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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.

REPLY BRIEF OF APPELLANT FUTUREWISE

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I. INTRODUCTION

This Reply Brief of Appellant Futurewise (reply) addresses the arguments in the Brief of Respondent City of Ridgefield and the Respondents Milt Brown, RDGB Royal Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View Estates LLC, and RDGS Real View LLCs' Opening Brief (LCCs' Opening Brief). As this reply will show, the arguments in those briefs all fail. The superior court had jurisdiction over both the challenge to the annexation and the rezone and should not have dismissed this appeal.

II. ARGUMENT

A. Standard of Review

Futurewise's Appellant's Opening Brief documented that matters outside the pleadings were presented and not excluded by the superior court.¹ The motion Mr. Brown, RDGB Royal Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View Estates LLC, and RDGS Real View LLC (LCCs) filed in superior court is treated as a motion for summary judgment.² The LCCs argue that because "the basic operative facts were undisputed and the core issue was one of

¹ *See for example*, Clerk's Papers (CP) 89 – 118, Tim Trohimovich Declaration Re: Standing with declarations and affidavits.

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

law” the court granted a Superior Court Civil Rule (CR) 12(b)(6) motion, not a motion for summary judgment.³ The State Supreme Court’s *Ortblad* decision did conclude that where “the basic operative facts are undisputed and the core issue is one of law ...” the decision is not treated as granting a motion for summary judgment.⁴ Futurewise is fine characterizing this case as granting a CR 12(b)(6) motion. For the purposes of the standard of review, this Court conducts a de novo review of the superior court ruling in either case.⁵

B. Did Futurewise have representational standing to bring the annexation and Land Use Petition Act (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

Futurewise’s Appellant’s Opening Brief argued that the State Supreme Court’s *Grant County Fire Protection District No. 5 v. City of Moses Lake* decision adopted the two-part standing test from *SAVE v. Bothell* for Uniform Declaratory Judgments Act (UDJA) challenges to annexations.⁶

³ LLCs’ Opening Brief pp. 11 – 12.

⁴ *Ortblad v. State*, 85 Wn.2d 109, 111, 530 P.2d 635, 637 (1975).

⁵ *Smith v. Safeco Ins. Co.*, 150 Wn. 2d 478, 483, 78 P.3d 1274, 1276 (2003) (summary judgment); *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216, 219 (1994) *cert denied* *Cutler v. Phillips Petroleum Co.*, 515 U.S. 1169 (1995) (CR 12(b)(6) motion).

⁶ *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419, 423 (2004).

Futurewise’s Appellant’s Opening Brief, on pages 11 through 25, also documented that the two-part test was met.

Both Ridgefield and the LCCs argue that there is a lack of evidence to support standing or that Futurewise’s members did not provide evidence of an injury in fact. This argument fails for two reasons. First the declarations and affidavits of Futurewise’s members are proper evidence for determining standing.⁷ The declarations and affidavits document injuries in fact, such as flooding, having to rebuild the foundation of their due to flooding and storm water damage, having pastures converted to wetlands due to flooding, increased storm water runoff from the proposed developments, storm water pumped onto their property, impacts to their agricultural operations, damage to fences, and killing a calf to name just a few.⁸

Second, under the *SAVE* test, a corporation seeking representational standing must “allege the challenged action has caused ‘injury in fact ...’”⁹ Futurewise and its members have certainly done that.

⁷ *City of Burlington v. Washington State Liquor Control Bd.*, 187 Wn. App. 853, 866 – 67, 351 P.3d 875, 881 (2015), *as amended* (June 17, 2015) *review denied City of Burlington v. Singh*, 184 Wn.2d 1014, 360 P.3d 818 (2015).

⁸ 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.

⁹ *Save a Valuable Env’t (SAVE) v. City of Bothell*, 89 Wn. 2d 862, 866 – 67, 576 P.2d 401, 404 (1978) underling added.

