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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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CLARK COUNTY, WASHINGTON et al.,  
Petitioners,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS  
BOARD et al.,  
Respondents.

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***AMICUS CURIAE* BRIEF ON BEHALF OF  
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN  
SUPPORT OF PETITIONS FOR REVIEW**

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ORIGINAL

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## **I. INTRODUCTION**

The Court of Appeals decision in *Clark County, Washington, et al. v. Western Washington Growth Management Hearings Review Board* involves issues of substantial public interest that warrant review by the Supreme Court. In particular, *Amicus* BIAW argues that the Court of Appeals decision ignores clear public policy, as articulated by this Court and the Legislature, in favor of finality and certainty in land use planning. In addition, the Court of Appeals failed to give proper deference to local decision making under the Growth Management Act (GMA). If left to stand, the decision by the Court of Appeals will have far-reaching, detrimental effects on the housing industry.

## **II. ISSUE OF CONCERN TO *AMICUS CURIAE***

Do the Petitions for Review raise issues under RAP 13.4 warranting review?

## **III. IDENTITY AND INTEREST OF *AMICUS CURIAE* BUILDING INDUSTRY ASSOCIATION OF WASHINGTON**

The Building Industry Association of Washington (“BIAW”) represents nearly 10,000 member companies who employ tens of thousands of Washingtonians. BIAW is made up of 16 affiliated local associations: the Building Industry Association of Clark County, Central Washington Home Builders Association, Jefferson County Home Builders

Association, Master Builders Association of King and Snohomish Counties, Home Builders Association of Kitsap County, Lewis-Clark Building Contractors Association, Lower Columbia Contractors Association, North Central Home Builders Association, North Peninsula Building Association, Olympia Master Builders, Master Builders Association of Pierce County, San Juan Builders Association, Skagit-Island Counties Builders Association, Spokane Home Builders Association, Home Builders Association of Tri-Cities and the Building Industry Association of Whatcom County.

BIAW's members are engaged in every aspect of the residential construction industry, from the initial investment stage to the marketing and selling of homes. These are the individuals and companies who apply for permits and pay the fees, taxes and upfront investment cost in reliance on local regulations. They are affected by any change in development regulations and any change in the way the Growth Management Act is implemented. Therefore, the Court of Appeals decision has a unique and direct impact on BIAW members.

#### **IV. STATEMENT OF THE CASE**

*Amicus* BIAW adopts and incorporates the statement of facts as set forth in the Petitions for Review submitted by Petitioners Clark County and City of La Center and by Petitioner Sterling Savings Bank.

## V. ARGUMENT

This case presents several critical issues warranting review under RAP 13.4. In addition to the issues presented by the Petitioners, *Amicus* BIAW argues: (1) The Court of Appeals decision is in conflict with the public policy in favor of finality and certainty in land use planning; (2) the Court of Appeals has failed to follow the guidance of this Court in giving the appropriate deference to local government GMA planning decisions. These issues have serious consequences for the home building industry throughout the state of Washington. In addition, *Amicus* BIAW believes Respondents Karpinski et al., in their Answer to the Petitions for Review, make the case themselves that important public issues are at stake.

### **A. The Court Of Appeals Decision Looks Right Through The Strong Public Policy In Favor Of Finality In Land Use Planning.**

*"The tendency of the law must always be to narrow the field of uncertainty." Oliver Wendell Holmes, Common Law 127 (1881).*

This Court has repeatedly emphasized the strong public policy supporting finality in a variety of land use decisions. Finality and certainty are the foundation for land use planning; without a set of rules to rely on, the average property owner, builder or developer cannot and will not proceed with spending the resources necessary for property

development. The Court of Appeals ruling that County legislative actions are not final until appeals are finished throws a curve ball at this idea.

