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No. 50406-5-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FUTUREWISE,

Appellant,

v.

CITY OF RIDGEFIELD, MILT BROWN, RDGB ROYAL FARMS LLC,
RDGK REST VIEW ESTATES LLC, RDGM RAWHIDE ESTATES LLC,
RDGF RIVER VIEW ESTATES LLC, and RDGS REAL VIEW LLC,

Respondents.

FUTUREWISE'S APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Court of Appeals should follow the decisions cited in this brief and hold that Futurewise had representational standing to appeal both the annexation and rezones at issue in this case. The Court of Appeals should also follow the decisions cited in this brief and hold that Futurewise properly appealed the annexations and rezones to Clark County Superior Court.

II. ASSIGNMENTS OF ERROR, ISSUES, AND CONCISE ANSWERS

Assignment of Error 1: The superior court made errors of law and fact in concluding that Futurewise lacked representational standing to bring the annexation and Land Use Petition Act (LUPA) appeals.

Issue 1: Did Futurewise have representational standing to bring the annexation and LUPA appeals? Yes. (Assignment of Error 1.)

Assignment of Error 2: The superior court made errors of law and fact in granting the motion to dismiss because the moving parties and the City were not entitled to judgment as a matter of law and material questions of fact exist.

Issue 2: Did the superior court make errors law and fact in granting the motion to dismiss where the moving parties and the City were not

entitled to judgment as a matter of law and genuine issues of material fact exist? Yes. (Assignment of Error 2.)

Assignment of Error 3: The superior court made errors of law and fact in concluding that the superior court lacked jurisdiction over the annexation and the LUPA appeals of the rezones.

Assignment of Error 4: The superior court made errors of law and fact in concluding that the only remedy for the annexation was an appeal to Growth Management Hearings Board under the Growth Management Act.

Issue 3: Did the superior court have jurisdiction over the over the annexation appeal? Yes. (Assignments of Error 3 and 4.)

Assignment of Error 5: The superior court made errors of law and fact in concluding that the rezones adopted by Ordinance No. 1216 were not subject to the LUPA appeals.

Issue 4: Did the superior court have jurisdiction over the over the LUPA appeal? Yes. (Assignments of Error 3 and 5.)

Assignment of Error 6: The superior court made errors of law and fact in concluding, to the extent that the court did, that Mr. Milt Brown, RDGB Royal Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View Estates LLC, or RDGS Real

View LLC (the LCCs) have any vested rights on the land within Brown Annexation.

Issue 5: Do the LCCs have any vested rights on the land within Brown Annexation? No. (Assignment of Error 6.)

III. STATEMENT OF THE CASE

Clark County updated its Comprehensive Land Use Plan on June 28, 2016.¹ As part of this update, Clark County dedesignated 111 acres of agricultural land of long-term commercial significance and included this land in the Ridgefield urban growth area (UGA).² Futurewise appealed the agricultural lands dedesignation and the UGA expansion, along with other issues, to the Growth Management Hearings Board on July 22, 2016.³

On September 8, 2016, the City of Ridgefield adopted Ordinance No. 1216 which annexed 111.42 acres north of the City and zoned this land Residential Low Density 6 (RLD-6) with an Urban Holding 10 (UH-10)

¹ Clerk's Papers (CP) 157, *Clark County Citizens United, Inc., Friends of Clark County, and Futurewise v. Clark County*, GMHB Case No. 16-2-0005c, Final Decision and Order (March 23, 2017), at 4 of 101.

² CP 175 – 76, CP 194 – 96, *Clark County Citizens United, Inc., Friends of Clark County, and Futurewise v. Clark County*, GMHB Case No. 16-2-0005c, Final Decision and Order (March 23, 2017), at 22 – 23, 41 – 43 of 101.

³ CP 157, CP 171 – 72, & CP 186, *Clark County Citizens United, Inc., Friends of Clark County, and Futurewise v. Clark County*, GMHB Case No. 16-2-0005c, Final Decision and Order (March 23, 2017), at 4, 18 – 19, 33 of 101.

overlay.⁴ The City of Ridgefield refers to this annexation as the Brown Annexation.⁵

In Clark County Superior Court Case No. 16-2-01813-4, Futurewise appealed the annexation under the following causes of action: (i) a complaint and petition for declaratory judgment filed under the Uniform Declaratory Judgments Act, chapter 7.24 RCW; (ii) a complaint and petition for declaratory judgment filed under the constitutional writ provisions of Article IV, Section 6 of the Washington State Constitution; (iii) a complaint and petition for review filed under the Land Use Petition Act, chapter 36.70C RCW; (iv) a complaint and petition for a writ of certiorari under chapter 7.16 RCW; (v) a complaint and petition for a writ of certiorari under Article IV, Section 6 of the Washington State Constitution; and (vi) a complaint and petition for a writ of review under Article IV, Section 6 of the Washington State Constitution or the common-law.⁶ Also in Clark County Superior Court Case No. 16-2-01813-4, Futurewise appealed the City of Ridgefield's rezones under the

⁴ CP 22, City of Ridgefield Ordinance No. 1216 p. 3.

⁵ CP 20, City of Ridgefield Ordinance No. 1216 p. 1.

⁶ CP 13 – 17, Complaint and Petition For Judicial Review Under RCW 36.70C; Petition For Declaratory Judgment Under RCW 7.24; Petition For Declaratory Judgment under Article IV, Section 6 of the Washington State Constitution; Petition For Writ of Certiorari Under RCW 7.16; Petition For Writ of Certiorari under Washington Constitution, Article IV, Section 6; Petition For Writ of Review Under Washington Constitution, Article IV, Section 6 or The Common-Law 11 – 15. Hereinafter Complaint.

Land Use Petition Act, chapter 36.70C RCW.⁷ Futurewise named the City of Ridgefield, Milt Brown, RDGB Royal Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View Estates LLC, and RDGS Real View LLC.⁸ The City of Ridgefield annexed the land in response to an annexation petition filed by RDGB Royal Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View Estates LLC, and RDGS Real View LLC (hereinafter the LCCs) and signed by Mr. Brown.⁹

The RLD-6 zone is a low density residential zone that allows single-family and duplex residences with a density of six dwelling units per net acre.¹⁰ The UH-10 zone overlay requires a density of one dwelling unit per ten acres until provisions are made to provide the public facilities and services needed to support the density of the underlying zone, in this case the RLD-6 zone.¹¹

Mr. Brown and the LLCs filed a motion to dismiss all of the causes of action under Superior Court Civil Rule (CR) 12(b)(6).¹² The City of

⁷ CP 12 – 13, Complaint 10 – 11.

⁸ CP 3, Complaint 1.

⁹ CP 22, City of Ridgefield Ordinance No. 1216 p. 3; CP 348 – 49, Notice of Intent to Annex pp. *1 – 2.

¹⁰ Chapter 18.210 Ridgefield Development Code (RDC) - Residential Low Density Districts (RLD-4, RLD-6, RLD-8).

¹¹ RDC 18.210.015C.