Ridgefield and the LCCs argue that *SAVE* should no longer apply since it was decided before the Growth Management Act (GMA) was adopted. But *Grant County* was decided over a decade after the GMA was adopted.¹⁰

The City argues that *SAVE* is also inapposite because the State Supreme Court relied on “serious detrimental effects on nearby agricultural and low density residential uses of land, requiring substantial investments ...” of state and local funds.¹¹ But these statements were not from the standing analysis, they were taken from the merits analysis.¹² Futurewise’s members have shown serious detrimental effects on nearby agricultural and low density residential uses of land.¹³ But that is not the standard for standing.

Ridgefield argues that all of the problems documented in the declarations and affidavits were caused by the Clark County Comprehensive Plan update, not the annexation and rezone. But Clark County did not authorize the construction of the Pioneer Place Pump Station that pumped storm water onto the Carlson property, cut the fence

¹⁰ Laws of 1990 1st ex.s., ch. 17; *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 802, 83 P.3d at 423.

¹¹ Brief of Respondent City of Ridgefield p. 23.

¹² *Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 868 – 69, 576 P.2d 401, 405 (1978).

¹³ 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.

making the field unusable for animal husbandry, and killed the calf.¹⁴ Ridgefield did.¹⁵ This pump station will serve the Brown Annexation.¹⁶ The LCCs' argument that Ordinance No. 1216 did not cause an injury in fact is simply wrong. It allowed the City to approve the pump station damaging the Carlson property.

Similarly, the LCCs argue the annexation did not authorize any development. But, as was documented above, the City has already relied on the annexation to authorize development, the pump station, that has harmed Futurewise's members. Given the that whole purpose of the annexation and rezone was to allow urban residential development, more adverse impacts will come.

As Futurewise's Appellant's Opening Brief documented on pages 22 and 23, Clark County is required to comply with the State of Washington Department of Ecology's *Phase I Municipal Stormwater Permit*¹⁷ and Ridgefield is not covered by any Municipal Stormwater Permit.¹⁸ So, the Futurewise members have and will experience greater storm water runoff,

¹⁴ CP 115 – 16, Declaration of Cynthia A. Carlson pp. 2 – 3.

¹⁵ CP 99 – 104, Affidavit of Janice Myev Exhibit A.

¹⁶ CP 115, Declaration of Cynthia A. Carlson p. 2.

¹⁷ 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).

¹⁸ CP 271, State of Washington Department of Ecology, *Who's Covered Under the Municipal Stormwater Permits?* webpage.

flooding, and siltation then they would have if the annexation had not occurred. The annexation and rezone are the causes of the injuries in fact.

The LLCs argue that under *Anderson*, to have standing the organization's member must address "specific proposed mitigation measures in determining they were inadequate."¹⁹ But *Anderson* did not include that requirement. As the court wrote:

The Chairman of the Buckley Plateau Coalition testified before the Hearing Examiner that he owns 60 acres of property immediately adjacent to the RPW Project site which he alleges would be adversely impacted by the RPW Project. He also contended that the mitigation measures proposed in the MDNS were insufficient to control stormwater runoff which would damage his adjoining property. We agree with the trial court that the Buckley Plateau Coalition adequately alleged a specific "injury in fact" within the "zone of interests" to be protected by SEPA, and that they had standing to challenge the MDNS.²⁰

Here, five Futurewise members own property and live adjacent to the Brown Annexation and state under oath that their properties will be adversely impact by the development allowed by the annexation and rezone.²¹ Water was pumped from the pump station construction site Ridgefield authorized, harming Ms. Carlson's property and nearby creeks

¹⁹ LLCs' Opening Brief p. 26.

²⁰ *Anderson v. Pierce Cty.*, 86 Wn. App. 290, 300, 936 P.2d 432, 438 (1997).

