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,

v.

FUTUREWISE,

Respondent,

and

CITY OF PASCO and PORT OF PASCO,

Appellants.

FRANKLIN COUNTY'S RESPONSE TO PETITION FOR REVIEW

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1. INTRODUCTION

The Court of Appeals correctly overturned a decision by the Eastern Washington Growth Management Hearing Board (the "GMHB")(Case No. 21-1-0005, Final Decision and Order (January 28, 2022) finding that Franklin County acted within its authority and did not defacto de-designate certain Agricultural Lands of Long-Term Commercial Significance ("ALLTCS") through the approval and adoption of its 2018 Comprehensive Plan update. *Franklin County, City of Pasco and Port of Pasco v. Futurewise*, Case No. 38907-3-III, July 13, 2023. (the "Opinion").

In overturning the GMHB, the Court of Appeals relied on the fact that (i) the meaning of the 2008 Comprehensive Plan map designation of "Franklin Crops" was unclear, and therefore (ii) the interpretations of Franklin County as to the meaning of those words is reasonable and should be given deference. *Id.* at 37-38. In so doing, the Court of Appeals held that the "Franklin Crops" designation on Map 8 did not mean that land was

designated as ALLTCS, and held that the County did not commit any error when updating its comprehensive plan. *Id.*

Futurewise's Petition for Review recycles the same in-the-weeds arguments that the Court of Appeals heard and found unpersuasive. None of the issues identified in Futurewise's Petition for Review are supported by the record, none justify further consideration under RAP 13.4(b)(4), and this Court should decline review.

2. IDENTITY OF RESPONDENT

The Respondent is Franklin County, a political subdivision of the State of Washington, whose 2018 Comprehensive Plan amendment was appealed by Petitioner Futurewise to the Eastern Washington Growth Management Hearing Board. Respondent was an appellant of the decision of the Eastern Washington Growth Management Hearing Board to Division III of the Washington State Court of Appeals and now submits this Response to Petition for Review.

3. COUNTERSTATEMENT OF THE ISSUES

Petitioner presents its Petition for Review pursuant to RAP 13.4(b)(4), which permits review if the case involves "an issue of substantial public interest." This case involves the interpretation of the meaning of two words found on Map 8 in Franklin County's 2008 Comprehensive Plan, the resolution of which was determined by the Court of Appeals under well settled principals of law and through multiple pages of analysis as to the very specific facts of this case. Does a non-published decision affecting a narrow issue decided under well-settled principles of law warrant review by the Washington Supreme Court under the "substantial public interest" test?

4. COUNTERSTATEMENT OF THE CASE

Pursuant to Washington's Growth Management Act (the "GMA" - Chapter 36.70A), Franklin County (the "County") has an obligation to periodically update its Comprehensive Plan consistent with the multiple, non-hierarchical goals of the

GMA. RCW 36.70A.020. Specifically, the GMA requires the County to designate areas within the County that are intended to accommodate future urban growth ("Urban Growth Area(s)" or "UGA"). RCW 36.70A.110. These areas are generally situated adjacent to cities within the County where municipal services (traffic infrastructure, sewer, and water) already exist.

The GMA also requires the County to preserve "[a]gricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products (i.e. ALLTCS). RCW 36.70A.170(1)(a). ALLTCS have a certain designation and corresponding de-designation process under the GMA and state law. RCW 36.70A.170; RCW 36.70A.050; *Lewis County." Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. 204, 234, 254 P.3d 862 (2011), vacated in part on other grounds, 177 Wash.2d 136, 298 P.3d 704 (2013).

Franklin County adopted its 2018 Comprehensive Plan update via Ordinance No. 07-2021 (the "2018 Comprehensive Plan"), which, among other changes, deleted the term "Franklin Crops" (on Map 17 of the 2018 Comprehensive Plan) because the 2008 Comprehensive Plan lacked any definition for the term. *Opinion,* at Page 19.

On August 5, 2021, Petitioner Futurewise appealed Franklin County's 2018 Comprehensive Plan to the GMHB asserting that it violated the GMA because the County did not use the proper criteria to de-designate, as ALLTCS, the areas of land labeled as "Franklin Crops" on Map 8 in the 2008 Comprehensive Plan. *Id.*, at Page 18. On January 28, 2022, the GMHB ruled in favor of Futurewise finding that the inclusion of "Franklin Crops" on the County's Map 8 coupled with the soil classification descriptions necessarily meant that Franklin County designated the "Franklin Crops" as ALLTCS. *Id.; and see* Growth Management Hearings Board Eastern Washington

Region Case No. 21-1-0005, Final Decision and Order (January 28, 2022) (the "FDO"), Pages 9:23-10:2.