¹² CP 49 – 50, *Futurewise v. City of Ridgefield et al.*, Case No. 16-2-01813-4 Defendants Milt Brown, RDGB Royal Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide

Ridgefield filed a Supplemental Memorandum in Support of Mr. Brown's and the LCCs' Motion to Dismiss.¹³

After two sets of briefing, the Honorable Judge Bernard F. Veljacic dismissed with prejudice both the appeal of the annexation and the LUPA appeal of the rezone for all of the defendants.¹⁴ The superior court explained the basis for its decision:

The Court hereby adopts the reasoning and points advanced by Defendants in their written submissions and oral arguments in favor of dismissal, and the additional reasons and points raised by Defendant City of Ridgefield in its supplemental briefing and oral argument in favor of dismissal, and finds that those reasons and points support dismissing the Complaint with prejudice.¹⁵

While not directly applicable to the questions addressed in this appeal, Futurewise, the City of Ridgefield, and the LCCs are all parties to Court of Appeals Division II Case No. 50847-8-II, the *Friends of Clark County and Futurewise v Clark County, et al.* The Court of Appeals is currently

Estates LLC, RDGF River View Estates LLC, and RDGS Real View LLC's Motion to Dismiss pp. 1 – 2 (Dec. 27, 2016).

¹³ CP 359 – 63, *Futurewise v. City of Ridgefield et al.*, Case No. 16-2-01813-4 Defendant City of Ridgefield's Supplemental Memorandum in Support of Defendants RDGB *et al.*, Motion to Dismiss pp. 1 – 5.

¹⁴ CP 401 – 02, *Futurewise v. City of Ridgefield et al.*, Case No. 16-2-01813-4 Clark County Superior Court General Judgment of Dismissal with Prejudice in Clark County Superior Court Case No. 16-2-01813-4 pp. 1 – 2 (filed on May 11, 2017).

¹⁵ CP 397 – 98, *Futurewise v. City of Ridgefield et al.*, Case No. 16-2-01813-4, Clark County Superior Court Order Granting Defendants Milt Brown, RDGB Royal Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View Estates LLC, and RDGS Real View LLC's Motions to Dismiss (ordered and filed on May 11, 2017) pp. *1 – 2.

considering whether to grant the Friends of Clark County's and Futurewise's Motion for Discretionary Review in Case No. 50847-8-II. The issues in that case include whether the Growth Management Hearings Board properly determined that Clark County violated the Growth Management Act (GMA) when it amended the comprehensive plan and zoning applicable to the Brown Annexation from agricultural lands of long-term commercial significance to residential and expanded the Ridgefield UGA to allow the Brown annexation.

This is the second time that Clark County has illegally expanded its UGAs onto agricultural lands and cities annexed some of those lands.¹⁶ The County, cities, and developers then claim that the Board cannot review the GMA violations on the annexed land.¹⁷ In the 2007 Clark County comprehensive plan update it was Camas and Ridgefield.¹⁸ In the 2016 comprehensive plan update it was La Center and Ridgefield.¹⁹

¹⁶ *Clark Cty. Washington v. W. Washington Growth Mgmt. Hearings Review Bd.*, 161 Wn. App. 204, 245 – 46, 254 P.3d 862, 881 (2011) *vacated in part Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 298 P.3d 704 (2013); CP 174 – 76, CP 190 – 96, *Clark County Citizens United, Inc., Friends of Clark County, and Futurewise v. Clark County*, GMHB Case No. 16-2-0005c, Final Decision and Order (March 23, 2017), 21—23 & 37 – 43 of 101.

¹⁷ *Id.*

¹⁸ *Clark Cty. Washington*, 161 Wn. App. at 245 – 46, 254 P.3d at 881.

¹⁹ CP 174 – 76, CP 190 – 96, *Clark County Citizens United, Inc., Friends of Clark County, and Futurewise v. Clark County*, GMHB Case No. 16-2-0005c, Final Decision and Order (March 23, 2017), 21—23 & 37 – 43 of 101.

IV. ARGUMENT

A. Standard of Review

While the motion to dismiss started as a CR 12(b)(6) motion, because matters outside the pleadings were presented and not excluded by the superior court,²⁰ it is treated as a motion for summary judgment.²¹

“‘The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.’ *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).”²²

The Washington State Supreme Court set out the rules for summary judgment in *Smith*.

A motion for summary judgment is properly granted where “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” CR 56(c). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *Ruff v. County of King*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995); *see also Ellwein*, 142 Wn.2d at 776, 15 P.3d 640. But a court must deny summary judgment when a party raises a material factual dispute. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).²³

²⁰ See for example, CP 89 – 118, Tim Trohimovich Declaration Re: Standing with declarations and affidavits.

²¹ *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 802, 699 P.2d 217, 218 (1985).

²² *Smith v. Safeco Ins. Co.*, 150 Wn. 2d 478, 483, 78 P.3d 1274, 1276 (2003).

²³ *Smith*, 150 Wn.2d 478 at 485–86, 78 P.3d at 1277.

The supreme court also discussed the court’s review of the materials submitted for summary judgment.

We review material submitted for and against a motion for summary judgment in the light most favorable to the party against whom the motion is made. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 588 P.2d 1346 (1979). The motion is granted only if, from all evidence, reasonable persons could reach but one conclusion. *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982). The motion must be denied unless it appears beyond doubt that plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 577 P.2d 580 (1978).²⁴

B. Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, and Land Use Petition Act (LUPA), chapter 36.70C RCW, overview

This court has written:

The UDJA provides that:

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, *may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise* and obtain a declaration of rights, status or other legal relations thereunder.

RCW 7.24.020 (emphasis added [by the court]).
Declaratory judgment actions are proper “to determine the

²⁴ *Sea-Pac Co.*, 103 Wn.2d at 802, 699 P.2d at 218.

facial validity of an enactment, as distinguished from its application or administration.” *City of Federal Way v. King County*, 62 Wn. App. 530, 535, 815 P.2d 790 (1991) (citing *Seattle–King County Council of Camp Fire v. Dep’t of Revenue*, 105 Wn.2d 55, 57 – 58, 711 P.2d 300 (1985)). The specific grant of power in RCW 7.24.020 is not, however, an exhaustive list of the general powers to seek declaratory relief. RCW 7.24.050. Rather, the UDJA grants, trial courts the general power to “declare rights, status and other legal relations” if “a judgment or decree will terminate the controversy or remove an uncertainty.” RCW 7.24.010, .050.²⁵

The Land Use Petition Act (LUPA), chapter 36.70C RCW, “shall be the *exclusive means* of judicial review of land use decisions,’ with certain specific exceptions.”²⁶ “A site-specific rezone authorized by a comprehensive plan is treated as a project permit subject to the provisions of chapter 36.70B RCW. RCW 36.70B.020(4).”²⁷ Since it is a project permit, it is also a land use decision for the purposes of LUPA.²⁸

In this case Futurewise appealed City of Ridgefield Ordinance No. 1216 and challenged the facial validity of the annexation and rezones. The court did not reach those issues, instead dismissing the appeal for the reasons and points advanced by the City and the LCCs.²⁹ For the reasons

²⁵ *Bainbridge Citizens United v. Washington State Dep’t of Nat. Res.*, 147 Wn. App. 365, 374, 198 P.3d 1033, 1037 – 38 (2008).

²⁶ *Chelan Cty. v. Nykreim*, 146 Wn. 2d 904, 916 – 17, 52 P.3d 1, 6 – 7 (2002) footnote omitted.

²⁷ *Woods v. Kittitas Cty.*, 162 Wn.2d 597, 613, 174 P.3d 25, 33 (2007).

²⁸ *Woods*, 162 Wn. 2d at 610, 174 P.3d at 32.

²⁹ CP 397 – 98, *Futurewise v. City of Ridgefield et al.*, Case No. 16-2-01813-4, Clark County Superior Court Order Granting Defendants Milt Brown, RDGB Royal Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View

set out below, the dismissal should not have been granted because the City and LCCs were not was not entitled to judgment as a matter of law and there are genuine issues of material fact.