²¹ CP 92 – 94, Affidavit of Edward Niece pp. 1 – 3; CP 95 – 97, Affidavit of Janice Myev pp. 1 – 3; CP 114 – 18, Declaration of Cynthia A. Carlson pp. 1 – 5; CP 105 – 09, Affidavit of Newt Rumble and Barbara Kusik pp. 1 – 8.

used by salmon.²² Development of the Brown Annexation will result in additional storm water runoff on her property.²³ A fork of Allen Creek flows through Ridgefield, through the Brown Annexation, and then downstream through Mr. Rumble's and Ms. Kusik's (Rumble-Kusik) property.²⁴ Development upstream in Ridgefield has increased the frequency, length of time, and depth that Allen Creek floods the Rumble-Kusik property where they live.²⁵ 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."²⁶ Other neighbors also raised concerns about drainage and flooding. This is much more specific evidence than the allegations in *Anderson* that provided standing for the coalition.

It is true that, unlike *Anderson*, the Futurewise members did not contend the mitigation measures in the SEPA document for the

²² CP 116, Declaration of Cynthia A. Carlson p. 3.

²³ CP 117 – 18, Declaration of Cynthia A. Carlson pp. 4 – 5.

²⁴ CP 106, Affidavit of Newt Rumble and Barbara Kusik p. 2.

²⁵ CP 107, Affidavit of Newt Rumble and Barbara Kusik p. 3.

²⁶ CP 111, Affidavit of Newt Rumble and Barbara Kusik p. 7.

development were inadequate. That is because Ridgefield relied on a SEPA exemption and so there are no SEPA documents or SEPA mitigation measures.²⁷ If the pump station incident is any indication, Ridgefield may never require any storm water mitigation.

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

Ridgefield argues that like the fire districts in *Grant County Fire Protection District No. 5*, Futurewise should not be granted standing under the less rigid approach to standing recognized in that decision. But if Futurewise is not granted standing the important issues in this case will not be resolved. As the State Supreme Court wrote, “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.”²⁸ In *Grant County Fire Protection District*, property owners could raise the same issues as the fire districts so the more liberal approach was not necessary.²⁹ That is not the case here, Futurewise is the only plaintiff/appellant. This fact argues for the application of the more liberal approach to standing.

²⁷ CP 21, City of Ridgefield Ordinance No. 1216 p. 2.

²⁸ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 803, 83 P.3d at 424.

²⁹ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 804, 83 P.3d at 424 – 25.

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.)

Further, in *Grant County Fire Protection District No. 5 v. City of Moses Lake*, the Washington State Supreme Court upheld challenging annexations under the Uniform Declaratory Judgments Act.³⁰ One of the annexations was in Grant County which does not have a boundary review board like Clark County.³¹ Like Clark County, Benton County plans under the GMA.³² The Washington State Supreme Court's *Grant County Fire Protection District No. 5* decision controls and the courts have the authority to review annexations in GMA counties without boundary review boards or county review boards.

The LLCs argue that *Grant County Fire Protection District No. 5* decision does not apply to this case as that decision addressed constitutional challenges to the annexation statutes. In *Grant County Fire Protection District No. 5*, property owners and fire districts challenged

³⁰ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 802, 83 P.3d at 423.

³¹ *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.

³² *Greenfield Estates Homeowners Association v. Grant County*, EWGMHB Case No. 04-1-0005, Final Decision and Order (Oct. 8, 2004), 2004 WL 3335333, at *4; CP 156, *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 3 of 101.

two annexations on the basis that the petition method of annexing property was unconstitutional.³³ The supreme court set out the rules for standing to seek a declaratory judgment, under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW.³⁴ The court followed the standing tests from *Save a Valuable Environment v. City of Bothell (SAVE)*.³⁵ After applying the tests, the State Supreme Court concluded “the property owners satisfy the requirements of actual injury for the ‘injury in fact’ test because they face different tax rates following annexation.”³⁶ This standing analysis applies generally to UDJA actions and was not limited to actions where the basis of the annexation challenge is a violation of the state constitution. It is also generally applicable that the court upheld the use of the UDJA to challenge annexations.³⁷ So, the *Grant County Fire Protection District No. 5* decision is applicable to this case.

