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No. 59416-8-I

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**SUPREME COURT
OF THE STATE OF WASHINGTON**

TOWN OF WOODWAY and SAVE RICHMOND BEACH,

Petitioners,

v.

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Respondents.

AMICUS CURIAE BRIEF OF FUTUREWISE

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TABLE OF CONTENTS

I. INTERESTS OF AMICUS CURIAE..... 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT 2

 A. This Court should accept review because the scope of
 Washington’s vested rights doctrine substantially
 affects the public interest. 2

 B. Washington’s already-liberal vesting rules give special
 importance to resolving how early permits vest. 7

IV. CONCLUSION..... 9

TABLE OF AUTHORITIES

CASES

<i>Association of Rural Residents v. Lindsey,</i> 141 Wn.2d 185, 4 P.3d 115 (2000).....	1
<i>Clean Water Alliance v. Whatcom County,</i> No. 64798-4 (Division I)	1
<i>HEAL et al. v. Central Puget Sound Growth Management Hearings Board,</i> 96 Wn. App. 522, 979 P.2d 864 (1999).....	1
<i>Kelly v. County of Chelan,</i> 167 Wn.2d 867, 224 P.3d 769 (2010).....	2
<i>King County v. Central Puget Sound Growth Management Hearings Bd.,</i> 91 Wn. App. 1, 951 P.2d 1151 (1998).....	1
<i>Lemire v. Pollution Control Hearings Board, et al.,</i> Cause No. 87703-3 decision pending	2
<i>Lewis County v. Western Washington Growth Management Hearings Bd.,</i> 157 Wn.2d 488, 139 P.3d 1096 (2006).....	1
<i>Quadrant Corp. v. Central Puget Sound Growth Management Hearings Bd.,</i> 154 Wn.2d 224, 110 P.3d 1132 (2005).....	1
<i>Skagit Surveyors and Engineers, LLC et al. v. Friends of Skagit County,</i> 135 Wn.2d 542, 958 P.2d 962 (1998).....	1
<i>Skamania County v. Columbia River Gorge Commission,</i> 144 Wn.2d 30, 26 P.3d 241 (2001).....	1
<i>Thurston County v. Cooper Point Ass'n,</i> 148 Wn.2d 1, 57 P.3d 1156 (2002).....	1
<i>Thurston County v. Cooper Point Association,</i> 108 Wn. App. 429, 31 P.3d 28 (2001).....	1

<i>Wash. Off Highway Vehicle Alliance v. State</i> , 176 Wn.2d 225 (2012)	3
--	---

STATUTES

Land Use Petition Act (LUPA).....	7
Pierce County Ordinance No. 2011-60s2	4
RCW 36.70A.110.....	4
RCW 36.70A.170.....	4
RCW 36.70A.302.....	6, 9
RCW 43.21C.075.....	5
State Environmental Policy Act (SEPA)	passim
WAC 197-11-310.....	5
Washington Growth Management Act (“GMA”).....	1, 9

OTHER AUTHORITIES

Karen L. Crocker, <i>Vested Rights and Zoning: Avoiding All-or-Nothing Results</i> , 43 B.C.L. Rev. 935 (2002).....	7
---	---

RULES

RAP 13.4(b)(4)	3
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I. INTERESTS OF AMICUS CURIAE

Futurewise, a nonprofit corporation, is a statewide organization interested in the efficient management of growth in the State of Washington and the effective implementation of the Washington Growth Management Act (“GMA”). With its principal mission to promote healthy communities and cities while protecting working farms and forests for this and future generations, Futurewise closely follows the implementation of the GMA and the adoption and amendment of local comprehensive plans and development regulations across the State.¹ Futurewise knows the

¹ Futurewise has appeared as *amicus curiae* in at least 12 appellate cases addressing issues under the Growth Management Act. *Skagit Surveyors and Engineers, LLC et al. v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998), *King County v. Central Puget Sound Growth Management Hearings Bd.*, 91 Wn. App. 1, 951 P.2d 1151 (1998), affirmed in part, reversed in part, 138 Wn.2d 161, 979 P.2d 374 (1999), *Clean Water Alliance v. Whatcom County*, No. 64798-4 (Division I), *HEAL et al. v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 979 P.2d 864 (1999), *Association of Rural Residents v. Lindsey*, 141 Wn.2d 185, 4 P.3d 115 (2000) (*amicus curiae* on motion for reconsideration), *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 26 P.3d 241 (2001), *Thurston County v. Cooper Point Association*, 108 Wn. App. 429, 31 P.3d 28 (2001), *Thurston County v. Cooper Point Ass’n*, 148 Wn.2d 1, 57 P.3d 1156 (2002), *Quadrant Corp. v. Central Puget Sound Growth Management Hearings Bd.*, 154 Wn.2d 224, 110 P.3d 1132 (2005); *Lewis County v. Western Washington Growth Management Hearings Bd.*, 157 Wn.2d 488, 139 P.3d 1096 (2006), *Kelly v. County of Chelan*, 167

scope of this issue, and the range of comprehensive plan and development regulation changes that might be affected by the Court of Appeals' ruling, because Futurewise comments on similar comprehensive plan and development regulation changes across the State. Similarly, Futurewise also knows the scope of the issue because Futurewise has appealed other comprehensive plan adoptions to the State's Growth Management Hearings Board and monitored development applications that were filed while those challenges were pending.

