No. 70542-3
King County Superior Court # 12-2-18714-2 SEA
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

THE CITY OF KIRKLAND, a Washington municipal corporation,

Appellant,

vs.

POTALA VILLAGE KIRKLAND, LLC, a Washington limited liability company, and LOBSANG DARGEY and TAMARA AGASSI DARGEY, a married couple,

Respondents.

RESPONDENTS' RESPONSE TO BRIEF OF *AMICI CURIAE*

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OTHER AUTHORITY

Roger D. Wynne, *Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, 24 Seattle U.L.Rev 851 (2001) 3, 4

I. INTRODUCTION

Washington State stands staunchly behind its vested rights scheme as a minority state, offering greater protection to land development applications than other states.[1] The vested rights doctrine, as it was established through common law, remains fully effective after decades of review. Contrary to what amici Futurewise and the Washington State Association of Municipal Attorneys ("Futurewise and Attorneys") assert, neither the Supreme Court, nor the three Courts of Appeals, have made any change to the long established common law-based doctrine of vested rights.

Without precedent, Futurewise and Attorneys ask this Court to drastically change the common law vested rights doctrine, throwing into chaos the long-established vesting process for untold numbers of pending applications state-wide. Not only property owners, but also cities and counties across Washington State rely heavily on common law vesting. Potala Village respectfully requests this Court to reject Futurewise and Attorneys' attempt to greater expand the confines of this appeal and the attempt to eviscerate Washington's long-standing vested rights doctrine.

Futurewise and Attorneys only reach their assertion that this Court should abandon the common law vested rights doctrine by a highly

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[1] *Abbey Road Group v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009); *Town of Woodway v. Snohomish County*, 322 P.3d 1219, 1223 (Wash. 2014).

selective review of case law. In order to argue that *Erickson* and *Abbey Road* support their position, Futurewise and Attorneys completely ignore express language in the various appellant and Supreme Court decisions supporting the consistent and uniform protection of the vested rights doctrine to shoreline substantial development permits. By totally failing to address this case law, Futurewise and Attorneys' arguments do not give this Court any basis to overturn decades of vested rights law.

II. ARGUMENT

A. Futurewise and Attorneys Fail to Raise Any New Arguments that Would Support a Change to the Vested Rights Doctrine.

i. Erickson *and* Abbey Road *expressly maintain application of the vested rights doctrine to shoreline applications.*

Futurewise and Attorneys make similar arguments as Kirkland regarding *Erickson* and *Abbey Road*. In doing so, Futurewise and Attorneys deliberately ignore both *Erickson's* and *Abbey Road's* express recitation of the development applications which are protected by the vested rights doctrine, namely as pertinent to the instant case, shoreline substantial development permits.[2] For brevity and due to time constraints in supplying this response, Potala Village respectfully hereby incorporates its Response Brief, particularly explanation showing that *Erickson* and *Abbey Road*

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[2] *Abbey Road*, 167 Wn.2d at 252, ftnt. 8; *Erickson v. McLerran*, 123 Wn.2d 864, 871, 872 P.2d 1090 (1994).

uphold the established common law vested rights doctrine and otherwise are substantively irrelevant to this appeal.

In both *Erickson* and *Abbey Road,* the Supreme Court had the ready opportunity to address and overturn the common law vested rights doctrine. Apart from those cases, the Supreme Court has had multiple other opportunities to reverse itself on the topic of common law vesting concerning shoreline development applications. Yet, repeatedly the Supreme Court expressly reiterates that vested rights protect shoreline development applications and states that it is not changing the doctrine.[3]

ii. Potala Village properly relies on law review recognition that the vested rights doctrine applies to shoreline substantial development applications.

Futurewise and Attorneys never explain why they assert Potala Village "misused" Mr. Wynne's articles.[4] Potala Village has cited Mr. Wynne's precise statements from his own published material:

> ...the rule in Washington seems to be that the vested rights doctrine applies to applications for building permits, preliminary subdivisions, conditional use permits, shoreline substantial development permits, grading permits, and septic permits, but not to applications for site-specific rezones, preliminary or binding site plans, or master use permits.[5]

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[3] *Norco Construction Inc. v. King County*, 97 Wn.2d, 680, 684-685, 649 P.2d 103 (1982); *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 207, 884 P.2d 910 (1994); *Erickson*, 123 Wn.2d at 871; *Abbey Road*, 167 Wn.2d at 253, ftnt. 8.

[4] *Brief of Amici Curiae*, page 17.

