

No. 88405-6

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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TOWN OF WOODWAY and SAVE RICHMOND BEACH,

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Petitioners,

v.

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Respondents.

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AMICUS CURIAE BRIEF OF FUTUREWISE IN SUPPORT OF  
PETITIONERS

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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.<sup>1</sup> Futurewise knows the

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<sup>1</sup> 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 Wn.2d 867,

scope of this issue 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 and development regulation changes 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 briefing of the parties and portions of the record on appeal.

## **II. STATEMENT OF THE CASE**

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

## **III. ARGUMENT**

### **A. The Court of Appeals' decision creates an unfair two-track system by allowing early vesting only in GMA-planning counties.**

This case asks the Court to resolve whether a development application can vest to a comprehensive plan or development

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224 P.3d 769 (2010), and *Lemire v. Pollution Control Hearings Board, et al.*, Cause No. 87703-3 Slip No. Opinion (Aug. 15, 2013).

regulation change based on a flawed analysis of the potential environmental impacts under SEPA. If upheld, the Court of Appeals' ruling would allow a permit to vest after any environmental review, no matter how flawed, or on no review at all.

This creates an unfair two-track system in Washington. Only 29 out of Washington's 39 counties fully plan under the GMA. RCW 36.70A.040 (GMA planning requirements). The Court of Appeals' ruling is based exclusively on the GMA's vesting provision, RCW 36.70A.302. *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, esp. 662-63 (2013). Accordingly, it applies only to counties planning under the GMA.

For the remaining 10 counties, a SEPA appeal that results in a reversal will void the enactment and any permits granted. *E.g.*, *Eastlake Cmty. Council v. Roanoke Assocs.*, 82 Wn.2d 475, 478 (1973). This cannot have been the Legislature's intent: the counties that fully plan under the GMA are those where development is most likely to have adverse impacts because population density is already high and growing; in other words, where careful planning is the most important. The non-planning counties—like highly-rural Garfield, with a 2013 population density of 3.17 people per square mile<sup>2</sup>—

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<sup>2</sup> [http://www.ofm.wa.gov/pop/popden/map\\_county.asp](http://www.ofm.wa.gov/pop/popden/map_county.asp).

simply have different planning needs than the GMA mandates for densely-populated counties like Snohomish. The Legislature cannot have intended a system where Garfield County’s land use decisions receive careful environmental review even though Snohomish County’s do not.

**B. The Growth Management Act is heavily dependent on State Environmental Policy Act review.**

SEPA’s purposes include “stimulat[ing] the health and welfare of human beings.” RCW 43.21C.010. As early as 1905, this Court noted that “There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community.” *Seattle v. Hinckley*, 40 Wash. 468, 471 (1905).

SEPA requires that a decision maker—here, the Snohomish County Council—know the environmental effects of a decision before it is made. As this Court noted, “SEPA *mandates* governmental bodies to consider the total environmental and ecological factors to the fullest in deciding major matters.” *Eastlake Cmty. Council v. Roanoke Assocs.*, 82 Wn.2d 475, 490 (1973)(emphasis in original).

And the GMA is heavily dependent on SEPA to provide environmental information necessary to evaluate the implications of the major land use decisions the GMA requires. Two of the GMA’s planning goals specifically reference environmental protection.

RCW 36.70A.020(9-10.) The GMA is further replete with specific references to SEPA and the need for cities and counties to comply with SEPA's mandates. *E.g.*, RCW 36.70A.035(b)(1); 36.70A.368(4)(c).

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). The Legislature adopted a position that provides significant protections to a property owner affected by a future development regulation change. Washington's vesting rule allows the property owner to "freeze" the regulations in place—no matter when they were changed or if the change is subject to appeal—at the time the application is complete. This protects a property owner from the vagaries of the amendment process: the property owner will not be prejudiced by changes but can instead know with certainty what he or she can build.

For a development regulation change that affects a range of properties—unlike the ordinance in question here—it is probable that only a small percentage of them will complete applications and vest before an unlawful change can be appealed to the Growth Board. The Legislature studied the impacts of vesting in 1998, and concluded that vesting did not adversely impact the goals of the

GMA because very few projects actually vested. *see* Land Use Study Commission Final Report, December 1998<sup>3</sup>, at pp 83-87.

