subdivisions served by public water and sewer systems. KCC 17.30.040. Permitted uses in rural-3 zones are similar to permitted uses in forest and range zones, although mining is allowed only as a conditional use. KCC 17.30.020, .030.

The predominant differences between the two zones are in their allowed densities and their purposes. As stated in the county code, '{t}he purpose and intent of the Rural-3 zone is to provide areas where residential development may occur on a low density basis. A primary goal and intent in siting R-3 zones will be to minimize adverse effects on adjacent natural resource lands.' KCC 17.30.010. The purpose of the forest and range zone 'is to provide for areas of Kittitas County wherein natural resource management is the highest priority and where the subdivision and development of lands for uses and activities incompatible with resource management are discouraged.' KCC 17.56.010.

After a public hearing held in April 2004, the Kittitas County planning commission voted five to one to forward the rezone request to the county board of commissioners for approval. The one planning commissioner who voted against the rezone expressed concern about the adequacy of the water supply for future development. In May 2004, the board of commissioners unanimously approved the rezone in a closed meeting. Ordinance 2004-15 adopting the rezone was filed on June 1, 2004.

Ms. Woods owns approximately 33 acres adjacent to the CESS property. In June 2004, she filed a petition under the Land Use Petition Act (LUPA), chapter 36.70C RCW, challenging the ordinance in the Yakima County Superior Court. After concluding it had jurisdiction over the site-specific rezone petition, the superior court decided that the rezone was inconsistent with the GMA because it allowed development 'urban in nature' in a rural area. Clerk's Papers (CP) at 16. On this basis, the court reversed the decision to rezone and denied CESS's motion for reconsideration. CESS and Kittitas County filed separate briefs on appeal.

Superior Court LUPA Jurisdiction

CESS first contends the trial court lacked subject matter jurisdiction under LUPA to consider whether the ordinance is consistent with the GMA. It argues that Ms. Woods is not really requesting review of a rezone from forest and range to rural-3, but is actually seeking to invalidate the rural-3 zone throughout the county. The trial court's subject matter jurisdiction to consider Ms. Woods' petition is a question of law reviewed de novo. Somers v. Snohomish County, 105 Wn. App. 937, 941, 21 P.3d 1165 (2001).

The GMA was enacted in 1990 to address problems associated with an increase in the state's population. Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County, 135 Wn.2d 542, 546-47, 958 P.2d 962 (1998). The GMA sought to alleviate the legislature's concern that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.

RCW 36.70A.010. To that end, the legislature called for citizens, the local government, and the private sector to cooperate in 'comprehensive land use planning.' RCW 36.70A.010. Among the new requirements imposed on many of the state's counties and cities, the GMA required the development of a comprehensive plan that would address the elements of land use, housing, capital facilities, utilities, rural areas, and transportation. RCW 36.70A.040, .070; Skagit Surveyors, 135 Wn.2d at 547. The rural element of each county's comprehensive plan was to include lands that permitted rural development, forestry, agriculture, and a variety of rural densities. RCW 36.70A.070(5)(b). 'To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, . . . conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.' RCW 36.70A.070(5)(b).

The legislature set out planning goals in RCW 36.70A.020 to guide the development of a comprehensive plan. Skagit Surveyors, 135 Wn.2d at 547. As in Skagit Surveyors, the two goals central to this case involve the designation of urban and rural development: (1) to '{e}ncourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner,' and (2) to '{r}educe the inappropriate conversion of undeveloped land into sprawling, low-density development.' RCW 36.70A.020(1), (2). Counties and cities are also urged to plan so as to preserve productive forest and agricultural lands and to increase access to natural resource lands. RCW 36.70A.020(8), (9). Ultimately the comprehensive plans adopted by the counties must 'designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.' RCW 36.70A.110(1). Each city must be located within an urban growth area. RCW 36.70A.110(1).