As Futurewise’s Appellant’s Opening Brief documented on pages 27 and 28, the limitations on appeals of boundary review board decisions and county annexation review board decisions do not apply in this case because Clark County does not have either of those boards.³⁸ Ridgefield

³³ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 798 – 800, 83 P.3d at 421 – 22.

³⁴ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 801 – 04, 83 P.3d at 423 –25.

³⁵ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 802, 83 P.3d at 423 citing *Save a Valuable Env't v. City of Bothell (SAVE)*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978).

³⁶ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 802 – 03, 83 P.3d at 423.

³⁷ *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 797 – 804, 83 P.3d at 421–25.

³⁸ RP 52.

cites to RCW 35A.14.220 and seems to argue that this section somehow limits judicial review of annexations. It does not. RCW 35A.14.220 provides that certain annexations are not subject to review by the annexation review boards and the boundary review boards. Nothing in RCW 35A.14.220 exempts annexations from judicial review.

Contrary to Ridgefield's argument, an appeal of an annexation is not a collateral attack on the GMA planning process for two reasons. First, the amendments authorizing the Brown Annexation have been found to violate the GMA.³⁹ So the planning process violated state law and this action will help implement the Growth Management Hearings Board's orders.

Second, this appeal challenges issues that Growth Management Hearings Board cannot consider such as whether the annexations complied with the annexation statutes. That is not a collateral attack on the GMA planning process.

Ridgefield argues that "Futurewise's challenge fails to identify any procedural or legal errors in the annexation."⁴⁰ However, the moving parties did not provide facts showing the annexation complied with state

³⁹ 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.

⁴⁰ Brief of Respondent City of Ridgefield p. 10.

law. Nor has Ridgefield produced the record that would allow Futurewise to address the merits of the annexation. A material question of fact remains on this issue. Or, applying the standard for a CR 12(b)(6) motion, it should not appear to the court “beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.”⁴¹

The LLCs argue that Futurewise failed to show that forums other than the Growth Management Hearings Board are authorized to hear GMA claims. But Futurewise’s Opening Brief documented that in the *Glenrose Community Association* decision, 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.⁴² The LCCs argue that this decision was made before the completion of the annexation. But that was not the reason the court of appeals concluded the superior court had jurisdiction. The court found jurisdiction because the lawsuit was “an action for writ of certiorari and/or declaratory relief.”⁴³

⁴¹ *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781, 785 (1988), *on reconsideration in part*, 113 Wn.2d 148, 776 P.2d 963 (1989).

⁴² *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).

⁴³ *Glenrose Cmty. Ass’n*, 93 Wn. App. at 846, 971 P.2d at 85 – 86.

Ridgefield and the LCCs argue the Growth Management Hearings Board has exclusive jurisdiction for determining compliance with the GMA. But the Growth Management Hearings Board only has exclusive jurisdiction over matters related to the adoption or amendment of shoreline master programs, plans, development regulations, or amendments adopted under RCW 36.70A.040 and certain other decisions none of which are annexations or site-specific rezones authorized by a comprehensive plan.⁴⁴

Further, boundary review board decisions on annexations must be consistent with certain GMA provisions.⁴⁵

Contrary to the LCCs' arguments, *Davidson Serles* does not support their position. In *Davidson Serles* the court of appeals held that Davidson Serles could challenge whether a rezone was a spot zone in court without bringing the issue before the Growth Management Hearings Board because the issue of spot zoning could not be raised before the Board.⁴⁶

The Growth Management Hearings Board “has jurisdiction to review only those claims that the comprehensive plan and development regulations do not comply with particular statutory provisions. *See* RCW 36.70A.280.”⁴⁷

⁴⁴ *Stafne v. Snohomish Cty.*, 156 Wn. App. 667, 682, 234 P.3d 225, 232 (2010), *aff'd*, *Stafne v. Snohomish Cty.*, 174 Wn.2d 24, 271 P.3d 868 (2012); RCW 36.70A.280.