C. Did Futurewise have representational standing to bring the annexation and LUPA appeals? (Assignment of Error 1.)

1. Futurewise met the standard standing requirements under the Land Use Petition Act, the Uniform Declaratory Judgments Act, and the other causes of action in Futurewise’s Complaint and Petition for Judicial Review

In *Grant County Fire Protection District No. 5 v. City of Moses Lake*, the State of Washington Supreme Court set out the requirements for standing under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW:

This court has established a two-part test to determine standing under the UDJA. The first part of the test asks whether the interest sought to be protected is “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Save a Valuable Env’t v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152–53, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)). The second part of the test considers whether the challenged action has caused “injury in fact,” economic or otherwise, to the party seeking standing. *Id.* at 866, 576 P.2d 401. Both tests must be met by the party seeking standing.³⁰

Estates LLC, and RDGS Real View LLC’s Motions to Dismiss (ordered and filed on May 11, 2017) pp. *1 – 2.

³⁰ *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419, 423 (2004).

The *Grant County Fire Protection District No. 5* case was a UDJA challenge to an annexation³¹ as is this case. When standing is challenged, the plaintiffs or petitioners must present testimony, affidavits, or declarations showing they have standing.³²

The Washington State Supreme Court has held “that a non-profit corporation or association which shows that one or more of its members are specifically injured by a government action may represent those members in proceedings for judicial review.”³³ Futurewise’s members meet both parts of the standing requirement.

First, the Growth Management Act (GMA), one of the statutes in question in this appeal, protects and regulates a variety of interests including the conservation of agricultural land of long-term commercial significance, the protection of the environment including the protection of the quality and quantity of groundwater and surface water quality, the protection of wildlife habitat, the regulation of traffic and transportation including walking and bicycling, promoting physical activity, reducing

³¹ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 801 – 03, 83 P.3d at 423.

³² *Anderson v. Pierce Cty.*, 86 Wn. App. 290, 299, 936 P.2d 432, 438 (1997); *Snohomish Cty. Prop. Rights All. v. Snohomish Cty.*, 76 Wn. App. 44, 47–48, 882 P.2d 807, 808–09 (1994) review denied *Snohomish Cty. Prop. Rights All. v. Snohomish Cty.*, 125 Wn.2d 1025, 890 P.2d 464 (1995). While Futurewise’s briefing relies on the affidavits and declaration by some its members, some of Futurewise’s members also testified before the City on the matters at issue in this case and their testimony also shows that Futurewise has standing.

³³ *Save a Valuable Env’t (SAVE) v. City of Bothell*, 89 Wn. 2d 862, 867, 576 P.2d 401, 404 (1978).

sprawl, protecting property rights, and providing for public participation.³⁴ At least five Futurewise members live and own property adjacent to the Brown Annexation. Futurewise seeks to represent their interests protected by the GMA through this lawsuit.³⁵

Second, the Brown Annexation has caused current and will cause future injuries in fact to the Futurewise members, including economic injuries. In *SAVE v. City of Bothell*, the case the *Grant County Fire Protection District No. 5* court cited for the standing requirements applicable to UDJA lawsuits,³⁶ the City rezoned a “parcel of farm land to permit construction of a major regional shopping center ...”³⁷ SAVE sued “alleging that the rezone will have serious detrimental effects on both the environment and the economy of the area.”³⁸ The State of Washington Supreme Court found that “SAVE has adequately alleged direct and specific harm to its members which would flow from the building of a shopping center near their homes in North Creek Valley.”³⁹

³⁴ CP 5 – 6, Complaint and Petition pp. 3 – 4; RCW 36.70A.020(2), (3), (6), (8), (9), (10), (11); RCW 36.70A.035; RCW 36.70A.040(3); RCW 36.70A.060; RCW 36.70A.070(1); RCW 36.70A.070(6).

³⁵ CP 5 – 6, Complaint and Petition pp. 3 – 4; CP 93 – 94, Affidavit of Edward Niece pp. 2 – 3; CP 95 – 97, Affidavit of Janice Myev pp. 1 – 3; CP 106 – 112, Affidavit of Newt Rumble and Barbara Kusik pp. 2 – 8; CP 116 – 18, Declaration of Cynthia A. Carlson pp. 3 – 5.

³⁶ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 802, 83 P.3d at 423.

³⁷ *Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 863–64, 576 P.2d 401, 402 (1978).

³⁸ *SAVE*, 89 Wn.2d at 865, 576 P.2d at 403.

³⁹ *SAVE*, 89 Wn.2d at 868, 576 P.2d at 404–05.

The same fact pattern applies in this lawsuit. Here Ridgefield has annexed and rezoned farmland for urban development.⁴⁰ Futurewise's members live next to the annexed and rezoned farmland.⁴¹ They will be directly and specifically harmed by the urban residential development on the adjacent Brown Annexation.⁴²

Cynthia A. Carlson has already suffered economic harm. The construction of a sewer pump station on part of the adjacent Brown Annexation repetitively cut her back fence allowing cows to escape from her property.⁴³ This work took place after the Brown Annexation.⁴⁴ The City of Ridgefield calls the sewer pump station the Pioneer Pump Station and it will serve the Brown Annexation and at least two other subdivisions.⁴⁵ Ms. Carlson and her husband were forced to relocate their cattle to their front pasture.⁴⁶ During the time the fence was cut, they did not have adequate pastureland for their cattle.⁴⁷ The destruction of their

⁴⁰ CP 22, City of Ridgefield Ordinance No. 1216 p. 3; CP 10, Complaint and Petition p. 8.

⁴¹ CP 93, Affidavit of Edward Niece p. 2; CP 95, Affidavit of Janice Myev p. 1; CP 106, Affidavit of Newt Rumble and Barbara Kusik p. 2; CP 115, Declaration of Cynthia A. Carlson p. 2.

⁴² CP 93 – 94, Affidavit of Edward Niece pp. 2 – 3; CP 96 – 97, Affidavit of Janice Myev pp. 2 – 3; CP 115 – 18, Declaration of Cynthia A. Carlson pp. 2 – 5; CP 106 – 09, Affidavit of Newt Rumble and Barbara Kusik pp. 2 – 8.

⁴³ CP 115 – 16, Declaration of Cynthia A. Carlson pp. 2 – 3.

⁴⁴ CP 115 – 18, Declaration of Cynthia A. Carlson pp. 2 – 5; CP 22, City of Ridgefield Ordinance No. 1216 p. 3.

⁴⁵ CP 115, Declaration of Cynthia A. Carlson p. 2.

⁴⁶ CP 116, Declaration of Cynthia A. Carlson p. 3.

⁴⁷ CP 116, Declaration of Cynthia A. Carlson p. 3.

fence will require use of their previous survey markers to reestablish their legal fence line. An agent for a developer killed one of their calves by mowing over the calf with a brush hog during a survey for the Pioneer Pump Station.⁴⁸ Clark County has designated the Carlsons' property as agricultural lands of long-term commercial significance and their agricultural operations are being interfered with by adjacent land uses.⁴⁹ Ridgefield has a duty under the GMA to adopt and enforce regulations to protect agricultural operations and has failed in this duty.⁵⁰

Water was pumped from the pump station construction site, harming Ms. Carlson's property and nearby creeks used by salmon.⁵¹ "I understand that as part of the 'Pioneer Place Pump Station' construction a 'leave' tree (or 'snag') that supported raptors and other wildlife was felled. The loss of this habitat has adversely impacted the use and enjoyment of my property due to the loss of opportunities to maintain their biologic habitat and to watch these birds."⁵² The protection of water quality and wildlife habitat are all interests protected by the GMA.⁵³

⁴⁸ CP 116, Declaration of Cynthia A. Carlson p. 3.

