IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR LINCOLN COUNTY

THE GLENROSE ASSOCIATION Petitioner, v. SPOKANE COUNTY AND SPOKANE YOUTH SPORTS ASSOCIATION Respondents.	NO. 21-2-00023-22 **THE GLENROSE ASSOCIATION'S REPLY BRIEF**

I. INTRODUCTION

The County concedes that the decision under review was based on an incorrect reading of the law by the hearing examiner.

> The County concedes that the Hearing Examiner probably erred when he determined that a use that does not appear anywhere in the Code should be administratively classified by comparison with other uses within *only* that zone the use is proposed in (e.g., Rural, Residential, etc.) as opposed to looking at all of the uses included in the many matrices. *See* AR 17.

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County Br at 10:7 - 11.

A court should not sustain an agency decision based on a post hoc rationalization offered by counsel. *Somer v. Woodhouse*, 28 Wn. App. 262, 272 (1981) ("agency action cannot be sustained on post hoc rationalizations supplied during judicial review") (rule-making case). Therefore, at minimum, the examiner's decision should be vacated.

But a remand for another go-round with the examiner is not required. This case has been in the courts and administrative agencies for seven years. The legal issues have been fully briefed. After vacating the examiner's erroneous decision, judicial and administrative efficiency would be served if the Court resolves the legal issues itself, as the statute allows. RCW 36.70C.130(1)(b) (de novo review of legal issues); RCW 36.70C.140 (court may "reverse" the agency's land use decision); *Shaw v. Clallam Cnty.*, 176 Wn. App. 925, 933 (2013) ("aids to construction a reviewing court may use to resolve ambiguity in a legislative enactment do not include remand to a lower tribunal to formulate a definition of a term").

Thus, the Court should resolve the legal issue and determine that the sports field complex at issue is not allowed in the rural Glenrose neighborhood. We demonstrated that in our opening brief and now rebut the contrary arguments raised by the county and the sports club (SYSA).

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II. UNDISPUTED FACTS AND ARGUMENTS

Numerous facts and arguments presented in our opening brief were either ignored or expressly confirmed by the respondents:

1. The proposed sports complex would be in the heart of the Glenrose rural residential neighborhood. The neighborhood is characterized by large lots, scattered residences, and open fields. Op. Br. at 11.
2. The sports field complex would include six baseball and soccer fields, along with storage buildings, restrooms, concession stands and bleachers. Large lighting arrays towering above the fields would make the fields available for use day and night. The Sports Association has acknowledged both the size of the facility and the large number of hours that it would be in operation throughout the year, during the day and after dark. Op. Br. at 12.
3. The facility is not intended to serve the Glenrose community. The primary users will be sports clubs from around the region and perhaps the state. The Association expects so little use by the surrounding community that its traffic analysis states there will be little demand for pedestrian facilities. Op. Br. at 12 – 13.
4. The Glenrose community is designated as a "Rural" community in the County's Comprehensive Land Use Plan. Op. Br. at 10.

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5. The Glenrose community's zoning designation ("Urban Reserve") is a rural district. Op. Br. at 10 - 11.
6. The "Participant Sports and Recreation (outdoor only)" use is not an allowed use in this rural zoning district. Op. Br. 20 (citing SCC 14.606.210.4).
7. The zoning code precludes uses in various zoning districts through two means (explicit and implicit). Explicitly, some uses are precluded by being listed as a prohibited use. Implicitly, some uses are precluded by not being included in the list of allowed uses: "All uses not specifically authorized by this Code are prohibited." SCC 14.606.210.4. *See* Op. Br. at 19. The County concurs. County Resp. at 10:7 - 11.
8. The hearing examiner erred in not recognizing that uses are implicitly prohibited if they are not expressly allowed. Op. Br. at 19; County Br. at 10:7 – 11.
9. The construction of the code proposed by the respondents would give rise to absurd or unlikely outcomes. Op. Br. at 27 - 29. (Neither respondent addressed this argument.)
10. The county has used the Community Recreation Facility use only to approve small, neighborhood parks. Op. Br. at 25:1 - 5. (Neither respondent contends otherwise.)

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The Court should accept the foregoing undisputed facts and law as verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992). We will reference them again as we discuss the specific issues.

III. STANDARD OF REVIEW AND DEFERENCE

The parties agree that the usual standards of review apply. They are set forth in the Land Use Petition Act (LUPA), ch. 36.70C RCW. Because the facts are not disputed, the most applicable standard of review is the one for legal issues—and those are reviewed de novo. As the county states: "Errors claimed under RCW 36.70C.130(1)(b) are reviewed de novo." Cy. Br. at 10:7. SYSA agrees: "[A]n erroneous interpretation of the law under RCW 36.70C.130(1)(b) . . . is reviewed de novo by this Court." SYSA Br. at 3:14.

