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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CLARK COUNTY, WASHINGTON and CITY OF LA CENTER, et al.

Petitioners,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, JOHN KARPINSKI, CLARK COUNTY NATURAL RESOURCES COUNCIL and FUTUREWISE,

Respondents.

BRIEF OF AMICUS CURIAE ON BEHALF OF THE WASHINGTON ASSOCIATION OF MUNICIPAL ATTORNEYS, IN SUPPORT OF PETITIONER CITY OF LA CENTER.

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I. INTRODUCTION

The Washington State Association of Municipal Attorneys (WSAMA) joins in and fully supports the arguments raised in Clark County and the City of La Center's Petition for Review. WSAMA urges this Court to accept review of the Court of Appeals' opinion because the opinion conflicts with well-established precedent and raises an issue of substantial public interest. RAP 13.4(b)(1), (2), (4).

Under the Growth Management Act, the local land use decisions of GMA-impacted cities and counties are subject to review by the Growth Management Hearings Boards. But just because local land use decisions are appealable does not mean they are non-final. In truth, the express statutory language gives local land use decisions a measure of finality even while they are undergoing appeal. RCW 36.70A.302(2).

The Opinion takes an unambiguous statute and turns it on its head, castigating local governments and developers for acting in reliance upon "non-final" decisions. The Opinion thereby ignores the public policies favoring predictability and certainty in land use planning. It hinders the ability of municipalities to rely upon the finality of their own legislative land use decisions. It throws an unconstitutional wrench into the expectancy interests of private developers, thereby contravening the constitutional

rights embodied in the vested rights doctrine. Finally, the Opinion allows an impermissible collateral attack on annexations that no one challenged at the time of their enactment. The Opinion undermines how WSAMA's members—as well as the parties to this very litigation—have interpreted RCW 36.70A.302(2) ever since its enactment in 1997. In addition, the Opinion gives Growth Boards license to interfere in local decision-making, to which they should instead defer. WSAMA therefore urges this Court to grant discretionary review under RAP 13.4(b).

II. STATEMENT OF THE CASE

WSAMA incorporates by reference the Statement of the Case contained in Clark County the City of La Center's Petition for Review.

III. ARGUMENT

A. The Court of Appeals decision raises an issue of substantial public interest; review is therefore appropriate under RAP 13.4(b)(4).

1. The Court of Appeals' decision flatly contradicts the Growth Management Act.

The thrust of the Court of Appeals Opinion ("Opinion") is that no vested rights can be acquired during the period of Growth Board review. *See* Opinion at 14 ("County decisions related to the GMA that are timely challenged and pending review before the Growth Board and/or an appellate court are not final and cannot be relied on . . ."). This directly

contradicts the Legislature's conscious choice to permit vesting prior to a determination of invalidity. RCW 36.70A.302 states as follows:

> A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

This statute is unambiguous. By its plain language, it declares that (1) decisions by the Growth Management Hearings Boards only have effect going forward, and (2) any rights that vested between the local land use decision (such as a comprehensive plan amendment) and receipt of the Growth Board's decision remain vested, even if the Growth Board finds invalidity. This plain language, enacted in 1997 via ESB 6094, was a conscious choice by the Legislature to permit reliance upon local land use decisions while those decisions are undergoing review by the Growth Boards.

The Opinion nullifies the plain meaning of this statute. In determining that comprehensive plan amendments are not "final" pending review, the Court of Appeals gives the Growth Boards the power to issue retroactive orders that compromise the validity of land use decisions made in the interim.

The Court of Appeals cites no authority supporting its analysis. Indeed, it avoids discussing RCW 36.70A.302 in any depth. The Opinion states merely, "Here, the cities' rights to annex the lands purportedly added to their UGAs had not yet vested under state law," because the comprehensive plan amendments were still under Growth Board review. Opinion at p. 14.

This circular reasoning renders RCW 36.70A.302(2) completely meaningless. According to the Opinion, vested rights can never be acquired during the period of review, precisely because a land use decision undergoing review is not "final." But the statute expressly grants the right to vest during the period of time between the local land use decision and the receipt of the Growth Board's decision.

The Court of Appeals expresses the belief that allowing rights to vest would render the Growth Management Act "unenforceable." Opinion at p. 14. While this concern may appear to have merit, it raises a policy question that is squarely within the purview of the Legislature—that is, does petition for review freeze the local government's ability to make land use and development decisions until all appeals are resolved? The Legislature has answered this question with a resounding "No."

In declaring the exact opposite, the Opinion has the potential to wreak havoc on the local planning efforts of WSAMA's member cities. If local governments are forced to freeze their planning and development efforts until all appeals are resolved (Opinion at 9), land use activities will be put on hold for years. Meanwhile, opportunities for economic development will be sacrificed while even unmeritorious appeals work their way through the system. Such an untenable situation is the opposite of what the Legislature expressly intended in enacting RCW 36.70A.302(2).

The appellate courts lack the power to issue decisions that are flatly contradictory to unambiguous statutory language. Such decisions intrude on the province of the Legislature and contravene the public policy of separation of powers. Review is merited under RAP 13.4(b)(4).

2. The Opinion thwarts the public policy in favor of vesting.

In determining that local land use decisions are not "final" while pending review before the Growth Boards, the Opinion nullifies 80 years of Washington jurisprudence with regard to the vested rights doctrine. Washington "embraces a vesting principle which places great emphasis on certainty and predictability in land use regulations." *Noble Manor v. Pierce County*, 81 Wn. App. 141, 145, 913 P.2d 417 (1996), citing *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994). The right of a

property owner to vest has been affirmed by the Washington State Supreme Court on numerous occasions over the past 80 years. *See Allenbach v. City of Tukwila*, 101 Wn.2d 193, 686 P.2d 473 (1984). The right to vest to current land use regulations "is rooted in concepts of fundamental fairness and due process." *Schneider Homes, Inc. v. City of Kent*, 87 Wn. App. 774, 777-78, 942 P.2d 1096 (1997).