⁴⁹ CP 116, Declaration of Cynthia A. Carlson p. 3; *See also* CP 5 – 6, Complaint and Petition pp. 3 – 4.

⁵⁰ CP 116, Declaration of Cynthia A. Carlson p. 3; RCW 36.70A.060(1).

⁵¹ CP 116, Declaration of Cynthia A. Carlson p. 3.

⁵² CP 116, Declaration of Cynthia A. Carlson p. 3.

⁵³ RCW 36.70A.020(9), (10); RCW 36.70A.040(3); RCW 36.70A.060.

Ms. Carlson's property and the wildlife on her property have been harmed by subdivisions abutting her property to the south due to storm water runoff and light pollution.⁵⁴ Ms. Carlson is concerned that a road that currently terminates at her property will be extended through her property to serve urban development in the area.⁵⁵ These current direct and specific harms are a foretaste of the direct and specific harms Ms. Carlson will suffer as the Brown Annexation continues to be developed and then occupied. She writes:

I am concerned that the development of the Brown Annexation will intensify the harm to our property and our agricultural operations already caused by the Pioneer Place Pump Station construction and the subdivisions to south. These adverse impacts include continuing interference with our agricultural operations from fence cutting, trespass, and adverse impacts to our livestock. I am also concerned that our long-established agricultural activities may now generate complaints from new subdivision residents that will adversely impact our ability to continue the agricultural use of our property. Other adverse impacts include additional storm water runoff, light pollution, and the extension of the new road onto or adjacent to our property with the attendant increase in traffic and air, noise, and light pollution. The annexation of the land in the Brown property, the change in use from agriculture to residential use, and the development of that land for housing will adversely affect our property, the value of our land for its current use, our use and enjoyment of our property, the agricultural use of our property, and the environment in which we reside.⁵⁶

⁵⁴ CP 117, Declaration of Cynthia A. Carlson p. 4.

⁵⁵ CP 117, Declaration of Cynthia A. Carlson p. 4.

⁵⁶ CP 117 – 18, Declaration of Cynthia A. Carlson pp. 4 – 5.

Mr. Newt Rumble's and Ms. Barbara Kusik's properties have also been damaged by development. A fork of Allen Creek flows through Ridgefield, through the Brown Annexation, and then downstream onto Mr. Rumble's and Ms. Kusik's (Rumble-Kusik) property.⁵⁷ Development upstream in Ridgefield has increased the frequency, length of time, and depth that Allen Creek floods the Rumble-Kusik property where they live.⁵⁸ Allen Creek now floods their property three to five times a year, up from the once or twice a year flooding that occurred when they first bought the property.⁵⁹ The duration of the flooding has increased from a few hours to a day or two then they first bought to property to two days five times a year and for three days three to five times a year.⁶⁰ These events now flood about half of the Rumble-Kusik property.⁶¹ In addition, the storm water runoff primarily from the developed and higher elevation areas to the south now floods about a half-acre of the Rumble-Kusik property approximately eight months of the year.⁶² The increased flooding caused by upstream development also deposits silt on Mr. Rumble's and Ms. Kusik's land.⁶³ The increased stream flows and flowing have also

⁵⁷ CP 106, Affidavit of Newt Rumble and Barbara Kusik p. 2.

⁵⁸ CP 107, Affidavit of Newt Rumble and Barbara Kusik p. 3.

⁵⁹ CP 107, Affidavit of Newt Rumble and Barbara Kusik p. 3.

⁶⁰ CP 107, Affidavit of Newt Rumble and Barbara Kusik p. 3.

⁶¹ CP 107, Affidavit of Newt Rumble and Barbara Kusik p. 3.

⁶² CP 107 – 08, Affidavit of Newt Rumble and Barbara Kusik pp. 3 – 4.

⁶³ CP 108 – 09, Affidavit of Newt Rumble and Barbara Kusik pp. 4 – 5.

caused the water table to rise, further contributing to flooding on the Rumble-Kusik property.⁶⁴

“There is a long established earthen dam and lake on the west branch of Allen Creek south of our property within the Brown Annexation.”⁶⁵ In July 2015, an equipment breach of that dam was responsible for a “flooding event that breached Allen Creek on our property depositing gravel, silt, vegetation, wood scraps, tree limbs, and refuse debris from the [land in the] Brown Annexation on to our property and the properties to the North. This single event necessitated clean up, and manual removal of silt from the stream bed of a depth between 6 and 10 inches x 48 inches x approximately 45 feet.”⁶⁶

As the Brown Annexation is developed, the modification or removal of the dam and the increased size of drainage culverts on the Brown Annexation and those of the neighboring developments “will particularly damage our property. The increased flows will carry the sediment that would have otherwise settled out while the water was impounded behind the dam. These increased flows and associated increased silt ... will cause further damage to our property, house, and driveway.”⁶⁷

⁶⁴ CP 107, Affidavit of Newt Rumble and Barbara Kusik p. 3.

⁶⁵ CP 106, Affidavit of Newt Rumble and Barbara Kusik p. 2.

⁶⁶ CP 107, Affidavit of Newt Rumble and Barbara Kusik p. 3.

⁶⁷ CP 111, Affidavit of Newt Rumble and Barbara Kusik p. 7.

Mr. Rumble and Ms. Kusik have “a long rural driveway, including an easement on adjacent property to access our residence. During one February 2017, flooding event, the water depth and road visibility were so impaired that they “had to leave a car on high ground above the flooding waters and wade through four to six inches of flood water and current across the driveway to get home.”⁶⁸ The driveway flooding events “previously occurred at most once a year ... and ... now are common place between November and March.”⁶⁹

During the spring of 2016, after 10 years of multiple flooding impact, we spent \$11,000 to reinstall much of our driveway with compacted asphalt grindings, which seasoned all through the summer and fall. The “major flooding events” in November and December of 2016, and January and February of 2017 have washed out 35 feet of those asphalt grindings, reducing the driveway width by six to eight inches, in just the first season. Previously, the same treatment had lasted close about 10 years, before the increasing frequency of flooding events began eroding the road, culminating in the 2016 repair and reconstruction.⁷⁰

The increased frequency and depth of flooding has required us to replace the floor supports of our home with pressure treated wood to combat rot in the crawl space. The increased flooding also required the installation of 2 sump pumps installed under our house in 2016. Silt, that had permeated up through the standing ground water, had to be excavated from the crawl space by hand to install the sump pump, which was a slow and expensive process.⁷¹

⁶⁸ CP 108, Affidavit of Newt Rumble and Barbara Kusik p. 4.

⁶⁹ CP 108, Affidavit of Newt Rumble and Barbara Kusik p. 4.

⁷⁰ CP 108, Affidavit of Newt Rumble and Barbara Kusik p. 4.

⁷¹ CP 109, Affidavit of Newt Rumble and Barbara Kusik p. 5.

Mr. Rumble and Ms. Kusik lease out their pastures to a farmer who grazes sheep on the property.⁷² When Mr. Rumble and Ms. Kusik first bought the land in 1992, their property had few wetland grasses.⁷³ The increased stream flow, silt, and flooding is causing the southwest part of their property to become swampy.⁷⁴ This is reducing the usable and developable part of their land.⁷⁵ The increased flow of mud and water also reduces the time their lower pasture can be grazed by the sheep.⁷⁶ The sheep now cannot graze the lower pasture until late May or June.⁷⁷ So the development in the upper watershed in Ridgefield has reduced Mr. Rumble's and Ms. Kusik's ability to farm their land and damaged their property.⁷⁸

Mr. Rumble and Ms. Kusik write:

The annexation of the land within the Brown annexation, the change in use from agriculture to residential use, and the development of that land for housing will, just as past development has, adversely affect our home and property and the value of our land due to increased flooding and siltation of the land and the expanded wetlands on our land. It will also cause damage to our property, home, and driveway increasing the annual inconvenience and costs of repair and maintenance, such as the new floor supports, the sump pump, the driveway repairs, and constant drainage

⁷² CP 109, Affidavit of Newt Rumble and Barbara Kusik p. 5.

