

**THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KITTITAS**

Michael E. Cooper
Judge
Department One



Scott R. Sparks
Judge
Department Two

FAX COVER SHEET

October 26, 2005

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FROM: Anna Barnaby/Judge Cooper
DEPARTMENT: Kittitas County Superior Court

206 448 3444

RE: *NFRD v Congdon, et al; Yakima County Cause 02 2 02689 2*
Memorandum Decision

MEMO: Fax copy of Judge Cooper's memorandum sent to you by this fax and by first class postage prepaid mail.

Total number of pages (incl. cover):

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

NEIGHBORS FOR RESPONSIBLE)
DEVELOPMENT, a Washington non-)
profit corporation,)
))
Petitioner,)
))
vs.)
))
CITY OF YAKIMA, a political subdivision)
of the State of Washington and CONGDON)
ORCHARDS, INC., CONGDON)
DEVELOPMENT COMPANY, LLC. and)
WESTHOME, LLC.,)
))
Respondents,)
and)
))
WAL-MART STORES, INC.,)
))
Intervenor.)

No. 02 2 02689 2

MEMORANDUM DECISION

INTRODUCTION

This action was instituted in September 2002 when the petitioner (NFRD) filed an appeal from the rezone of the Congdon Orchards, Inc. (Congdon) property pursuant to the Land Use Pctition Act (Chapter 36.70C RCW)¹. The undersigned was assigned to this case on August 24, 2004. The parties agreed to a stipulated scheduling order after a March 3, 2005 status conference at which the parties consented to adjudicate any claims for declaratory judgment relief relating to

¹ Hereafter LUPA.

the development agreement between the City of Yakima and Congdon before resolving or adjudicating any claims asserted pursuant to LUPA. On May 10, 2005 the court heard oral argument on NFRD's claim challenging the development agreement and on Congdon's assertion of rights under the development agreement. On May 25, 2005 the court issued its memorandum decision upholding the development agreement and based upon that memorandum decision entered its order regarding the development agreement on June 23, 2005.

On September 16, 2005 the parties presented oral argument on the LUPA appeal of NFRD regarding NFRD's contentions that the rezone process was fatally flawed. The court thereafter expended considerable effort in and around its other pressing business to review the entire record, the declarations and the extensive briefing by all parties.

DISCUSSION

1. Issues Presented. NFRD raises six broad points of contention on appeal. It contends the City of Yakima engaged in an unlawful procedure and failed to follow its prescribed process; that Ordinance No. 2002-45 (the rezone ordinance) is inconsistent with the comprehensive plan amendment; that Ordinance No. 2002-45 is inconsistent with the urban area zoning ordinance; that Ordinance No. 2002-45 is an illegal "contract rezone"; that the City of Yakima violated provisions of the State Environmental Policy Act (SEPA) in processing and deciding the rezone application; and that the City of Yakima violated the appearance of fairness doctrine and the procedural due process rights of the greater Yakima community.

2. Factual Background. Congdon owns certain real property between South 72nd Avenue and South 48th Avenue, west to east, and Midvale/Arlington Avenues to West Washington Avenue, north to south, totaling approximately 725 acres. The land has historically been used primarily for agriculture and farming. Congdon's warehouse and packing facilities are located in the central portion of the property and Congdon Castle or west home, sits in the protected central ridge area.

Congdon properties and all bordering properties have historically been zoned for low density residential neighborhoods, either suburban residential (SR) or single family residential (R-1). To the north of Congdon the properties are zoned R-1 or single family residential; to the east of Congdon the properties are zoned R-1, R-2, R-3 and M-1 for duplex and single family

residential/industrial. To the west of Congdon the adjoining properties are zoned R-1, or single family residential, and to the south the adjoining properties are zoned SR and R-1 single family residential.² In the 1990s and early 2000s, the Congdon orchard area of Yakima County grew significantly in both residential and commercial development so both the city and Congdon began planning for future development of the Congdon property.