The only dispute regards whether the county's construction of its zoning code is entitled to any deference. It is not. This is so because LUPA directs the superior court to review the hearing examiner's decision[1] and the county concedes that the examiner's reasoning was incorrect:

> The County concedes that the Hearing Examiner probably erred when he determined that a use that does not appear anywhere in the Code should be administratively classified by comparison with other uses within *only* that zone the use

[1] That the decision under review is the examiner's (not the earlier staff decision) is the result of LUPA's definition of a "land use decision" which directs the superior court to review the ultimate decision made by the county, not a preliminary decision that was subject to an administrative appeal: " 'Land use decision' means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, . . ." RCW 36.70C.020(2).

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> is proposed in (e.g., Rural, Residential, etc.) as opposed to looking at all of the uses included in the many matrices. *See* AR 17.

Cy. Br at 10:7.

Because the county has abandoned the rationale in the final "land use decision" under review, the county cannot and has not argued that the alternative rationale advanced in its brief is entitled to deference.

SYSA urges deference for the examiner's construction of the code. SYSA Br. at 8:17. That plea should be rejected because the county itself has disavowed that construction.

SYSA's deference argument suffers other defects, too. As we emphasized and discussed at some length in our opening brief, LUPA limits deference to only situations when it is "due." RCW 36.70C.130(1)(b). We demonstrated that the courts have construed this to mean that no deference is "due" unless there is a history of applying the code in a certain way—a "uniformly applied interpretation" in the words of one court. *See* Op. Br. at 16 (citing and quoting *Alaska Airlines, Inc. v. Dep't of Labor & Indus.*, 1 Wn.3d 666, 683 - 684 (2023)). A "one-off" interpretation is entitled to no deference. In arguing for deference, SYSA fails to acknowledge this limitation and provides no argument that the hearing examiner's rationale (now discredited by the prosecutor's office) is reflective of a "uniformly applied interpretation" by the county.

The bottom line is that the court's review of the legal issues is de novo.

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IV. ARGUMENT

A. The Prosecutor's Post Hoc Rationalization is Flawed.

In our opening brief, we demonstrated that the examiner erred in failing to consider whether the proposed sports field complex falls within the scope of the "Participant Sports and Recreation (outdoor only)" use, which is prohibited in this rural zone. Because the county concedes the examiner erred, we do not address that further.

In lieu of defending the examiner's decision, the prosecutor's office advances a rationale that it asserts had been "implicitly" adopted by the planning director. Cy. Br. at 3:19. The prosecutor argues that because the code defines "Commercial" to mean a pecuniary use and the Participant Sports and Recreation (outdoor only) use is listed under a "Commercial" heading, the Participant Sports and Recreation (outdoor only) use cannot be construed to include a non-pecuniary activity. *Id.* at 11 – 12.

As discussed above, this post hoc argument is entitled to no deference. In addition, the prosecutor's argument fails on its merits. As detailed below, despite the pecuniary aspect of the definition of "commercial," the code includes various non-pecuniary uses under the "Commercial" headings. Thus, this rationale was not adopted by the hearing examiner. It should not be adopted by this Court either.

The county and SYSA are correct that the term "commercial" is defined as an activity pursued "for pecuniary gain." SCC 14.300.100. But they are wrong in contending that only pecuniary uses are listed under the "Commercial" headings.

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As the county explains, the code lumps various specific uses under broad headings. Cy. Br. at 8. The broad headings are terms like "Commercial," "Agricultural," and "Residential." The specific uses listed under those headings are narrower—like "church," "kennel," "beekeeping," "dwelling, single-family" and the specific uses at issue here, "Participant Sports and Recreation (outdoor only)" and "Community Recreational Facility."

Despite the code's definition of "commercial," the use matrices include various non-pecuniary activities under "Commercial" headings. For instance, animal shelters, public kennels, scientific research activities, and wildlife rehabilitation uses are all listed under "Commercial" headings. SCC 14.612.220 (Table 612-1); 14.606.220 (Table 606-1). Thus, despite the ostensible "pecuniary" definition of "commercial," the drafters did not limit uses under the "Commercial" headings to only pecuniary activities. The "Commercial" headings do not preclude a specific use beneath the heading from including non-profit activities.

A code should be construed considering all of its parts. *Subcontractors & Suppliers Collection Servs. v. McConnachie,* 106 Wn. App. 738, 741 (2001). Clearly, when the code is considered as a whole, the drafters did not limit uses under the "Commercial" headings to only pecuniary uses. Notably, the examiner did not adopt that rationale that the prosecutor says had been "implicitly" offered by the director. Cy. Br. at 3:19. The Court should reject the prosecutor's effort to breathe life into it now.