⁷³ CP 109, Affidavit of Newt Rumble and Barbara Kusik p. 5.

⁷⁴ CP 109, Affidavit of Newt Rumble and Barbara Kusik p. 5.

⁷⁵ CP 109, Affidavit of Newt Rumble and Barbara Kusik p. 5.

⁷⁶ CP 109, Affidavit of Newt Rumble and Barbara Kusik p. 5.

⁷⁷ CP 109, Affidavit of Newt Rumble and Barbara Kusik p. 5.

⁷⁸ CP 109, Affidavit of Newt Rumble and Barbara Kusik p. 5.

repair. The Growth Management Act (GMA), in RCW 36.70A.070(1), requires the City of Ridgefield’s comprehensive plan to “review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state” The GMA, in RCW 36.70A.120, provides that City of Ridgefield “shall perform its activities and make capital budget decisions in conformity with its comprehensive plan.”⁷⁹

However, the City of Ridgefield has not effectively addressed Mr. Rumble’s and Ms. Kusik’s flooding problems.⁸⁰

The Brown Annexation and the development of that land will directly and adversely damage Mr. Niece’s property by increasing storm water, silt, and pollution in the salmon stream near his house and other impacts.⁸¹

In addition, Mr. Niece and his wife

walk and bicycle in the area around our home. The conversion of the Brown annexation from agricultural use to residential use and the residential development will increase traffic around our home making walking and bicycling more dangerous and less enjoyable. This will adversely affect my use and enjoyment of my property. The Growth Management Act requires comprehensive plans to promote physical activity such as walking and bicycling.⁸²

Ms. Myev will be directly and specifically harmed because the City of Ridgefield, to serve urban development in this area, apparently anticipates

⁷⁹ CP 109 – 10, Affidavit of Newt Rumble and Barbara Kusik pp. 5 – 6.

⁸⁰ CP 111 – 12, Affidavit of Newt Rumble and Barbara Kusik pp. 7 – 8.

⁸¹ CP 93, Affidavit of Edward Niece p. 2.

⁸² CP 94, Affidavit of Edward Niece p. 3.

extending N. 35th Avenue north for “approximately 870 yards to meet 41st Avenue at 289th Street- **through the center of [Ms. Myev’s] home.**”⁸³ She will also be adversely affected by the conversion of the agricultural land which supports wildlife habitat to residential development.⁸⁴

The annexation is the direct cause of the Futurewise members storm water injuries in fact. Clark County is required to comply with the State of Washington Department of Ecology’s *Phase I Municipal Stormwater Permit*.⁸⁵ So Clark County is required to adopt and enforce storm water regulations that will control storm water from construction sites and reduce storm water runoff from development and redevelopment including controls on the amount of storm water allowed to leave the development site, water quality controls on runoff, and low impact development techniques.⁸⁶ But Ridgefield is not covered by any Municipal Stormwater Permit and does not have to meet any permit standards to protect downstream property owners.⁸⁷ In Clark County the company constructing the Pioneer Sewer Pump Station would have had to control the storm

⁸³ CP 97, Affidavit of Janice Myev p. 3 emphasis in the original.

⁸⁴ CP 97, Affidavit of Janice Myev p. 3.

⁸⁵ CP 271, State of Washington Department of Ecology, *Who’s Covered Under the Municipal Stormwater Permits?* webpage; CP 276, State of Washington Department of Ecology, *Phase I Municipal Stormwater Permit* p. 5 of 75 (Modified August 19, 2016).

⁸⁶ CP 282 – 83, CP 286 – 90, State of Washington Department of Ecology, *Phase I Municipal Stormwater Permit* pp. 11 – 12, pp. 15 – 19 of 75 (Modified August 19, 2016).

⁸⁷ CP 271, State of Washington Department of Ecology, *Who’s Covered Under the Municipal Stormwater Permits?* webpage.

water from the construction site and could not have pumped water onto the neighbor's property as the construction company did on Ms. Carlson's property, damaging her land.⁸⁸ Since Ridgefield is not required to adopt and enforce storm water controls like Clark County, the Futurewise members have and will experience greater storm water runoff, flooding, and siltation than they would have if the annexation had not occurred.

The LCCs argued below that Futurewise does not meet the standards for standing under LUPA citing to *Thompson v. City of Mercer Island*. But Futurewise's members do meet the standards in *Thompson*:

¶ 22 An allegedly aggrieved person has standing to file a land use petition only if he shows that the land use decision has prejudiced him, or is likely to. RCW 36.70C.060(2)(a). To satisfy the prejudice requirement, a petitioner must show that he would suffer injury in fact as a result of the land use decision. *Chelan County v. Nykreim*, 146 Wn.2d 904, 934, 52 P.3d 1 (2002). To show an injury in fact, the petitioner must allege a “specific and perceptible” harm. *Knight*, 173 Wn.2d at 341, 267 P.3d 973, quoting *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 829, 965 P.2d 636 (1998). If the petitioner alleges a threatened rather than an existing injury, he “must also show that the injury will be immediate, concrete and specific; a conjectural or hypothetical injury will not confer standing.” *Suquamish*, 92 Wn. App. at 829, 965 P.2d 636, quoting *Harris v. Pierce County*, 84 Wn. App. 222, 231, 928 P.2d 1111 (1996) (internal quotation marks omitted).⁸⁹

⁸⁸ CP 116, Declaration of Cynthia A. Carlson p. 3.

⁸⁹ *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 662, 375 P.3d 681, 685–86, *as amended on denial of reconsideration* (May 4, 2016), *review denied*, 186 Wn.2d 1013, 380 P.3d 483 (2016).

As was documented above, all five of Futurewise’s members own property and live adjacent to the Brown Annexation.⁹⁰ Ms. Carlson’s fence was damaged, a calf killed, and she had to move her cattle out of the pasture in which they were grazing.⁹¹ Storm water runoff from the pump station construction has damaged Ms. Carlson’s property.⁹² Storm water runoff, light pollution from existing subdivisions in Ridgefield, and the destruction of wildlife habitat have also damaged her property and the wildlife habitat on or near her property.⁹³ This damage is ““specific and perceptible”” economic and environmental harm. The Brown Annexation will increase the intensity of these impacts and by building homes close to her agricultural operation putting the farm at risk of having to close.⁹⁴

Mr. Rumble’s and Ms. Kusik’s house, property, and driveway have been damaged by increased flooding due to storm water runoff from development in Ridgefield.⁹⁵ This damage is ““specific and perceptible”” economic and environmental harm. All five adjacent property owners have written under oath that they will be adversely impacted by increased storm

⁹⁰ CP 93, Affidavit of Edward Niece p. 2; CP 95, Affidavit of Janice Myev p. 1; CP 106, Affidavit of Newt Rumble and Barbara Kusik p. 2; CP 115, Declaration of Cynthia A. Carlson p. 2.

⁹¹ CP 116, Declaration of Cynthia A. Carlson p. 3.

⁹² CP 116, Declaration of Cynthia A. Carlson p. 3.

⁹³ CP 116, Declaration of Cynthia A. Carlson p. 3.