In 2000 Congdon and the city entered into discussions regarding how the Congdon property could best be developed over the next several years. On May 15, 2001 the initial stage of negotiation and agreement between the city and Congdon resulted in the execution of a memorandum of understanding which led to the Congdon property being annexed to the city in July and August 2001. In October 2001 the city adopted certain amendments to its comprehensive plan relating to the future development of the Congdon property.³ On November 20, 2001 the city and Congdon entered into a development agreement to provide for the vesting of certain property rights for the future development of the Congdon property. On or about January 10, 2002 Congdon submitted its application to rezone its property and filed an environmental checklist. On March 5, 2002 the City of Yakima issued a Determination of Non-Significance (DNS) regarding Congdon's rezone application. No administrative appeal was filed by anyone pertaining to the DNS. On March 14, 2002 and April 15, 2002 hearing examiner Phil Lamb conducted public hearings on the Congdon rezone application. The hearings were open to all members of the public, including members of the NFRD. On April 30, 2002 the hearing examiner issued his recommendation regarding the rezone application and recommended approval of the rezone application contingent upon the adoption of several significant conditions including buffering, street improvements, street closures, roadway terminations, physical barrier buffers, increased open space requirements and lighting restrictions.

After considering the hearing examiner recommendations the City of Yakima remanded the matter back to the hearing examiner for additional hearings regarding the proposed conditions so the hearing examiner conducted the third day of public hearings on June 24, 2002. On July 9, 2002 the hearing examiner issued a 46 page revised recommendation. On July 30, 2002 the Yakima City Council concluded the presumptive lighting and open space requirements for tracts D and E of the rezone application were not appropriate and should await specific

² See finding of fact number 6 of the hearing examiner's revised recommendation, pages 3 through 6, for a more detailed description of the characteristics of the 725 acres which was the subject of the Congdon rezone application.

³ Ordinance No. 2001-56 discussed herein below.

project application. The City Council also voted to subject all future project applications of the Congdon properties to SEPA review regardless of size and to subject Class 1 permitted uses to the level of review normally associated with Class 2 uses. Otherwise, the council affirmed the hearing examiner's revised recommendations approving the rezone and on August 20, 2002 approved Ordinance 2002-45 implementing the Congdon rezone.

Parallel to this proceeding was the appeal of Ordinance 2001-56 approving the expansion of the arterial commercial and industrial land use designations on certain portions of the Congdon property to the Eastern Washington Growth Management Hearings Board (GMHB). On December 5, 2002 the GMHB issued a final decision and order relating to NFRD's appeal of Ordinance 2001-56, invalidating the ordinance regarding the future land use designation because of the city's failure to properly provide for public participation and public notice pursuant to RCW 36.70A.035 and RCW 36.70A.140. Moreover, because the city did not act in accordance with the GMHB dictate, on or about May 19, 2003 the GMHB issued an order on continued non-compliance and continued invalidity and on November 5, 2004 issued a second order on non-compliance, finding that the city had failed to take any action to achieve compliance as required by its final decision and order dated December 5, 2002 and the order on continued non-compliance dated May 19, 2003. The GMHB, therefore, ordered the city to repeal Ordinance No. 2001-56 within 30 days. On December 14, 2004 the Yakima City Council adopted Ordinance 2004-88, repealing Ordinance 2001-56.

In September 2002 NFRD filed their appeal concerning the rezone of the Congdon property.

3. Standard of Review. The Land Use Petition Act (LUPA) is the exclusive means by which to obtain a judicial review of a land use decision. RCW 36.70C.030. 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 36.70C.020(1). In reviewing the land use decision the court must apply the standards set forth in RCW 36.70C.130, which provide:

"(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief as 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;
- (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 party seeking relief from the land use decision has the burden of meeting one of these six standards for granting relief by a preponderance of the evidence. Pinecrest Homeowners v. Colniger & Associates, 151 Wn.2d 279, 288 (2004).

4. Decision.

a. Whether the City of Yakima engaged in unlawful procedure and failed to follow prescribed processes? NFRD’s first contention is that the City of Yakima failed to follow its prescribed processes and therefore engaged in unlawful procedures in adopting their rezone. NFRD contends the improper processes followed included the city council improperly adopting and modifying conditions in the context of a closed record hearing; that they lacked the authority to modify the text, standards and procedures in the context of a zoning map amendment; that the City of Yakima failed to notify or engage in formal consultation with the Washington State Department of Transportation Aviation Division and the Yakima Air Terminal as required by RCW 36.78.510 and RCW 36.70.547; and that the public was improperly precluded from proposing, discussing or commenting on either the airport safety overlay issues or mitigational alternatives.

