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JUL 09 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By *[Signature]*

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No. 271234
Kittitas County Cause Nos. 08-2-00195-7; -8-2-00210-4; 08-2-00224-4;
08-2-00231-7; 08-2-00239-2
Consolidated under No. 08-2-00195-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

KITTITAS COUNTY, a political subdivision of the State of Washington,
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW),
CENTRAL WASHINGTON HOME BUILDERS (CWHBA),
MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO.,
TEANAWAY RIDGE, LLC, KITTITAS COUNTY FARM BUREAU,
and SON VIDA II,
Petitioners,

v.

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE, and
EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD,

Respondents.

**MEMO OF
KITTITAS COUNTY IN OPPOSITION TO DIRECT
REVIEW**

205 West 5th Ave Room 213
Ellensburg, Washington 98926
(509)962-7520
fax (509)962-7022

Neil A. Caulkins
Deputy Prosecuting Attorney
Kittitas County

July 8, 2008

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I. INTRODUCTION

Appellant Kittitas County, respondent before the Growth Management Hearings Board, submits this memorandum in opposition to the application by Futurewise for direct review by the Washington State Court of Appeals, Division Three, pursuant to RCW 34.05.518.

II. DISCUSSION

For the Court of Appeals to accept direct review pursuant to RCW 34.05.518(5), it must find “that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either: (i) Fundamental and urgent statewide or regional issues are raised; or (ii) The proceeding is likely to have significant precedential value.” RCW 34.05.518(3)(b). None of these criteria are met, and so direct review should not be granted.

A. Absence of Prejudice.

Futurewise has failed to demonstrate how this matter being heard in the Kittitas County Superior Court would be detrimental to any party. The Kittitas County Superior Court, of its own motion, has pledged to grant accelerated review, pursuant to RCW 36.70A.305, within 60 days. Exhibit B-9 of Futurewise’s Motion for Discretionary Review. This

1 accelerated review promises to resolve this controversy more promptly
2 than the Court of Appeals could, thereby removing any prejudice.

3 Futurewise has not demonstrated how vested development
4 applications harm the Kittitas Conservation Coalition (KCC). They are a
5 group of county residents who experience no demonstrated impact by the
6 regulations at issue here. There is no evidence that the members of this
7 organization are uniquely harmed by these regulations during the
8 pendency of the appeal that would constitute detriment from any delayed
9 resolution.

10 Futurewise has failed to allege any harm from the regulation that is
11 subject of this litigation. Contrary to Futurewise's representations at page
12 thirteen of its motion, the FDO in this matter did not find degradation to
13 water quality, problems with transportation and service delivery, or
14 endangerment of farming and other natural resource uses. In the absence
15 of any identifiable harms, no prejudice exists for any party or the public
16 that would justify granting direct review.

17 Futurewise relies upon bare assertions of alleged market instability
18 harming the Central Washington Home Builders Association (CWHBA) at
19 page fourteen of its motion. Futurewise misses the fact that the CWHBA
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23 **MEMO IN OPPOSITION**
TO DIRECT REVIEW

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GREGORY L. ZEMPEL
KITTITAS COUNTY PROSECUTOR
KITTITAS COUNTY COURTHOUSE - ROOM 213
ELLENSBURG, WASHINGTON 98926-3129
TELEPHONE 509 962-7520

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1 are involved in construction, not real estate speculation and development,
2 and that, regardless of the ultimate maximum rural density in Kittitas
3 County, they will still be building houses. The folks actually involved in
4 real estate development and speculation realize the risks of their endeavors
5 (it is known as real estate speculation for a reason) and proceed
6 accordingly. The allegation at page fourteen of Futurewise's motion that
7 the environment in Kittitas County is so destroyed from the County's use
8 of 3-acre zoning to the point that financing is difficult to obtain or that
9 property is hard to sell is both preposterous and unsupported by the record.
10 These sorts of allegations do not demonstrate the prejudice needed to grant
11 direct review by the Court of Appeals.

