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Court of Appeals No. 50406-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FUTUREWISE,

Plaintiff-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,**

Defendant-Respondent.

**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 LLC'S' OPENING BRIEF**

James D. Howsley, WSBA # 32442
JORDAN RAMIS PC
1499 SE Tech Center Place, Ste 380
Vancouver, WA 98683
(360) 567-3900
(360) 567-3901 - FAX
Attorneys for Defendants-Respondents
RDGB Royal Farms LLC, RDGK Rest
View Estates LLC, RDGM Rawhide
Estates LLC, RDGF River View
Estates LLC, and RDGS Real View

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I. INTRODUCTION

The Superior Court correctly dismissed Futurewise's complaint with prejudice for failure to state a claim upon which relief can be granted because Futurewise lacked standing. For standing, the Land Use Petition Act (LUPA) requires a party to be the applicant, the owner of the property, or suffer prejudice or a likelihood of prejudice. Futurewise satisfies none of these requirements. There is no participation standing under LUPA. Futurewise failed to show that any of its members will suffer injury in fact caused by the Annexation Ordinance, and therefore lacks representational standing.

The Superior Court correctly dismissed Futurewise's complaint with prejudice for failure to state a claim upon which relief can be granted. Futurewise disingenuously sought to expand the jurisdiction and remedies available for alleged violations of the Growth Management Act (GMA) without legal authority. The GMA vests exclusive jurisdiction in the Growth Management Hearings Board (GMHB) for alleged GMA violations (except with written consent of all parties to Superior Court jurisdiction). The GMA defines what legal government decisions can be challenged and what remedies are available. One cannot use the Declaratory Judgment Act (DJA) or Writs to circumvent the GMA as its jurisdiction is exclusive. One cannot challenge annexations under LUPA. Even if one can divide a City annexation ordinance into its annexation and

zoning components, there is no LUPA jurisdiction as the zoning is area-wide and original, not a site specific rezone. Futurewise has separately sought and acquired all of its available remedies under the GMA through the GMHB. The GMA only provides prospective relief, and expressly protects rights acquired under local law, i.e., ordinances (such as the Annexation Ordinance at issue), from being affected by the GMA's prospective relief. Since Futurewise failed to show standing and failed to allege any viable claims, the Superior Court correctly dismissed its complaint with prejudice.

II. STATEMENT OF ERRORS AND ISSUES

Futurewise's statement of errors and issues is convoluted and repetitive. Respondent LLCs respectfully offer the following statement:

Assignment of Error – Did the Superior Court err by granting the motion to dismiss?

Answer: No.

Issue 1 – Did the Superior Court correctly determine that Futurewise lacked standing?

Answer: Yes.

Issue 2 – Did the Superior Court correctly determine that Futurewise failed to allege a viable claim in Superior Court for the alleged GMA violations?

Answer: Yes.

III. STATEMENT OF THE CASE

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 LLC (Respondent LLCs) in general agree with Appellant Futurewise's statement of the case with the following notes and additions. Respondent LLCs agree that appeal, Case No. 50847-8-II, is not applicable to the questions addressed in this matter, and Respondent LLCs question why the admittedly irrelevant material is included. Respondent LLCs also question the legal effect of the allegation that Clark County has twice illegally expanded its UGA, because Clark County is neither a party nor interested in the underlying challenge to the Annexation Ordinance.

Respondent LLCs offer the following additional statements for the Court's consideration:

1) Futurewise admitted that even without the annexation the injuries allegedly suffered by its members would likely have occurred. The Court smartly questioned whether the claimed injuries flowed from the annexation or the expansion of the UGA. RP 37-38.

2) The Court ruled from the Bench:

Listen, there's -- there are some -- appear to be in holes in the review process. I don't think it's my job as a judicial officer to second-guess what the legislature has decided to do. The legislature

appears to have a policy under the GMA to have some finality in decisions made by local. In this case, Ridgefield relied upon the County's conduct with regard to managing growth. The legislature appears to allow property owners in local jurisdictions to rely upon County behavior in that regard and to take action so that things can proceed forward.

I can understand a reason for that, but my understanding of that reason is neither here nor there. It appears to be a legislative problem. And I'm not going to extend the Court's jurisdiction otherwise to fix an ill where I might personally think that it needs fixing. It's the legislature's determination that that's how they want annexations to proceed. And that the GMA and the policies around the GMA should be the remedy, and that this local jurisdiction can act on what appears to be growth management decision by the County and then it wouldn't be undone. Well, that's the legislature's decision.

I do think the case cited - I'm forgetting the name - Glenrose, that that is distinguishable. That's a mid-annexation analysis. And the legislature with regard to these particular statutory schemes has appeared to take great -- gone to great lengths and taken great pains to provide exclusive jurisdiction on these growth management decisions. And in the growth management arena, such that I think that their decision to leave the statutes as they are well made. They're not just some sort of mistake.

And so I'm going to grant the motion to dismiss on the grounds pled by the LLCs, the multiple LLCs, and the City and in particular the City's briefing I thought was helpful. And I think there's great argument on behalf of Futurewise. I just don't agree today. So I'll entertain an order to that effect by the prevailing parties.

RP 66-68.

IV. ARGUMENT

A. **Standard of Review**

A CR 12(b)(6) motion to dismiss is reviewed de novo. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755 (1994), cert. denied, 515 U.S. 1169 (1995). CR 12(b)(6) provides for dismissal if a complaint fails to state a claim upon which relief can be granted. *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 623 (1998). Dismissal is warranted if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery. *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330 (1998), cert. denied, 525 U.S. 1171 (1999). All facts alleged in the plaintiff's complaint are presumed true. *Tenore* at 330. But the court is not required to accept the complaint's legal conclusions as true. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120 (1987), appeal dismissed, 488 U.S. 805 (1988). Resort to materials outside the complaint does not convert the motion to dismiss into a motion for summary judgment so long as the basic operative facts are undisputed and the core issue is one of law. *Ortblad v. State*, 85 Wn.2d 109, 111 (1975).