First, NFRD asserts the City of Yakima City Council did not have the authority to modify or further condition the application for the rezone without notice or an opportunity to comment being afforded to the public. Here, the council modified the hearing examiner’s revised recommendations in a public meeting (as opposed to a public hearing) and eliminated

compatibility conditions 4.3 and 5.4 regarding the limitation on outdoor lighting to 50,000 lumens per net acre, eliminated the requirement of landscaping and impervious coverage conditions 4.4 and 5.5 in the establishment of open space/landscaping requirement of 10% of parking area, modified the environmental review standards and procedures with regard to tracts D and E of the rezone property and modified the project review standards applicable to proposals within tracts D and E.

Yakima Municipal Code (YMC) 15.23.030(F) states:

“F. Action by the legislative body. Upon receipt of the hearing examiner’s recommendation on a proposed rezone, the legislative body shall hold a public meeting and affirm or reject the hearing examiner’s decision.

The legislative body shall conduct its own public hearing when it rejects the recommendation of the hearing examiner or desires additional public testimony. Notice of the public hearing shall be given in the manner set forth in section 15.11.090. In either case, the findings of the legislative body shall include the considerations established in subsection (E) of this section.”

NFRD contends the city’s actions in modifying the hearing examiner’s revised recommendations violates qualitative due process notice requirements because neither the plaintiff nor the public at large was afforded the opportunity after due notice to make comment or provide input when the city “rejected” the recommendation of the hearing examiner. NFRD further contends the city council exacerbated the problem in the closed record hearing by revising the review standards applicable to environmental review and project permit application and by in effect proposing a Congdon overlay zone and that they did not have the authority to change or modify the zoning district text or development standards in the context of a zoning map amendment.

That is not correct. The city did not reject the hearing examiner’s revised recommendations. Rather, specifically, Ordinance No. 2002-45 affirmed the hearing examiner’s revised recommendation after remand subject to making modifications, for which the city made detailed findings and conclusions. Nothing in YMC 15.23.030(F) precludes the Yakima City Council from somehow imposing further conditions on a rezone application during the public meeting when it considers the recommendation of the hearing examiner. The Yakima City council retains full decision-making authority with regard to rezone applications and may substitute its judgment for that of the hearing examiner on any issue. Maranatha Mining, Inc. v. Pierce County, 59 Wn.App. 795, 801 (1990). Here, the council affirmed the hearing examiner’s

recommendations with conditions, except for those conditions that it rejected and/or imposed by its own judgment. The Yakima City Council did not improperly adopt and/or modify conditions at the public meeting nor did it fail to follow its own procedures.

Next, NFRD argues the City of Yakima erred because it made text amendments to the zoning ordinance in the context of a zoning map amendment.⁴ Here, NFRD contends Congdon sought the zoning map changes to specific and established zoning districts such as the central business district support, light industrial and multi-family residential, and that the application contained no conditions or mitigation measures. Based on the evidence the hearing examiner determined that there were serious deficiencies in information and analysis, exposed adverse impacts and compoundability issues, and that as a result thereof, the zoning map amendment as proposed did not conform to either the comprehensive plan or the intent of the Urban Area Zoning Ordinance unless modified. NFRD contends the hearing examiner's modifications represented amendments to the text, standards, procedures or other provisions for the established zoning districts which could only be implemented through the text amendment procedures of YMC 15.23.020 and that he therefore exceeded his authority to establish and impose new development standards and procedures in the context of the zoning map amendment. Congdon argues that NFRD's claims are meritless because the hearing examiner specifically has the authority to make written recommendations to approve, approve with conditions or deny the proposed rezone and that the hearing examiner's findings, conclusions and recommendations comport with his authority to approve the proposed rezone with conditions. The hearing examiner's conclusions indicate the proposed rezones for tracts B through F as modified by his recommended conditions conform to the goals and policies of the Yakima urban area comprehensive plan and to the intent of the Yakima urban area zoning ordinance and that with the proposed mitigation the property is suitable for uses permitted in the proposed zones.

While nobody has argued specifically what the difference between a text amendment and a zoning map amendment is, it appears to the court text amendments deal with the specific district intent statements for each zoning district as described in YMC 15.03.030, or the permitted land uses allowed in each zoning district pursuant to Chapter 15.04 YMC, not a change in the zoning map of the various zoning districts as adopted pursuant to YMC 15.03.040.

