Supreme Court Case No. 1022662
Court of Appeals Case No. 38907-3-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FRANKLIN COUNTY,

Appellant,

vs.

FUTUREWISE,

Respondent,

And

CITY OF PASCO, and PORT OF PASCO,

Appellants.

CITY OF PASCO'S ANSWER TO PETITION FOR REVIEW

Kenneth W. Harper, WSBA #25578
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, WA 98902
(509) 575-0313, Email: kharper@mjbe.com
Attorneys for Appellant City of Pasco

TABLE OF CONTENTS

I. INTRODUCTION 1

II. IDENTITY OF RESPONDENT 2

III. COUNTERSTATEMENT OF THE CASE 2

IV. REVIEW SHOULD BE DENIED 5

A. Interpretation of the 2008 Franklin County comprehensive plan is not an issue of substantial public interest 6

B. The Court of Appeals applied ordinary principles of statutory construction to interpreting Franklin County's 2008 comprehensive plan 10

V. CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Hama Hama Co. v. Shoreline Hearings Bd.,
85 Wn.2d 441, 536 P.2d 157 (1975) 13

King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,
91 Wn. App. 1, 951 P.2d 1151 (1998) 13

King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,
138 Wn.2d 161 (1999) 13

Lakeside Indus. v. Thurston Cnty.,
119 Wn. App. 886, 83 P.3d 433 (2004) 10

Lakeside Indus. V. Thurston Cnty.,
152 Wn.2d 1015, 101 P.3d 107 (2004) 10

Phoenix Dev., Inc. v. City of Woodinville,
171 Wn.2d 820, 256 P.3d 1150 (2011) 13

Quadrant Corp. v. Growth Mgmt. Hearings Bd.,
154 Wn.2d 224, 110 P.3d 1132 (2005) 14

Statutes

RCW 36.70A.170(1)(a) 3
RCW 36.70A.320 14
RCW 36.70A.3201 14

Rules

RAP 13.4(b)(1) and (2) 15
RAP 13.4(b)(1)-(3)..... 1
RAP 13.4(b)(4)..... 1, 2, 8, 10, 11, 16

I. INTRODUCTION

Futurewise does not claim that the decision of the Court of Appeals in this case is in conflict with any decision of this Court or any other decision of the Court of Appeals. Futurewise also does not argue that the decision involves a significant question of constitutional law. RAP 13.4(b)(1)-(3).

Rather, Futurewise argues that review should be granted under the "substantial public interest" prong. RAP 13.4(b)(4). But Futurewise fails to show that the decision has significance to anyone beyond the present parties. The court below grappled with a dispute over the meaning of an obscure section of a now-superseded comprehensive plan. The court weighed a variety of arguments and sources of meaning in order to construe the plan. The resulting decision will be of no precedential value because it is unpublished, and it is highly implausible that any other comprehensive plan will present a similar interpretation dilemma in the future.

The Court of Appeals overruled the Eastern Washington Growth Management Hearings Board (the "Board" or "GMHB") on a specific interpretation of Franklin County's 2008 comprehensive plan. In its effort to obtain review, Futurewise asserts that the plain language of the comprehensive plan required a different outcome. This is only re-argument of the losing points it made below. Mere repetition of Futurewise's arguments—or repetition with slight variations of earlier themes—is not a persuasive way to show that the criteria of RAP 13.4(b)(4) have been met.

The petition should be denied.

II. IDENTITY OF RESPONDENT

The respondent is the City of Pasco. The City, along with Franklin County and the Port of Pasco, was a respondent before the GMHB and was an appellant in the proceedings before the Court of Appeals.

III. COUNTERSTATEMENT OF THE CASE

The City incorporates by reference the statement of facts in the decision. Op. at 2-17.

The case below concerned a discrete issue: "[o]ur principal task on this appeal is to determine whether Franklin County designated some specific acreage of farmland as ALLTCS[1] in the County's 2008 comprehensive plan." *Id*. at 3-4.

As was noted before both the Board and the Court of Appeals, the facts of this case are relatively undisputed. A map legend in the County's 2008 comprehensive plan used a term—"Franklin Crops"—that was not found anywhere else in the text of the comprehensive plan. *Id*. at 9. This term was deleted in the updated 2018 comprehensive plan because the 2008 plan provided no definition for the term. *Id*. at 19. The Court of Appeals observed that "[i]n these proceedings, no party has offered a definition or explanation for the term." *Id*. at 9.