12 Any delay in a decision as to appropriate density will not harm
13 those who wish to subdivide property. Those who want to subdivide now
14 can apply and vest under current regulation. Those who wait until the
15 issue is resolved will vest under what ever regulation is ultimately
16 determined to be GMA-compliant. The worst case scenario for those
17 developers who wait is that they will be able to create fewer lots, but those
18 they do create can be sold for more because they will be larger, leaving the
19 developer no worse financially for it.
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1 arriving at appropriate rural densities. Therefore, whatever those
2 circumstances and processes are that were used in Kittitas County, they
3 would, by definition, have no applicability to other counties. In short,
4 because this case is not threatening the “no bright line rule” status of the
5 law and will be factually specific to Kittitas County, it lacks the potential
6 for precedential value required under RCW 34.05.518(3)(b)(ii) to justify
7 direct review by the Court of Appeals.

8 **D. Advantages of Case Being Heard in Kittitas County.**

9 The location of the forum is obviously most convenient for all the
10 parties. Most of the parties are from Kittitas County, and it will be closer
11 for both CWHBA and Futurewise to come to Ellensburg rather than
12 Spokane. Contrary to the representations of Futurewise, ultimate review
13 by the Court of Appeals is not a certainty for this matter. The Superior
14 Court decision may well be the ultimate resolution of this case.
15 Regardless, having a well-reasoned trial court opinion will only aid the
16 Court of Appeals’ review should this matter eventually be before it.

17 **III. CONCLUSION**

18 For these reasons, Kittitas County opposes direct appellate review
19 of this matter by the Court of Appeals, Division III.
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Respectfully submitted this 8th day of July,
2008.



NEIL A. CAULKINS, WSBA #31759
Deputy Prosecuting Attorney
Attorney for Kittitas County

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BOARD,

Respondent,

AFFIDAVIT OF MAILING

ANGELA T. BUGNI, being first duly sworn upon oath, deposes and
says:

I am a citizen of the United States of America and of the State of
Washington, over the age of 18 years, not a party to the above-entitled
proceeding and competent to be a witness therein.

 **ORIGINAL**

On July 8, 2008, I sent overnight via UPS one original and one copy of the MEMO OF KITTITAS COUNTY IN OPPOSITION TO DIRECT REVIEW, to the following individual(s) at the specified addresses:

WASHINGTON COURT OF APPEALS
DIVISION III
500 N CEDAR STREET
SPOKANE WA 99201

On July 8, 2008, I sent via E-mail and US Mail one copy of the MEMO OF KITTITAS COUNTY IN OPPOSITION TO DIRECT REVIEW, to the following individual(s) at the specified addresses:

Mr. Tim Trohimovich
Futurewise
814 2nd Avenue, Suite 500
Seattle WA 98104
Tim@futurewise.org

Mr. Jeffrey David Slothower
Lathrop Winbauer Harrel Slothower & Denison LLP
PO Box 1088
Ellensburg WA 98926
jslothower@lwhsd.com

Mr. Gregory McElroy
McElroy Law Firm, PLLC
1808 N. 42nd Street
Seattle WA 98103
gmcclroy@mcelroylaw.com

Ms. Martha Lantz
Office of the Attorney General
1125 Washington Street SE
Olympia WA 98504
marthall@atg.wa.gov

Mr. Andrew Cook
Mr. Timothy M. Harris
Building Industry Association of Washington
111 21st Avenue SW
Olympia WA 98507
andyc@biaw.com

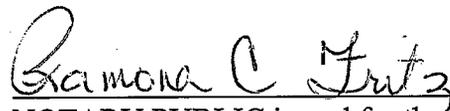
Mr. Alexander Weal Mackie
Perkins Coie LLP
1201 3rd Avenue, Suite 4800
Seattle WA 98101-3099
amackie@perkinscoie.com

placing said copies in a sealed envelope with postage prepaid thereon.



Angela T. Bugni
Legal Secretary

SUBSCRIBED AND SWORN to (or affirmed) before me this 8th day of
July, 2008.



NOTARY PUBLIC in and for the
State of Washington.
My Commission Expires: 9-1-08