⁴ See YMC 15.23.020. Text Amendments (YMC 15.23.020) may be initiated only by the legislative body of the city (the city council) or the regional planning commission. Zoning map amendments are made pursuant to YMC 15.23.030.

Accordingly, the conditions imposed by the hearing examiner and adopted by the Yakima City Council and/or imposed by the Yakima City Council appear to ensure that the zoning map application of Congdon conforms to the intent of each zoning district proposed in the application and that the conditions are not, therefore, changing the text of those districts. To the contrary, the conditions are enabling the zoning map amendment application to conform to the intent of the Yakima Urban Area Zoning Ordinance as well as the goals and policies of the Yakima Urban Area Comprehensive Plan. The city council, therefore, did not err in affirming the hearing examiner's recommendations as modified.

NFRD also alleges the City of Yakima failed to notify or engage in formal consultation with the Washington State Department of Transportation Aviation Division and Yakima Air Terminal as required by RCW 36.70A.510 and RCW 36.70.547. Because Congdon Orchards property lies within the airport safety overlay (ASO) for the Yakima Air Terminal, a general aviation airport, RCW 36.70A.510 and RCW 36.70.547 require the city to, through its comprehensive plan and development regulations, discourage the siting of incompatible uses adjacent to such general aviation airport. Adoption of plans and regulations may only be made or amended after formal consultation with the airport owners and managers, private airport operators, pilots, ports and the Aviation Division of the Department of Transportation and all proposed and adopted plans and regulations shall be filed with the Aviation Division of the Department of Transportation within a reasonable time after release for public consideration and comment. RCW 36.70.547.

The city council dealt with the Airport Safety Overlay regulations in Section IV.B. of Ordinance 2002-45 and concluded, based on the evidence, specifically Exhibit H-21B, that it was addressing the requirements of the statutes and the ordinance.⁵ NFRD's complaint concerning the ASO deals with Growth Management Act notice procedures in general and not the rezone application specifically. It is the court's opinion that the City of Yakima and Congdon pursuant to Ordinance 2002-45 IV.B. adequately addressed and imposed the appropriate conditions concerning the Airport Safety Overlay zone to ensure compliance therewith.

b. Whether Ordinance No. 2002-45 is inconsistent with the Urban Area Comprehensive Plan or the Urban Area Zoning Ordinance. The crux of NFRD's appeal rests

⁵ It is noted the GMHB in its final decision and order dated December 5, 2002 noted that the letter of May 24, 2001 (the city's Exhibit H-21B) neither satisfies nor substitutes for the statutory requirements of RCW 36.70A.510 or RCW 36.70.547 and that the City of Yakima's failure to comply with those statutes was clearly erroneous.

with its assertion that because the Congdon rezone was presumably premised on the validity of the underlying comprehensive plan amendment (Ordinance No. 2001-56), which served as a substitute for specific proof regarding changed circumstances, suitability of property for proposed uses, and compatibility with adjacent land uses and public need, that the invalidation of Ordinance No. 2001-56 by GMIB and its subsequent repeal by Ordinance 2004-88 caused the house of cards on which the Congdon rezone was based to crumble.

Ordinance No. 2001-56 amended the Yakima Urban Area Comprehensive Plan based on Congdon's request that approximately 38 acres of property situated north of Nob Hill Boulevard and south of Midvale/Arlington between South 64th Avenue and South 69th Avenue be reclassified from high density residential to arterial commercial on the future land use map of the Yakima Urban Area Comprehensive Plan; that approximately 20 acres of property situated south of Nob Hill Boulevard generally between South 64th Avenue and South 67th Avenue be reclassified from neighborhood commercial to arterial commercial on the future land use map of the Yakima Urban Area Comprehensive Plan; and that approximately 39 acres of property located north of West Washington Avenue and west of South 48th Avenue be reclassified from medium density residential to industrial on the future land use map of the Yakima Urban Area Comprehensive Plan.

