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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.

BRIEF OF RESPONDENT CITY OF RIDGEFIELD

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I. INTRODUCTION

This appeal is Petitioner Futurewise’s tardy collateral attack on Clark County’s 2016 Comprehensive Plan, which expanded the Ridgefield Urban Growth Area (“UGA”), allowing Ridgefield to annex land. City of Ridgefield Ordinance No. 1216 (“Ordinance No. 1216”) annexes 111 acres and establishes default zoning on that land. Because Futurewise had no standing to challenge the annexation, and because it could properly challenge the zoning only to the Growth Management Hearings Board (“GMHB”), the Clark County Superior Court (“Superior Court”) properly dismissed this case.

The Legislature determined there would be no right of appeal for annexations and zoning regulations unless specific standing requirements are met. In the absence of standing, Futurewise relies on the Uniform Declaratory Judgment Act to request a declaratory judgment, a collateral method of review of the annexation.¹ Because the Superior Court lacks subject matter jurisdiction and Futurewise lacks standing, this Court should affirm the Superior Court’s dismissal.

¹ Futurewise has abandoned causes of action three through six in its Complaint, which include writs of review and certiorari, both constitutional and as provided by chapter 7.16 RCW. See RAP 10.3.

II. RESTATEMENT OF ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR

1. Whether this case is an impermissible tardy collateral challenge to the 2016 Clark County Comprehensive plan?
2. Whether the trial court properly concluded that Futurewise lacked standing to challenge the Brown Annexation, thereby depriving the Court of jurisdiction to entertain the annexation challenge?
3. Whether the trial court's determination that Futurewise lacked jurisdiction to challenge City zoning established in Ordinance No. 1216 should be affirmed because the Court lacks jurisdiction to hear the zoning challenge that is within the exclusive jurisdiction of the Growth Management Hearings Board?
4. Whether the trial court properly dismissed Futurewise's challenges to the City's annexation and establishment of default zoning where Futurewise failed to state a claim upon which relief could be granted, thereby warranting dismissal because Futurewise cannot prove any set of facts which would justify recovery?
 - a. Whether the trial court properly found that Futurewise lacked representational standing under the Uniform Declaratory Judgment Act?
 - b. Whether the Court should conclude that Futurewise has abandoned causes of action three through six on appeal under RAP 10.3, including writs of review or certiorari, both constitutional and as provided by chapter 7.16 RCW?
 - c. In the alternative, whether the Court should affirm the trial court's conclusion that Futurewise failed to state a claim upon which relief could be granted to support a declaratory judgment or a writ of review or certiorari?

III. STATEMENT OF THE CASE

A. Factual Background.

On September 8, 2016, the City of Ridgefield (“the City”) adopted Ordinance No. 1216, annexing 111.42 acres, commonly referred to as the “Brown Annexation.” Ordinance No. 1216 also zoned the Brown Annexation area as Residential Low Density 6 (“RLD-6”). CP 20–22.

The land within the Brown Annexation area is contiguous land north of the City limits and within the Ridgefield UGA. CP 26. The Ridgefield UGA is shown on the Ridgefield Urban Growth Area Comprehensive Plan Map of the Clark County 20-Year Comprehensive Growth Management Plan, which the Board of Clark County Councilors adopted on June 28, 2016, in Clark County Ordinance No. 2016-06-12.² CP 20. There are 18 legal lots within the Brown Annexation area, all of which are owned by five limited liability corporations: RDGB Royal Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View Estates LLC, and RDGS Real View LLC (together, “the LLCs”). CP 13, 354.

The LLCs initiated the Brown Annexation on June 22, 2016, by direct petition, pursuant to RCW 35A.14.120. CP 21, 348–49. The City

² Futurewise and Friends of Clark County have filed a separate challenge of an order of the GMHB related to Clark County’s 2015 Comprehensive Plan Update, as adopted in Amended Ordinance 2016-06-12. Clark County, et al. v. Growth Management Hearings Board, et al., No. 50847-8 (Div. II, 2017) (direct review accepted by the Court).

adopted Resolution No. 511 on August 11, 2016, accepting a notice of intent to annex the Brown Annexation area and authorizing commencement of annexation proceedings. CP 20. The Clark County Deputy Assessor certified the sufficiency of the Brown Annexation on August 15, 2016. CP 21. The Ridgefield City Council held a properly noticed public hearing on the Brown Annexation on August 25, 2016. CP 21. Futurewise and its members commented on the Brown Annexation, and the City Council considered such comments and input from the public. CP 12.

As required by the Growth Management Act (“GMA”), RCW 36.70A.130(5)(b), Clark County updated its Comprehensive Plan on June 28, 2016, which, among other things, expanded the Ridgefield UGA by 111 acres. CP 11, 157, 174-5. Previously, the land within the Brown Annexation area was unincorporated County land, designated as agricultural. CP 10. The 2016 Clark County Comprehensive Plan de-designated agricultural land within the Brown Annexation area. CP 10. Futurewise challenged the adoption of the 2016 Clark County Comprehensive Plan, alleging dozens of violations of the GMA and specifically challenging the expansion of the Ridgefield UGA to include the Brown Annexation area and the de-designation of the agricultural farm land. CP 171-78, 186-196. That case has been adjudicated by the GMHB

(CP 253) and is currently pending appeal before this Court.³

Ridgefield Municipal Code (“RMC”) 18.210.015(B) requires all newly annexed RLD land be RLD-6 or greater density. Ordinance No. 1216 states:

[U]nder RMC 18.210.015, the City is applying RLD zoning to implement the residential/urban low comprehensive plan designation adopted by the County Council on June 28, 2016;

...