But for a development regulation change that benefits one project—like the change that allowed Point Wells to proceed as an Urban Center here, or an agricultural land de-designation or an urban growth area expansion for a specific parcel—allowing vesting to occur in the absence of proper environmental review means a county not only does not need to consider the environmental considerations “to the fullest”, it need not have considered them at all. The property owner—who proposed the regulation and is the sole beneficiary of it—has every incentive and the ability to immediately file a complete application and vest, mooting any possibility that the judicial system can provide effective review.

As the Town of Woodway has ably argued, this is a sea change in vesting. *See* Response Brief of Town of Woodway at 5-16. Before this case, any ordinance enacted in violation of SEPA was void. *Id.* SEPA mandates that a major action like changing Point Wells to an urban center only take place after full environmental review. RCW 43.21C.031. The property owner here is hardly subject to the vagaries of the amendment process: it asked for an illegal

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<sup>3</sup> Available at <http://www.commerce.wa.gov/Documents/GMS-Land-Use-Study-Commission-Report-1998.pdf>

development regulation change enacted without proper environmental review, and now claims that it is entitled to build to those illegal standards because it raced to get its permit application in before the Growth Management Hearings Board could rule. 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. And allowing a county to dispense with environmental review means that SEPA—a cornerstone of the land use planning process mandated by the GMA—is a dead letter for a change that is proposed by and benefits a particular property owner.

**C. Washington’s already-liberal vesting rules should not be further expanded.**

Reversing this expansion 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/vol43/iss4/4>, at p. 949-51 (Noting that Washington is one of only 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.* The GMA was enacted to combat “uncoordinated and unplanned growth.” RCW 36.70A.010. But ever-expanding the reach of vesting means that uncoordinated and unplanned growth is exactly what will occur.

**D. Reversing the Court of Appeals’ determination is necessary to preserve the efficacy of SEPA across the state.**

Early vesting to an invalid development regulation is not a problem unique to Point Wells. For example, in 2005 and 2009/2010, Spokane County amended its comprehensive plans and zoning and the amendments were found to violate state law. *Miotke et al. v. Spokane County*, GMHB Case No. 05-1-0007 Order on Reconsideration (April 9, 2007), at 3 –4, 2007 WL 1459449; *CAUSE v. Spokane County*, GMHB Case No. 10-1-0003, Order Lifting Invalidity (March 8, 2011), at 3 – 4 of 5, 2011 WL 3528232. But during the time the appeal was being considered, developments vested rendering the Growth Management Hearings Board decisions ineffective.

Spokane County recently approved an additional urban growth area expansion of 4,507 acres when the county’s own land capacity study showed no expansion was needed. And in fact the

existing urban growth areas have excess capacity.<sup>4</sup> Hundreds of property owners are trying to vest before the Growth Management Hearings Board can decide the appeal. Governor Inslee, when authorizing the Washington State Department of Commerce and Transportation to appeal these urban growth area expansions, pointed out that the expansions would adversely affect the future viability of Fairchild Air Force Base and the county and state economies.<sup>5</sup> Governor Inslee asked the county to stop accepting development applications to vest the urban growth area expansions, but at least at present his request has fallen on deaf ears.

Likewise, 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

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<sup>4</sup> Planning Technical Advisory Committee, *Regional Land Quantity Analysis for Spokane County Summary Report* p.1 (October, 2010 Amended May, 2011) and accessed on Sept. 23, 2013 at: <http://www.spokanecounty.org/data/buildingandplanning/lrp/documents/PTC%20LQA%20report%202010.pdf>.

<sup>5</sup> State of Washington Department of Commerce, “State seeking review of Spokane Urban Growth Areas expansion” (Sept. 18, 2013) accessed on Sept. 23, 2013 at: <http://www.commerce.wa.gov/media/Pages/PressReleaseView.aspx?pressreleaseid=137>

add nearly 500 acres of land to its urban growth areas.<sup>6</sup>

These 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. There are accordingly tens or hundreds of potential similar situations to Point Wells presented statewide every year, as the Spokane County vesting frenzy currently occurring demonstrates.