Here, the customary standard of review applies. Futurewise offered materials outside of the complaint to support its claimed standing,

which were uncontested. Therefore, the basic operative facts were undisputed and the core issue was one of law.

B. Issue #1 (Standing) – The Superior Court correctly determined that Futurewise lacked standing.

The LUPA standing requirements are:

Standing to bring a land use petition under this chapter is limited to the following persons:

- (1) The applicant and the owner of property to which the land use decision is directed;
- (2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
 - (a) The land use decision has prejudiced or is likely to prejudice that person;
 - (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
 - (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
 - (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

RCW 36.70C.060 (emphasis added). Standing is limited to two categories of persons. Under RCW 36.70C.060 (1), “the applicant and the owner of property to which the land use decision is directed” have standing. Futurewise admits that Respondent LLCs, not Futurewise, own the annexated properties. *See* CP 7 (Complaint, ¶3.8).

Under RCW 36.70C.060 (2), a person has standing if they are aggrieved or adversely affected. RCW 36.70C.060. In *Thompson v. City of Mercer Island*, 193 Wn.App. 653 (2016), the Court recently explained what does and does not constitute injury sufficient to establish standing under LUPA:

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. To satisfy the prejudice requirement, a petitioner must show that he would suffer injury in fact as a result of the land use decision. To show an injury in fact, the petitioner must allege a “ ‘specific and perceptible’ ” harm. 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.’ ”

[...]To have standing, a petitioner's interest “must be more than simply the abstract interest of the general public in having others comply with the law.”

Thompson believes the creation of Tract X violates the city's code and comprehensive plan for land use, as well as Washington law. His land use petition identifies 11 legal errors surrounding the creation and approval of Tract X. But it does not allege any specific injury to Thompson or his property. Thompson's sole interest is trying to enforce zoning protections in his neighborhood. His abstract interest in having others comply with the law is not enough to confer standing.

Thompson argues that this court must assume his allegations of legal error are true and “presume” harm to adjacent property. [...] Thompson does not cite authority allowing a court to presume harm. Granting that the creation of Tract X will increase

the amount of impervious surface area available for development on lot one, Thompson has failed to show any “ ‘immediate, concrete, and specific’ ” injury. Because Thompson failed to show that the creation of Tract X prejudiced him, or is likely to, he lacked standing to bring a land use petition.

Thompson at 662-664 (internal citations omitted) (emphasis added).

Futurewise only alleges it has members who live or own property in Clark County and the City of Ridgefield, and does not allege any specific property ownership or proximity of its members to the annexed property, merely that its members “may be adversely impacted because their farm land will be adversely affected by adjacent urban residential development.” *See* CP 5-6 (Complaint, ¶3.2). An abstract interest in having the GMA enforced is insufficient. At best, this is an alleged hypothetical (“may be”) injury, and lacks the requisite allegation of an immediate, concrete and specific harm. *Thompson* at 664. Futurewise alleged no such harm, and therefore lacked sufficient “injury in fact” for standing.

Futurewise asserted “participation standing” (*see* CP 5-6 (Complaint, ¶3.2)) however that does not exist under LUPA. *See* RCW 36.70C.060. “Participant standing” is granted under the GMA before the GMHB (*see* RCW 36.70A.280 (2)(b)), but is not applicable to a LUPA claim in Superior Court.

Futurewise also wrongfully asserted representational standing based upon a purported common-law injury in fact to its members. Futurewise is admittedly a nonprofit corporation. *See* CP 5 (Complaint, ¶3.1). It must meet three elements to have representational standing: (1) the members of the association would otherwise have standing to sue in their own right; (2) the interests that the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the association's individual members. *See Des Moines Marina Ass'n v. City of Des Moines*, 124 Wn.App. 282, 291 (2004). In a case involving a non-profit corporation challenge, the Court affirmed the requirements:

The standing of a nonprofit corporation to challenge government actions threatening environmental damage is firmly established in federal jurisprudence, and our courts have adopted the federal approach. To establish standing, a party must (1) show that 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, and (2) allege [that] the challenged action has caused 'injury in fact,' economic or otherwise.

Magnolia Neighborhood Planning Council v. City of Seattle, 155 Wn.App. 305, 312 (2010) (internal quotations omitted). As shown below, Futurewise did not show any member injury in fact caused by the Annexation Ordinance.

Futurewise needed to show an “injury in fact” to one of its members to gain representational standing. *See e.g., Thompson v. City of Mercer Island*, 193 Wn.App. 653, 662 (2016). As explained by that Court, the claimed injury must be “specific and perceptible” harm, and if threatened rather than an existing injury, it “must also show that the injury will be immediate, concrete and specific” as a “conjectural or hypothetical injury will not confer standing,” and “must be more than simply the abstract interest of the general public in having others comply with the law.” *Thompson* at 662-664. Here, Futurewise failed to show the required injury in fact.

Before discussing the claimed “injuries” that Futurewise’s members alleged they would undergo in the future it is important to clarify what the challenged Annexation Ordinance does not allow. Ordinance No. 1216 does not authorize any development to occur, such as houses or streets. *See* CP 20-22 (Exhibit A to Complaint). Future development is unknown and speculative. There is nothing in the annexation allowing a sewer pump station to be built, or that initiates condemnation for streets. The conditions that would be imposed upon any future development in the area are speculative. With a proper understanding of the narrow scope of the Annexation Ordinance, the declarations can be analyzed.