[T]he City is designating subject properties RLD-6, as under RMC 18.201.015(B), the City is required to designate all newly annexed RLD land as RLD-6 or greater density; . . .

CP 20-21.

B. Procedural History.

On September 16, 2016, Futurewise filed a “Complaint and Petition for Judicial Review Under RCW 26.70C; 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; Article IV, Section 6; Petition for Writ of Review Under Washington Constitution, Article IV, Section 6 of the Common-Law”

³ Clark County, et. al., v. Growth Management Hearings Board, et. al., No. 50847-8-II (Div. II, 2017).

(hereafter “Complaint”) in Superior Court alleging that Ordinance No. 1216 is “invalid and in violation of the requirements of Chapter 35A.14 RCW, Annexation by Code Cities, Chapter 36.70A RCW, the Growth Management Act, and other applicable provisions of state law, and the Ridgefield Development Code.” CP 1, 4. Futurewise seeks remedies under the Land Use Petition Act (“LUPA”), chapter 36.70 RCW, as well as a declaratory judgment and various writs. CP 3–19.

In response to Futurewise’s Complaint, the LLCs filed a Motion to Dismiss on December 27, 2016, alleging lack of standing, lack of jurisdiction, and seeking the dismissal of Mr. Brown, as an individual. CP 49–50. After two rounds of briefing⁴ and significant oral argument, the trial court granted the LLCs’ Motion to Dismiss. CP 402.

On appeal, Futurewise challenges the Order Granting Defendants’ Motions to Dismiss. Futurewise has not assigned error and has abandoned on appeal its request for a declaratory judgment and writs of review and certiorari under RAP 10.3.

IV. ARGUMENT

A. Standard of Review on Appeal.

Futurewise appeals the Superior Court’s Order granting Defendants’

⁴ In response to the Motion to Dismiss, Futurewise filed four affidavits, signed by its members. CP 92-118. The record is silent as to whether the trial court based its ruling below on the Futurewise affidavits.

Motions to Dismiss. Because a trial court's dismissal under CR 12(b)(6) presents a question of law, appellate review is de novo. Berst v. Snohomish Cnty., 114 Wn. App. 245, 251, 57 P.3d 273 (2002).

While the City believes that this case was properly dismissed below, it is the City's position that the Complaint and pleadings support dismissal pursuant to CR 12(b)(6). To the extent that this Court concludes from the record that the trial court did consider such matters, it reviews the trial court's ruling under the de novo standard of review for summary judgment. Id. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Superior Court Civil Rule ("CR") 56(c). Appellate review of a decision to grant summary judgment is de novo. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). An appellate court engages in the same inquiry as the trial court, which is to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 278, 937 P.2d 1082 (1997) (quoting CR 56(c)). A material fact is one on which the outcome of the case depends. Atherton Condo. Ass'n. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

B. Futurewise is Barred from Bringing a Tardy Collateral Challenge to Clark County's Comprehensive Plan.

This lawsuit is an untimely challenge to the 2016 Clark County Comprehensive Plan and should be dismissed. RCW 36.70A.290(2) provides 60 days to challenge development regulations under the GMA, and thus the time to challenge the 2016 Clark County Comprehensive Plan expired on August 27, 2016. In BD Lawson Partners, LP v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 165 Wn. App. 677, 269 P.3d 300 (2011), a citizens group challenged Black Diamond's 2010 adoption of two permits approved pursuant to and consistent with the City's 2009 GMA-based development regulations. On direct appeal, Division One of the Court of Appeals held any challenge to the 2010 permits constituted "an impermissible collateral attack on the 2009 ordinances." Id. at 690. Such is the case here.

Following the 2016 Clark County Comprehensive Plan, Futurewise appealed the GMHB decision challenging the UGA expansion which later became the Brown Annexation and the de-designation of agricultural land in that area. On March 23, 2017, the GMHB decided that case on the merits and the appeal is presently pending before this Court. CP 253; Clark County, et. al., v. Growth Management Hearings Board, et. al., No. 50847-

8-II (2017).

Despite its previous challenge directly to the 2016 Comprehensive Plan, Futurewise is attempting a second attack on Clark County's 2016 amendment to the UGA boundary and the de-designation of the agricultural land contained therein by challenging Ordinance No. 1216. The Complaint in this case contains multiple allegations relating to the 2016 Clark County Comprehensive Plan. See e.g. CP 9 ("the City failed to consider whether the land in the Brown Annexation should have been designated as agricultural lands of long-term commercial significance"). The cases are so intertwined that Judge Veljacic asked the parties to brief the relevance of the GMHB's ruling prior to issuing his decision to dismiss the present case. RP 40 (The Court: "I don't want to duplicate issues I think it would be against everybody's interests including judicial economy, to rehear issues that are heard by the Growth Management Hearings Board."); RP 42 (The Court: "[M]y hope is that there may be some information in the GMHB decision that might address this").