**1. The Home Building Industry Cannot Operate Without Finality In Land Use Planning.**

This Court recently articulated the significance of finality to the building industry. The Court in *Thurston County v. W. Washington Growth Mgmt. Hearings Bd.* considered whether “failure to revise” challenges should be limited to those aspects of a comprehensive plan directly affected by new or substantively amended GMA provisions. Unanimously ruling to limit these challenges, this Court emphasized the public policy of preserving finality: “Finality is important because ‘[i]f there were not finality, no owner of land would ever be safe in proceeding with development of his property’.” *Thurston County*, 164 Wash. 2d 329, 345, 190 P.3d 38, 45 (2008) (quoting *Deschenes v. King County*, 83 Wash.2d 714, 717, 521 P.2d 1181 (1974), *overruled in part by Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wash.2d 840, 991 P.2d 1161 (2000).).

The facts were different in *Thurston County*, but the same reasoning applies here. If the housing industry cannot rely on the finality of legislative decisions by a local government, no property owner or developer will be safe in proceeding. As Clark County and LaCenter

point out in their Petition: “No person could know whether to file a permit application, or what price to buy or sell property.” Petition at p. 10.

**2. Numerous Decisions Of This Court Have Emphasized Finality And Certainty As A Critical Foundation To The Land Use System.**

In addition to *Thurston County*, the public policy favoring finality and certainty has been addressed by this Court in a variety of land use contexts, from vesting to time limitations under the Land Use Petition Act.

In *West Main Associates v. City of Bellevue*, 106 Wash.2d 47, 720 P.2d 782 (1986), this Court considered the application of the vested rights doctrine to a city ordinance. The Court in *West Main* reasoned that “society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.” *West Main*, 106 Wash.2d at 53. In *West Main*, this Court concluded that the city “misused its power by denying developers the ability to determine the ordinances that will control their land use.” *Id.*

The danger presented by the Court of Appeals decision in *Clark County* is that land use decisions will be tied up for years in court, leaving no rule in place on which a landowner or developer can rely. This Court considered this danger as early as 50 years ago.

“An owner of property has a vested right to put it to a permissible use as provided for by prevailing zoning ordinances. The right accrues at the time an application for

a building permit is made. The moves and countermoves of the parties hereto by way of passing ordinance and bringing actions for injunctions, should had did avail the parties nothing. A zoning ordinance is not retroactive so as to affect rights that have already vested.”

*State ex rel. Ogden v. City of Bellevue*, 45 Wash. 2d 492, 496, 275 P.2d 899, 902 (1954) citing to *State ex rel. Hardy v. Superior Court for King County*, 155 Wash. 244, 284 P. 93 (1930). See also *Eastlake Cmty. Council v. Roanoke Associates, Inc.*, 82 Wash. 2d 475, 484, 513 P.2d 36, 42 (1973) (“In the pursuit of certainty in the date of vesting of rights. . .”).

In *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 829 P.2d 765 (1992), this Court considered a takings challenge by a developer that arose from a city low-income housing ordinance. The benefits of administrative finality to both the land owner and the government were once again pointed out: “[i]ncreasingly, this court is called upon to resolve disputes concerning land use regulation, and the trend is likely to continue,” then the Court explained its objective in resolving these disputes: “[a] body of cogent, workable rules upon which regulators and landowners alike can rely is essential to the task.” *Sintra*, 119 Wash.2d at 5.

Finally, in a case involving adherence to strict time limits for appeal under our state’s Land Use Petition Act, this court re-iterated the same public policy goal: explaining that it has long “recognized strong public policy supporting administrative finality in land use decisions.”

*Chelan County v. Nykreim*, 146 Wash.2d at 904, 931, 52 P.3d 1 (2002)  
(internal citations omitted).

*Amicus* BIAW believes the Court of Appeals decision looks right through the foregoing reasoning. The future of the economy rests largely on the housing industry, and without predictability, certainty and finality provided by a set of concrete rules, the industry cannot operate.