Futurewise knows the facts of this case because Futurewise commented against adoption of the ordinance in question here and has reviewed the petitions for review and the answer.

II. STATEMENT OF THE CASE

Futurewise relies on Petitioners Town of Woodway and Save Richmond Beach's statements of the case.

III. ARGUMENT

- A. **This Court should accept review because the scope of Washington's vested rights doctrine substantially affects the public interest.**

This Court accepts review of cases that involve an issue of

Wn.2d 867, 224 P.3d 769 (2010), and *Lemire v. Pollution Control Hearings Board, et al.*, Cause No. 87703-3 decision pending.

substantial public interest. RAP 13.4(b)(4). An issue is of substantial public interest when it is of a public nature, an authoritative determination is desirable to provide future guidance to public officers, and the issue is likely to recur. e.g., *Wash. Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 233 (2012)(evaluating substantial public interest in the context of mootness). Each of those elements is present here.

The question presented is whether a development permit application vests to a new land use regulation even if adoption of that regulation violates the State Environmental Policy Act (SEPA). As the Town of Woodway and Save Richmond Beach have ably established, this is a question of first impression, and the Court of Appeals' ruling substantially conflicts with the goals and tenets of the Growth Management Act and SEPA. The issue is of a public nature because it involves the adoption of a comprehensive plan and development regulation change by a County, and petitioners are a city and a citizens' group. And the issue is likely to recur and guidance to public officers is useful because there are tens or hundreds of similar permit applications filed every year across the State. Knowing when those permit applications vest provides certainty for developers, municipalities, and parties interested in challenging the applications.

The development permit at issue in this case—an application to Snohomish County to develop an urban village—required an amendment of Snohomish County’s comprehensive plan and development regulations. A significant number of development permits filed with cities and counties across the State every year are similarly dependent on comprehensive plan and development regulation changes. For example, non-agricultural development proposed on designated agricultural land, and proposals requiring an expansion of an urban growth area, each require a comprehensive plan and associated development regulation change. See RCW 36.70A.110; 36.70A.170. In 2012-13, major agricultural de-designations and/or urban growth area expansions were considered in Spokane, King, and Pierce counties.

Spokane County approved an urban growth area expansion with 11 individual requests that totaled 334 acres. Similarly, Pierce County Ordinance No. 2011-60s2 de-designated 125.39 acres of “Agricultural Resource Lands,” the county’s agricultural lands of long-term commercial significance. Ordinance No. 2011-60s2 also de-designated 56.41 acres of “Rural Farm.” And King County considered—but rejected—a proposal to add nearly 500 acres of

land to its urban growth areas.²

These three major comprehensive plan changes in a brief period of time are not anomalous. Instead, virtually every year brings proposals across the State to alter comprehensive plans and development regulations for specific development proposals. Each of these changes requires some level of SEPA review. WAC 197-11-310. And any SEPA review can be challenged for compliance with SEPA's procedural and substantive requirements. RCW 43.21C.075.

But as soon as a comprehensive plan and development regulation change is adopted—even if it is appealed—applicants can submit permit applications. There are accordingly tens or hundreds of potential similar situations—a development permit application after a comprehensive plan or regulation change with environmental review—presented statewide every year. If these permit applications vest at the time they are complete even if SEPA review is challenged, then a later reversal of the comprehensive plan or

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http://www.google.com/url?sa=t&rct=j&q=snoqualmie%20urban%20growth%20area%20expansion&source=web&cd=2&ved=0CDQQFjAB&url=http%3A%2F%2Fwww.kingcounty.gov%2Fsitecore%2Fshell%2FControls%2FRich%2520Text%2520Editor%2F~%2Fmedia%2Fproperty%2Fpermits%2Fdocuments%2FGMPC%2F2012%2FSeptember%2FUGA_Changes_Staff_Report_91112.ashx&ei=ltZUUdubIKiDjAK1vYHoBQ&usg=AFQjCNE8Tq8JKksIUdHsKtXOv3a2m2ocg&bvm=bv.44442042,d.cGE

regulation change is moot as to that particular application: the permit is allowed to proceed under then-existing regulations, regardless of later reversal. But if the applications have not vested, then a reversal means that the application must either comply with the regulations in effect before the change, or the applicant must wait until SEPA review and a new amendment is adopted to re-apply.