[5] CP 873, *Second Kolouskova Declaration*, Exhibit B (footnotes omitted; emphasis added), containing a complete copy of Roger D. Wynne, *Washington's Vested Rights Doctrine:*

Potala Village also corrected Kirkland's arguments which confused the Seattle University Law Review article on which the *Abbey Road* Court relied with a later personal opinion article Mr. Wynne authored for an informal newsletter.[6]

Contrary to Futurewise and Attorneys' desires, *Abbey Road* supports Potala Village by relying on the Wynne law review article to explain (1) that it is a developer's legitimate choice to approach the development permit process in a sequential fashion and (2) that reform of the vested rights doctrine should be made by the Washington State legislature.[7] Using this logic and Court's application of the vested rights doctrine, *Abbey Road* fully supports the vesting of Potala Village's vested rights doctrine: the Court expressly recognized the application of vested rights to a shoreline development application and that Potala Village may legitimately approach permitting in a sequential fashion.

Abbey Road explains that Futurewise and Attorneys already have an available course of action to express their displeasure with the vested rights doctrine: request legislative reform. Several years have passed since the *Abbey Road* Court affirmed that the vested rights doctrine protects shoreline

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How We Have Muddled a Simple Concept and How We Can Reclaim It, 24 Seattle U.L.Rev 851 (2001).

[6] *Respondents' Opening Brief*, pages 37-38.

[7] *Abbey Road*, 167 Wn.2d at 258, 261, *citing to* Wynne, *Washington's Vested Rights Doctrine*, 24 Seattle U.L.Rev at 928-929.

applications without any action by the Washington State legislature. *Woodway* does not in any way affect or alter either *Abbey Road* or the Court's repeated recognition of vested rights in the instant context. If the Washington State legislature was ever in the future to disagree with the Supreme Court, it can address the matter through statutory revision.

B. The Supreme Court's Most Recent Review of Vested Rights Maintains Strong Support of the Doctrine.

Despite Futurewise and Attorneys' arguments to the contrary, the Supreme Court made no substantive changes to the vested rights doctrine in deciding *Town of Woodway v. Snohomish County*, 322 P.3d 1219 (Wash. 2014).[8] To the contrary, the Supreme Court emphatically defended the vested rights doctrine:

> Washington's vested rights doctrine strongly protects the right to develop property. Our state employs a "date certain" standard for vesting.[9]

The very first statement from the Supreme Court in *Woodway* supports Potala Village's vested rights:

> In Washington, developers have a vested right to have their development proposals processed under land use plans and

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[8] Futurewise and Attorneys use their amicus brief to argue the merits of the Supreme Court's decision in, issued after the completion of briefing in this appeal, effectively circumventing the Court's rule regarding supplemental authorities. RAP 10.8.

[9] *Woodway*, 322 P.3d at 1222-23 (emphasis added).

development regulations in effect at the time a complete permit application is filed.[10]

In stating that Washington's vested rights doctrine strongly protects development rights, the Court cites *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958).[11] *Hull v. Hunt* was a common law vested rights case decided long before statutory confirmation of the vested rights doctrine for subdivisions and building permits.

The Supreme Court affirmed this Court's 2013 *Woodway* decision. In no way did the Supreme Court take issue with this Court's description of the vested rights doctrine and that it "also applies to … shoreline substantial development permit applications."[12] While the Supreme Court recognized that the doctrine has been statutorily codified, the Court did not in any way challenge the common law application of vested rights or indicate any intent to overturn the doctrine.

The *Woodway* case did not involve an examination of the common law vested rights doctrine as it protects shoreline substantial development applications. The *Woodway* Supreme Court decision simply did not address the vested rights doctrine as it applies to Potala Village's project. Futurewise and Attorneys' reliance on *Woodway* to argue otherwise simply

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[10] *Id.*, at 1221.
[11] *Id.*
[12] *Woodway*, 172 Wn. App. 643, 652, 291 P.3d 278 (2013), *aff'd*, 322 P.3d 1219 (Wash. 2014).

is not supported by a complete review of the Supreme Court and affirmed Court of Appeals decisions.

It is noteworthy that the Supreme Court did not make a distinction between which applications the developer in *Woodway*, BSRE, submitted vested versus which did not. As noted by this Court, BSRE submitted multiple applications for subdivision, shoreline substantial development, and building permit.[13] The Supreme Court did not distinguish between those applications; the Supreme Court did not state that only the subdivision and building permit applications vested. The Supreme Court simply did not go that far and nor draw any new distinctions or establish any new law which would restrict or overturn common law vested rights. As a result, post-*Woodway*, common law vested rights, including Potala Village's vested right in its shoreline substantial development application, remain a strong protection of Potala Village's right to develop its property.