⁹⁴ CP 116, Declaration of Cynthia A. Carlson p. 3.

⁹⁵ CP 107 – 11, Affidavit of Newt Rumble and Barbara Kusik pp. 3 – 7.

water runoff from the Brown Annexation.⁹⁶ Three of the adjacent property owner's properties will be damaged by storm water runoff from the Brown Annexation.⁹⁷ This evidence meets the standing requirements in *Thompson*.⁹⁸

Evidence of likely future storm water impacts was sufficient to confer LUPA standing in *Anderson v. Pierce County*.⁹⁹ It is sufficient in this case too.¹⁰⁰

The above evidence proves Futurewise's members have standing. This evidence is also sufficient to show there is a genuine issue as to a material fact. This evidence and the cited rules of law also shows the LCCs and Ridgefield were not entitled judgment as a matter of law on the standing issue.

2. Alternatively, because this controversy is of substantial public importance, a less rigid and more liberal approach to standing is justified

In the *Grant County Fire Protection District No. 5* decision, the State of Washington Supreme Court wrote:

⁹⁶ CP 93 – 94, Affidavit of Edward Niece pp. 2 –3; CP 96 – 97, Affidavit of Janice Myev pp. 2 –3; CP 106 – 11, Affidavit of Newt Rumble pp. 2 – 7; CP 115 – 18, Declaration of Cynthia A. Carlson pp. 2 – 5.

⁹⁷ CP 106 – 11, Affidavit of Newt Rumble pp. 2 – 7; CP 115 – 18, Declaration of Cynthia A. Carlson pp. 2 – 5.

⁹⁸ *Thompson v. City of Mercer Island*, 193 Wn. App. at 663, 375 P.3d at 686.

⁹⁹ *Anderson v. Pierce Cty.*, 86 Wn. App. 290, 300, 936 P.2d 432, 438 (1997).

¹⁰⁰ CP 93 – 94, Affidavit of Edward Niece pp. 2 –3; CP 96 – 97, Affidavit of Janice Myev pp. 2 –3; CP 106 – 11, Affidavit of Newt Rumble pp. 2 – 7; CP 115 – 18, Declaration of Cynthia A. Carlson pp. 2 – 5.

Further, when a controversy is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture, this court has been willing to take a “less rigid and more liberal” approach to standing. *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969). However, we have applied this liberal approach to standing only in cases where the plaintiff whose standing was challenged was the *only* plaintiff in the case and the liberal approach was necessary to ensure that the important public issues raised did not escape review. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 380, 858 P.2d 245 (1993) (denying standing to fire district upon finding that the argument raised could be more effectively argued by the other plaintiffs in the case).¹⁰¹

This annexation and the legal question of whether a city can annex land while a Growth Management Hearing Board decision is pending is a controversy of substantial public importance as the annexation will lead to the conversion of farmland,¹⁰² so the questions directly bear on agriculture. Only Futurewise has appealed the annexation and rezone. So Futurewise qualifies for the “less rigid and more liberal” approach to standing recognized by the supreme court.

D. Did the superior court make errors law and fact in granting the motion to dismiss where the moving parties and the City were not entitled to judgment as a matter of law and genuine issues of material fact exist? (Assignment of Error 2.)

1. Did the superior court have jurisdiction over the over the annexation appeal? (Assignments of Error 3 and 4.)

¹⁰¹ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 803, 83 P.3d at 424.

¹⁰² CP 10 – 11, Complaint pp. 8 – 9.

(i) The superior court had jurisdiction over the appeals of the Brown Annexation under the Uniform Declaratory Judgments Act.

The superior court had jurisdiction over the annexation appeal. In *Grant County Fire Protection District No. 5 v. City of Moses Lake*, the Washington State Supreme Court upheld a challenge to an annexation under the Uniform Declaratory Judgments Act.¹⁰³ One of the annexations was in Grant County which does not have a boundary review board like Clark County.¹⁰⁴ The Washington State Supreme Court’s *Grant County Fire Protection District No. 5* decision controls and the superior court made an error of law in dismissing the annexation appeal.

RCW 36.93.160(5)’s limitations on who can appeal a boundary review board decision on an annexation and when they can appeal the decision do not apply here because Clark County does not have a boundary review board.¹⁰⁵ RCW 36.93.160 only applies “[w]hen the jurisdiction of the boundary review board has been invoked ...”¹⁰⁶

For a similar reason RCW 35A.14.210’s limitations on who can appeal a county annexation review board decision on an annexation and when they can appeal the decision do not apply here because Clark County does

¹⁰³ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 802, 83 P.3d at 423.

¹⁰⁴ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 798 – 99, 83 P.3d at 421 – 22; Verbatim Report of Proceedings 16-2-01813-4 (RP) 52.

¹⁰⁵ RP 52.

¹⁰⁶ RCW 36.93.160(1).

not have a county annexation review board.¹⁰⁷ RCW 35A.14.210 only applies to the decisions of a county annexation review board.

To the extend the superior court concluded that the Brown Annexation could not be appealed under the Declaratory Judgments Act, the superior court made an error of law. The Court of Appeals should follow the Washington State Supreme Court's *Grant County Fire Protection District No. 5* and hold that the Brown Annexation was properly appealed under the Declaratory Judgments Act. So, the LCCs and Ridgefield were not entitled to judgment as a matter of law on the annexation appeal issues.

(ii) The Growth Management Act (GMA) does not preclude this challenge to the Brown Annexation

The GMA provides that certain violations of the GMA must be appealed to the Growth Management Hearings Board.¹⁰⁸ Futurewise appealed Clark County's decisions dedesignating the agricultural land of long-term commercial significance that makes up the Brown Annexation and expanding the UGA to include this land to the Growth Management Hearings Board.¹⁰⁹ Futurewise prevailed on these issues. The Growth

¹⁰⁷ RP 52.

¹⁰⁸ RCW 36.70A.280(1); RCW 36.70A.290(2).

¹⁰⁹ CP 11 – 12, Complaint pp. 9 – 10.

Management Hearings Board (Board) held that both the agricultural lands dedesignations and the UGA expansion violated the GMA.¹¹⁰

However, nothing in the GMA grants the Board exclusive jurisdiction over whether annexations comply with the GMA.¹¹¹ In *Glenrose Community Association v. City of Spokane*, the court of appeals held that courts have jurisdiction to review an annexation's compliance with the GMA under an action for a writ of certiorari or an action under the Uniform Declaratory Judgments Act.¹¹² The court of appeals wrote: "Some of the issues raised by the Association call for relief that is available by way of a declaratory judgment. Specifically, the action alleged the City lacked authority to proceed with the annexation 'in light of the public policies embodied in the Washington Growth Management Act'"¹¹³

¹¹⁰ CP 175 – 76 & 187 – 96, *Clark County Citizens United, Inc., Friends of Clark County, and Futurewise v. Clark County*, GMHB Case No. 16-2-0005c, Final Decision and Order (March 23, 2017), at 22 – 23 & 37 – 43 of 101. These decisions are under appeal, but are still good law.

¹¹¹ RCW 36.70A.280(1); RCW 36.70A.290(2).