Futurewise tendered several declarations in a failed attempt to identify an injury in fact, even though the factual assertions in those declarations were undisputed. Edward Niece claimed to own property abutting the annexed property and to be a member of Futurewise, although the date he became a member is not disclosed. CP 93. Mr. Niece claimed the development of the annexed land will adversely affect his home and property. CP 93. Mr. Niece identified that his property is already subject to increased water flow from already existing development. CP 93. He *speculated* that the future development of the annexed property will increase the flow of water through his property. CP 93. Lastly, he *speculated* that future development will make it less enjoyable and more dangerous to walk or bike around his home. CP 94.

Since Ordinance No. 1216 does not authorize any development to occur, only that a development application can be submitted, Mr. Niece is speculating about what development will occur in the future under future City permits, what conditions will be imposed upon those permits, that the conditions and requirements will be insufficient, and that damage *may* occur to his property. That is a lot of assumptions. He also acknowledged the water flow issue predates Ordinance No. 1216. His current problems cannot be related to the Annexation Ordinance. Walking and biking on his property should not be affected as he owns and controls that property. Mr. Niece supplied no evidence that the ordinance will actually increase

water flow or traffic. It was pure conjecture. He had no more interest in maintaining the current state and safety of his biking outside of his property than any other resident in the area in general. He also had no greater interest than any one who owns property downstream of a particular location. If this type of interest was sufficient to show injury in fact, a resident of Astoria would have an “injury in fact” for anything that occurred upstream in the whole Columbia River Basin. There is no evidence for any injury in fact to Mr. Niece resulting from Ordinance No. 1216.

Ms. Janice Myev claimed to own property that abuts the annexed property and to be a member of Futurewise, however when she became a member is not identified. CP 95. She identified that she believes that the City will at some time in the future construct a road through her house. CP 96. She discussed how the Clark Regional Wastewater District is currently building a sewage pump station 300 feet south of her property and that the annexed property is to the north and east of the pump station. CP 96. She stated that the pump station will serve existing developments farther to the south. CP 96. She feared that the City will take her property in the future for construction of N. 35th Avenue. CP 97.

No citizen likes the idea that the government can simply step in and take their property even though they must pay fair compensation. Unfortunately, that is a cost burden some of us bear for the greater good.

However, her concerns can only be classified as speculative. Nothing in Ordinance No. 1216 allows the building of a street, nor does it enact a current intent to condemn. It is just too speculative of a claimed injury. As for her claimed negative impact on quality of life, as she admits, that is a generalized impact suffered by members of the community at large. Ms. Myev has simply not identified any injury in fact or provided any evidence that injury will occur to her under Ordinance No. 1216.

Mr. Newt Rumble and Ms. Barbara Husik claimed to own property that abuts part of the annexed land and to be members of Futurewise, however no indication is given as to when they joined. CP 106. They identified that a stream flows through their property. CP 106. They identified hearsay testimony by a City council member that a beaver dam on the annexed properties was breached in 2015 and flooded their property. CP 106-107. They claimed that the property currently suffers from floods and increased flows and that development upstream of the annexed properties has caused the increased flows they suffer. CP 107-108. They provide no evidence that the developments are in fact the cause of the additional flows. They alleged damage to their road from the *current* flooding and flows. CP 108. They worried that *future* development of the annexed properties will cause additional increases in the flows and flooding. CP 109-110. They supplied no evidence that any proposed development will actually have any quantifiable effect upon the

flows that currently reach their property. They believed the current storm water regulations are insufficient to deal with the conditions caused by global warming on the west side of the Cascades. CP 110. They are also concerned about the salmon in the stream. CP 111.

Since Ordinance No. 1216 does not authorize any development to occur, Mr. Rumble and Ms. Kusik are purely speculating about what development will occur in the *future* under *future* City permits, what conditions will be imposed upon those permits, that the conditions and requirements will be insufficient, and that damage will occur to their property from the development. That is a lot of assumptions and a purely speculative chain. They offered no evidence that any specific development will have a measurable effect upon the flows that reached their property. They also identified that they have current flooding issues that predate Ordinance No. 1216. They provided no evidence as to what has caused the current flows or added to the current flows. The concern about the salmon, while noble, is no more than the concern experienced by all of us who appreciate salmon habitat. They have also supplied no evidence that any planned development will cause any issue that will have a measurable effect upon the salmon. They also have no greater interest than any one who owns property downstream of a particular location. If this type of interest was sufficient to show injury in fact, a resident of Astoria would have an “injury in fact” for anything that occurred upstream

in the whole Columbia River Basin. Mr. Rumble and Ms. Kusik have simply not identified any injury in fact caused to them by Ordinance No. 1216.

And finally, Ms. Cynthia Carlson claims to own property adjacent to the annexed property and to be a member of Futurewise; however no indication is given as to when she became a member. CP 114-115. She stated that a sewer pump station, called the Pioneer Place Pump Station, is being constructed adjacent to her property and she believed it will serve the annexed property and two other existing subdivisions (one of which is identified as Pioneer Place). CP 115. She claimed the construction of the pump station *has damaged* her fencing, causing her to relocate her cows, that the death of a calf occurred during surveying for the pump station, that water has been pumped from the pump station site harming her property and nearby creeks that contain salmon, that a tree has been removed to build the pump station, and claimed that a manhole for the pump station may have been built on her property but she seems unsure of the ownership at the location. CP 115-116. She identified that current subdivisions next to her property called Cedar Creek and Pioneer Place *currently* cause water to run onto her property and light to shine on her property and that coyotes are eating wild animals. CP 117. She states that the Pioneer Place Pump Station and the existing subdivisions *have already* harmed her property. CP 117. She is concerned that the City may take

her property in the future to build a street. CP 117. She is concerned that future development of the annexed property may cause additional harm to her property similar to those caused by the Pioneer Place Pump Station construction, additional water and light on her property and a possible road next to or on her property. CP 117-118.