Contrary to what Futurewise argues now, Futurewise recognized in an amicus brief to the Supreme Court that the vested rights doctrine exists in good standing in Washington: "Washington has one of the most liberal vested rights doctrines in the United States."[14] In that amicus brief, Futurewise readily asserted that the purpose of vesting is "allowing a

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[13] *Woodway*, 172 Wn. App. at 649.

[14] *Appendix*, Amicus Curiae Brief of Futurewise in Support of Petitioners, *Town of Woodway v. Snohomish County*, Supreme Court Case No. 88405-6.

property owner stability of law when a development project is considered."[15]

The *Woodway* dissent, taking a similar position to Futurewise as stated in their amicus brief, described vested rights as a "judicially created doctrine" which "operates to protect citizens and developers from the government changing the conditions and requirements that existed and were relied on when a completed building permit or development proposal was submitted."[16]

> In other words, under the doctrine, except under limited circumstances, the government could not change the rules of the game after it had already been played.[17]

Instead, the dissent and Futurewise were concerned in *Woodway* that there had been no change in the laws that affected the development in *Woodway* after the development applications were submitted.[18] The *Woodway* facts involved a late decision that the laws to which the development applications originally vested were not lawful to begin with.

In direct contrast to *Woodway*, Kirkland fundamentally changed the laws which affect Potala Village's development <u>after</u> Potala Village submitted its complete shoreline substantial development permit application. As required by law, Potala Village's shoreline application

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[15] *Id.*
[16] *Woodway*, 322 P.3d at 1227.
[17] *Id.*
[18] *Id.*

reflected the entire proposed Potala Village project across the complete site (as required by state and local application requirements).[19] Using Futurewise and the *Woodway* dissent's own statements of the doctrine, both should rationally concur that Potala Village's shoreline application should vest against Kirkland's attempt to "change the rules of the game" after the complete application was submitted.

C. *Erickson* and *Deer Creek* Involved Unique Local Site Plan Permit Processes Not Relevant to This Appeal.

Futurewise and Attorneys rely on precedent which evaluates permit processes that are purely the construct of local regulation and not at issue in this appeal. Their reliance on this precedent for the proposition that this Court should not expand the vested rights doctrine is inapposite: Potala Village has never asked for an expansion of the vested rights doctrine. Instead, Potala Village has only ever relied on the vested rights doctrine as long established and consistently reiterated over the years.

Erickson addressed a unique City of Seattle permitting scheme, the Master Use Permit (MUP) process; *Erickson* was limited to review of the vested rights doctrine as it applied to the MUP. In contrast, the instant case concerns Washington State's shoreline substantial development permit

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[19] CP 392-643. *Dargey Declaration*, Exhibit B (Shoreline approval with background application materials for the entire project, including but not limited to detailed site plan, architectural plans, parking plans, building elevations, exterior building design and materials, lot coverage information, soil, groundwater, drainage, water quality and stormwater plans).

requirement; this case does not involve the City of Seattle or any type of MUP. As a result, *Erickson* is only relevant for the Court's ready affirmation that shoreline substantial development applications are protected by the vested rights doctrine.[20] Otherwise, Futurewise and Attorneys' heavy reliance on *Erickson* is misplaced.

In *Erickson*, the Washington Supreme Court analyzed whether the vested rights doctrine applies to the filing of a MUP application in Seattle when filed alone, without an attendant building permit or other application already protected by the vested rights doctrine.[21] The Court accepted both a statutory vesting <u>and</u> doctrinal, common law vested rights with roots in constitutional principles of fundamental fairness.[22]

The *Erickson* Court recognized that shoreline substantial development applications are protected by the vested rights doctrine.[23] However, the Court <u>declined to expand</u> the vested rights doctrine beyond what it already applies to. Within the bounds of the established doctrine, the *Erickson* Court affirmed Seattle's vesting ordinance that addressed the totally unique and local MUP permitting process.[24]

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[20] *Erickson*, 123 Wn.2d at 867-68.
[21] *Id.* at 867.
[22] *Id.* at 870, 873.
[23] *Id.*, at 867-868.
[24] *Id.* at 877.

Potala Village does not in any way request an expansion of vested rights. Instead, Potala Village asks this Court to apply the vested rights doctrine to its shoreline substantial development permit as has been repeatedly affirmed in case law over decades. *Erickson* is fully consistent with Potala Village's position.