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The prosecutor's argument also ignores that the code directs focus on the specific uses authorized by the code, not the broad category headings. SCC 14.604.300.2 (proposed use is "subject to the development standards *for the use* it most nearly resembles" (emphasis supplied)). The prosecutor's argument ignores that code direction by evaluating the proposal in light of the broad category titles (*e.g.*, Commercial and Institutional) instead of the specific uses listed in the matrices (*e.g.*, Participant Sports and Recreation (outdoor only) and Community Recreational Facility).

In sum, the prosecutor's post hoc argument is entitled to no deference; ignores that various non-pecuniary uses are listed under "Commercial" headings; and ignores the code's direction to focus on the specific uses, not the headings. The examiner rejected this rationale and so should the Court.

B. The Respondents Remaining Arguments are Flawed.

In our opening brief, we made two primary arguments in support of the conclusion that the proposed sports field should be classified as a Participant Sports and Recreation (outdoor only). The first argument was simply that the proposed sports field proposal fits within the scope of a Participant Sports and Recreation (outdoor only) and does not fit within the scope of a Community Recreational Facility. Thus, there was no need to conduct a "more nearly resembles" analysis, because the sports field only resembles one listed use. Op. Br. at 32.

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The second argument was that even if a "more nearly resembles" analysis were employed, the examiner bungled it by excluding the Participant Sports and Recreation (outdoor only) use from his analysis. Op. Br. at 33 - 35. The county does not attempt to defend against that argument. *See, e.g.*, Cy. Resp. at 10:7 - 11.

In response to these arguments, the county and SYSA focus on a variety of issues that they claim demonstrate that the sports fields complex should be classified as a Community Recreational Facility. We have already addressed the primary argument advanced by the county—that the sports complex is non-pecuniary and, therefore, cannot be a Participant Sports and Recreation (outdoor only). We address the remaining arguments here.

1. The Sports Field Complex is Not a "Camp."

In a footnote, the county briefly argues that the SYSA proposal might be classified as a "youth camp." Cy. Br. at 2, n.1. This argument should be rejected because arguments given only fleeting treatment are not entitled to consideration by a reviewing court. *Cowiche Canyon Conservancy v. Bosley, supra*.

Even if the argument were considered, it should be rejected. Neither the hearing examiner nor the director considered the sports field complex to be a "youth camp." A court should not sustain an agency decision based on a post hoc rationalization offered by counsel. *Somer v. Woodhouse, supra.*

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2. The term "community" in "Community Recreational Facility" does not apply to a *regional* sports venue.

The county and SYSA argue that the term Community Recreational Facility should be construed to encompass not just neighborhood facilities but also regional sports complexes. But as detailed in our opening brief, words matter. The Participant Sports and Recreation (outdoor only) use includes the more specific term "sports." The more specific controls over the broader "recreational" term use in the Community Recreational Facility term. If a "most nearly resembles" analysis were employed, clearly the sports field complex more nearly resembles a Participant *Sports* Recreation use than a Community Recreation Facility. The use described with the more specific "sports" term should apply.

Conversely, the *Community* Recreation Facility category does not apply because the proposed use is not intended for the Glenrose "community." It is undisputed that it will serve at least the entire region and perhaps beyond. We acknowledge (as the respondents emphasize) that in some contexts the term "community" could embrace more than the immediate neighborhood. But the issue is to decipher the import of the term as used *in this context*. "We try to place the language in the context of the overall legislative scheme." *Subcontractors & Suppliers Collection Servs. v. McConnachie, supra*, 106 Wn. App. at 741.

In our opening brief, we established that the county's consistent, historic use of

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the Community Recreational Facility category has been only to authorize small neighborhood parks. Op. Br. at 25:1 - 5. The county does not dispute that. Neither does SYSA. It is a verity on appeal. *Spokane Cnty. v. E. Washington Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 576 (2013).

That construction of the term also is consistent with related county land use documents. The Comprehensive Plan seeks to protect rural areas (like Glenrose) from urban uses and impacts. The plan's Rural designation for the Glenrose neighborhood is used to protect the traditional rural way of life in rural areas, including typical rural recreational and open space uses. AR 56.

More specifically, the Comprehensive Plan generally limits community services to urban areas. Comprehensive Plan at UL -13. In rural areas, they are allowed only in Rural Activity Centers. Comprehensive Plan at RL-9 — RL-10.[2] Glenrose is not a designated Rural Activity Center. There is no allowance for "community services" in rural areas designated as "Urban Reserve" (the designation assigned to Glenrose). The zoning code is required to be consistent with the Comprehensive Plan. RCW 36.70A.040(4)(d). The zoning code should not be construed to allow a sports complex in the guise of a "community" recreational facility in a rural area (other than in a Rural Activity Center, which Glenrose is not).