Ordinance No. 1216 does not mention or authorize the construction of the Pioneer Place Pump Station. It appears from her representation that the pump station is associated with current subdivisions that border her property. Since the pump station is serving currently existing subdivisions and is not authorized by the Annexation Ordinance, her issues are not related to the Annexation Ordinance. Since it does not authorize any development, Ms. Carlson is speculating about what development will occur in the future under future City permits, what conditions will be imposed upon those permits, that the conditions and requirements will be insufficient, and that damage will occur to her property. She has not submitted evidence that any planned development will have any measurable effect on her property. That chain of assumptions is pure speculation. She also identified that she has current flow issues from the existing subdivisions and the pump station being built to service them, and that those problems predate Ordinance No. 1216. The concern about the salmon, while noble, is no more than the concern experienced by all who appreciate salmon habitat. Coyotes are wild animals that are by nature

predators that hunt and feed on wild animals. She also has no greater interest than any one who owns property downstream of a particular location. If this type of interest was sufficient to show injury in fact, a resident of Astoria would have an “injury in fact” for anything that occurred upstream in the whole Columbia River Basin (or whatever basin was drained by any other river). Ms. Carson simply did not identify any injury in fact that has been caused by Ordinance No. 1216 or supply any evidence that any particular development action will have a demonstrable effect upon her property. That is the end of the materials submitted by Futurewise to support its claimed representational standing based upon member injury in fact.

Futurewise was required to show an “injury in fact” to one of its members that was a “specific and perceptible” harm, and if threatened rather than an existing injury, it “must also show that the injury will be immediate, concrete and specific” as a “conjectural or hypothetical injury will not confer standing,” and “must be more than simply the abstract interest of the general public in having others comply with the law.” *Thompson* at 662-664. Futurewise did not show any current injury caused by the Annexation Ordinance. All alleged “injuries” either predate enactment of the Ordinance (i.e, increased flows for years) or are attributable to existing subdivisions (water and light and damage from construction of a pump station for the existing subdivisions). The

remainder are at best premature or are of a general nature that may be felt by the public at large. In the end, there is no credible evidence that Annexation Ordinance will cause a demonstrably and measurable effect upon any Futurewise member's property. Since Futurewise has not shown an injury in fact to one of its members, it lacks representational standing.

Futurewise argued that *SAVE v. City of Bothell*, 89 Wn.2d 862 (1978) provided that neighbors have injury in fact as a matter of law from neighboring development. That case is factually distinguished because it involved a proposed "major regional shopping center." *SAVE* at 866. The case states that *SAVE* alleged injury in fact to its members but does not discuss what was alleged or shown in particular. *SAVE* at 866. The case simply does not establish every neighbor has injury in fact as a matter of law. Rather, the case requires that the organization must "show that it or one of its members will be specifically and perceptibly harmed by the action." *SAVE* at 867.

Futurewise also argues that unsupported allegations of speculation that storm water run-off or traffic may cause harm are sufficient to show injury in fact, relying upon *Thompson v. City of Mercer Island*, 193 Wn.App. 653 (2016). However, each of the cases cited by that decision involved a member who offered specific evidence based upon current fact. For example, in *Suquamish Indian Tribe v. Kitsap Cty.*, 92 Wn.App. 816, 831 (1998), the Court stated:

The affidavits submitted by NKCC members are sufficient to establish the existence of genuine disputes of material fact regarding standing. Charlie Burrow, who lives 150 feet from the project, states that according to the EIS, there will be at least a 48 percent increase in traffic on South Kingston Road, the road in front of his property. He notes that this will affect him by increasing his risks in traveling on the road and increasing the traffic passing by his house. Jim Halstead, whose property is bordered on three sides by the project, alleges the same injuries from the increase in traffic predicted for South Kingston Road. Zane Thomas, who lives along roads that will be affected by the project, stated that he would be affected by the large predicted increase in traffic on two roads that provide primary access to his home. Evidence of this type of injury is sufficient to establish injury in fact. The Screens argue that the NKCC members cannot establish standing based solely on their proximity to the project site. But the NKCC members allege specific harms that will result from that proximity. They do not rely on their location alone.

(Emphasis added). Note that the members were able to point to specific calculations of the increase in traffic from a specific project, the building of 450 homes and a golf course. In the case of *Knight v. City of Yelm.*, 173 Wn.2d 325, 342-343 (2011) the court stated:

Her interest is not abstract. Knight owns land 1,300 feet away from the proposed subdivisions, and she has senior water rights within the same aquifer as Tahoma Terra's proposed sources of water for the new development. She presented allegations that the City is overdrawing its water rights and that it has insufficient water supplies to serve the proposed developments, allegations bolstered by the DOE in an amicus brief filed in support of Knight's LUPA petition in the superior court. In particular, Knight presented evidence that the City has had a water deficit every year since 2001 and will have a deficit at least through 2012 (the last year for which

Knights expert calculated the City's supply and demand), even after accounting for a recent transfer of water rights from the Tahoma Valley Golf Course and assuming the DOE approves a future rights transfer from a nearby farm. Knight also presented a hydrogeologist's report detailing the adverse impact the subdivisions' water demand would have on her water rights. Specifically, any additional groundwater withdrawals by the City at its existing wells would reduce the flow in Thompson Creek, adversely affecting Knight's ability to withdraw water from the creek under her permit. Additionally, reduced flow in Thompson Creek would reduce "leakage" flow that resupplies the shallow aquifer from which Knight draws groundwater pursuant to her senior water rights.