Because Futurewise has already sued challenging the Comprehensive Plan, this lawsuit is an untimely collateral attack and should be dismissed.

C. Futurewise Lacks Standing to Challenge the Brown Annexation in Ordinance No. 1216.

Futurewise challenges the Brown Annexation under chapter 35A.15 RCW and the GMA for “failing to follow the statutory requirements for a direct petition annexation.” CP 8. The Court lacks jurisdiction to entertain Futurewise’s challenge to the Brown Annexation. Moreover, Futurewise’s challenge fails to identify any procedural or legal errors in the annexation.⁵

The Legislature established the review process for annexations by code cities in chapter 35A.14 RCW, which provides that certain annexations are reviewable by a boundary review board or an annexation board.⁶ RCW 35A.14.001; RCW 35A.14.200; RCW 36.93.160(5); RCW 35A.14.040. For decisions made by review boards, appeals to a superior court may only be initiated by the affected governmental unit or “any person owning real property in or residing in” the annexation area—arguably, the only two classes of parties who could be adversely impacted by an annexation in a GMA jurisdiction. RCW 35A.14.200; RCW 36.93.160(5).

The Legislature further exempted certain petition-initiated annexations from review.

⁵ Here, Futurewise is essentially challenging the previous de-designation of agricultural land, which was the County’s action prior to the Brown Annexation. CP 10. Further, this issue is already before this Court in Clark County, et al. v. Growth Management Hearings Board, et al., No. 50847-8-II (Div. II, 2017) (direct review accepted by the Court).

⁶ Futurewise acknowledges that “LUPA is not the mechanism for judicial review of annexations.” Opening Brief at 32.

When review procedure may be dispensed with.

. . . When the area proposed for annexation in a petition or resolution, initiated and filed under any of the methods of initiating annexation authorized by this chapter, is less than fifty acres or less than two million dollars in assessed valuation, review procedures shall not be required as to such annexation proposal, except as provided in chapter 36.93 RCW in those counties with a review board established pursuant to chapter 36.93 RCW: PROVIDED, That when an annexation proposal is initiated by the direct petition method authorized by RCW 35A.14.120, review procedures shall not be required without regard to acreage or assessed valuation, except as provided in chapter 36.93 RCW in those counties with a boundary review board established pursuant to chapter 36.93 RCW.

RCW 35A.14.220 (emphasis added).

Concurrent with the adoption of the GMA, the Legislature specifically authorized counties to disband boundary review boards. RCW 36.93.230. Thus, the Legislature has determined that no board review procedures are necessary for an annexation by direct petition in a county without a review board; the planning processes set forth in the GMA are sufficient controls for a city's legislative decision to annex. Any challenge to the annexation would be an impermissible collateral challenge to the GMA planning process.

Here, the Brown Annexation was initiated by direct petition. CP 10. Clark County disbanded its boundary review board in lieu of the GMA planning process. RP 52, ln. 4–9. Futurewise is neither a landowner within the annexation area nor an affected governmental unit. Futurewise’s challenge to the Brown Annexation is a tardy collateral attack on the City’s land use planning and annexation authority.

The Legislature specifically eliminated a third-party’s ability to challenge an annexation where, as here, the essence of Futurewise’s appeal is with the County’s prior action re-drawing the UGA and de-designation of agricultural land. Futurewise has already separately challenged those actions and this Court has accepted review. Clark County, et. al., v. Growth Management Hearings Board, et. al., No. 50847-8-II (2017).

There is no dispute that the Brown Annexation comports with the City’s Comprehensive Plan and is within the UGA. Futurewise has presented no facts to support the proposition that the City’s annexation process was flawed. See generally RCW 35A.14.120–.150. Futurewise is using the Brown Annexation to collaterally attack the County’s prior decisions with regard to this area. Allowing Futurewise to challenge the Brown Annexation gives it an unwarranted second bite at the proverbial apple. This Court should affirm the trial court’s dismissal and find that Futurewise lacks standing to challenge the annexation.

D. The Superior Court Lacks Jurisdiction to Hear Futurewise's Challenge to the Zoning Established in Ordinance No. 1216.

Futurewise also challenges the portion of Ordinance No. 1216 implementing RLD-6 zoning in the Brown Annexation area, alleging it fails to comply with the GMA. CP 9 at ¶ 4.4. Because Ordinance No. 1216 is a development regulation subject to the exclusive jurisdiction of the GMHB, the Superior Court correctly determined it lacked subject matter jurisdiction.

The GMA vests exclusive jurisdiction with the GMHB for any alleged violations of the GMA, including challenges to development regulations.⁷ RCW 36.70A.280(1)(a); WAC 242-03-025(1)(a); Woods v. Kittitas Cnty., 162 Wn.2d 597, 614-15, 174 P.3d 25 (2007). RCW 36.70A.030(7) defines what a “development regulation” is and, “more helpfully, what it is not.” Wenatchee Sportsmen Ass'n v. Chelan Cnty., 141 Wn.2d 169, 178, 4 P.3d 123 (2000). Specifically, a challenge to a zoning ordinance must be filed before the GMHB.