As much as Futurewise and Attorneys would like to equate the shoreline permit in this instant case to a MUP in *Erickson*, a state required shoreline permit has no semblance to that of Seattle's MUP. As the *Erickson* court explained, MUPs are site plan approval permits that are "umbrella" or "master" permits composed of a number of independent regulatory parts.[25] A MUP application is a fundamentally informal application, with no requirement for substantive project plans or supportive analysis.[26] This uniquely Seattle permit allows for a vague concept to evolve during the review process and recognizes that as plans develop, the specific requirements of a particular MUP may change.[27] Thus, for a MUP, the project plans "mature and grow increasingly concrete."[28]

In contrast, as Potala Village discussed in its brief, the statewide shoreline substantial development permit application is required to be a

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[25] *Id.* at 866.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 875.

substantive and comprehensive application that governs the entire project.[29] As is the case for Potala Village's actual situation, the application necessarily had to set forth the entire project with a detailed architectural plan set and supporting expert analysis (not just the portion of the property within the designated shoreline area).[30] Also unlike Seattle, Kirkland and Potala Village had no intent that the shoreline application permit is iterative or that the requirements would change as the project plans develop. Thus, Potala Village's shoreline substantial development permit includes Kirkland's approval of the entire proposed project of mixed use building and site design.

Futurewise and Attorneys argue that *Erickson* "disproves" the doctrine of vested rights because the Court held that Seattle's vesting rights did not extend to a MUP. Futurewise and Attorneys assert that "shoreline . . . permits are MUPs in Seattle."[31] They refer this Court to a number of Seattle's ordinances, all of which only provide that certain procedures for a shoreline permit are to follow the same sections in the Seattle code as those required for a MUP.[32] While Futurewise and Attorneys correctly point out that a shoreline permit is a Type II decision just like a MUP in Seattle (and only Seattle), they selectively ignore that many other types of permits,

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[29] *Respondents' Opening Brief*, pages 23-26.
[30] CP 392-643. *Dargey Declaration*, Exhibit B.
[31] *Brief of Amici Curiae*, page 13.
[32] *Id.*, Appendices.

including building, demolition, grading, other construction permits, short subdivisions, and major phased developments, to name a few, are also Type II decisions.[33]

The *Erickson* Court based its holding on construction of Seattle's purely local vesting ordinance. The Seattle Municipal Code provides the vesting date for a MUP as either the date the MUP is issued or the date a building permit application is submitted.[34] The *Erickson* developer had challenged that vesting ordinance, asking the Court to instead require that Seattle vest a MUP at the time of filing, rather than at issuance.[35] However, because the Court found the Seattle ordinance to be lawful, the *Erickson* developer was unsuccessful in persuading the Court that Seattle's vested rights rule should apply to a MUP at the time of application.[36]

The instant case simply does not involve any similar MUP process. As Kirkland admits in its opening brief, Kirkland "does not have an independent vesting provision related to shoreline permit applications in any of its code provisions."[37] Seattle and Kirkland do not have the same local vesting provisions. Therefore, the *Erickson* Court's holding that

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[33] *Id.*
[34] *Erickson*, 123 Wn.2d at 869.
[35] *Id.* at 873.
[36] *Id.* at 877.
[37] *Appellant City of Kirkland's Opening Brief*, page 24.

Seattle's vesting ordinance for its MUPs is lawful has no bearing on this instant case.

Futurewise and Attorneys' reliance on *Deer Creek* is substantively inapposite.[38] Therein, the developer only submitted an informal site plan before Spokane County changed its zoning to prohibit the proposed development. The developer did not attempt to submit a conditional use permit application until after Spokane County made those legislative changes.[39] Such belated vesting of the conditional use permit application could not save the developer's project because the County had already changed its zoning by the time that application was submitted. As a result, the *Deer Creek* Court did not evaluate the vested rights doctrine as it applies to a conditional use permit application.