(Emphasis added). Note again that the members came forward with specific evidence that what was planned would result in an insufficient amount of water. And finally, in *Anderson v. Pierce Cty.*, 86 Wn.App. 290, 300 (1997), the Court found:

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 storm water 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.

(Emphasis added). Note again that the member addressed specific proposed mitigation measures in determining that they were inadequate. The specific evidence shown in the above examples are leaps and bounds

beyond the bare conjecture based on nonexistent plans and their speculative effects provided by Futurewise.

In a tacit acknowledgement that it lacks the required injury, Futurewise resorted to the final hope of those wanting representational standing, and argued for a new, lesser standard for standing. As acknowledged by Futurewise, for this standard to be considered, the action must “immediately affect significant segments of the population.” This type of standing is only recognized in matters that may affect a substantial percentage of the State’s population. For example, in *Washington Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 77 Wn.2d 94, 96 (1969), the Court permitted such special standing as the matter at issue affected a large portion of the State’s population and would immediately affect the management and operation of utility districts across the State:

Affecting as it does a substantial percentage of the population, the case is one of statewide importance. It directly involves the generation, sale and distribution of electrical energy within the state and will immediately affect the management and operation of public utility districts and other municipal corporations in this state.

(Emphasis added). With all due respect to the members involved with Futurewise, this is a local matter that will affect a small number of persons. This Annexation Ordinance matter simply does not have state-wide effects necessary for special standing.

Futurewise simply did not demonstrate standing and this case was properly dismissed with prejudice by the Superior Court.

Respondent LLCs hereby adopt the arguments raised by the City of Ridgefield in support of a lack of standing.

C. Issue #2 (Futurewise’s Issues 2 through 6) – The Superior Court correctly determined that Futurewise failed to allege a viable claim in Superior Court for the alleged GMA violations.

1. Summary.

The Growth Management Act (GMA) vests jurisdiction in the Growth Management Hearings Board (GMHB) for petitions alleging violation of the GMA. *See* RCW 36.70A.280(1)(a) (GMHB “shall hear and determine only those petitions alleging [...] city planning under this chapter is not in compliance with the requirements of this chapter”). The Complaint alleged the GMA had been violated. The GMHB has exclusive jurisdiction for actions alleging non-compliance with the GMA.

Jurisdiction vests in the Superior Court only if all parties stipulate to court jurisdiction which did not happen. Thus, the only authorized and possible claims that are permitted under the GMA are a petition before the GMHB (which Plaintiff admitted it has already pursued) or a complaint in the Superior Court if all parties consented. Futurewise’s complaint was nothing more than a disingenuous attempt to expand the claims and

forums in which to allege violations of the GMA. The complaint is not legislatively authorized. Futurewise failed to demonstrate that other claims or forums are authorized to determine issues regarding GMA violations. Thus, Futurewise failed to state a claim upon which relief can be granted and the complaint was properly dismissed with prejudice.¹

2. The GMA vests jurisdiction in the GMHB for alleged violations of the GMA.

The GMA vests jurisdiction in the GMHB for alleged violations of the GMA. *See* RCW 36.70A.280(1)(a) (GMHB “shall hear and determine only those petitions alleging [...] city planning under this chapter is not in compliance with the requirements of this chapter”). That jurisdiction is exclusive. “Growth management hearings boards have exclusive jurisdiction to determine compliance with the [Growth Management Act].” *Stafne v. Snohomish Cnty.*, 156 Wn.App. 667, 682 (2010) (*citing Woods v. Kittitas Cnty.*, 162 Wn.2d 597, 614–15, (2007)); *Davidson Series & Associates v. City of Kirkland*, 159 Wn.App. 616, 625 (2011). The Superior Court is only vested with jurisdiction to hear GMA challenges if all parties have agreed to such jurisdiction in writing. *See* RCW 36.70A.295(1) (“The superior court may directly review a petition for review filed under RCW 36.70A.290 if all parties to the proceeding before

¹ Respondent LLCs hereby agree with and adopt the City’s argument that Futurewise has waived its appeal of the dismissal of claims Three through Six. RAP 10.3. In the event that the Court disagrees, Respondent LLCs will fully brief that the dismissal with prejudice of those claims was proper.

the board have agreed to direct review in the superior court”). Thus, the GMA limits jurisdiction to the GMHB for GMA issues unless all parties consent otherwise.

The GMA limits the local government actions that may be challenged for GMA violations to certain acts by the City that are more legislative in nature; such as comprehensive plans and development regulations and other steps required to be taken by the Act. *See* RCW 36.70A.040 (planning and development regulations); RCW 36.70A.280 (listing items that may be challenged before GMHB). “Development regulations” are defined as:

“Development regulations” or “regulation” means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit 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). As further defined by the Court:

‘The GMA defines what a ‘development regulation’ is and, more helpfully, what it is not.’ *Wenatchee Sportsmen Ass’n v. Chelan Cnty.*, 141 Wash.2d 169, 178, 4 P.3d 123 (2000). A ‘project permit application’ is not a ‘development regulation.’ RCW 36.70A.030(7). ‘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.’ *Wenatchee Sportsmen*, 141 Wash.2d at 179, 4 P.3d 123 (citing RCW 36.70B.020).

Davidson Series & Associates, 159 Wn.App. at 630. Annexation is not a “development regulation.” Futurewise, like all other Washington residents, can bring GMA challenges when the underlying planning documents are enacted or in response to the enactment of a development regulation. And that is just what Futurewise has done. As they freely admit, they sought the permitted relief under the GMA before the GMHB; Case No. 16-2-0005e. They have fully utilized their legal remedy. Here Futurewise seeks GMA remedies outside of the legislatively imposed process. That path leads to unwanted results; such as inconsistent holdings, forum shopping and the waste of limited judicial resources. Futurewise had its authorized forum and remedy before the GMHB.