⁴⁵ *Stewart v. Washington State Boundary Review Bd. for King Cty.*, 100 Wn. App. 165, 172–73, 996 P.2d 1087, 1091 (2000).

⁴⁶ *Davidson Serles & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 638 – 39, 246 P.3d 822, 834–35 (2011).

⁴⁷ *Davidson Serles*, 159 Wn. App. at 638, 246 P.3d at 834.

The legality of an annexation or a site-specific rezone are just like spot zoning. These issues cannot be raised before the Growth Management Hearings Board and so were properly appealed to superior court.

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

Futurewise's Appellant's Opening Brief, on pages 32 through 37, documented that the LUPA provides for judicial review of rezones authorized by a "then existing" comprehensive plan.⁴⁸ 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"⁴⁹ Since Ordinance 1216 indicated that the rezone was authorized by a then existing comprehensive plan, LUPA was the proper method of seeking judicial review of the rezones adopted by Ordinance 1216 on September 8, 2016.⁵⁰

Ridgefield argues that City, not a specific party, was the moving force behind the rezone. But Mr. Brown, on behalf of the LCCs, applied for an annexation and rezone. The City of Ridgefield Master Land Use

⁴⁸ 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).

⁴⁹ CP 20, City of Ridgefield Ordinance No. 1216 p. 1.

⁵⁰ CP 22, City of Ridgefield Ordinance No. 1216 p. 3.

Application for the annexation, signed by Mr. Brown and Mr. Howsley, stated that the zoning was “TBD,” to be determined.⁵¹ According to the “Introductory Statement for Annexation” Mr. Brown, on behalf of the LLCs, requested low density single-family uses and that was the zoning the City of Ridgefield approved.⁵²

Ridgefield and the LCCs argue that it did not change the zoning, but instead instituted zoning within an area that previously lacked City zoning. But the property had county zoning which Ordinance 1216 rezoned to city zoning.⁵³ Contrary to the implication on page 18 of the Brief of Respondent City of Ridgefield, the zoning change in the *Spokane County* decision was not determined to be a development regulation because the zoning changed from county zoning to city zoning, all of the comprehensive plan designations and zones at issue were Spokane County designations and zones.⁵⁴ Rather it was not rezone because the zoning change was not “authorized by a then-existing comprehensive plan ...”⁵⁵

⁵¹ CP 351, Milt Brown Ridgefield Master Use Application p. 2.

⁵² CP 355, Milt Brown Ridgefield Master Use Application p. 6; CP 22, City of Ridgefield Ordinance No. 1216 p. 3.

⁵³ CP 9, 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 p. 7. Hereinafter Complaint; CP 22, City of Ridgefield Ordinance No. 1216 p. 3.

⁵⁴ *Spokane Cty.*, 176 Wn. App. at 562 – 64, 309 P.3d at 676 – 77.

⁵⁵ *Spokane Cty.*, 176 Wn. App. at 572, 309 P.3d at 681.

Contrary to Ridgefield’s argument, rezones are not limited to a single lot or parcel. The *Cathcart-Maltby-Clearview Community Council* decision changed the zoning on two parcels of land which was held to be a site-specific rezone and a “single tract.”⁵⁶ In *Smith v. Skagit County*, the tract the county rezoned was 480 acres.⁵⁷ In *Tugwell*, a rezone reviewed under LUPA, the tract was approximately 115 acres.⁵⁸ The tract in *Woods* was 251.63 acres and was properly challenged under LUPA.⁵⁹

“[A] site-specific rezone is a change in the zone designation of a ‘specific tract’ at the request of ‘specific parties’ ...”⁶⁰ “[A] site-specific rezone is a project permit approval under LUPA if it is authorized by a then-existing comprehensive plan ...”⁶¹

The Brown Annexation rezone was a site-specific rezone. Ordinance No. 1216 rezoned the Brown Annexation, and only the Brown Annexation, to Residential Low Density 6 with an Urban Holding 10 overlay.⁶² The Brown Annexation is a specific tract and, at 111 acres, is

⁵⁶ *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish Cty.*, 96 Wn.2d 201, 203 & 212, 634 P.2d 853, 855 & 860 (1981).