[1] An acronym for "Agricultural Lands of Long-Term Commercial Significance." *See* RCW 36.70A.170(1)(a).

The lynchpin of Futurewise's argument to the Court of Appeals depended on showing that Franklin Crops was intended by the 2008 plan to be a form of ALLTCS. The problem for Futurewise was that "the prose and the map use vague and undefined terms" for these concepts. *Id*. at 4. The court found that "the origin and meaning of *Franklin Crops* is a mystery wrapped in an enigma. The phrase *Franklin Crops* is found nowhere in the 2008 comprehensive plan other than Map 8. The prose inside the body of the plan nowhere identifies Franklin Crops as ALLTCS." *Id*. at 33.

For its argument to have any persuasive force, Futurewise had to demonstrate that its initial premise regarding the meaning of Franklin Crops was correct. The Court of Appeals stated that there could be no violation of the Growth Management Act or the State Environmental Policy Act due to the County's actions unless Franklin Crops were shown to be ALLTCS. *Id*. at 21.

Based upon the limited factual dispute and the particular nature of the case, the only issue before the court was whether Franklin Crops were designated as ALLTCS under the County's 2008 comprehensive plan. *Id*. at 1. The court found that the County's 2008 comprehensive plan was not a "model of clarity." *Id*. at 37 ("Map 8's reference to *Franklin Crops* lacks clarity."). Therefore, so long as the County presented a reasonable interpretation of its 2008 comprehensive plan, it was entitled to some degree of deference. *Id*. at 37.

The court found that although the County's interpretation was not the only possible interpretation, it was nevertheless a reasonable interpretation of the 2008 comprehensive plan. *Id*. at 37. On this narrowly-defined issue, the court held that because Franklin Crops was a map label that was "an anomaly and not created as part of deliberate planning" the County did not violate GMA or SEPA by removing the term from the County's 2018 comprehensive plan. *Id*. at 37-39.

IV. REVIEW SHOULD BE DENIED

A. Interpretation of the 2008 Franklin County comprehensive plan is not an issue of substantial public interest.

In the case below, there was no dispute over any provision of the GMA. Op. at 26. Instead, the only question before the Court of Appeals was "whether a map labeled as 'Agricultural Lands' and identified as Map 8 in Franklin County's 2008 comprehensive plan designated land labeled as 'Franklin Crops' for protection as agricultural land of long-term commercial significance (ALLTCS)." *Id*. at 1. The Court of Appeals answered this question in the negative, finding that the County did not designate Franklin Crops as ALLTCS in 2008 and therefore the removal of the reference to Franklin Crops in the County's 2018 comprehensive plan did not violate the GMA or SEPA. *Id*. at 38.

Futurewise's claim of substantial public interest can only gain traction by first showing that an exceedingly narrow question of interpreting an ambiguous comprehensive plan was

in error. And on that question—how to interpret a particular map and related text of a particular county's comprehensive plan—Futurewise has no persuasive claim of substantial public interest.

Futurewise tries to bolster this weakness in its case by exaggerating the reasoning of the Court of Appeals to portray the court as making a decision with far-reaching effect. For instance, Futurewise argues that the court was wrongly influenced by a County "staff interpretation" process. Pet. at 14-16. But in its decision, the Court of Appeals gave the statement of Franklin County's planning director only passing treatment, and appropriately pointed out that the planning director's conclusion was unsupported by any analysis and "came a decade after the adoption of the 2008 comprehensive plan." Op. at 30. The court was hardly beguiled by the planning director's position, and the decision below devotes little more than a paragraph, pro and con, to that entire matter. *Id*.

In its petition, Futurewise ignores the Court of Appeals' decision that Franklin Crops were simply not designated as ALLTCS at all. But on close examination, if Futurewise is wrong on its initial premise regarding Franklin Crops—a subject that, to reiterate, is not a matter of great public interest—then the rest of its claims under RAP 13.4(b)(4) also fail.

Put differently, there could only be a legitimate concern of the specter of an "after-the-fact interpretation…overrid[ing] the plain language of the comprehensive plan" if one grants that the language of the comprehensive plan was overridden. Pet. at 30. Likewise, the Futurewise claim of an issue of substantial public interest arising from opportunistic de-designations of ALLTCS by staff memoranda rather than the formal de-designation process is meritless if there was no de-designation because Franklin Crops were not ALLTCS in the first place. *Id*. at 14. Here, the Court of Appeals treated the planning director's views as nothing more than one of many arguments

that the parties presented and upon which the court commented. Op. at 30.