3. Futurewise is not entitled to declaratory judgment or a writ for alleged GMA violations.

Futurewise argued it could seek Superior Court determinations of compliance with the GMA as a declaratory judgment or as a writ. That path has been consistently rejected by this Court. In *Davidson*, the Court held that if a plaintiff had a remedy under the GMA and before the GMHB, then it cannot use other actions, such as declaratory relief or writs, to seek resolution of challenges based upon alleged violations of the

GMA. The Court stated:

The GMA establishes the exclusive means to review the City's amendments to its comprehensive plan and zoning code. This provided Davidson with an adequate mechanism for review, and constituted an adequate, alternative remedy to review by constitutional writ. *See Stafne*, 156 Wash.App. at 688, 234 P.3d 225. The availability of review through the Board bars the superior court herein from issuing a constitutional writ. *Torrance*, 136 Wash.2d at 791, 966 P.2d 891. Davidson also contends that the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, provides a basis for the superior court to assume subject matter jurisdiction. However, “[a] party is not entitled to a declaratory judgment if there is an adequate alternative remedy available.” *Stafne*, 156 Wash.App. at 688, 234 P.3d 225 (citing *Grandmaster Sheng-Yen Lu v. King Cnty.*, 110 Wash.App. 92, 98–99, 38 P.3d 1040 (2002)). Because the GMA establishes a means of review of the City's comprehensive plan and zoning code amendments, Davidson had an adequate alternative remedy. *See Stafne*, 156 Wash.App. at 688, 234 P.3d 225.

Davidson Series & Associates, 159 Wn.App. at 627 (emphasis added).

There is a remedy under the GMA, but no authority for other actions such as declaratory relief or writs.

Plaintiff claimed that *Glenrose Cmty Ass'n v. City of Spokane*, 93 Wn.App. 839 (1999) allows declaratory relief or a writ. That case does not support such a position. That case challenged an incomplete annexation, not whether a completed annexation violated the GMA. The Court described the status of the annexation at the time of the suit:

RCW 35.13 sets out procedures to annex land contiguous to a city. Before circulating a petition of landowners requesting annexation, the initiating parties “shall notify the legislative body of the city ... in writing of their intention to commence annexation proceedings.” RCW 35.13.125. The initiating parties must own not less than 10 percent of the assessed valuation of the territory to be annexed. RCW 35.13.125. The legislative body (here the City Council) must then set a date, “not later than sixty days after the filing of the request,” to meet with the initiating parties and determine whether the city will accept, reject, or geographically modify the proposed annexation. RCW 35.13.125. It is this determination that RCW 35.13.125 speaks to: “There shall be no appeal from the decision of the legislative body.” If the legislative body of the city accepts the proposed annexation or a modification of it, RCW 36.93.090 next requires it to file a notice of its intent to annex with the boundary review board. That board reviews the proposal, and either approves, disapproves, or modifies it. RCW 36.93.100. The board's decision is subject to superior court review. RCW 36.93.160(6). If the board approves the proposal, then “[a] petition for annexation ... may be made in writing addressed to and filed with the legislative body....” RCW 35.13.130. “[T]he petition must be signed by the owners of not less than seventy-five percent in value ... of the property for which annexation is petitioned[.]” RCW 35.13.130. “Following the hearing, the council ... shall determine by ordinance whether annexation shall be made.” RCW 35.13.150. Here, the Association's lawsuit preceded the Boundary Review Board's consideration of the annexation proposal.

Glenrose Cmty. Ass'n v. City of Spokane, 93 Wn.App. 839, 845–46 (1999)

(emphasis added), 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 (2005). Declaratory relief

is appropriate when a jurisdiction is not following the steps of an incomplete process. There is nothing surprising about the Court allowing a declaratory judgment to proceed under those circumstances.

The Court also found that the GMA was not even applicable to the annexation. *Glenrose* at 848. *Glenrose* does not support Futurewise's GMA claims. Later cases affirm. See *Davidson Series & Associates*, 159 Wn.App. at 627.

Likewise, the case of *Wenatchee Sportsmen Ass'n v. Chelan Cty.*, 141 Wn.2d 169, 177 (2000), cited by Futurewise does not authorize a GMA challenge to an annexation. That case dealt with the LUPA exception to GMHB jurisdiction. The Court defined the issue:

We first address Stemilt's argument that WSA's failure to challenge the rezone before a GMHB means that it failed to exhaust its administrative remedies. In order to bring a land use petition under LUPA, the petitioner must have exhausted his or her administrative remedies to the extent required by law. RCW 36.70C.060. Stemilt claims WSA needed to appeal the County's rezone decision to the GMHB in order to meet LUPA's exhaustion requirement. Stemilt's claim is correct only if approval of a site-specific rezone is the kind of decision that must be appealed to a GMHB rather than to a superior court through a LUPA petition.

Wenatchee at 177. The issue was whether LUPA or GMA applied, triggering an exception to LUPA. Thus, two express statutes authorized review. The court found that the action was a site specific rezone and LUPA applied. *Wenatchee* at 179-180 ("Thus, the rezone of Stemilt's

property is a site-specific rezone authorized by a comprehensive plan, but not a comprehensive plan under the GMA”). Note that the dissent in that case was very unhappy that the majority found the GMA did not apply. *Wenatchee* at 183-184.

Plaintiff argues that *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791 (2004) allows declaratory relief to challenge an annexation for GMA compliance. That case has nothing to do with GMA challenges to an annexation in a declaratory action; rather it contested the constitutionality of the “petition method of annexation.” *Grant County* at 797-798. The case does not authorize the use of a writ or a declaratory judgment when a plaintiff makes a GMA challenge and has an adequate alternative remedy under the law. Again, later cases hold that one cannot do so. *See Davidson Series & Associates*, 159 Wn.App. at 627.