⁵⁷ *Smith v. Skagit Cty.*, 75 Wn.2d 715, 736, 453 P.2d 832, 844 (1969), *holding modified by State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1992).

⁵⁸ *Tugwell v. Kittitas Cty.*, 90 Wn. App. 1, 5, 951 P.2d 272, 274 (1997).

⁵⁹ *Woods v. Kittitas Cty.*, 162 Wn.2d 597, 603 & 610, 174 P.3d 25, 28 & 31 (2007).

⁶⁰ *Spokane Cty.*, 176 Wn. App. at 570, 309 P.3d at 680.

⁶¹ *Spokane Cty.*, 176 Wn. App. at 572, 309 P.3d at 681.

⁶² CP 22, CP 26, CP 28, Ordinance No. 1216 p. 3, Exhibit 1 p. *3, Exhibit 2 p. *2.

smaller than several tracts challenged under LUPA.⁶³ The property formerly had Clark County zoning.⁶⁴ 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.⁶⁵ According to the “Introductory Statement for Annexation” Mr. Brown and the LLCs requested low density single-family uses and that was the zoning the City of Ridgefield approved.⁶⁶ So there was an application requesting the rezone. Ordinance 1216 indicated that the rezone was authorized by a then existing comprehensive plan.⁶⁷ 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 authorized by an existing comprehensive plan and subject to LUPA.

Ridgefield argues that a site-specific land use decision cannot be challenged for compliance with the GMA. While the GMA, by its terms, only applies to “the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040,” nothing in the GMA prohibits

⁶³ CP 22, CP 24 – 26, CP 28, Ordinance No. 1216 p. 3, Exhibit 1 pp. *1 – 3, Exhibit 2 p. *2; *Tugwell*, 90 Wn. App. at 5, 951 P.2d at 274; *Woods v. Kittitas Cty.*, 162 Wn.2d 597, 603 & 610, 174 P.3d 25, 28 & 31 (2007).

⁶⁴ CP 9, Complaint p. 7.

⁶⁵ CP 351, Milt Brown Ridgefield Master Use Application p. 2.

⁶⁶ CP 355, Milt Brown Ridgefield Master Use Application p. 6; CP 22, City of Ridgefield Ordinance No. 1216 p. 3.

⁶⁷ CP 20, City of Ridgefield Ordinance No. 1216 p. 1.

a county or city from requiring that its zoning must be consistent with the GMA.⁶⁸ Ridgefield Development Code (RDC) 18.320.050D and RDC 18.320.030B require that rezones adopted at the time of an annexation must comply with federal and state laws which includes the GMA.

The *Woods* decision’s conclusion that the GMA does not apply to site-specific rezones was based on the analysis of the GMA and LUPA.⁶⁹ It did not address the situation we have here where the City’s development regulations require compliance with state and federal laws which include the GMA.⁷⁰ Failing to give effect to that requirement is an impermissible collateral attack on Ridgefield’s development regulations.

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 other land use regulations.”⁷¹ The LCCs argue that Ordinance 1216 vested the Brown Annexation and rezone against the Growth Management

⁶⁸ RCW 36.70A.020; chapter 36.70A RCW.

⁶⁹ *Woods v. Kittitas Cty.*, 162 Wn.2d 597, 612 – 16, 174 P.3d 25, 33 – 34 (2007).

⁷⁰ *Id.*

⁷¹ *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180, 182 – 83 (2009).