The *Deer Creek* developer also could have vested its site plan under a local vesting ordinance unique to Spokane County but did not.[40] Again, Kirkland has no such unique vesting scheme as was presented in *Deer Creek.*

Futurewise and Attorneys fail to disclose that their reliance on *Deer Creek* conclusions pertain only to that developer's attempt to vest an

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[38] *Deer Creek Developers v. Spokane County*, 157 Wn. App. 1, 236 P.3d 906 (2010).
[39] *Id.*, at 7-8.
[40] *Id.*, at 14-15.

informal site plan.[41] As Potala Village already recognized, site plans are purely creatures of local creation without necessarily having any level of formality. The *Abbey Road*, *Erickson* and *Deer Creek* courts properly leave the determination of vesting for such solely local applications to the discretion of the local jurisdiction. Futurewise and Attorneys totally disregard this critical distinction. None of these cases change the common law vesting doctrine as it protects shoreline substantial development permits, permits which are the creature primarily of State law and comprehensive in nature.

D. Futurewise and Attorneys Misuse Kirkland's Appeal to Assert that this Court Should Overturn all Common Law Vested Rights and Limit Vesting Only to Building Permit Applications.

Futurewise and Attorneys ask this Court to stray far beyond the scope of issues presented. Potala Village respectfully requests this Court to decline Futurewise and Attorneys' improper invitation to overturn the entire common law vested rights doctrine.[42]

Futurewise and Attorneys' position directly contradicts precedent repeatedly made by the Supreme Court and all three Courts of Appeal. This Court is bound by Supreme Court precedent on point and its own most recent judicial statements of the doctrine, for example as set forth in this Court's *Woodway* decision. Contrary to Futurewise and Attorneys' urging,

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[41] *Id.*, at 11.
[42] *Brief of Amici Curiae*, pages 1, 18-19.

this Court would act consistently with Supreme Court and all three Courts of Appeals in upholding Potala Village's vested rights as those apply to the complete (and comprehensive) shoreline substantial development application.

Cities and counties across the state would be deeply affected by the fundamental change that Futurewise and the Attorneys suggest. Though Futurewise and Attorneys desire an abandonment of the vested rights doctrine, they notably failed to bring to their side those immediately concerned public agency groups such as the Association of Washington Cities or Washington State Association of Counties. Certainly, such an extensive change to the vested rights doctrine would result in significant changes to city and county permit processing regulations and have a broad reaching effect on projects currently under review across the state.

III. CONCLUSION

Futurewise and Attorneys do not provide any persuasive arguments to support their request that this Court overturn the established vested rights doctrine. Potala Village respectfully requests that this Court reject Futurewise and Attorneys attempt to convert the instant case into a far broader review of the vested rights doctrine than provided for in Kirkland's assignments of error. Instead, Potala Village respectfully requests this Court to issue a decision consistent with the established vested rights case

law, namely that Potala Village's shoreline substantial development application vested to the zoning and land use regulations in effect at the time that application was complete.

DATED this 2nd day of June, 2014.

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435-1 Response to Amicus Brief 6-2-14.doc

2013 WL 5676370 (Wash.) (Appellate Brief)
Supreme Court of Washington

TOWN OF WOODWAY and Save Richmond Beach., Petitioners,
v.
SNOHOMISH COUNTY and Bsre Point Wells, LP, Respondents.

No. 88405-6.
October 2, 2013.

Amicus Curiae Brief of Futurewise in Support of Petitioners

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*3 I. INTERESTS OF AMICUS CURIAE

Futurewise, a nonprofit corporation, is a statewide organization interested in the efficient management of growth in the State

of Washington and the effective implementation of the Washington Growth Management Act ("GMA"). With its principal mission to promote healthy communities and cities while protecting working farms and forests for this and future generations, Futurewise closely follows the implementation of the GMA and the adoption and amendment of local comprehensive plans and development regulations across the State.[1] Futurewise knows the *4 scope of this issue because Futurewise comments on similar comprehensive plan and development regulation changes across the State. Similarly, Futurewise also knows the scope of the issue because Futurewise has appealed other comprehensive plan adoptions and development regulation changes to the State's Growth Management Hearings Board and monitored development applications that were filed while those challenges were pending.

Futurewise knows the facts of this case because Futurewise commented against adoption of the ordinance in question here and has reviewed the briefing of the parties and portions of the record on appeal.

II. STATEMENT OF THE CASE

Futurewise relies on Petitioners Town of Woodway and Save Richmond Beach's statements of the case.

III. ARGUMENT

A. The Court of Appeals' decision creates an unfair two-track system by allowing early vesting only in GMA-planning counties.

This case asks the Court to resolve whether a development application can vest to a comprehensive plan or development *5 regulation change based on a flawed analysis of the potential environmental impacts under SEP A. If upheld, the Court of Appeals' ruling would allow a permit to vest after any environmental review, no matter how flawed, or on no review at all.