4. Futurewise is not entitled to challenge the annexation ordinance under the GMA.

Futurewise challenged the annexation before the GMHB, in Issue 7: “Does the annexation of land within an urban growth area expansion under appeal violate RCW 36.70A.020(1), (2), (8); RCW 36.70A.060(1)(a); RCW 36.70A.070 (internal consistency), (1); RCW 36.70A.110; RCW 36.70A.115; RCW 36.70A.130(1), (3), (5); RCW 36.70A.170; RCW 36.70A.215(1), (2), (3), (4); or any other applicable provision of state law?” *See* CP 172 (FDO, p.19). The GMHB correctly

found that it had no jurisdiction over city annexation ordinances:

The Board agrees with Clark County and Intervenor Cities that the Board has no subject matter jurisdiction over city annexation ordinances. Accordingly, the Board will confine its analysis of Issue 5 to only the allegations that Clark County Ordinance 2016-06-12 violated specific requirements of the Growth Management Act.

CP 172 (FDO, p.19) (emphasis added). In short, the GMHB lacked jurisdiction over alleged GMA violations in the Annexation Ordinance.

5. Futurewise is not entitled to a LUPA challenge because the ordinance imposes original area wide zoning.

Even if the Annexation Ordinance can be divided into its annexation element and a zoning element, there is no authority for a LUPA challenge. What is ironic about Futurewise's citation to *Wenatchee* is that it proves that Futurewise does not have a LUPA claim for even the zoning issue it raised. A "land use decision" does not include an area wide rezone. RCW 36.70C.020(2). Instead, it only includes "site specific rezones." RCW 36.70B.020(7). To demonstrate that an ordinance effectuates 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." See *Schnitzer West, LLC v. City of Puyallup*, 196 Wn.App. 434, 441 (2016), (review granted), *Schnitzer West LLC v. City of Puyallup*, 187 Wn2d. 1025. Here, Ordinance No. 1216 stated that City by rule must

designate annexed property with certain required zoning. *See* CP 21 (Exhibit A attached to Plaintiff’s Complaint, p.2). In fact, the numerous annexed parcels had no City zoning prior to annexation so it is theoretically impossible for there to be a site specific rezone. Therefore, there was no specific rezone requested and no LUPA claim.

Futurewise has not shown authority for GMA claims outside of the authorized and exclusive remedies offered under the GMA before the GMHB. Futurewise admits that it has exercised its rights before the GMHB to put forward its alleged GMA grievances. It had a forum and remedies created by the Washington Legislature. Its claims in Superior Court were properly dismissed with prejudice. If Futurewise is unhappy with the forum or the remedy provided, new legislation is the answer.

6. The GMA limits the potential relief granted to prospective relief only.

The GMA provides prospective relief only: “[a] determination of invalidity is prospective in effect....” *See* RCW 36.70A.302 (2) (emphasis added). And a GMA decision “does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county.” *See* RCW 36.70A.302 (2) (emphasis added). GMA relief is not retroactive and cannot extinguish the Annexation Ordinance.

Here, Ridgefield’s local law granted important rights to Respondent LLCs in Ordinance No. 1216 prior to March 23, 2017. The

Annexation Ordinance is unquestionably a local law. It acknowledged that property owners petitioned to have their property annexed into the City. *See* CP 20-21 (Exhibit A, p.1, 2). (“received a petition to annex” “signed by owners of not less than sixty percent in value”). The City then passed a local law, i.e, “the Annexation Ordinance,” on September 8, 2016, that annexed the property into the corporate limits of the City of Ridgefield and applied city zoning to the property. CP 22 (Exhibit A, p. 3). That local law became effective October 14, 2016. *See* CP 23 (Exhibit A, p. 4). The FDO was not issued until March 23, 2017, six months after the Annexation Ordinance passed and five months after its effective date. By the express terms of the GMA, the FDO did not extinguish rights that vested under local law before the FDO was issued. Simply put, the GMA and FDO have no effect upon the rights granted to the Respondent LLCs.

This is not atypical under the GMA. The Act also exempts completed development permit applications, construction permits, or even uncompleted applications for a single family residence, remodeling permits, tenant improvement permits, additions to existing structures, boundary line adjustments, or land divisions. *See* RCW 36.70A.302. Thus, the GMA itself recognizes that rights may vest by law, and that completed or incomplete applications may be submitted prior to the prospective ruling of the GMHB, and such remain effective even if a GMA violation is later found. This is just the natural and correct result of

providing only prospective relief. Thus, the GMA and FDO have no effect upon the rights granted to the Respondent LLCs under the Annexation Ordinance.

While Futurewise opposes these rights and believes they undermine the purpose of the GMA, Futurewise's interpretation is not the governing legal standard. Futurewise's argument does not and cannot change the remedies and rights provided by statute. The Legislature has made a balancing determination and expressed such balance in the statute. Such balancing always results in one party feeling relieved and another party feeling aggrieved. *See e.g. Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 873 (1994) ("The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use"). While this may feel regrettable to Futurewise, such is always the result when two conflicting interests collide.