Hearings Board’s determination of invalidity for the Ridgefield urban growth area (UGA) expansion.⁷² RCW 36.70A.302(3) provides that a “development permit application not vested under state or local law before receipt of the board’s order by the county or city vests to the local ordinance or resolution that is determined by the board not to substantially interfere with the fulfillment of the goals of this [the GMA]” subject to certain exceptions that do not apply here. Annexations and rezones do not vest under state law.⁷³

Ordinance No. 1216 did not vest the Brown Annexation or rezone against subsequent changes in comprehensive plans and land use regulations.⁷⁴ The LCCs argument that they have vested rights fails.

D. This appeal challenges the City of Ridgefield actions annexing and rezoning the land in the Brown annexation, not the Clark County comprehensive plan.

Ridgefield argues that this appeal is a tardy collateral challenge to the Clark County Comprehensive Plan. This argument fails for three reasons. First, Futurewise has successfully appealed the Clark County

⁷² CP 250 – 53, *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 97 – 100 of 101.

⁷³ 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); *Teed v. King Cty.*, 36 Wn. App. 635, 644 – 45, 677 P.2d 179, 184 – 85 (1984).

⁷⁴ CP 20 – 22, City of Ridgefield Ordinance No. 1216 pp. 1 – 3.

Comprehensive Plan’s dedesignation of the agricultural land in the Brown Annexation and the Ridgefield urban growth area (UGA) expansion that included the Brown Annexation. The Growth Management Hearings Board concluded the Ridgefield UGA expansion and the agricultural lands dedesignation violated the GMA.⁷⁵ The Board also made a determination of invalidity for the Ridgefield UGA expansion and the agricultural lands dedesignation.⁷⁶

Second, 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, Amendments, to zoning districts and zoning overlay districts adopted at the time of annexation.⁷⁷ So Ridgefield’s development regulations require rezones to be consistent with the GMA. The court can review the rezone for compliance with RDC 18.320.050D and RDC 18.320.050D and through them the GMA.

Third, Futurewise challenged whether the annexation and rezone complied with the annexation statutes, other state laws, the Ridgefield Comprehensive Plan, and the Ridgefield Development Code in addition to

⁷⁵ 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.

⁷⁶ CP 250 – 53, *Id.* at 97 – 100 of 101.

⁷⁷ CP 8 – 9, Complaint pp. 6 – 7.

the GMA.⁷⁸ This appeal is different from the *Somers* decision in that Futurewise argues the annexation is inconsistent with the Ridgefield Comprehensive Plan and the Ridgefield Development Code. In *Somers* the court of appeals concluded that because the subdivision was consistent with the previously adopted zoning that applied to the rural land, *Somers* was actually challenging the underlying zoning regulations not the subdivision approval and so the appeal of the zoning, a type of development regulation, must be to the Growth Management Hearings Board.⁷⁹

Futurewise's appeal is like the like the LUPA appeal upheld in *Citizens v. Mount Vernon*. "Because the citizens in *Mount Vernon* argued that the project conflicted with the underlying zoning as well as with the GMA, their petition did not have the effect of challenging the underlying zoning as inconsistent with the GMA." Like the citizens in *Mount Vernon*, Futurewise is not challenging the Ridgefield comprehensive plan or zoning regulations, instead it is challenging the site-specific rezone.⁸⁰ "Because the Board does not have jurisdiction to 'render a decision on a

⁷⁸ CP 8, Complaint p. 6.

⁷⁹ *Somers v. Snohomish Cty.*, 105 Wn. App. 937, 945 – 47, 21 P.3d 1165, 1169 – 70 (2001).

⁸⁰ *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn. 2d 861, 868, 947 P.2d 1208, 1212 (1997).

specific development project,' the Court concluded, the "[c]itizens properly brought the issue to the superior court for judicial review."⁸¹

Ridgefield's collateral attack argument, if accepted, would allow a county to violate the GMA and a city, knowing that that action was challenged and having intervened in the appeal, to annex the challenged UGA amendment and then allow both the county and city to ignore the Growth Management Hearings Board's orders. This violates RCW 36.70A.330(2)'s requirement that GMA violations must be brought into compliance with the Act.