This creates an unfair two-track system in Washington. Only 29 out of Washington's 39 counties fully plan under the GMA. RCW 36.70A.040 (GMA planning requirements). The Court of Appeals' ruling is based exclusively on the GMA's vesting provision, RCW 36.70A.302. *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, esp. 662-63 (2013). Accordingly, it applies only to counties planning under the GMA.

For the remaining 10 counties, a SEPA appeal that results in a reversal will void the enactment and any permits granted. *E.g., Eastlake Cmty. Council v. Roanoke Assocs.*, 82 Wn.2d 475, 478 (1973). This cannot have been the Legislature's intent: the counties that fully plan under the GMA are those where development is most likely to have adverse impacts because population density is already high and growing; in other words, where careful planning is the most important. The non-planning counties - like highly-rural Garfield, with a 2013 population density of 3.17 people per square mile[2] - *6 simply have different planning needs than the GMA mandates for densely-populated counties like Snohomish. The Legislature cannot have intended a system where Garfield County's land use decisions receive careful environmental review even though Snohomish County's do not.

B. The Growth Management Act is heavily dependent on State Environmental Policy Act review.

SEPA's purposes include "stimulat[ing] the health and welfare of human beings." RCW 43.21C.010. As early as 1905, this Court noted that "There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community." *Seattle v. Hinckley*, 40 Wash. 468, 471 (1905). SEPA requires that a decision maker - here, the Snohomish County Council - know the environmental effects of a decision before it is made. As this Court noted, "SEPA *mandates* governmental bodies to consider the total environmental and ecological factors to the fullest in deciding major matters." *Eastlake Cmty. Council v. Roanoke Assocs.*, 82 Wn.2d 475, 490 (1973)(emphasis in original).

And the GMA is heavily dependent on SEPA to provide environmental information necessary to evaluate the implications of the major land use decisions the GMA requires. Two of the GMA's planning goals specifically reference environmental

protection. *7 RCW 36.70A.020(9-10.) The GMA is further replete with specific references to SEPA and the need for cities and counties to comply with SEPA's mandates. *E.g.*, RCW 36.70A.035(b)(l); 36.70A.368(4)(c).

In adopting the GMA's vesting provision, the legislature grappled with the question of how to treat permit applications affected by subsequent GMA enactments (i.e., comprehensive plans and development regulations). The Legislature adopted a position that provides significant protections to a property owner affected by a future development regulation change. Washington's vesting rule allows the property owner to "freeze" the regulations in place - no matter when they were changed or if the change is subject to appeal - at the time the application is complete. This protects a property owner from the vagaries of the amendment process: the property owner will not be prejudiced by changes but can instead know with certainty what he or she can build.

For a development regulation change that affects a range of properties - unlike the ordinance in question here - it is probable that only a small percentage of them will complete applications and vest before an unlawful change can be appealed to the Growth Board. The Legislature studied the impacts of vesting in 1998, and concluded that vesting did not adversely impact the goals of the ***8** GMA because very few projects actually vested, *see* Land Use Study Commission Final Report, December 1998,' at pp 83-87.

But for a development regulation change that benefits one project - like the change that allowed Point Wells to proceed as an Urban Center here, or an agricultural land de-designation or an urban growth area expansion for a specific parcel - allowing vesting to occur in the absence of proper environmental review means a county not only does not need to consider the environmental considerations "to the fullest", it need not have considered them at all. The property owner - who proposed the regulation and is the sole beneficiary of it - has every incentive and the ability to immediately file a complete application and vest, mooting any possibility that the judicial system can provide effective review.

As the Town of Woodway has ably argued, this is a sea change in vesting. *See* Response Brief of Town of Woodway at 5-16. Before this case, any ordinance enacted in violation of SEPA was void. *Id.* SEPA mandates that a major action like changing Point Wells to an urban center only take place after full environmental review. RCW 43.21C.031. The property owner here is hardly subject to the vagaries of the amendment process: it asked for an illegal ***9** development regulation change enacted without proper environmental review, and now claims that it is entitled to build to those illegal standards because it raced to get its permit application in before the Growth Management Hearings Board could rule. The purpose of vesting - allowing a property owner stability of law when a development project is considered - simply does not apply when the property owner requests the change. And allowing a county to dispense with environmental review means that SEP A - a cornerstone of the land use planning process mandated by the GMA - is a dead letter for a change that is proposed by and benefits a particular property owner.