While Futurewise is unhappy with the prospective relief available for GMA violations and the protection of rights that have vested under the Annexation Ordinance, its appropriate remedy is to pursue a change in the GMA; that is, to pursue a legislative solution for a legislative problem. In fact, a legislative process was underway to amend the GMA to delay the effective date of actions that expand urban growth areas or remove the designation of agricultural lands, if an appeal is made to the GMHB, until after the GMHB issues its final order. *See* CP 382 (Exhibit B, Engrossed

Substitute House Bill 2023). Futurewise even testified in favor of such amendment. *See* CP 389 (Exhibit C, House Bill Report HB 2023). The Court may take judicial notice of such legislative records in a motion to dismiss. *See Berge v. Gorton*, 88 Wn.2d 756, 763 (1977) (“In considering a CR 12(b)(6) motion, this court may take judicial notice of matters of public record”); *Washington State Farm Bureau Fed'n v. Reed*, 154 Wn.2d 668, 677 (2005) (“We take judicial notice of facts in the record establishing that the legislative enactment of the emergency clause prohibiting referendum on sections 1 and 2 of SSB 6078 was not obviously false and a mere ruse to deprive the voters of their referendum power”); *In re Marriage of Campbell*, 37 Wn.App. 840, 845 (1984) (“A court can also take notice of legislative facts”).

To date, the Legislature has declined to enact the amendment desired by Futurewise to the GMA. The Court must not read items into the GMA that the Legislature has chosen not to include. *See State v. Jackson*, 137 Wn.2d 712, 723 (1999) (“Regardless of the Legislature's reasons, we are bound to conclude that the Legislature's failure to include the language of MPC §2.06(3)(a)(iii) in Washington's accomplice liability statute was purposeful and evidenced its intent to reject the concept of extending accomplice liability for omissions to act”). Here, the Legislature has chosen not to delay the effective date of actions expanding urban growth boundaries or de-designating agricultural land until after the

GMHB has issued its final decision. Instead, it has decided to continue with the current law protecting rights that vest under local law prior to the GMHB final order. Futurewise wants the legislature to rebalance the interests at stake and make a balance more to its liking. That is a political issue for the Legislature, not a judicial question for this court.

7. **Respondent LLCs hereby adopt the arguments advanced by the City of Ridgefield.**

Respondent LLCs hereby adopt the arguments advanced by the City of Ridgefield in its responsive briefing in support of sustaining the Superior Court dismissal with prejudice.

D. Respondent LLCs Request Costs.

The Superior Court awarded costs and disbursements, as provided in chapter RCW 4.84 and CR 54, to the Respondent LLCs as the prevailing party below. CP 402, 430-31; RP at 70–71. In responding to this appeal, the Respondent LLCs request an award of reasonable costs pursuant to RAP 18.1(a) and RCW 4.84.010 to be paid by Futurewise.

V. CONCLUSION

Respondent LLCs respectfully request that the Court sustain the judgment of the Superior Court, which was correct under the facts and law. The Superior Court correctly dismissed Futurewise’s complaint with prejudice for failure to state a claim upon which relief can be granted

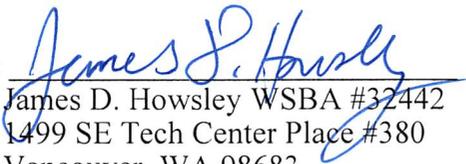
because it lacked standing. Futurewise had no standing under LUPA since it was not the applicant, or the owner of the property, nor has it or its members been prejudiced, or are they likely to suffer prejudice because there is no evidence of an injury in fact caused by the Annexation Ordinance. There is no participation standing under LUPA. And there is no representational standing because none of its members will suffer injury in fact.

The Superior Court correctly dismissed Futurewise's complaint with prejudice for failure to state a claim upon which relief can be granted. Futurewise relentlessly seeks to expand the forums and remedies for alleged violations of the GMA, without legal authority. The GMA vests exclusive jurisdiction in the GMHB for alleged GMA violations (barring written consent of all parties to Superior Court jurisdiction), and Futurewise cannot use the Declaratory Judgment Act (DJA) or Writs to circumvent the GMA, nor challenge annexations under LUPA. Even if a City annexation ordinance is divided into its annexation and zoning components, there is no LUPA jurisdiction since the zoning is area-wide and original, not a site specific rezone. Futurewise has sought and acquired all of its available remedies under the GMA, and if it deems these insufficient, the correct path forward is to seek a legislative change, not an unauthorized quest for additional forums and claims.

The Superior Court correctly dismissed its complaint with prejudice. That judgment should be sustained.

RESPECTFULLY SUBMITTED this 10 day of January, 2018.

JORDAN RAMIS PC

By: 
James D. Howsley WSBA #32442
1499 SE Tech Center Place #380
Vancouver, WA 98683
(360) 567-3900 – phone
(360) 567-3901 – fax
Attorneys for Defendants-
Respondents RDGB Royal Farms
LLC, RDGK Rest View Estates LLC,
RDGM Rawhide Estates LLC, RDGF
River View Estates LLC, and RDGS
Real View LLC

CERTIFICATE OF SERVICE

I hereby certify that on the date shown I served a true and correct copy of the RESPONDENTS' OPENING BRIEF by first class mail, postage prepaid, on:

VIA E-FILE
State of Washington Court of Appeals
Division II
950 Broadway, Ste 300
MS TB-06
Tacoma, WA 98402

VIA E-SERVICE AND USPS
Janean Parker
Law Office of Janean Parker
PO box 298
Adna, WA 98532
Attorney for Respondent City of Ridgefield

VIA E-SERVICE AND USPS
Hillary Graber
Kendra Comeau
Kenyon Disend, PLLC
11 Front Street South
Issaquah, WA 98027
Attorneys for Respondent City of Ridgefield

VIA E-SERVICE AND USPS
Tim Trohimovich
816 Second Avenue, Ste 200
Seattle WA 98104
Attorney for Appellant Futurewise

DATED: January 10th, 2018.



Lisa D. McKee
Assistant to James D. Howsley

JORDAN RAMIS, PC

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- tim@futurewise.org

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1499 SE TECH CENTER PL STE 380

VANCOUVER, WA, 98683-9575

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