E. Futurewise has not abandoned the other causes of action in this appeal.

Ridgefield and the LCCs argue Futurewise has abandoned the following causes of action: a complaint and petition for declaratory judgment filed under the constitutional writ provisions of Article IV, Section 6 of the Washington State Constitution; a complaint and petition for a writ of certiorari under chapter 7.16 RCW; a complaint and petition for a writ of certiorari under Article IV, Section 6 of the Washington State Constitution; and a complaint and petition for a writ of review under Article IV, Section 6 of the Washington State Constitution or the

⁸¹ *Somers v. Snohomish Cty.*, 105 Wn. App. 937, 946, 21 P.3d 1165, 1170 (2001) *citing Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn. 2d 861, 868, 947 P.2d 1208, 1212 (1997).

common-law. Ridgefield offers merits arguments that the parties never made to the Superior Court and then argues that since Futurewise did not assign error on those grounds, Futurewise has abandoned those causes of action.⁸² But the judge did not dismiss the case based on those merits arguments.⁸³

For example, Ridgefield argues that it did not act arbitrarily or capriciously and writes that Futurewise did not point to any facts in the record to support that claim.⁸⁴ But Ridgefield has not yet produced the record in this case. And Ridgefield never argued that the City had not acted arbitrarily or capriciously.⁸⁵ The superior court did not decide that Ridgefield had not acted arbitrarily or capriciously.⁸⁶

Futurewise cannot assign error to something that has not yet happened. The superior court has not reached the merits of this case. It also should

⁸² Brief of Respondent City of Ridgefield pp. 27 – 33.

⁸³ 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; RP 3 – 71.

⁸⁴ Brief of Respondent City of Ridgefield p. 32.

⁸⁵ RP 3 – 71; CP 32 – 40, Defendant City of Ridgefield’s Answer to Complaint For Judicial Review, Declaratory Judgment, Writ of Certiorari, and Writ of Review pp. 1 – 8; CP 359 – 63, Defendant City of Ridgefield’s Supplemental Memorandum in Support of Defendants RDGB et al. Motion to Dismiss pp. 1 – 5.

⁸⁶ 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; RP 3 – 71.

not appear to the court “beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.”⁸⁷ In addition, there is certainly a material question of fact as to those issues since the City has not provided any evidence that it had not acted arbitrarily or capriciously. Futurewise has not abandoned any claims.

F. This Court should hold for Futurewise, therefore neither Ridgefield nor the LCCs should be awarded costs and statutory attorney fees.

Futurewise’s Appellant’s Opening Brief and this reply document that the Court should reverse the superior court and remand this case back the superior court for a decision on the merits. Consequently, neither Ridgefield nor the LCCs should be eligible for or awarded costs and attorney fees in this case.

III. CONCLUSION

As Futurewise’s Appellant’s Opening Brief and this reply have argued, 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

⁸⁷ *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781, 785 (1988).

matter of law. The facts in evidence in this case either show that these appeals were proper or, at the least, establish genuine issues of material fact. The complaint shows that it should not appear to the court “beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.”⁸⁸ 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: February 8, 2018, and respectfully submitted,

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke at the bottom.

Tim Trohimovich, WSBA No. 22367
Attorney for Futurewise

⁸⁸ *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781, 785 (1988).

CERTIFICATE OF SERVICE

The undersigned declares on penalty of perjury under the laws of the State of Washington that on this 8th day of February 2018, 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: **Reply Brief of Appellant Futurewise** in Case No. 50406-5-II.

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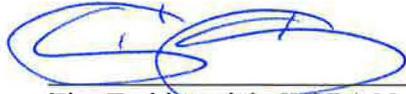
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Signed and certified on this 8th day of February 2018,



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