**E. Requiring careful environmental review is especially important where an unincorporated area will later be incorporated into a City.**

Snohomish County has made a mess for either the City of Woodinville or Shoreline. The Legislature has clearly indicated that

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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=AFQjCNE8Tq8JKkslUdHsketxOv3a2m2ocg&bvm=bv.44442042,d.cGE](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=AFQjCNE8Tq8JKkslUdHsketxOv3a2m2ocg&bvm=bv.44442042,d.cGE)

urban areas should be incorporated. RCW 36.70A.110(4). In this case—and in a myriad of other similar cases across the state—a county controlled a swath of urban land. But a city would eventually incorporate that land; in this case, either Woodway or Shoreline will eventually annex Point Wells. RCW 35.13.010 (“Any portion of a county not incorporated as part of a city or town but lying contiguous thereto may become a part of the city or town by annexation.”) Once annexed, all the environmental problems Snohomish County failed to address—traffic, fire, police, sewer, water, and the rest—will be the annexing city’s problem.

And as the Growth Board found, with Point Wells surrounded on all sides by either the Puget Sound or Woodway or Shoreline, the cities need not wait to feel the ill effects of Snohomish County’s incautious planning. *Town of Woodway et al. v. Snohomish County*, Nos. 09-3-0013c/10-3-0011c (Corrected Final Decision & Order, May 17, 2011), esp. at 21. Traffic flowing through the one existing minor road will adversely affect Shoreline. Urban services that should be going to Woodway will be diverted to deal with the inevitable needs of over 3,000 densely-packed new housing units at Point Wells. In short, the Legislature’s decision to encourage annexation must be weighed when evaluating a county’s irresponsible decision to allow dense urban development in an area

like Point Wells that is simply unsuited to support it.

**F. The Legislature did not intend that the GMA eviscerate SEPA.**

The Legislature did not act blindly when considering the interplay between SEPA and the GMA. This Court's jurisprudence holding that a failure to comply with SEPA voids an ordinance was firmly established long before the GMA. *See* Response Brief of Town of Woodway at 5-16. Further, the Legislature commissioned a land use study commission to evaluate the impacts of vesting. The Land Use Study Commission concluded that vesting raised no significant issues. *see* Land Use Study Commission Final Report, December 1998<sup>7</sup>, at pp 83-87. The Land Use Study Commission's report focused solely on the GMA, and did not consider the possibility that a project might vest even if SEPA review was not complete. Had the Land Use Study Commission known of this sea change to vesting, it might have recommended that the Legislature reconsider the broad scope of vesting adopted in RCW 36.70A.302. The Legislature's knowledge that noncompliance with SEPA would void a comprehensive plan or development regulation—and determination not to expressly address this issue despite repeated

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<sup>7</sup> Available at <http://www.commerce.wa.gov/Documents/GMS-Land-Use-Study-Commission-Report-1998.pdf>

references to the need to comply with SEPA made throughout the GMA—is compelling evidence that the Legislature intended to leave this area of jurisprudence unchanged.

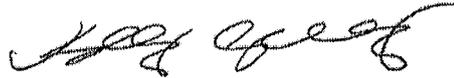
#### IV. CONCLUSION

SEPA was passed in 1971 to protect Washington’s environment—not only the wildlife, but the very real human impacts of traffic, noise, air and water quality, and all the rest—that come with major land use changes. SEPA should not be dead: it is a study cornerstone that prevents jurisdictions like Snohomish County from blindly making decisions without regard to the environmental considerations. Snohomish County and developer BSRE ask this Court to kill SEPA for development regulation changes like Point Wells that are proposed by the property owner. According to those parties, it doesn’t matter whether Snohomish County carefully considered SEPA or threw the statute into the trash: if the ordinance BSRE requested passed, BSRE is vested to it and this Court is powerless. Futurewise asks this Court to dig SEPA’s vital environmental and human protections out of their grave and reverse the Court of Appeals’ determination that BSRE vested to the illegal ordinance BSRE proposed.

Dated this 24th day of September, 2013.

Respectfully submitted,

Newman Du Wors LLP

A handwritten signature in cursive script, appearing to read "Keith Scully", written in black ink.

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