Franklin County, the City of Pasco and the Port of Pasco appealed the FDO to the Court of Appeals (Court of Appeals Case No. 38907-3-III) where Franklin County maintained that that the GMHB committed legal error and that the evidence did not support the GMHB's findings that the 2008 Comprehensive Plan designated Franklin Crops as ALLTCS. *Opinion,* at page 21. On July 23, 2023 the Court of Appeals issued its Opinion finding in pertinent part that:

> We decline to apply deference to the GMHB with regard to its ruling as to the intent behind language in the 2008 comprehensive plan for several reasons. First, the Franklin County Board of County Commissioners adopted the 2008 comprehensive plan as part of the legislative process. Second, the parties do not dispute any underlying facts, only the meaning of language scattered throughout a document. Assuming one deems the interpretation of the 2008 plan to constitute a factual determination, we would still conclude that the GMHB committed legal error by failing to defer to Franklin County's interpretation of Map 8.

> After anatomizing and rebuilding Franklin County's 2008 comprehensive plan, we conclude that land designated as ALLTCS in the plan did not encompass the land labeled as Franklin Crops on Map 8. Map 8's reference to Franklin Crops lacks clarity. Many of the provisions of the plan support exclusion of Franklin Crops from ALLTCS protection. The County's interpretation of the plan, although not the only reasonable interpretation, is reasonable. No evidence suggests the County employs fraud or deceit when now advocating a construction of the 2008 plan as excluding Franklin Crops from ALLTCS-designation. RCW 36.70A.320(3) declares that the GMHB should find compliance of the County's comprehensive plan unless the County acts "clearly erroneous in view of the entire record before the board." The Conty's actions were not clearly erroneous. Deference to the County's planning actions supersedes our deference to the GMHB.
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> . . .
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> Franklin County's 2008 comprehensive plan did not designate *Franklin Crops* as ALLTCS. Therefore, adding acreage to the city of Pasco's UGA in the 2018 plan, the County did not need to follow the steps required by the GMA and SEPA to include land previously labeled by Map 8 as Franklin Crops inside the UGA.

Opinion, at Pages 37-38 (alteration in the original).

The principles of law utilized by the Court of Appeals in its Opinion – statutory construction and deference to the local

jurisdiction charged with implementing its own code - are not novel, nor does Futurewise suggest so. Instead, Futurewise's argument focuses on its claim that the 2008 Comprehensive Plan, and in particular use of the words "Franklin Crops," is a clear and unambiguous designation of that property as ALLTCS. But this question is limited to the specifics of Franklin County's 2008 Comprehensive Plan. Accordingly, irrespective of whether the "Franklin Crops" designation is ambiguous or clear, Futurewise has not met its burden of showing this as-applied analysis as a basis for this Court's review pursuant to the "substantial public interest" test contained in RAP 13.4(b)(4).

5. ARGUMENT WHY REVIEW SHOULD BE DENIED

Petitioner alleges that review should be granted pursuant to RAP 13.4(b)(4) because the outcome of this case bears some relationship to a "substantial public interest." However, Petitioner spends the vast majority of its Petition for Review re-asserting the same technical legal arguments it relied upon before

the GMHB and the Court of Appeals, and never explains how the instant decision, if allowed to stand, would affect the "substantial public interest." In fact, not only does Petitioner not address this question at all, but the Petition for Review also fails to allege any specific public harm – i.e. "the Court's Opinion will cause confusion for local planning agencies because . . . etc., etc."

The Petition for Review must be denied because (i) the Opinion is unpublished and doesn't create precedence for future cases, (ii) the Opinion was decided using well-established legal principles, which (iii) will only apply to the narrow facts of the instant case. There is no substantial public interest in the outcome of this case.

5.1. The Opinion Is Unpublished And Doesn't Create Precedence For Future Cases, And Therefore Does Not Affect Any Substantial Public Interest.

The Court of Appeals determined that the instant case would not be published. Unpublished opinions of the Court of Appeals are not published in the Washington Appellate Reports,

have no precedential value, and are not binding upon any court. CR 14.1(a). Moreover, CR 14.1(c) provides that Washington appellate courts should not, unless necessary for a reasoned decision, cite or even discuss unpublished opinions in their opinions. As such, the scenarios where the instant case could be cited by another lawyer in briefing or used by another court are extremely remote, and the threat of such distant harm cannot possibly rise to the level of "substantial public interest."