In 1991, the legislature created the growth management hearings boards (GMHB) as the enforcement mechanism for the GMA. Skagit Surveyors, 135 Wn.2d at 548. These boards have very limited jurisdiction to invalidate all or part of comprehensive plans or development regulations that substantially fail to comply with the goals of the GMA. Id. at 549; Somers, 105 Wn. App. at 942; RCW 36.70A.280(1)(a), .302. Development

regulations are defined as 'controls placed on development or land use activities by a county or city,' including zoning ordinances. RCW 36.70A.030(7). However, a development regulation does not include a decision to approve a project permit application, 'even though the decision may be expressed in a resolution or ordinance.' RCW 36.70A.030(7). A site-specific rezone authorized by a comprehensive plan is a project permit application. RCW 36.70B.020(4). Consequently, the GMHB does not have jurisdiction to hear a challenge to a site-specific rezone, even if the rezone is adopted as a county ordinance. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 179, 4 P.3d 123 (2000); Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997).

LUPA is the exclusive means for judicial review of land use decisions that are not subject to review by quasi-judicial bodies such as the GMHB. RCW 36.70C.030; Somers, 105 Wn. App. at 941-42. Accordingly, if Ms. Woods' challenge is limited to the validity of the site-specific rezone adopted in Ordinance 2004-15, she properly filed a LUPA petition in superior court. However, if CESS is correct, and she is actually alleging that the rural-3 zone itself does not comply with the requirements of the GMA, then only the GMHB would have subject matter jurisdiction.3 Wenatchee Sportsmen, 141 Wn.2d at 178.

Generally, the proponent of a rezone must show a substantial change in circumstances or that the proposed rezone implements policies of the comprehensive plan. Henderson v. Kittitas County, 124 Wn. App. 747, 754, 100 P.3d 842 (2004), review denied, 154 Wn.2d 1028 (2005). A party challenging a site-specific rezone through a LUPA petition must establish at least one of the following standards:

(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 sub stantial 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). Ms. Woods' LUPA petition alleges the following errors, (as summarized by this court): (1) erroneous interpretation of the law; (2) incomplete evidence of changed circumstances or consistency with the comprehensive plan and the GMA; (3) unlawful procedure (failure to disclose conflicts of interest and ex parte communications); (4) violation of Ms.

Woods' constitutional rights of procedural due process; and (5) clearly erroneous application of the law to these facts. Each assignment of error relates to the rezone from forest and range to rural-3. Consequently, on the basis of the relief sought in the petition, Ms. Woods necessarily sought relief under LUPA in superior court. Wenatchee Sportsmen, 141 Wn.2d at 179 n.1.

CESS cites Somers to support its argument that Ms. Woods is actually challenging the validity of the county's rural-3 zoning classification, adopted by Kittitas County Ordinance 92-4 in 1992. In Somers, a developer in Snohomish County applied for approval of a subdivision on land zoned 'Residential 20,000,' allowing minimum lot sizes of 20,000 square feet. 105 Wn. App. at 939. Although the proposed development was located outside the urban growth area established by the county in 1995, the subdivision was approved. Neighboring landowners sought review in the King County Superior Court under LUPA. They alleged that the proposed subdivision constituted urban growth outside an urban growth area in violation of the GMA. The superior court agreed.

On appeal, Division One of this court held that the superior court did not have subject matter jurisdiction to consider the neighboring landowners' LUPA petition. Id. at 941. Although the petitioners appeared to challenge a project permit application, they were actually collaterally challenging the county's Residential 20,000 zoning ordinance to the extent that it permitted urban density outside the urban growth area, a violation of the GMA. Id. at 943. No one disputed that the proposed subdivision complied with the Residential 20,000 zone, which already existed at the time of the project permit application. Id. at 939. The petitioners admitted in oral argument that their true position was that, to the extent the Residential 20,000 zone allows urban growth outside the urban growth area, any development authorized by this zone is not permitted by the GMA. Id. at 945. Somers reiterated that only the GMHB has jurisdiction to determine whether a development regulation, such as a zoning ordinance, complies with the GMA. Id. at 944. Holding that the LUPA process cannot be used to raise issues that should have been brought before the GMHB, Somers vacated the trial court's decision and reinstated approval of the proposed subdivision. Id. at 950.