“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

⁷ The Superior Court may only hear GMA challenges if all parties agree in writing. RCW 36.70A.295(1). There was no such agreement here.

ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application

RCW 36.70A.030(7) (emphasis added).⁸

In contrast to legislative, area-wide zoning ordinances, which must be appealed to the GMHB, Washington courts have determined that quasi-judicial site-specific rezoning challenges are project permits that must be appealed under LUPA, chapter 36.70C RCW:

A “decision to approve a project permit application” is not a development regulation, even if it appears in a legislative resolution or ordinance. Instead, a project permit approval is a “land use decision” under LUPA. RCW 36.70C.020(2)(a). Project permit applications include proposals for “site-specific rezones authorized by a comprehensive plan” but exclude proposals for “the adoption or amendment of a comprehensive plan . . . or development regulations.” RCW 36.70B.020(4).

Spokane Cnty. v. E. Washington Growth Mgmt. Hearings Bd., 176 Wn.

App. 555, 569, 309 P.3d 673 (2013) (internal citations omitted). A

“challenge to a site-specific land use decision can be only for violations of

⁸ “Project permit application” is defined in RCW 36.70B.020(4) as “any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations.”

the comprehensive plan and/or development regulations, but not violations of the GMA.” Woods, 162 Wn.2d at 616. In Davidson Serles & Associates v. City of Kirkland, 159 Wn. App. 616, 630-31, 246 P.3d 822 (2011), Division One further distinguished a project permit from a development regulation based on the fact that a development regulation anticipates and provides guidance for future project permit applications.

A site-specific rezone is “a change in the zone designation of a ‘specific tract’ at the request of ‘specific parties.’” Spokane Cnty., 176 Wn. App. at 570 (quoting Woods, 162 Wn.2d at 611 n.7). In Schnitzer W., LLC v. City of Puyallup, the City, not a “specific party,” was the moving force behind the zoning change and this Court determined the zoning decision was, therefore, not a site-specific rezone. 196 Wn. App. 434, 442-44, 382 P.3d 744 (2016), *review granted*, 187 Wn.2d 1025, 391 P.3d 456 (March 29, 2017). This Court reasoned:

RCW 36.70C.020(2)(a) defines a land use decision as a final determination on “[a]n *application* for a project permit or other governmental approval.” (Emphasis added.) Under RCW 36.70B.020(4), project permit means a permit required from a local government. But a public agency does not apply for a permit to itself nor does it apply for approval of its own action. Read together, these two statutes require an application from someone other than the public entity.

Id. at 441-42.

Thus, whether the Superior Court had jurisdiction to review the zoning established by Ordinance No. 1216 depends on whether the zoning imposed is a development regulation, thereby invoking the jurisdiction of the GMHB, or a site-specific rezone, constituting project permit approval, subject to LUPA in Superior Court. In this instance, the City's establishment of RLD-6 zoning in an area newly annexed to the City constitutes a development regulation subject to the jurisdiction of the GMHB.

Futurewise argues that Ordinance No. 1216, which establishes RLD-6 zoning in the Brown Annexation area, is a site-specific rezone because it comports with the City's Comprehensive Plan and is, therefore, subject to LUPA. This is misstatement of the law. The GMA requires cities to harmonize any development regulation with that city's comprehensive plan. RCW 36.70A.040; Woods, 162 Wn.2d at 609. This type of cohesive land use planning is one of the fundamental underpinnings of the GMA. The cases cited by Futurewise stand for the proposition that permit-based zoning decisions, which are initiated by a landowner, limited in scope to a permitting decision on a specific property, and which fully comply with a city's comprehensive plan, do not constitute a development regulation and do not reach the jurisdiction of the GMHB. Wenatchee Sportsmen Ass'n, 141 Wn.2d at 178. Site-specific rezones are, by definition, decisions on a

permit application and extremely limited in nature. By contrast, the City’s adoption of Ordinance No. 1216 was a legislative decision to establish City zoning for the first time over a 111-acre area encompassing 18 different parcels.

Here, Futurewise’s zoning complaints are fully grounded in the GMA. CP 9 at ¶ 4.4 (“the adoption of the zoning for the land in the Brown Annexation fails to comply with Chapter 36.70A RCW, the Growth Management Act”). Ordinance No. 1216 established zoning area-wide pursuant to City code. CP 20–21. The Ordinance itself makes clear that the City initiated⁹ the zoning determination; it was not done at the “request of specific parties.” CP 20–21; Spokane Cnty., 176 Wn. App. at 570.

The statutory scheme authorizes a city to annex property and to adopt proposed zoning regulations that will become effective upon such annexation. See generally RCW 35A.14.100, .330; Bellewood No. 1, LLC v. LOMA, 124 Wn. App. 45, 47-48, 97 P.3d 747 (2004). Under RCW 35A.14.330, a city “*may* prepare a proposed zoning regulation to become effective upon annexation of any area” (Emphasis added.) The City’s decision to establish zoning was a legislative action well within its

⁹ There is no evidence in the record to support Futurewise’s allegation that Mr. Brown asked for specific zoning in this case. See Opening Brief at 37. To the contrary, Ordinance No. 1216 expressly states that the City initiated the zoning action. CP 20–21.

established powers, not a quasi-judicial decision subject to LUPA.