5.2 The Opinion Was Correctly Decided Using Well-Established Legal Principles, And Therefore Does Not Affect Any Substantial Public Interest.

Review is unnecessary in this case because the Court of Appeal's Opinion fits squarely into well-established case law. The Opinion was made by using basic principles of statutory interpretation and deference to the local agency charged with administering and enforcement of a statute. *Opinion*, at page 26.

In describing the "substantial public interests" at stake here, Petitioner argues that: "[t]his case provides this Court with an opportunity to decide an issue of substantial public interest

that should be determined by the Supreme Court under RAP 13.4(b)(4): The principles for interpreting comprehensive plans." *Petition for Review*, at page 20. Petitioner does not elaborate on how the Opinion is a dangerous deviation from prior interpretations of comprehensive plans by courts, or how such a precedence would otherwise negatively affect a substantial public interest. Rather, Petitioner generally alleges that the Court of Appeals erred by deferring to Franklin County's interpretations of its own code. *Petition for Review*, at page 20-29.

Critically, it is important to note that Petitioner agrees that the Court of Appeals used basic rules of statutory construction in its analysis. *See Petition for Review*, at page 20. The Court of Appeals stated that "[c]ourts must ascertain and carry out the intent and purpose of the local legislative body promulgating a local ordinance or code." *Opinion*, at page 27 (*citing Neighbors of Black Nugget Road v. King County*, 88 Wn.App. 773, 778, 946

P.2d 1188 (1997). The Court went on to assert that in order "[t]o determine legislative intent, we look first to the plain language of the ordinance." *Id.* (*citing Fraternal Order of Eagles, Tenion Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002).

However, the phrase Franklin Crops is found nowhere in the 2008 Comprehensive Plan other than on the face of Map 8, and nowhere does the body of the plan identify Franklin Crops as ALLTCS. *Id.* at 33. As such, the Court declared that "the ALLTCS designation criteria identified in the County's 2008 plan, particularly as it applies to *Franklin Crops,* lacks clarity." *Id.* (alteration in the original). Moreover, the Court quickly recognized that "when interpreting a comprehensive plan that is not a 'model of clarity' the local government's interpretation is entitled to great weight." *Id.* at 28 (*citing King County v. Central Puget Sound Growth Management Hearings Board*, 91 Wn.App. 1, 12 (1998). This is not unfettered discretion, but rather the local

jurisdiction's interpretations must be reasonable. *Id.* (*citing State v. Yon*, 159 Wn.App. 195, 199, 246 P.3d 818 (2010) and *Hansen v. Transworld Wireless TV-Spokane, Inc.,* 111 Wn.App. 361, 375, 44 P.3d 929 (2002).

Because of this lack of clarity, the Court deferred to the interpretation of the term "Franklin Crops" by Franklin County. *See Id.* at Pages 12 -13. Ultimately, the Court found that although there may be other reasonable interpretations of the term "Franklin Crops," Franklin County's interpretation (that the areas on Map 8 containing the term "Franklin Crops" where not considered ALLTCS) was nonetheless reasonable, and that therefore removing the term Franklin Crops from the 2018 Comprehensive Plan did not de-designate ALLTCS or violate the GMA. *Id.* at 37-39. In reaching this conclusion, the Court used established principles of well-settled law.

5.3 The Opinion Only Applies To The Specific Facts Of The Underlying Matter, And Therefore Does Not Affect Any Substantial Public Interests.

Because there is no novel legal theory adopted by the Court of Appeals, nor any deviation from the basics of statutory construction and interpretation, this Opinion is limited to the unique facts of this case and does not concern or influence a broader substantial public interest.

This case is not a case where the Court of Appeals read the applicable statutes or case law in a new light. Instead, the Court of Appeals used the plain, unambiguous language of the statutes and cases to find that the term "Franklin Crops" is ambiguous, and, therefore, that Franklin County's prior interpretations of its own code should be given great deference. The result of this analysis was a determination that "Franklin Crops" was not a designation of ALLTCS, and, as such, the removal of that term did not de-designate ALLTCS either.

6. CONCLUSION

Based on the foregoing, Franklin County respectfully asks this Court to deny Futurewise's Petition for Review.

I certify that this document contains 2,288 words.

RESPECTFULLY SUBMITTED this 13th day of September, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that **Response to Franklin County to Petition for Review,** was served by the method indicated below to the following this 13th day of September, 2023.

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