As discussed above, Ms. Woods raised several issues properly addressed in a LUPA petition pursuant to RCW 36.70C.130(1). Additionally, however, she alleged that CESS failed to present substantial evidence that the proposed rezone complied with the GMA. To the extent that she sought review of the rural-3 zone for compliance with the GMA, the superior court lacked subject matter jurisdiction. Somers, 105 Wn. App. at 945.

Ms. Woods argues in response that Wenatchee Sportsmen establishes that the issue of a site-specific rezone's compliance with the GMA is properly raised in a LUPA petition. On the contrary, Wenatchee Sportsmen merely noted that the question of whether a rezone allows urban growth outside an urban growth area may be challenged in a LUPA proceeding that considers

whether such a rezone is compatible with the urban growth area adopted in the county's comprehensive plan. 141 Wn.2d at 181-82. Consistency with the comprehensive plan is properly determined in a LUPA petition; compliance with the GMA is not.

Accordingly, we decline to address the rezone's compliance with the GMA and confine our review to the remaining assignments of error properly raised in the LUPA petition.

Rezoning and the Comprehensive Plan

CESS contends the board of commissioners correctly decided that the rezone was proper and consistent with the county's comprehensive plan. The superior court reversed, concluding that the rezone to rural-3 allowed for urban growth in a rural area in violation of the GMA. 'On review of a superior court's decision on a land use petition, we stand in the same position as the superior court.' Henderson, 124 Wn. App. at 752. Errors of law are reviewed de novo; evidentiary issues are viewed in the light most favorable to the party that prevailed in the highest fact-finding forum. Id. Because CESS prevailed before the board, we will view the record that was before the board in the light most favorable to CESS. Id.

Rezones are not presumed valid. Citizens, 133 Wn.2d at 874-75. As noted above, proponents of a rezone have the burden of proof in showing (1) that conditions have changed since the original zoning, or that the proposed rezone implements policies of the comprehensive plan; and (2) that the rezone bears a substantial relationship to the public health, safety, morals, or welfare. Id.; Henderson, 124 Wn. App. at 752-54. Kittitas County additionally requires the rezoning proponent to establish the following:

a. The proposed amendment is compatible with the comprehensive plan; and
b. The proposed amendment bears a substantial relation to the public health, safety or welfare; and
c. The proposed amendment has merit and value for Kittitas County or a sub-area of the county; and
d. The proposed amendment is appropriate because of changed circumstances or because of a need for additional property in the proposed zone or because the proposed zone is appropriate for reasonable development of the subject property; and
e. The subject property is suitable for development in general conformance with zoning standards for the proposed zone; and
f. The proposed amendment will not be materially detrimental to the use of properties in the immediate vicinity of the subject property; and
g. The proposed changes in use of the subject property shall not adversely impact irrigation water deliveries to other properties.

KCC 17.98.020(5).

The board found that the proposed rezone (1) was consistent with the rural land use designation of the county comprehensive plan; (2) was consistent with rural-3 zoning to the north and similar land use to the

east; (3) protected public health, safety and welfare because it did not allow 'high intensity uses' such as asphalt plants, landfills, sawmills, and airports, which are conditionally allowed in the forest and range zone (CP at 173); (4) had value to the county because it will increase the tax base; (5) was appropriate for three-acre development due to the surrounding zoning and developments; (6) was suitable for development in conformance with the rural-3 zoning standards; (7) would not be materially detrimental to the use of properties in the immediate vicinity because it limits the number of permitted and conditional uses; and (8) will not adversely impact irrigation deliveries because it is not located within an irrigation district. After we eliminate Ms. Woods' issues regarding compliance with the GMA, her remaining challenges are to findings (1), (3), (5), and (6).

I. Finding (1): Is the proposed rezone consistent with the comprehensive plan? According to undisputed findings in Ordinance 2004-15, the county comprehensive plan designated the area of the CESS property as rural in 1996. Ms. Woods argues that the comprehensive plan recognizes that a five-acre minimum lot preserves rural character. She quotes language from the plan in support: 4

'There exists a generalization that five-acre minimum lot sizes might preserve 'rural character.' The County Planning Department has GIS data showing over 603,716 acres eligible for consideration as rural land. If so, Kittitas County will retain rural character for a long time based on the five acre density criteria.'