Further, in establishing zoning regulations applicable to the newly annexed area, Ordinance No. 1216 did not “change” an existing designation, but instead instituted zoning within an area that previously lacked City zoning. Spokane Cnty., 176 Wn. App. at 570. In addition, the area rezoned by Ordinance No. 1216 was not a “specific tract.” The term “tract” is a synonym of lot or parcel. RCW 58.17.020(9). An area-wide zoning change is distinct from a single parcel rezone. Raynes v. City of Leavenworth, 118 Wn.2d 237, 248, 821 P.2d 1204 (1992). The Brown Annexation area included 111 acres and was comprised of 18 separate tracts owned by multiple parties.¹⁰

The thrust of Futurewise’s objections in this case stem directly from the GMA. CP 9 at ¶ 4.4. Somers v. Snohomish Cnty., is instructive. 105 Wn. App. 937, 945, 21 P.3d 1165 (2001). In Somers, a hearing examiner approved a developer’s application for a new subdivision in Snohomish County and neighboring landowners filed a LUPA petition, claiming the development constituted “urban growth” in violation of the GMA. Id. at 939. The Court of Appeals held that, although the petitioners in Somers

¹⁰ In reply, the City anticipates that Futurewise will argue that all of the parcels are owned by one man, Mr. Brown. In truth, the 18 tracts are owned by various LLCs but, even still, the “fact that the ordinance affects specific individuals is not a sufficient reason to classify the proceedings as quasi-judicial.” Raynes, 118 Wn.2d at 248.

claimed to challenge approval of the subdivision, their real claim was that the zoning ordinance violated the GMA by allowing urban growth outside the County's IUGA—a claim over which the GMHB, and not a superior court, would have subject matter jurisdiction. *Id.* at 943–44 (“Although the Somers’ LUPA petition does not expressly challenge the underlying zoning as contrary to the GMA, it does so implicitly”). “A petitioner cannot use the LUPA process to raise issues that should have been brought before the GMHB.” *Id.* at 944.

Because Ordinance No. 1216 is a development regulation, establishing default zoning in a newly annexed area, any challenge by Futurewise to Ordinance No. 1216 should have been made to the GMHB and not the Superior Court. For these reasons, the Court should dismiss this appeal of a development regulation.

E. Futurewise Fails to State a Claim Upon Which Relief Could Be Granted.

In this appeal, Futurewise appears to recognize it lacks standing necessary to challenge the annexation and zoning ordinance at issue here, and alternatively requests relief under the Uniform Declaratory Judgment Act (“UDJA”). However, Futurewise lacks representational standing to pursue a declaratory judgment. This lawsuit is simply Futurewise’s impermissible tardy collateral challenge to the Clark County 2016

Comprehensive Plan.

Futurewise has further abandoned on appeal causes of action three through six in its Complaint related to writs of review and certiorari, both statutory and constitutional, under RAP 10.3. While Futurewise lacks standing, should this Court consider Futurewise's claims for writs of review or certiorari, both constitutional and as provided by chapter 7.16 RCW, the Court should conclude those claims fail as a matter of law.

1. Futurewise has not provided evidence sufficient to confer standing under the Uniform Declaratory Judgment Act.

Futurewise seeks declaratory and injunctive relief under the UDJA, chapter 7.24 RCW. CP 3–19, ¶¶ 7.1–7.5. In order to pursue such relief, Futurewise must first establish standing by presenting a justiciable controversy based on allegations of harm personal to the party that are substantial rather than speculative or abstract. Futurewise has the burden to state a claim upon which relief can be granted, and it has failed to do so here. Futurewise accordingly lacks standing.

The Court applies a two-factor test to determine standing under the UDJA: (1) is the interest to be protected “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question,” and (2), has the challenged action caused injury in fact, economic or otherwise, to the party seeking standing. Grant Cnty.

Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (“Grant County II”) (internal citations omitted). Both tests must be met by the party seeking standing.

An organization, including a nonprofit corporation like Futurewise, is required to demonstrate standing to bring suit on behalf of its members by providing evidence that (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt v. Wash. State Apple Adver. Comm’n., 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). The Washington Supreme Court has adopted a more liberal approach to standing “when a controversy is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture.” Grant County II, 150 Wn.2d at 803.

Under Washington’s representational standing doctrine, a party may have standing under a “less rigid and more liberal approach” when the plaintiff whose standing is challenged is the only plaintiff in the case and issues of substantial public importance would otherwise escape review. Id. (citing Yakima Cnty. Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 380, 858 P.2d 245 (1993)).

Futurewise lacks representational standing here, much like the Grant County Fire Protection District No. 5 (“Fire District”) in Grant County II. There, the Fire District filed an application for writ of review and a complaint for declaratory judgment contesting the constitutionality of the petition method of annexation in a code city. Id. at 798. The Fire District argued the annexation would negatively affect its tax base. The Washington Supreme Court held that the Fire District could not assert representational standing because there was no evidence in the record to show that the residents represented by the Fire District would receive less effective fire protection or other emergency services, and that issues related to the District’s tax base did not constitute a “controversy of serious public interest such that standing requirements will be applied more liberally.” Id. Similarly, Futurewise does not have representational standing—even under the liberal approach to standing.