¹¹² *Glenrose Cmty. Ass'n v. City of Spokane*, 93 Wn. App. 839, 846, 971 P.2d 82, 85–86 (1999), as amended (Feb. 26, 1999) disapproved of by *Snohomish Cty. Fire Prot. Dist. No. 1 v. Washington State Boundary Review Bd. for Snohomish Cty.*, 155 Wn.2d 70, 117 P.3d 348 (2005). The supreme court disapproved of the court of appeals' dicta that "[i]t is only after Boundary Review Board approval that supporters of annexation must present the City Council with a petition signed by owners of 75 percent of the assessed property value." [*Glenrose Cmty. Ass'n v. City of Spokane*, 93 Wn. App.] at 850, 971 P.2d 82. To the extent the language in *Glenrose* conflicts with our holding in the present case, we disapprove *Glenrose*." *Snohomish Cty. Fire Prot. Dist. No. 1 v. Washington State Boundary Review Bd. for Snohomish Cty.*, 155 Wn.2d 70, 79 fn. 8, 117 P.3d 348, 352 fn. 8 (2005). The supreme court did not disapprove of the court of appeal's holding that the courts have the authority to review an annexation's compliance with the GMA. *Id.*

¹¹³ *Glenrose Cmty. Ass'n*, 93 Wn. App. at 846–47, 971 P.2d at 86.

This lawsuit also includes Uniform Declaratory Judgments Act and certiorari causes of action challenging whether Ridgefield violated the GMA in approving the Brown Annexation.¹¹⁴ Like the lawsuit filed in *Glenrose Community Association v. City of Spokane*, the superior court had the authority to review Brown Annexation for compliance with the GMA and the other laws at issue in this judicial appeal.

In the *Davidson Serles* decision the court of appeals held that Davidson Serles could challenge whether the rezone was a spot zone because the issue of spot zoning could not be raised before the Growth Management Hearings Board.¹¹⁵ The legality of an annexation is just like spot zoning, it cannot be raised before the Board and so was property appealed to superior court.

Bodies other than the Growth Management Hearings Board must determine GMA compliance. For example, boundary review board decisions on annexations must be consistent with certain GMA provisions.¹¹⁶

¹¹⁴ CP 8 – 18, Complaint pp. 6 – 16.

¹¹⁵ *Davidson Serles & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 638 – 39, 246 P.3d 822, 834–35 (2011).

¹¹⁶ *Stewart v. Washington State Boundary Review Bd. for King Cty.*, 100 Wn. App. 165, 172–73, 996 P.2d 1087, 1091 (2000) “The decisions of a boundary review board located in a county that is required or chooses to plan under RCW 36.70A.040 must be consistent with RCW 36.70A.020, 36.70A.110, and 36.70A.210.” The decision cited RCW 36.93.157. “The first cited section with which consistency is required includes the goals of the GMA (RCW 36.70A.020). The second concerns urban growth areas (RCW

To the extend the superior court concluded that the GMA precluded an appeal of the Brown annexation under the Declaratory Judgments Act, the superior court made an error of law. The Court of Appeals should follow the Washington State Supreme Court’s *Grant County Fire Protection District No. 5* and the *Glenrose Community Association* decisions and hold that the Brown Annexation was properly appealed under the Declaratory Judgments Act and the other causes of action.

2. Did the superior court have jurisdiction over the over the LUPA appeal? (Assignments of Error 3, 4, and 5.)

- (i) The Land Use Petition Act (LUPA) does not provide a means of reviewing annexations, but is a method of judicial review of the rezones authorized by a comprehensive plan**

“Whether a court has subject matter jurisdiction for a [Land Use Petition Act] LUPA petition is a question of law ...”¹¹⁷ Under LUPA “superior court review is limited to actions defined by LUPA as land use decisions. RCW 36.70C.010, .040(1); *Post v. City of Tacoma*, 167 Wn.2d 300, 309, 217 P.3d 1179 (2009).”¹¹⁸

RCW 36.70C.020(2) provides in relevant part that a

“[l]and use decision” means a final determination by a local jurisdiction's body or officer with the highest level of

36.70A.110), and the third concerns county-wide planning policies (RCW 36.70A.210).” *Stewart*, 100 Wn. App. at 173, 996 P.2d at 1091.

¹¹⁷ *Schnitzer W., LLC v. City of Puyallup*, 196 Wn. App. 434, 439, 382 P.3d 744, 747 (2016) review granted *Schnitzer W., LLC v. City of Puyallup*, 187 Wn.2d 1025, 391 P.3d 456 (2017).

¹¹⁸ *Durland v. San Juan Cty.*, 182 Wn.2d 55, 64, 340 P.3d 191, 196 (2014).

authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses ...¹¹⁹

“[L]and use decisions” do not include annexations. So LUPA is not the mechanism for judicial review of annexations.

(ii) The Land Use Petition Act (LUPA) is a method of reviewing the rezones authorized by a comprehensive plan

LUPA does provide for judicial review of rezones authorized by a “then existing” comprehensive plan.¹²⁰ Ridgefield Ordinance No. 1216 provides that the “annexation area is designated Urban Low as shown on the Comprehensive Plan Map of the Ridgefield Urban Area Comprehensive Plan. adopted on February 25, 2016, Ordinance No. 1203”¹²¹ Since Ordinance 1216 claimed that the rezone was authorized by a then existing comprehensive plan, LUPA was the proper method of

¹¹⁹ Emphasis added.

¹²⁰ RCW 36.70C.020(2); *Spokane Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 572, 309 P.3d 673, 681 (2013) review denied *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 179 Wn.2d 1015, 318 P.3d 279 (2014); *Schnitzer W., LLC*, 196 Wn. App. at 441, 382 P.3d at 748.

¹²¹ CP 20, City of Ridgefield Ordinance No. 1216 p. 1.

seeking judicial review of the rezones adopted by Ordinance 1216 on September 8, 2016.¹²²

The LCCs argued below in their Motion to Dismiss, at CP 52, that “[t]he GMA vests jurisdiction in the [Growth Management Hearings Board] GMHB for petitions alleging violation of the GMA. See RCW 36.70A.280(1)(a).” However, the Washington State Supreme Court held that:

The GMA in turn limits the kinds of matters that GMHBs may review: “A growth management hearings board shall hear and determine only those petitions alleging ... [t]hat a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter....” RCW 36.70A.280(1)(a). Another provision of the GMA spells out in greater detail the subject matter of each petition: “All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter ... must be filed within sixty days after publication....” RCW 36.70A.290(2). From the language of these GMA provisions, we conclude that unless a petition alleges that a comprehensive plan or a development regulation or amendments to either are not in compliance with the requirements of the GMA, a GMHB does not have jurisdiction to hear the petition.¹²³

The state Supreme Court went on to write that:

The GMA defines what a “development regulation” is and, more helpfully, what it is not: “A development regulation does not include a decision to approve a project permit

¹²² CP 22, City of Ridgefield Ordinance No. 1216 p. 3.

¹²³ *Wenatchee Sportsmen Ass'n v. Chelan Cty.*, 141 Wn.2d 169, 178, 4 P.3d 123, 127 (2000).

application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.” RCW 36.70A.030(7). The Local Project Review statute defines “project permit application” as including, among other things, “site-specific rezones authorized by a comprehensive plan or subarea plan.” RCW 36.70B.020(4). The items listed under “project permit application” are specific permits or licenses; more general decisions such as the adoption of a comprehensive plan or subarea plan are not approvals of project permit applications. RCW 36.70B.020. The conclusion to be drawn from these provisions is that a site-specific rezone is not a development regulation under the GMA, and hence pursuant to RCW 36.70A.280 and .290, a GMHB does not have jurisdiction to hear a petition that does not involve a comprehensive plan or development regulation under the GMA.¹ See also *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997).

¹ Challenges to a decision concerning a site-specific rezone should be brought by means of a LUPA petition in superior court.¹²⁴

Since this lawsuit challenges an annexation and a rezone that the LCCs and City do not argue is not authorized by the City of Ridgefield comprehensive plan, jurisdiction over this lawsuit is in the superior court, not before the Growth Management Hearings Board.