**B. The Court Of Appeals Failed To Follow The Guidance Of This Court In Giving The Appropriate Deference To Local Government GMA Planning Decisions.**

*Amicus* BIAW believes the Hearings Board and Court of Appeals inappropriately elevated certain factors over others in evaluating the agricultural designations of several of the properties at issue.<sup>1</sup> This approach is in conflict with this Court's ruling in *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wash.2d 224, 110 P.3d 1132 (2005), and the design of the GMA itself.

The GMA affords counties a special kind of deference. In fact, this Court and the Legislature have acted to reinforce the high level of deference afforded to counties.<sup>2</sup> In 1997, several years after the original

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<sup>1</sup> Specifically, the Court of Appeals decision elevates the issue of soils above other factors in WAC 365-190-050 for several of the properties. See *Clark County* at 28, 31, 32.

<sup>2</sup> See Settle, Richard, *Washington's Growth Management Revolution Goes to Court*, Seattle University Law Review, Summer 1999, 23 SEAULR 5, at p. 8: The GMA, from its inception, was "riddled with politically necessary omissions, internal inconsistencies, and vague language" which then led to further legislative and judicial clarification on many issues, one of them being deference.

passage of the Act, the Legislature amended it to include the highly deferential clearly erroneous standard and took the unusual step of codifying the statement of legislative intent:

In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.320. (emphasis added)

This Court has clarified that deference to county GMA actions overrides deference that would otherwise be granted to administrative agencies: “In the face of this clear legislative directive, we now hold that deference to county planning actions that are consistent with the requirements of the GMA, supersedes deference granted to the APA and courts to administrative bodies in general.” *Quadrant*, 154 Wn.2d at 238. More recently, this Court stated clearly, “[g]reat deference is accorded to a local government’s decisions that are ‘consistent with the requirements and goals’ of the GMA.” *Thurston County*, 164 Wash.2d at 337.

The Court of Appeals points out “a Growth Board must *review* the evidence but not *reweigh* it.” *Clark County v. WWGMHB*, slip op at 12 (Emphasis in original). But the court proceeds to do just this by pointing to “the County’s overtly heavy reliance on economic factors” and “overtly ignor[ing] the goals of the GMA.” *Id.* At 15-17, 32-33. This language is associated with *re-weighing* and runs counter to the level of deference afforded to counties under the GMA.

**C. Respondents Karpinski et al., In Their Answer To The Petitions For Review, Make The Case That Important Public Issues Are At Stake.**

As a final note, Karpinski *et al.*’s argument that the Court of Appeals decision does not concern an issue of public interest warranting review under RAP 13.4 is disingenuous. In fact, Karpinski *et al.*’s Answer includes several admissions establishing that an important public interest is present. In discussing issues of annexation, Karpinski admits that the case concerns a “surprising twist,” which created “an interesting quandary,” Karpinski *et al.* Answer at p. 3. Karpinski also concedes that “[a] number of issues decided by the Court of Appeals below are certainly of public interest and importance inasmuch as the decision addresses whether a local government can, through annexation, insulate its land use decision under the [Growth Management Act] from administrative and judicial review.” Answer at p. 6.

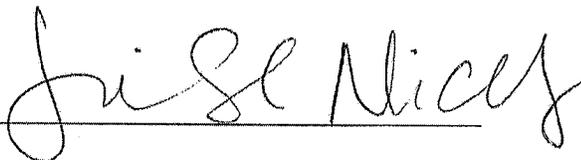
Rarely does an “interesting quandary” lead to a non-controversial result. The Court of Appeals decision is new law in Washington State because it says landowners and the industry serving them can no longer rely on the planning decisions by local governments.

**VI. CONCLUSION**

Repeatedly, the Court has concluded that it is critical to the land use system to provide certainty, predictability and finality to both the land owners and the government. In this case, the Court of Appeals’ holding that a County’s comprehensive plan change is not final until appeals are finished is in direct conflict with this public policy and its review of Clark County’s planning decisions does not follow the appropriate level of deference under the GMA. If left to stand, this decision will have broad, detrimental effect on the residential housing industry in Washington state.

*Amicus* BIAW therefore requests this Court accept review.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of July, 2011.

By 

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