CP at 104 (quoting Kittitas County's comprehensive plan). Five-acre zoning apparently is not available in Kittitas County for its rural land, however. And as noted by CESS and by this court in Henderson, additional language in the comprehensive plan actually reveals a concern with the effects of the 20-acre minimum lots:

'State planners are concerned about 'urban sprawl' with less than five acre minimum lot sizes. However, over the past fifteen to twenty years Kittitas County has experienced 'rural sprawl' through the adoption of 20 acre minimum lot sizes, which has caused the conversion of farm land into weed patches. Small lot zoning with conservation easements for agriculture, timber, or open space may be preferable to the wasteful 'sprawl' developments of large lot zoning and could be more conducive to retaining rural character.'

Henderson, 124 Wn. App. at 755 (quoting Kittitas County's comprehensive plan). As we found in Henderson, at 756, the proposed rezone from forest and range 20-acre minimum lots to rural 3-acre minimum lots (agricultural 3-acre lots in Henderson) appears to implement this policy of the comprehensive plan. Strict compliance with a comprehensive plan is not determinative; only general conformance is required. Tugwell v. Kittitas County, 90 Wn. App. 1, 8, 951 P.2d 272 (1997). Consequently, the record supports the board's finding that the proposed rezone is consistent with

the comprehensive plan.

II. Finding (3): Does the proposed rezone bear a substantial relationship to the public health, safety, or welfare? A rezone must bear a substantial relationship to the county's health, safety, morals, or welfare. Schofield v. Spokane County, 96 Wn. App. 581, 587, 980 P.2d 277 (1999). The board found that the rezone to rural-3 lessened the number of 'intense rural land uses' that are allowed in the forest and range zone. CP at 174. As explained above, permitted uses on rural-3 land are very similar to the permitted uses on forest and range land. The 'high intensity' uses discussed by the board, including asphalt plants, airports, and sawmills, are only conditionally allowed on forest and range land. KCC 17.30.020, .030; KCC 17.56.020, .030; CP at 173. The board found that the rezone 'protects public health, safety, and welfare, in an area with lots smaller than 20 acres in size.' CP at 173. Although somewhat unclear, this language seems to indicate that, because the area near the CESS properties includes lots smaller than 20 acres in size, the rezone would protect public health, safety, and welfare by preventing such potentially disruptive uses near these smaller lots. This benefit is only hypothetical, of course, but any potential use authorized within a zone is hypothetical until its potential is realized.

Ms. Woods contends the planning commission acknowledged that there are deficiencies with regard to water availability for development of the CESS properties. In its State Environmental Policy Act (chapter 43.21C RCW) determination of nonsignificance, the county planning department gave a mitigated determination that there was no guarantee of adequate water or transportation for future development. However, these problems are related to prospective approval of a subdivision, not to the application for a rezone. Without specific plans to review, we cannot determine the impact of such plans on water resources. Henderson, 124 Wn. App. at 757.

Ultimately, we may not substitute our judgment for that of the board's. Schofield, 96 Wn. App. at 589. We may find 'that the board made a clearly erroneous application of the law only if we are left with the firm conviction that it made a mistake.' Henderson, 124 Wn. App. at 752. Here, the board's finding of a substantial relationship to the public health, safety, or welfare is not clearly a mistake. The finding is bolstered by the board's additional finding that the rezone will increase the tax base, which provides additional services to the local community. See Henderson, 124 Wn. App. at 756.

III. Finding (5): Is the rural-3 zone appropriate due to surrounding zoning and developments? The board found that the CESS property was appropriate for three-acre development because adjacent properties allow three-acre densities. Property north of the CESS property is already zoned rural-3 and property to the east, while zoned forest and range, was developed to a density similar to rural-3 before it was zoned forest and range. Although the area south of the CESS property is zoned commercial forest, one of the primary goals of the rural-3 zone is to 'minimize