Ridgefield Development Code (RDC) 18.320.050D provides that the “city shall not approve any amendment petition which is contrary to state or federal law.” RDC 18.320.030B applies chapter 18.320 RDC,

¹²⁴ *Wenatchee Sportsmen Ass'n*, 141 Wn.2d at 178 – 79, 4 P.3d at 127.

Amendments, to zoning districts and zoning overlay districts adopted at the time of annexation. City of Ridgefield Ordinance No. 1216 adopted a zoning district and overlay for the property in the Brown Annexation when the land was annexed.¹²⁵ The adoption of zoning for the land in the Brown Annexation violated state law including the GMA and the Ridgefield Development Code including RDC 18.320.050D.¹²⁶ The superior court had jurisdiction over these GMA and Ridgefield Development Code violations.¹²⁷

In the *Schnitzer West, LLC v. City of Puyallup* decision, the court of appeals concluded that a “‘site-specific’ rezone” is a “land use decision subject to superior court review under LUPA.”¹²⁸ To demonstrate the adoption of “a site-specific rezone, the evidence must show (1) that there was a change in zone designation (2) of a specific tract and (3) that specific tract’s zoning designation change was requested by a ‘specific party.’ *Spokane County*, 176 Wn. App. at 570, 309 P.3d 673 (internal quotation marks omitted) (quoting *Woods*, 162 Wn.2d at 611 n.7, 174 P.3d 25).”¹²⁹

¹²⁵ CP 8, Complaint p. 6; CP 22, City of Ridgefield Ordinance No. 1216 p. 3.

¹²⁶ CP 8 – 9, Complaint pp. 6 – 7.

¹²⁷ *Glenrose Cmty. Ass'n*, 93 Wn. App. at 846, 971 P.2d at 85–86.

¹²⁸ *Schnitzer W., LLC*, 196 Wn. App. at 441, 382 P.3d at 748.

¹²⁹ *Id.*

The Brown Annexation rezones meet these criteria. City of Ridgefield Ordinance No. 1216 rezoned the Brown Annexation, and only the Brown Annexation, to Residential Low Density 6 with an Urban Holding 10 overlay.¹³⁰ The Brown Annexation is a specific tract.¹³¹ The City of Ridgefield Master Land Use Application for the annexation, signed by Mr. Brown and Mr. Howsley, stated that zoning was “TBD,” to be determined.¹³² Mr. Brown and the LLCs, specific parties, did request a zoning change. Since the property was being annexed the zoning had to change from Clark County zoning to Ridgefield zoning at some time. According to the “Introductory Statement for Annexation” Mr. Brown and the LLCs wanted low density single-family uses and that was the zoning the City of Ridgefield approved.¹³³ The City of Ridgefield’s adoption of the Residential Low Density 6 (RLD-6) zone with an Urban Holding 10 (UH-10) overlay was a site-specific rezone.

Further, Ridgefield Development Code (RDC) 18.210.015B does not require the City to adopt a specific zone for annexed land and does not set a specific deadline for the adoption of city zoning for annexed property.

¹³⁰ CP 22, CP 26, CP 28, Ordinance No. 1216 p. 3, Exhibit 1 p. *3, Exhibit 2 p. *2.

¹³¹ CP 22, CP 25 – 26, CP 28, Ordinance No. 1216 p. 3, Exhibit 1 pp. *2 – 3, Exhibit 2 p. *2.

¹³² CP 351, Milt Brown Ridgefield Master Use Application p. 2.

¹³³ CP 355, Milt Brown Ridgefield Master Use Application p. 6; CP 22, City of Ridgefield Ordinance No. 1216 p. 3.

RDC 18.210.015B provides in full that “[t]he city shall designate all newly annexed RLD land as RLD-6 or greater density.”¹³⁴ So the City of Ridgefield could have adopted a higher density base zone for the Brown Annexation, but chose to follow Mr. Brown’s request for low density single family zoning and adopted the lowest density base zone the city could adopt. Again, this shows that the City of Ridgefield’s adoption of the Residential Low Density 6 zone with an Urban Holding 10 overlay was a site-specific rezone. So LUPA was the proper means of challenging the rezone of the Brown Annexation. To the extent that the superior court concluded otherwise, the court made an error of law. The LCCs and the City were not entitled to judgment as a matter of law on this issue. The above evidence also shows there are genuine issues of material fact.

3. Do the LCCs have any vested rights on the land within Brown Annexation? (Assignment of Error 6.)

“¶ 9 Washington's vested rights doctrine, as it was originally judicially recognized, entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or

¹³⁴ RDC 18.210.015C requires an Urban Holding (UH) overlay “until urban services, consistent with the adopted capital facility plan and [Ridgefield Urban Area Comprehensive Plan] RUACP, are available to the UH site or until all financing necessary to construct or bond for the necessary urban services is secured.”

other land use regulations.”¹³⁵ The legislature has codified the vested rights doctrine for building permits and long and short subdivisions, the process for creating building lots.¹³⁶ Only certain permit applications vest the right to develop regardless of subsequent changes to development regulations.¹³⁷ Annexation applications and annexation approvals do not vest a right to develop under the vested rights doctrine.¹³⁸ So the annexation did not vest any right to develop the Brown Annexation. Therefore, the superior court made an error of law to the extent the court relied on vested rights to dismiss this appeal. The LCCs and the City were not entitled to judgment as a matter of law on this issue.

V. CONCLUSION

As this brief has documented, Futurewise had representational standing to appeal the annexation and rezones. Futurewise also properly appealed the annexation and rezones to superior court. The superior court erred in dismissing the appeals because the LCCs and the City of Ridgefield were not entitled to judgment as a matter of law. The facts in

¹³⁵ *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180, 182–83 (2009).

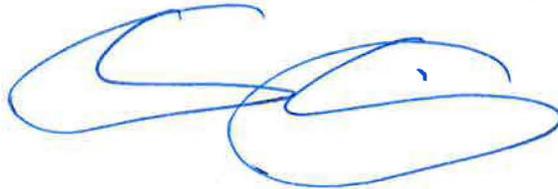
¹³⁶ *Potala Vill. Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 198 – 99, 334 P.3d 1143, 1146 – 47 (2014).

¹³⁷ *Abbey Rd. Grp., LLC*, 167 Wn. 2d at 260 – 61, 218 P.3d at 187 – 88.

¹³⁸ Roger D. Wynne, *Washington’s Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It* 24 SEATTLE UNIVERSITY LAW REVIEW 851, 866 fn. 38 (2001) citing *Vashon Island Comm. for Self-Government v. King County Boundary Review Bd.*, 127 Wn.2d 759, 767 – 68, 903 P.2d 953, 957 – 58 (1995).

evidence in this case either show that these appeals were proper or, at the least, establish genuine issues of material fact. The court should reverse the superior court and remand the matter back to the superior court for a bench trial on the record created by the City of Ridgefield.

Dated: December 11, 2017, and respectfully submitted,

A handwritten signature in blue ink, consisting of several overlapping loops and a horizontal line, positioned above a horizontal line.

Tim Trohimovich, WSBA No. 22367
Attorney for Futurewise

CERTIFICATE OF SERVICE

The undersigned declares on penalty of perjury under the laws of the State of Washington that on this 11th day of December 2017, the undersigned caused the electronic original and true and correct copies of the following documents to be served on the persons listed below in the manner shown: **Futurewise’s Appellant’s Opening Brief** in Case No. 50406-5-II.

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