Futurewise is a nonprofit corporation “working to promote healthy communities while protecting farmland, forests, and shorelines today and for future generations.” CP 5, ¶ 3.1. It does not have the same representative capacity for residents in the annexation process as a city does for potential residents. City of Seattle v. State of Washington, 103 Wn.2d 663, 669, 694 P.2d 641 (1985). It also does not serve schools demanding funding for education, a paramount duty of the state, in a representative

capacity. Seattle Sch. Dist. No. 1 v. State of Washington, 90 Wn.2d 476, 493-94, 585 P.2d 71 (1978).

No evidence exists in this record that a single Futurewise member would be deprived a constitutional right or even be subject to regulation by Ordinance No. 1216. By its own admission, some Futurewise members live “adjacent to the Brown annexation” but none live within the annexed area. See Futurewise Opening Brief at 13.

Futurewise and its members fail to satisfy either prong of the two-factor test under the UDJA. The Brown Annexation was a legislative action by the City, and Futurewise does not argue that the annexation was intended to protect or directly regulate any of its members.

Futurewise also fails the zone of interest test necessary to confer standing under the UDJA. While it relies on Save v. City of Bothell for the self-serving assertion that its members will suffer current and future injuries, the case is inapposite. 89 Wn.2d 862, 576 P.2d 401 (1978). First, the Washington state Supreme Court decided Save well before the Legislature passed the GMA, which provides exclusive jurisdiction for the claims in this matter. Second, the Court relied on evidence of “serious detrimental effects” on nearby agricultural and low density residential uses of land, requiring substantial investments in highways, sewers, and utilities costing “millions of dollars of local, state and federal funds,” and a loss of

the “essentially rural character of the Valley” when it ruled that the zoning decision disregarded the welfare of the whole community and was arbitrary and capricious. Id. at 868-869.

The record here is devoid of substantial evidence that Futurewise members have suffered an “injury in fact” related to the annexation or zoning in Ordinance No. 1216. As the trial court suggested, the injuries as claimed may well have occurred without the annexation. See RP 37, ¶ 24 – RP 38, ¶ 1. Further, the injuries claimed are not “fairly traceable to the challenged action,” and they fail the redress requirement of the injury-in-fact test. KS Tacoma Holdings, LLC v. Shorelines Hearings Bd., 166 Wn. App. 117, 134–35, 272 P.2d 876 (2012) (internal citations omitted). The Brown Annexation does not authorize any *actual development* to occur and the harm claimed in the four Futurewise member declarations relate to pre-existing development actions that cannot be attributed to the annexation decision. CP 20–28.

In fact, the injuries alleged by Futurewise members demonstrate that Futurewise’s complaints truly lie with the Clark County 2016 Comprehensive Plan, and not with Ordinance No. 1216, as described below:

Cynthia Carlson. The alleged harm caused by the installation of a sewer pump adjacent to Ms. Carlson’s property serves pre-existing subdivisions; there is no evidence linking the City’s annexation with the

pump station and the contingent claimed harms to the fence and calf. CP 114–18. The remaining portions of Ms. Carlson’s declaration are speculation and cannot meet the “injury-in-fact” test. See Thompson v. City of Mercer Island, 193 Wn. App. 653, 663, 375 P.3d 681 (2016) (holding that petitioner’s “sole interest is trying to enforce zoning protections in his neighborhood,” which fails to show injury in fact and establish standing under LUPA).

Newt Rumble and Barbara Kusik. Mr. Rumble and Ms. Kusik similarly do not establish “injury-in-fact” for Futurewise because their claims stem from increased development not attributable to the recent Brown Annexation and RLD-6 zoning decision. Mr. Rumble and Ms. Kusik do not assert, nor do they provide any expert reports or opinions to support, that the flooding they currently experience is traceable to development now permitted—*but not yet underway*—under Ordinance No. 1216, and there is no substantial evidence to support such a claim in the record before the Court. CP 105–13.

Edward Niece. Mr. Niece does not present any evidence which would support his bald assertions of potential speculative injuries to his property. See Concerned Olympia Residents for Environment v. City of Olympia, 33 Wn. App. 677, 683-684, 657 P.2d 790 (1983) (denying standing because litigant failed to demonstrate specific and perceptible

harm and “[o]therwise, the judicial process will become no more than a vehicle for the vindication of value interests of concerned bystanders.”). Mr. Niece claims that the annexation *will* increase pollution, silt, and harm to coho salmon and it *will* increase traffic. CP 92-94. These are not specific and perceptible harms, but rather speculation based on development unrelated to the City’s adoption of Ordinance No. 1216.

Janice Myev. Ms. Myev’s declaration concerns a *proposed access easement* for access to a pump station that may at some point be constructed through her property. CP 94–104. First, whether the City has authority in eminent domain to construct such a road is not the subject of this appeal. Second, this proposed access is not traceable to Ordinance No. 1216. The only interest alleged by Ms. Myev is economic—owning property that could at some point be condemned—which is not enough to establish standing. Harris v. Pierce Cnty., 84 Wn. App. 222, 928 P.2d 111 (1996) (dismissing claim because of a lack of standing by property owner who alleged economic harm related to property that could be condemned).