Congdon argued at the rezone hearings that the zoning map changes it sought were consistent with and implemented the comprehensive plan effectuating the policies of the Yakima Urban Area Comprehensive Plan and its future land use map. NFRD contends the hearing examiner made a similar assumption in reviewing the hearing examiner's revised recommendations. It is noteworthy the hearing examiner did not rely on Congdon's argument that the comprehensive plan amendments to the future land use map determined the outcome of the rezone application. To the contrary, at page 15 of his revised recommendations the hearing examiner points out the argument is flawed, that he needed to review not only the comprehensive plan and the future land use map but also all of the evidence presented and apply the standards set forth in YMC 15.23.030(E). In fact, the hearing examiner made an exhaustive review of the evidence presented to him before determining that the rezone if properly conditioned, complied with the Yakima Urban Area Comprehensive Plan and the standards set forth in YMC 15.23.030(E). He stated at page 20-21 of his revised recommendation:

“Ultimately, substantial evidence must support the land use decision.

The zoning ordinance defines the intent of each zoning district and indicates that distinctions between each district are significant, are based on the comprehensive plan, and are intended as a guide to administration and interpretation of the zoning ordinance. (YMC 15.01.030).

Seven criteria are established, all of which must be considered by the hearing examiner in making a recommendation on a rezone. The seven criteria are the criteria listed in this section 9 of the recommendation. (YMC 15.23.030(E)). Criterion 4 requires consideration of: ‘the extent to which the proposed amendments are in compliance with and/or deviate from the goals and policies as adopted in the Yakima Urban Area Comprehensive Plan and the intent of this title.’”

The court concludes the hearing examiner considered the comprehensive plan as a whole, not just Ordinance 2001-45 in evaluating the rezone application.⁶

In any event the GMHB in its final decision and order dated December 5, 2002 did determine that NFRD had “failed to convince the board of any internal inconsistencies in the city’s comprehensive plan and that their arguments would effectively bar any amendments to a comprehensive plan including amendments to correct an inconsistency.” The GMHB further concluded that the future land use map changes did not introduce new land uses for the parcels in question and Congdon’s application did not create any inconsistency with the Yakima Urban Area Comprehensive Plan.⁷ NFRD did not appeal that portion of the GMHB decision to the Thurston County Superior Court, and the Thurston County Superior Court affirmed GMHB’s decision denying Yakima’s motion to dismiss.⁸ Res judicata bars NFRD from relitigating any alleged issue of inconsistency. Detray v. City of Olympia, 121 Wn.App. 777, 792 (2004).

Finally, the record before the hearing examiner certainly indicates he determined there was substantial evidence to support his determination to recommend approval of the rezone with conditions. Substantial evidence is that sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the decision. Schofield v. Spokane County, 96 Wn.App. 581, 586 (1999). Additionally, the proponent of a rezone need only demonstrate general

⁶ It is also noted on page 17 of the examiner’s revised recommendation that there are potential zones other than R-3 and CBDS which could presumably satisfy the mandates of the comprehensive plan; it is not absolutely necessary that these rezones be adopted in order to implement the plan, since R-2 and B-2 zoning could likewise be argued as consistent with these comprehensive plan designations. The end result is that the hearing examiner considered the overall comprehensive plan and determined as one of several criteria that the evidence presented indicated to him the rezone application was compatible with the overall Yakima Urban Area Comprehensive Plan.

⁷ See final decision and order GMHB for Eastern Washington, dated December 5, 2002, pages 31 and 32.

⁸ See order denying Congdon Orchards’ petition for review and affirming Eastern Washington GMHB, dated January 3, 2004 and filed February 3, 2004.

conformance with a comprehensive plan. Tugwell v. Kittitas County, 90 Wn.App. 1, 9 (1997). In reviewing the record to determine whether it supported the findings of the hearing examiner, it appears the hearing examiner thoughtfully and carefully considered all criteria for rezones established by YMC 15.23.030(E) in painstaking detail. With respect to public testimony he noted those few who testified⁹ in support of the rezone project and those many more who testified against the rezone. The hearing examiner was acutely aware that while many homeowners wanted to keep the area as it is for open space and aesthetic reasons, most citizens who complained recognized that the development of the Congdon properties was inevitable and desirable but protested because of the lack of significant buffering from the more intense uses adjacent to single family neighborhoods and from commercial activities of the highest intensity. The hearing examiner also acknowledged that many neighbors complained bitterly about the lack of notice or confusing nature of the notice which accompanied the 2001 comprehensive plan amendments and the short notice prior to the rezone hearings and that many of the protesting testimonies and letters addressed the questionable notice given them.