Whether permit applications vest despite the pendency of a SEPA challenge has a massive impact on every party involved, and on the important public policies embodied in SEPA's procedural requirements. Land developers, municipalities, and other interested parties all rely on predictable vesting rules. For developers, substantial costs are incurred preparing permit applications, including costs associated with architectural and site design, land acquisition, and environmental and other studies. Knowing whether a permit application will vest despite a SEPA challenge allows a developer to know if funds should be expended preparing a permit application, or if the developer should wait until the appeal is complete.

Likewise, municipalities processing permit applications need to know if those applications are vested. The Growth Management Hearings Board has authority to invalidate a comprehensive plan or development regulation change. RCW 36.70A.302. A determination

of invalidity suspends many non-vested development permit applications. Municipalities must know if they should expend resources evaluating vested development permits or adhere to a declaration of invalidity's requirement that no further action be taken until the declaration is lifted.

Similarly, parties challenging comprehensive plan and development regulations changes need to know when permits vest. Project permits can generally be challenged only through the Land Use Petition Act (LUPA) and, once vested, must be evaluated under the regulations in effect at the time the permit application was complete. Knowing whether a permit is vested allows a party to evaluate whether an appeal should challenge the comprehensive plan or development regulation change and environmental review or the permit itself under LUPA. Uncertainty as to vesting status wastes party and court resources litigating issues that may be moot.

B. Washington's already-liberal vesting rules give special importance to resolving how early permits vest.

Establishing the scope of vesting carries special importance given Washington's already-liberal vesting rules. Washington has one of the most liberal vested rights doctrines in the United States. See Karen L. Crocker, Vested Rights and Zoning: Avoiding All-or-Nothing Results, 43 B.C.L. Rev. 935 (2002), <http://>

/lawdigitalcommons.bc.edu/bclr/ vol143/ iss4/4, at p. 949-51 (Noting that Washington is one of four states following the “early vesting rule”). In Washington, vesting occurs when a development application is complete, unlike in the majority of states, where vesting only occurs after a permit is granted, or even after substantial construction has occurred. *Id.*

SEPA requires mandatory environmental review before a decision that potentially adversely impacts the environment is made. SEPA requires a careful evaluation of a range of potential impacts, including impacts on traffic, water, air, wildlife and other aspects of the natural and human environment. Without SEPA review, a municipality does not have the information necessary to know how changing a comprehensive plan or development regulation may impact the community, environment, and state transportation facilities. Early vesting under the circumstances of this case eviscerates SEPA’s purpose, allowing a municipality to ignore or evade environmental review. Accepting review allows the Court to close the loophole on SEPA created by the Court of Appeals’ decision.

Having become intimately familiar with the statewide implementation of the GMA, Futurewise disagrees with the Court of Appeals’ conclusion that the legislature intended the GMA’s vesting

provision (RCW 36.70A.302) to undermine SEPA by operating in the manner presented by this case. In adopting the GMA's vesting provision, the legislature grappled with the question of how to treat permit applications affected by subsequent GMA enactments (i.e., comprehensive plans and development regulations) required by this new law. But in this case, the enactments in question were adopted at the request of the property owner to facilitate a specific development project and were not already in place. The purpose of vesting—allowing a property owner stability of law when a development project is considered—simply does not apply when the property owner requests the change. As it turned out, Snohomish County's enactments were adopted in violation of both SEPA and the GMA itself. Futurewise disagrees that Washington law allows vesting under the circumstances presented by this case, and encourages the Court to accept review to clarify this important question of first impression.

IV. CONCLUSION

Vesting after a comprehensive plan or development regulation amendment potentially affects thousands of acres and hundreds of development permit applications every year. A definitive answer to whether a permit application vests despite incomplete or absent environmental review allows all interested

parties to know when vested rights accrue and will save judicial and party resources by eliminating potentially moot appeals.

Dated this 5th day of April, 2013.

Respectfully submitted,

Newman Du Wors LLP

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Attorney for Futurewise

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TOWN OF WOODWAY; et al.,
Plaintiff/Petitioner

vs

No. 59416-8-I

SNOHOMISH COUNTY; et al.,

DECLARATION OF
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(DCLR)

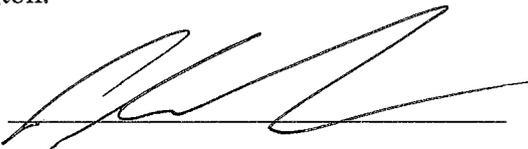
Defendant/Respondent

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 3400 Capitol Blvd. S #103, Tumwater WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 15 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: April 5, 2013 at Tumwater, Washington.

Signature: 

Print Name: James Lincoln