C. Washington's already-liberal vesting rules should not be further expanded.

Reversing this expansion of vesting carries special importance given Washington's already-liberal vesting rules. Washington has one of the most liberal vested rights doctrines in the United States. See Karen L. Crocker, Vested Rights and Zoning: Avoiding All-or-Nothing Results, 43 B.C.L. Rev. 935 (2002), http://lawdigitalcommons.bc.edu/bclr/vol43/iss4/4, at p. 949-51 (Noting that Washington is one of only four states following the "early vesting rule"). In Washington, vesting occurs when a development application is complete, unlike in the majority of states, where ***10** vesting only occurs after a permit is granted, or even after substantial construction has occurred. *Id.* The GMA was enacted to combat "uncoordinated and unplanned growth." RCW 36.70A.010. But ever-expanding the reach of vesting means that uncoordinated and unplanned growth is exactly what will occur.

D. Reversing the Court of Appeals' determination is necessary to preserve the efficacy of SEP A across the state.

Early vesting to an invalid development regulation is not a problem unique to Point Wells. For example, in 2005 and 2009/2010, Spokane County amended its comprehensive plans and zoning and the amendments were found to violate state law. *Miotke et al v. Spokane County*, GMHB Case No. 05-1-0007 Order on Reconsideration (April 9, 2007), at 3 -4, 2007

WL 1459449; *CAUSE v. Spokane County*, GMHB Case No. 10-1-0003, Order Lifting Invalidity (March 8, 2011), at 3 - 4 of 5, 2011 WL 3528232. But during the time the appeal was being considered, developments vested rendering the Growth Management Hearings Board decisions ineffective.

Spokane County recently approved an additional urban growth area expansion of 4,507 acres when the county's own land capacity study showed no expansion was needed. And in fact the ***11** existing urban growth areas have excess capacity.[4] Hundreds of property owners are trying to vest before the Growth Management Hearings Board can decide the appeal. Governor Inslee, when authorizing the Washington State Department of Commerce and Transportation to appeal these urban growth area expansions, pointed out that the expansions would adversely affect the future viability of Fairchild Air Force Base and the county and state economies.[5] Governor Inslee asked the county to stop accepting development applications to vest the urban growth area expansions, but at least at present his request has fallen on deaf ears.

Likewise, Pierce County Ordinance No. 201 l-60s2 de-designated 125.39 acres of "Agricultural Resource Lands," the county's agricultural lands of long-term commercial significance. Ordinance No. 201 l-60s2 also de-designated 56.41 acres of "Rural Farm." And King County considered - but rejected - a proposal to ***12** add nearly 500 acres of land to its urban growth areas.[6]

These major comprehensive plan changes in a brief period of time are not anomalous. Instead, virtually every year brings proposals across the State to alter comprehensive plans and development regulations for specific development proposals. Each of these changes requires some level of SEPA review. WAC 197-11-310. And any SEPA review can be challenged for compliance with SEPA's procedural and substantive requirements. RCW 43.21C.075. There are accordingly tens or hundreds of potential similar situations to Point Wells presented statewide every year, as the Spokane County vesting frenzy currently occurring demonstrates.

E. Requiring careful environmental review is especially important where an unincorporated area will later be incorporated into a City.

Snohomish County has made a mess for either the City of Woodinville or Shoreline. The Legislature has clearly indicated that ***13** urban areas should be incorporated. RCW 36.70A.110(4). In this case - and in a myriad of other similar cases across the state - a county controlled a swath of urban land. But a city would eventually incorporate that land; in this case, either Woodway or Shoreline will eventually annex Point Wells. RCW 35.13.010 ("Any portion of a county not incorporated as part of a city or town but lying contiguous thereto may become a part of the city or town by annexation.") Once annexed, all the environmental problems Snohomish ZCounty failed to address - traffic, fire, police, sewer, water, and the rest - will be the annexing city's problem.

And as the Growth Board found, with Point Wells surrounded on all sides by either the Puget Sound or Woodway or Shoreline, the cities need not wait to feel the ill effects of Snohomish County's incautious planning. *Town of Woodway et al. v. Snohomish County*, Nos. 09-3-0013c/10-3-0011c (Corrected Final Decision & Order, May 17, 2011), esp, at 21. Traffic flowing through the one existing minor road will adversely affect Shoreline. Urban services that should be going to Woodway will be diverted to deal with the inevitable needs of over 3,000 densely-packed new housing units at Point Wells. In short, the Legislature's decision to encourage annexation must be weighed when evaluating a county's irresponsible decision to allow dense urban development in an area ***14** like Point Wells that is simply unsuited to support it.