[2] The Spokane County Comprehensive Plan is accessible at: https://www.spokanecounty.org/DocumentCenter/View/52538/Comp-Plan-2023-Printing?bidId=.

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SYSA responds that an urban sports complex is consistent with the Comprehensive Plan's Rural designation because this area is ultimately destined to be urbanized; converting sports fields to homes will be easy and consistent with those long-range plans. SYSA Br. at 7:10. But this ignores that until that transformation occurs (if ever), the Glenrose rural area is to be protected from urban uses and impacts. The Comprehensive Plan says conversion of this area from rural to urban is a possibility, not a certainty, and is based on 40-year population projections. Comprehensive Plan at RL-8. *See also* SCC 14.618.100 (UR zone reserved for urban development "in the long term"). Thus, in the interim, a small neighborhood park could be developed in this rural area consistent with the Comprehensive Plan. A small, unlit facility (daytime use) would not burden neighbors with urban levels of traffic, light and noise in the intervening years and decades. But developing a lighted, multi-field sports complex for regional jamborees and other high-volume events is not a reasonably compatible use in the intervening decades.

SYSA asserts that our analysis of the "community" issue is not supported by law or facts. SYSA Br. at 6:16. But SYSA does not support its assertion with any analysis or discussion of the law and facts we discussed. *Id*. Contrary to SYSA's unsupported claim, we discussed both the law and facts in our opening brief (at 23 - 25) and have done so again in this brief. SYSA's conclusory assertion, unsupported by argument, is not entitled to any consideration. *Cowiche Canyon Conservancy v. Bosley, supra*.

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Ironically, SYSA frequently makes factual claims with no reference to the record. *See, e.g.,* SYSA Br. at 6:1 – 6 & 8:7 (fields available to public); 7:15 – 16 (mitigation measures would result in minimal neighborhood impacts). Judicial review is "on the record." RCW 36.70A.120(1).[3] SYSA's factual assertions made without reference to the administrative record are the assertions which should be ignored. *Cowiche Canyon Conservancy v. Bosley, supra*.

3. The County and SYSA Ignore the Obvious Absurd Results that would be Spawned if their Interpretation were Correct.

In our opening brief, we demonstrated that if the examiner's reading of the code were correct, absurd and unlikely results would ensue. Op. Br. at 27 - 29. If the examiner were correct, urban sports complexes would be allowed in the most sensitive rural lands set aside for natural protection. *Id.* Multi-family developments would be allowed in rural single-family neighborhoods because they are not expressly precluded (rather they are unlisted and thus precluded by implication) and "most nearly resemble" a duplex. *Id*.

Understandably, the county has abandoned the examiner's logic. But SYSA has not. Yet in response to these obvious flaws in the examiner's logic, SYSA responds with . . . nothing. SYSA dares not address these obvious flaws in its argument. But ignoring them does not make them go away.

[3] Exceptions to this limitation exist, RCW 36.70C.120, but no party has sought to invoke them.

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4. This appeal is not a collateral attack on a 2008 decision.

SYSA repeatedly argues that this appeal is a tardy, collateral attack on a county decision made in 2008 or 2010. SYSA Br. at 2:14; 7:14; 9:14. This argument is frivolous. That argument was advanced by the county and SYSA when the county initially refused in 2019 to provide an administrative determination (akin to a declaratory judgment) on the issue now before the court. The Glenrose Association had to seek judicial intervention to compel the county to issue an administrative determination. The superior court did so. In explaining the reasons to compel the county to issue an administrative determination, the Superior Court rejected the same collateral attack argument now raised by SYSA. The Court rejected both the claim that file notes from 2008 constituted a "decision" and the claim that a decision in 2010 addressed the same issue as now presented. AR 158 (¶¶ 8 and 9). Notably, SYSA fails to inform this Court of that history. But ignoring it will not make it go away. SYSA's "collateral attack" argument should be rejected, again, as it was in the prior Superior Court decision.

V. CONCLUSION

A lighted, multi-field sports complex, serving the entire region, operating from morning through the evening, is not an appropriate use in the rural Glenrose neighborhood. The Court should reject the efforts of SYSA and the county to construe the code to allow this incompatible use. The examiner's decision, which the county has

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disavowed, should be vacated and reversed. The Court should determine that this urban-scale use is not allowed in this rural neighborhood.

Dated this 6th day of February, 2025.

Respectfully submitted,

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