In enacting RCW 36.70A.302(2), the Legislature expressly chose to allow development activities to proceed during the period of Growth Board review, thereby respecting the constitutional principles of vesting. This intent is unambiguous. If the Legislature had intended instead to freeze all land development activity—from annexations and subdivisions to building permits and development agreements—until GMA appeals are resolved, it could have expressly stated so.

In terms of the vested rights doctrine, annexations should be treated no differently than private development approvals. The Legislature has expressly given cities the authority to annex lands into their corporate limits. *See, e.g.*, Chapter 35A.14 RCW; Chapter 35.13 RCW. Annexations, especially those that occur via petition, are often developer driven and can be a necessary prerequisite to acquiring vested rights. *See* RCW 35A.14.120 (allowing private property owners to petition for annexation). It goes

without saying that a crucial consideration in any development proposal is the identity of the permitting authority and the set of regulations to which the proposal shall be subject. Put another way, if a land owner does not know if he or she is in the city or the county, the land owner cannot possibly vest to existing land use regulations. Thus, allowing unchallenged annexations to be thwarted pending appellate review is a back-door way of frustrating vesting. This contravenes the unambiguous statutory language.

The Opinion ignores eight decades of judicial and legislative support for the vested rights doctrine. It contravenes appellate authority at all levels and stymies public policies favoring economic development. Review is warranted under RAP 13.4(b)(1), (2), and (4).

B. The Opinion allows a collateral attack on land use decisions (the annexations), in contravention of Supreme Court and Court of Appeals precedent; review is warranted under RAP 13.4(b)(1), (2).

As noted in the Petition for Review, the Opinion calls into question the validity of the annexations, even though no one sought to enjoin or stay them. In fact, the original petitioners stipulated the annexations could go forward on the belief that RCW 36.70A.302(2) permits vesting. CP 48. The Court of Appeals raised the "finality" issue *sua sponte*.

The Growth Board appropriately recognized it had no power to act in a manner that would jeopardize the unchallenged annexations. The

Growth Boards, along with the courts, lack the authority to rule upon an unchallenged land use regulation under the guise of a challenge to another land use decision. *See, e.g., Montlake Community Club v. Central Puget Sound Growth Management Hearings Board*, 110 Wn. App. 731, 43 P.3d 57 (2002); *Wenatchee Sportsmen v. Chelan County*, 141 Wn.2d 169, 181-182, 4 P.3d 123 (2000); *Somers v. Snohomish County*, 105 Wn. App. 937, 21 P.3d 1165 (2001); *Feil v. Eastern Washington Growth Management Hearings Board*, 153 Wn. App. 394, 220 P.3d 1248 (2009); *Caswell v. Pierce County*, 99 Wn. App. 194, 992 P.2d 534 (2000), *review denied*, 142 Wn.2d 1010, 16 P.3d 1265 (2000).

The Respondents now characterize the annexations as a "*fait accompli* rending the issues related to the annexed areas moot." Answer at p. 3. But the fact remains that the Respondents could have made this argument to the Growth Board, and they did not. The Respondents, or any other concerned citizen with standing, could have sought to stay or enjoin the annexations, but no one did. The time for challenging the annexations has long since passed.

Allowing unchallenged annexations to be called into question would contravene precedent and raise a concern of substantial public interest. Such action compromises the authority of cities to accept annexation petitions that are necessary prerequisites to economic

development and vesting. Review is therefore warranted under RAP 13.4(b)(1), (2), and (3).

C. In failing to defer to Clark County's evaluation of the WAC factors, the Opinion conflicts with Supreme Court precedent; review is warranted under RAP 13.4(b)(1).

Finally, the Opinion violates this Court's precedent in failing to defer to the County's reasonable application of the criteria for designating agricultural areas. Pursuant to this Court's precedent, neither courts nor Growth Boards can refuse to consider competent evidence that supports a local government's decision. *City of Arlington v. Central Puget Sound Growth Management Hearings Board*, 164 Wn.2d 768, 193 P.3d 1077 (2008). In *City of Arlington*, the Supreme Court stated:

> The Board found that the County's action in redesignating the land was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. We find the Board erred in concluding the County committed clear error in determining the land in question has no long-term commercial significance for agricultural production. <u>There is evidence in the record supporting the County's determination on this point, and the Board wrongly dismissed this evidence. Because this evidence supports the County's finding . . . the Board erred in not deferring to the County's decision</u>.

Id. at 782. Here, as in *Arlington*, the Court substituted its own judgment for the County's, in violation of the GMA mandate to leave decision-making in the hands of local governments. RCW 36.70A.320; 3201.

From the perspective of WSAMA's members, undue interference by the Growth Boards intrudes upon the province of local elected legislators to do one of the jobs their constituents elected them to do—make decisions with regard to long term use of land. As long as these decisions find support in the record and are not contrary to the GMA, courts should not be permitted to substitute their judgment. The Court of Appeals in this case did exactly that, and its decision should be reversed.

IV. CONCLUSION

For the foregoing reasons, WSAMA respectfully requests that the Supreme Court grant the Petition for Review filed by Clark County and the City of La Center.

RESPECTFULLY SUBMITTED this 7th day of July 2011.

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Attached for filing is a copy of the Motion and Brief of Amicus Curiae on Behalf of the Washington State Association of Municipal Attorneys, In Support of Petitioner City of La Center.

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