Futurewise exaggerates—and nearly misrepresents the record below—in claiming that Franklin Crops "were mapped as ALLTCS." Pet. at 15. More accurately, the Court of Appeals recognized that "[m]ap 8's legend listed *Franklin Crops* as one of the categories of land outlined on the map," but whether or not this was the same as identifying that Franklin Crops were ALLTCS was the entire issue in dispute. If matters were as simplistic as Futurewise portrays in its petition for review, one wonders why the Court of Appeals would need a 39-page opinion to decide the matter.

Rather than show this Court a strong public interest justification for review of such a narrow issue, Futurewise restates its merits arguments that Franklin Crops were designated as ALLTCS. Futurewise's petition one-sidedly plows through exactly the points of analysis discussed in the decision below. But this only shows that arguments pro and

con could be mustered on both sides of the issue. The Court of Appeals' conclusion, after considering all sources of meaning, was that "[m]any of the provisions of the plan support exclusion of *Franklin Crops* from ALLTCS protection" and that the County's interpretation was reasonable. Op. at 37. This does not rise to the level of an issue of substantial public interest under RAP 13.4(b)(4).

B. The Court of Appeals applied ordinary principles of statutory construction to interpreting Franklin County's 2008 comprehensive plan.

Futurewise claims that the underlying decision requires review because the Court of Appeals misapplied the appropriate standards for interpreting a comprehensive plan. Pet. at 16-20. This argument stems from the premise that the court wrongly construed the comprehensive plan like a contract rather than a legislative enactment, relying on *Lakeside Indus. v. Thurston Cnty.*, 119 Wn. App. 886, 83 P.3d 433 (2004), as amended (Feb. 24, 2004), *review denied* 152 Wn.2d 1015, 101 P.3d 107 (2004).

But as Futurewise admits in the very next section of its brief, the Court of Appeals did in fact apply principles of statutory construction to the 2008 comprehensive plan. Pet. at 20-21. After raising this claim, Futurewise discredits its own argument with the acknowledgement that "later the Opinion rejected the application of contract principles…." *Id*. at 22. Put succinctly, the Court of Appeals did exactly what Futurewise asks this Court to do—determine whether Franklin Crops were designated as ALLTCS under the County's 2008 comprehensive plan as a matter of discerning and carrying out the intent and purpose of the local legislative body. Op. at 27. This is re-litigation of the merits, not an argument under RAP 13.4(b)(4).

Futurewise's attempt to pit rules of contract interpretation against rules of statutory interpretation is only a red herring. The Court of Appeals did not stake the outcome of this case on either view, nor is it clear how any difference in the law of construing ambiguous texts of either type would matter.

Futurewise's argument on the principles of statutory construction proves to be nothing more than a springboard for it to re-litigate its arguments below.

Futurewise believes that the plain language of the 2008 comprehensive plan designated Franklin Crops as ALLTCS. Pet. at 23-28. Fair enough. But in its petition for review Futurewise spends almost all of its pages simply reasserting its "plain language" argument in different guises. The Court of Appeals gave full consideration to each of these theories. The bottom line after evaluating the nuances on both sides of the issue was that Futurewise did not prevail. But this did not depend on a matter of contract law interpretation as opposed to statutory or comprehensive plan interpretation.

The Court of Appeals disagreed with Futurewise because, after thoroughly considering the text and maps of the plan, the court found that they lacked clarity. Op. at 28. The Court of Appeals' consideration and rejection of Futurewise's

interpretation of the plan does not implicate a matter of substantial public interest.

As the Court of Appeals noted, the County's 2008 comprehensive plan is susceptible to multiple reasonable interpretations. So long as the County's interpretation of its own comprehensive plan is reasonable, it was entitled to some degree of deference. *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 830, 256 P.3d 1150 (2011); *Hama Hama Co. v. Shoreline Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975); *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 91 Wn. App. 1, 12, 951 P.2d 1151 (1998), *rev'd in part on other grounds*, *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161 (1999).