Moreover, the hearing examiner noted that in response to the community voice, Congdon replied by agreeing to increase set-back and reduce building height for R-3 and CBDS zoned ground adjacent to R-1 developments.

Next, the hearing examiner considered and determined that the property was suitable for any type of urban use as there was no evidence to the contrary.

Third, the hearing examiner considered the recommendations from interested agencies and departments, wherein he found all agencies and city departments advised that public services are available to or may be economically extended to the site and that the rezone would not create any difficulties for the infrastructure. More specifically, the hearing examiner noted the Airport Safety Overlay zone was not addressed in any significant fashion but that the planning division staff report of the city indicated the proposal had been reviewed by the airport manager as required by the provisions in the Urban Area Zoning Ordinance concerning airport safety overlay zone. As discussed above, the record included a letter from airport manager Bob Clem that the proposal was consistent with the ASO. The hearing examiner also noted Mr. Carmody's objection and offer of proof, which consisted of several other items.

⁹ Either in person or by letter.

Fourth, the extent to which the proposed amendments are in compliance with and/or deviate from the goals and policies as adopted in the Yakima Urban Area Comprehensive Plan, as discussed above, were addressed at length by the hearing examiner.¹⁰ He noted at page 20:

“Both the comprehensive plan and the zoning ordinance place confidence in the public, and request public input for those uses which the documents deem less compatible than others. If the language of the comprehensive plan and the zoning ordinance is to have meaning, substantial weight must be put on neighborhood opinion as to compatibility. That opinion is in turn based upon reasonable concerns, concerns uniquely within the purview of the neighbors.”

The hearing examiner then went on to address each tract and determined, except for tract A, that the proposed zones would be in conflict with the directives of the comprehensive plan unless modified. The hearing examiner then proceeded to create and impose his conditions to meet what he thought were the concerns addressed by the neighbors based upon the evidence presented and to bring the rezone into conformity with the comprehensive plan and zoning ordinance.

Fifth, the hearing examiner found the public facilities were adequate to serve the property or would be dealt with and governed by the terms of the development agreement.

Sixth, the compatibility of the rezone with conditions was addressed in combination with the detailed discussion by the hearing examiner in paragraph 9.4 of his report and is in compliance with Woodinville Water District v. King County, 105 Wn.App. 897, 906 (2001).

Finally, the hearing examiner considered the evidence in light of the 7th criterion, that the public need exists for the proposed change. The hearing examiner noted the Congdon ground had been predominantly zoned SR and R-1 since the beginning of zoning in Yakima County, that increased urban development around the entire perimeter of the properties as well as recent changes in the comprehensive plan land use designations both in 1996 and in 2001, clearly constitute the requisite change of circumstances, and therefore constitute the public need justifying this request. Bjarnson v. Kitsap County, 78 Wn.App. 840, 846-847 (1995); Bassani v. Board of County Commissioners, 70 Wn.App. 389, 392-396, review denied 122 Wn.2d 1027 (1993). He also noted that the comprehensive plan clearly details the need or desirability for additional high density residential housing in the West Valley area and identifies the need for

¹⁰ See paragraph 9.4.1, pages 15 to 21 of the hearing examiner's revised recommendation.

more industrially zoned property. It is clear to this court that even though Ordinance 2001-56 was determined to be invalid and subsequently repealed because of action by the GMHB there was substantial evidence to support the hearing examiner's determination and the city's affirmance thereof that the proposed rezone was in general conformance with the comprehensive plan and zoning ordinance.

c. Whether Ordinance 2002-45 is an illegal "contract rezone". This court has already determined the validity of the development agreement and will not readdress its reasons for validation. Suffice it to say, the development agreement between Congdon and the city is valid, binding and enforceable and does not constitute an illegal contract rezone. State, ex rel. Myhre v. City of Spokane, 70 Wn.2d 207, 216 (1967). No evidence has been presented to demonstrate that the development agreement predetermined the outcome of the rezone or that the rezone was arbitrary and unreasonable with no substantial relation to the public health, safety, morals and general welfare of the community. To the contrary, the record amply demonstrates the rezone decision was supported by evidence independent of the development agreement.