F. The Legislature did not intend that the GMA eviscerate SEPA.

The Legislature did not act blindly when considering the interplay between SEPA and the GMA. This Court's jurisprudence holding that a failure to comply with SEPA voids an ordinance was firmly established long before the GMA. *See* Response Brief of Town of Woodway at 5-16. Further, the Legislature commissioned a land use study commission to evaluate the impacts of vesting. The Land Use Study Commission concluded that vesting raised no significant issues, *see* Land Use Study Commission Final Report, December 1998,[7] at pp 83-87. The Land Use Study Commission's report focused solely on the GMA, and did not consider the possibility that a project might vest even if SEPA review was not complete. Had the Land

Use Study Commission known of this sea change to vesting, it might have recommended that the Legislature reconsider the broad scope of vesting adopted in RCW 36.70A.302. The Legislature's knowledge that noncompliance with SEPA would void a comprehensive plan or development regulation - and determination not to expressly address this issue despite repeated ***15** references to the need to comply with SEPA made throughout the GMA - is compelling evidence that the Legislature intended to leave this area of jurisprudence unchanged.

IV. CONCLUSION

SEPA was passed in 1971 to protect Washington's environment - not only the wildlife, but the very real human impacts of traffic, noise, air and water quality, and all the rest - that come with major land use changes. SEPA should not be dead: it is a study cornerstone that prevents jurisdictions like Snohomish County from blindly making decisions without regard to the environmental considerations. Snohomish County and developer BSRE ask this Court to kill SEPA for development regulation changes like Point Wells that are proposed by the property owner. According to those parties, it doesn't matter whether Snohomish County carefully considered SEPA or threw the statute into the trash: if the ordinance BSRE[7] requested passed, BSRE is vested to it and this Court is powerless. Futurewise asks this Court to dig SEPA's vital environmental and human protections out of their grave and reverse the Court of Appeals' determination that BSRE vested to the illegal ordinance BSRE proposed.

***16** Dated this 24th day of September, 2013.
Respectfully submitted,

Newman Du Wors LLP

<<signature>>

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Footnotes

1 Futurewise has appeared as *amicus curiae* in at least 12 appellate cases addressing issues under the Growth Management Act. *Skagit Surveyors and Engineers, LLC et al. v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998), *King County v. Central Puget Sound Growth Management Hearings Bd.*, 91 Wn. App. 1, 951 P.2d 1151 (1998), affirmed in part, reversed in part, 138 Wn.2d 161, 979 P.2d 374 (1999), *Clean Water Alliance v. Whatcom County*, No. 64798-4 (Division I), *HEAL et al. v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 979 P.2d 864 (1999), *Association of Rural Residents v. Lindsey*, 141 Wn.2d 185, 4 P.3d 115 (2000) *(amicus curiae* on motion for reconsideration), *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 26 P.3d 241 (2001), *Thurston County v. Cooper Point Association*, 108 Wn. App. 429, 31 P.3d 28 (2001), *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 57 P.3d 1156 (2002),*Quadrant Corp. v. Central Puget Sound Growth Management Hearings Bd.*, 154 Wn.2d 224, 110 P.3d 1132 (2005); *Lewis County v. Western Washington Growth Management Hearings Bd.*, 157 Wn.2d 488, 139 P.3d 1096 (2006), *Kelly v. County of Chelan*, 167 Wn.2d 867, 224 P.3d 769 (2010), and *Lemire v. Pollution Control Hearings Board, et al*, Cause No. 87703-3 Slip No. Opinion (Aug. 15, 2013).

2 http://www.ofm.wa.gov/pop/popden/map_county.asp.

3 Available at http://www.commerce.wa.gov/Documents/GMS-Land-Use-Study-Commission-Report-1998.pdf

4 Planning Technical Advisory Committee. *Regional Land Quantity Analysis for Spokane County Summary Report* p.1 (October, 2010 Amended May, 2011) and accessed on Sept. 23, 2013 at: http:// www.spokanecounty.org/data/buildingandplanning/lrp/documents/PTCLQA00report2010.pdf.

5 State of Washington Department of Commerce. "State seeking review of Spokane Urban Growth Areas expansion" (Sept. 18, 2013) accessed on Sept. 23, 2013 at: http://www.commerce.wa.gov/media/Pages/PressReleaseView.aspx? pressreleaseid=137

6 http://www.google.com

7 Available at http://www.commerce.wa.gov/Documents/GMS-Land-Use-Study-Commission-Report-1998.pdf

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