Simply put, Ordinance No. 1216 does not permit development to occur nor does it permit the sewer pump house to be built to serve pre-existing developments. Even in the absence of Ordinance No. 1216, these alleged harms could still arise. The claimed harms simply cannot be linked or related to the zoning decision for the Brown Annexation area. Futurewise

fails to demonstrate representational standing. The Court should affirm the trial court's order of dismissal.

2. Futurewise has abandoned causes of action three through six on appeal, including writs of review or certiorari, both constitutional and as provided by chapter 7.16 RCW.

Superior courts have constitutional and statutory authority to issue writs of review or certiorari over matters involving real property, unless such proceedings are otherwise provided for by law. See Wash. Const. art. IV, § 6; RCW 2.08.010. With the adoption of the GMA, “such proceedings are [now] otherwise provided for by law.” See RCW 2.08.010. Given the legal framework, Futurewise does not have the right to claim a writ of review or certiorari, nor does it pursue such claims in this appeal.

This Court's jurisprudence has long provided that an appellant's failure to assign error and provide argument in its opening brief regarding such assignments of error constitutes an abandonment of such issues. Joy v. Dept. of Labor and Industries, 170 Wn. App. 614, 285 P.3d 187 (2012); West v. Thurston Cnty., 168 Wn. App. 162, 275 P.3d 1200 (2012); Bercier v. Kiga, 127 Wn. App. 809, 103 P.2d 232 (2004).

Because Futurewise lacks standing to appeal under the GMA or LUPA, it included causes of action three through six in its Complaint, pleading writs of review or certiorari, both constitutional and statutory. CP 3-19, ¶¶ 8.1-11.4. However, on appeal Futurewise does not assign error to

the trial court's order as it relates to declaratory judgment under the Wash. Const. art. IV, § 6 (third cause of action), an application for a writ of certiorari under chapter 7.16 RCW (fourth cause of action), an application for a writ of certiorari under the Wash. Const. art. IV, § 6 (fifth cause of action), and a writ of review under the Wash. Const. art. IV, § 6 (sixth cause of action). Futurewise fails to provide argument or citation to authority for causes of action three through six. See RAP 10.3.

The Court should decline to consider Futurewise's causes of action three through six, which are not supported by any references to the record nor by any citations to legal authority. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). As a result, Futurewise has abandoned its appeals of these issues.

If the Court decides to consider the requests for writs of review or certiorari, despite Futurewise's lack of standing in this case and its abandonment of these claims on appeal, the Court should dismiss Futurewise's requests because Ordinance No. 1216 was a purely legislative act and there is no evidence—or even a suggestion by Futurewise—that the City acted arbitrarily or capriciously.

a. Statutory Writ of Review.

A statutory writ is not a proper cause of action because the City's passage of Ordinance No. 1216 was not an exercise of a judicial or quasi-

judicial function. See RCW 7.16.040; Raynes, 118 Wn.2d at 237. RCW

7.16.040 permits a statutory writ when:

[a]n inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

Generally, the statutory writ is available only to review actions judicial in nature. Raynes, 118 Wn.2d at 243-44. The statutory writ does not apply to the City's legislative adoption of Ordinance No. 1216.

Courts afford great deference to legislative actions to prevent substitution of judicial judgment for the decisions of elected officials and to preserve the separation of powers. Id. at 243. In Raynes, the Court applied a four-part test to determine whether a particular decision was quasi-judicial or legislative. Id. Although not a rigid or conclusive test, in general, an administrative decision sufficiently resembles a judicial action to allow issuance of a writ if: (1) the court could have been charged with the duty at issue in the first instance; (2) the courts have historically performed such duties; (3) the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the

enactment of a new general law of prospective application; and (4) the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators. Id. at 244–45.

In Raynes, the Court held that the City of Leavenworth’s amendments to a zoning ordinance related to RV parks was a legislative act, not subject to a statutory writ of review. In so holding, the Court concluded that courts do not adopt zoning ordinances, the zoning ordinance did not involve the application of current law to a factual circumstance, and “[p]olicymaking decisions which are based on careful consideration of public opinion are clearly within the purview of legislative bodies and do not resemble the ordinary business of the courts.” Id.

The facts related to the City’s adoption of Ordinance No. 1216 mirror those in Raynes. The City made a legislative decision to enact zoning as part of the annexation based on public policy established from public hearings and comments. Adopting an annexation ordinance and zoning regulations is not the ordinary business of a court but instead, fundamentally, the function of a legislative body. Futurewise does not provide argument related to any facts that would support a statutory writ of review, nor does Futurewise argue that the City acted in a judicial function. The Court should decline review of this legislative act by a statutory writ of certiorari.

b. Constitutional writ of certiorari.

The Court reviews the trial court's order to dismiss causes of action five and six, the constitutional writ of certiorari and review, de novo. Torrance v. King Cnty., 136 Wn.2d 783, 788, 966 P.2d 891 (1998), *distinguished on other grounds by* Wenatchee Sportsmen Ass'n, 141 Wn.2d 169. Because Futurewise does not argue that the City's decision to adopt Ordinance No. 1216 was illegal or arbitrary and capricious, there is insufficient evidence to support a constitutional writ of certiorari, and this Court should affirm.