d. Whether the City of Yakima violated the provisions of SEPA in processing and deciding the rezone application. The SEPA issue is not properly before the court. Pursuant to RCW 37.70C.060(2)(d), RCW 43.21C.075(4), and WAC 197-11-680(3)(c), a party has standing to raise a SEPA issue only if the party has exhausted his or her administrative remedies to the extent required by law. State ex rel. Friend & Rikalo Contractor v. Grays Harbor County, 122 Wn.2d 244, 249 (1993). Failure to use available administrative appeal process will result in the dismissal of the plaintiff's judicial SEPA appeal. Clean v. City of Spokane, 133 Wn.2d 455, 465 (1997). Here, NFRD or the individual neighbors prior to the formation of NFRD, failed to exhaust administrative remedies. The city issued its SEPA decision, a DNS, on March 5, 2002. The DNS was appealable within five days of the decision under YMC 6.88.170. No one filed an administrative appeal of the DNS within the limitations prescribed. Moreover, NFRD failed to properly appeal the SEPA determination. RCW 43.21C.075 requires SEPA appeals to be combined with specific underlying government action. Deadline for filing a SEPA appeal is dictated by the time limit for challenging the underlying governmental action with which it is linked. Summit-Waller Citizen's Association v. Pierce County, 77 Wn.App. 384, 397 (1995). NFRD never filed an administrative SEPA appeal. Moreover, nowhere in NFRD's petition for review does NFRD allege a SEPA claim other than to allege the DNS should have been

withdrawn because of evidence garnered during the hearings. NFRD waived all SEPA claims and is barred from raising any SEPA issues on appeal.

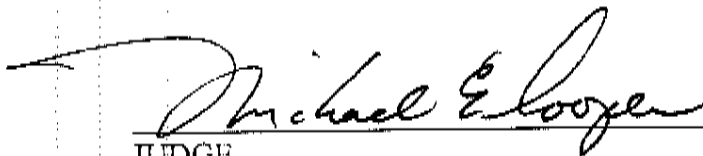
e. Whether the City of Yakima violated the appearance of fairness doctrine and the procedural due process rights of the community and the procedural due process rights of the community. NFRD contends the city staff/management acted improperly as an advocate for the project proponent and failed to disclose ex parte communications with the quasi-judicial decision-maker and that the city staff/management failed to provide the hearing examiner and city council with relevant information pertaining to the rezone application. The appearance of fairness test under the appearance of fairness doctrine set forth in RCW 42.36.010 requires a showing that "a disinterested person, having been apprised of the totality of a [decision-maker's] personal interest in a matter being acted upon, [is] reasonably justified in thinking that partiality may exist." Bunko v. City of Puyallup Civil Service Commission, 95 Wn.App. 495, 503 (1999). In order to prevail on this claim NFRD must present evidence of actual or potential bias. Organization to Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 890 (1996). Thus, "the party asserting a violation of the doctrine must produce sufficient evidence demonstrating bias, such as personal or pecuniary interest on the part of a [decision-maker]; mere speculation is not enough." Bunko, supra. NFRD has not presented any evidence that would even suggest, must less prove, that any of the Yakima City Council had a personal or pecuniary interest in the rezone decision.

CONCLUSION

Based on foregoing it is this reviewing court's determination that the Yakima City Council based its rezone decision on the consistency with the comprehensive plan, changed circumstances in the area of the rezone based upon numerous growth factors, and the specific seven factors set forth in YMC 15.23.030(E). While it is noted that there was considerable, if not overwhelming public opposition to the rezone, "neighborhood opposition alone may not be the basis of a land use decision. Tugwell, supra. Nevertheless, both the hearing examiner and the city council, it is apparent, listened carefully and thoughtfully to the local opposition because the hearing examiner imposed several conditions on the rezone to make it conform with the comprehensive plan and/or planning goals and the city council adopted those conditions, except

for two, and imposed their own additional mitigation measures to enhance the SEPA and administrative requirements for future project specific applications in the commercial district. Overall, there was substantial evidence to support the hearing examiner's revised recommendations and the city council's affirmation, as modified, of the hearing examiner's revised recommendations. It is also apparent from the record the city followed its procedure to effect its land use decision, did not exceed its authority, and neither made errors at law nor erroneously applied the law to the facts. The court, therefore, affirms the action by the Yakima City Council in adopting Ordinance 2002-45.

DATED: October 26, 2005.


JUDGE