Futurewise seeks to cast doubt on the court's application of the standard of review by noting that the decision below cited only the court of appeals' decision in *King County*. Pet. at 29. But in the very next paragraph, the court stated that deference was due only because the County's interpretation was

reasonable. Op. at 28. This view is perfectly consistent with this Court's precedent and is largely compelled by the GMA itself. *See* RCW 36.70A.320 and .3201 (mandating more deferential standard of review to county or city planning actions). All of this was discussed in detail in *Quadrant Corp. v. Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005) ("In the face of this clear legislative directive, we now hold that deference to county planning actions, that are consistent with the requirements of the GMA, supersedes deference granted to the APA and courts to administrative bodies in general."). Here, the court correctly cited *Quadrant* for the proposition that deference to county GMA actions overrides deference that otherwise would be granted to administrative agencies. Op. at 24. There was no error.

Notably, Futurewise apparently does not wish to engage with this precedent anyway, since it does not seek review on the basis of a conflict with other appellate decisions under RAP

13.4(b)(1) and (2) (decision below conflicts with decision of Supreme Court or published decision of the Court of Appeals).

The Court of Appeals conducted a thorough analysis of all arguments below before determining that the County's interpretation that Franklin Crops were not ALLTCS was reasonable. It necessarily followed that the County did not improperly de-designate ALLTCS in its 2018 comprehensive plan. Op. at 29-39.

Futurewise's argument is rendered hollow because Futurewise also sought to use extrinsic information from 2019 to support its own interpretation of the County's 2008 comprehensive plan. CP 872-923; Op. at 34; Pet. at 5-6. The City does not claim that this was improper. The City mentions this to show the Court that the Court of Appeals considered all the points raised by Futurewise in its search for the appropriate meaning of Franklin Crops.

V. CONCLUSION

Futurewise disagrees with the outcome before the Court of Appeals and seeks to re-litigate the merits of a case regarding a specific and narrow issue on which it was fully heard. This does not rise to the level of an issue of substantial public interest under RAP 13.4(b)(4).

Because Futurewise's petition meets none of this Court's criteria for granting review, the City respectfully requests that it be denied.

I, KENNETH W. HARPER, do hereby certify that the foregoing filing contains 2,434 words, in compliance with RAP 18.17.

DATED this 12th day of September, 2023.

MENKE JACKSON BEYER, LLP

/s/Kenneth W. Harper
WSBA #25578
807 North 39th Avenue
Yakima, WA 98902
(509) 575-0313
(509) 575-0351 (fax)
Attorneys for Appellant
City of Pasco

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that the foregoing was delivered to the following persons in the manner indicated below:

Tim Trohimovich Futurewise 816 2nd Ave. Ste. 200 Seattle, WA 98104-1535	☐ U.S. Mail ☐ Overnight/Express ☐ Hand Delivered ☒ Email: tim@futurewise.org
Samuel W. Plauche Jesse DeNike Plauche & Carr LLP 1218 Third Ave., Ste. 2000 Seattle, WA 98101	☐ U.S. Mail ☐ Overnight/Express ☐ Hand Delivered ☒ Email: billy@plauchecarr.com jesse@plauchecarr.com
Taudd A. Hume Deanna M. Willman Witherspoon Brajcich McPhee, PLLC 601 W. Main Ave., Ste. 714 Spokane, WA 99201-0677	☐ U.S. Mail ☐ Overnight/Express ☐ Hand Delivered ☒ Email: thume@workwith.com dwillman@workwith.com
Washington State Court of Appeals Division III Clerk/Administrator 500 N. Cedar Street Spokane, WA 99201	☐ U.S. Mail ☐ Overnight/Express ☐ Hand Delivered ☒ E-Filed

DATED this 12th day of September, 2023.

/s/
Cindy Maley
Legal Assistant

MENKE JACKSON BEYER, LLP

September 13, 2023 - 8:40 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,266-2
Appellate Court Case Title:	Franklin County, et al. v. Futurewise
Superior Court Case Number:	22-2-50122-0

The following documents have been uploaded:

- 1022662_Answer_Reply_20230913083704SC821426_2366.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was City of Pasco's Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- Lisa.Petersen@atg.wa.gov
- aimee@plauchecarr.com
- billy@plauchecarr.com
- dwillman@workwith.com
- jesse@plauchecarr.com
- lalseaef@atg.wa.gov
- rclayton@workwith.com
- thume@workwith.com
- tim@futurewise.org
- treistroffer@workwith.com

Comments:

Sender Name: Cindy Maley - Email: cindy@mjbe.com
Filing on Behalf of: Kenneth W. Harper - Email: kharper@mjbe.com (Alternate Email: cindy@mjbe.com)

Address:
807 N 39th Ave
Yakima, WA, 98902
Phone: (509) 575-0313

Note: The Filing Id is 20230913083704SC821426