The fundamental purpose of the constitutional writ of certiorari pursuant to Wash. Const. art. IV, § 6 is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority. Saldin Securities, Inc. v. Snohomish Cnty., 134 Wn.2d 288, 292, 949 P.2d 370 (1998). Judicial review is not full appellate review but, instead, involves consideration only of whether, based on the administrative record, the tribunal's decision was illegal or arbitrary and capricious. City of Bellevue v. East Bellevue Community Council, 138 Wn.2d 937, 943-944, 983 P.2d 602 (1999).

First, the City did not act illegally and the record is devoid of any evidence to support such an assertion. The LLCs initiated the Brown Annexation on June 22, 2016, by direct petition, pursuant to RCW

35A.14.120. CP 21, 348–49. The City adopted Resolution No. 511 on August 11, 2016, accepting a notice of intent to annex the Brown Annexation area, held a properly noticed public hearing on the Brown Annexation on August 25, 2016, and then adopted Ordinance No. 1216, which applied RLD-6 zoning to the Brown Annexation area. CP 20–21.

Second, the City did not act arbitrarily or capriciously and Futurewise points to no facts in the record to support such a claim. A decision is arbitrary and capricious only when it can be said to constitute “willful and unreasoning action, without consideration and in disregard of facts and circumstances.” Miller v. City of Tacoma, 61 Wn.2d 374, 390, 378 P.2d 464 (1963).

Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

Id.

Here, Futurewise offers no evidence or argument of “willful and unreasoning action, without consideration and in disregard of facts and circumstances.” Rather, Futurewise seems to simply wish that the City had designated the Brown Annexation area “as agricultural lands of long-term commercial significance under the Growth Management Act.” CP 7, ¶ 4.4. The City decided that annexation and establishing zoning were appropriate

after considering public comment, and it had the authority to adopt Ordinance No. 1216. Futurewise does not point to anything that would require the City in its legislative authority to apply different zoning or to take a different action. See City of Bellevue, 138 Wn.2d 937 (rejecting constitutional writ); Torrance, 136 Wn.2d at 791–92 (denying constitutional writ). The record plainly establishes that the City did not act arbitrarily or capriciously when it took action upon due consideration, and the Court should affirm the trial court’s dismissal.

c. The City takes no position regarding vested development rights.

Futurewise Assignment of Error 6 alleges the LLCs do not maintain any vested rights on the land within the Brown Annexation. Futurewise Opening Brief at 2–3, 36–37. No permit applications are at issue in this case. Thus, the City takes no position as to whether development rights within the Brown Annexation have vested at this time.

F. Fees on Appeal.

The Superior Court awarded costs and disbursements, as provided in chapter 4.84 RCW and CR 54, to the LLC’s as the prevailing party below. CP 402, 430-31; RP 70, ¶ 20 – RP 71, ¶ 14. In responding to this appeal, the City requests an award of reasonable attorneys’ fees and expenses

pursuant to RAP 18.1(a) and RCW 4.84.185 to be paid by Futurewise.

V. CONCLUSION

The present case is Futurewise's thinly veiled attempt to collaterally challenge Clark County's 2016 Comprehensive Plan. Because Futurewise lacks standing and jurisdiction to bring this case before the Superior Court, and because tardy collateral challenges cannot properly be brought in any event, this Court should affirm the Superior Court's order of dismissal.

RESPECTFULLY SUBMITTED this 9th day of January, 2018.

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DECLARATION OF SERVICE

I, Margaret C. Starkey, declare and state:

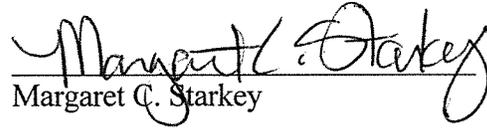
1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 9th day of January, 2018, I sent for service a true copy of the foregoing *Brief of Respondent City of Ridgefield* on the following using the method of service indicated below:

<p><i>Attorneys for Milt Brown and LLCs:</i> James D. Howsley David H. Bowser Jordan Ramis PC 1499 SE Tech Center Place, Ste. 380 Vancouver, WA 98683</p>	<p><input checked="" type="checkbox"/> By E-Mail To: Jamie.howsley@jordanramis.com David.bowser@jordanramis.com Lisa.mckee@jordanramis.com Joseph.schaeffer@jordanramis.com litparalegal@jordanramis.com <input checked="" type="checkbox"/> Court's ECF System</p>
<p><i>Attorneys for Futurewise & Friends of Clark County:</i> Tim Trohimovich Director of Planning & Law Futurewise 816 Second Ave. #200 Seattle, WA 98104</p>	<p><input checked="" type="checkbox"/> By E-Mail To: tim@futurewise.org <input checked="" type="checkbox"/> Court's ECF System</p>
<p><i>Associated Counsel for City of Ridgefield:</i> Law Office of Janean Z. Parker Parker P.O. Box 298 Adna, WA 98522</p>	<p><input checked="" type="checkbox"/> By E-Mail To: parkerlaw@wwestsky.net <input checked="" type="checkbox"/> Court's ECF System</p>

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of January, 2018, at Issaquah, Washington.


Margaret C. Starkey

KENYON DISEND, PLLC

January 09, 2018 - 3:55 PM

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