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STATE OF WASHINGTON
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NO. 88405-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TOWN OF WOODWAY and SAVE RICHMOND BEACH,

Petitioners,

v.

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Respondents.

BSRE'S ANSWER TO AMICUS CURIAE BRIEFS OF FUTUREWISE
AND SHORELINE COALITION FOR OPEN GOVERNMENT

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I. IDENTITY OF BSRE

BSRE is the owner of the property that is the subject of this appeal. As one of the respondents in this appeal before the Supreme Court, BSRE submits this answer to the amicus curiae briefs of Futurewise and Shoreline Coalition for Open Government.

II. ARGUMENT

A. Neither of the Amicus Curiae Briefs Provide Meaningful Case Authority Supporting Their Arguments.

Neither Futurewise nor the Shoreline Coalition for Open Government was a party at the trial court level or at the Court of Appeals. The amicus curiae briefs submitted by these parties do not provide substantive legal support for reversing the unanimous decision of the Court of Appeals. Indeed, it is noteworthy that Futurewise's amicus brief does not analyze the language of the GMA's vesting provisions, nor rely on any post-GMA case authority. Instead, it cites State v. Hinckley, 4 Wash. 468 (1905), a case which is more than 100 years old, which involved the acquittal of a builder for alleged violation of a city ordinance regarding the construction of fire escapes. The Hinckley case provides no meaningful guidance to the Court in this appeal.

The only other case authority cited by Futurewise is Eastlake Community Council v. Roanoke Associates, 82 Wn.2d 475, 513 P.2d 36 (1973), another case which predates the GMA and which involved an applicant's "project-level" SEPA responsibilities, not a failure by a

jurisdiction to comply with SEPA's procedural requirements in a legislative context.

Finally, Futurewise cites to Growth Management Hearings Board cases in Spokane County, which have no relationship to the current controversy. For its part, the Shoreline Coalition cites only to the Erickson case, which merely provides general language as to Washington's vesting rules. Erickson & Associates, Inc. v. McClerran, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994).

While the drafters of the amicus curiae briefs may feel strongly about the outcome of this case, their briefs provide no significant legal guidance for this Court.

B. The Fact That GMA Counties May be Treated Differently Than Non-GMA Counties is Neither Surprising Nor Material.

Futurewise argues that the Court of Appeals' decision in this case "creates an unfair two-track system," noting that counties that do not plan under GMA may be subject to different rules. BSRE disputes that the issue of vesting in this case would be different in non-GMA counties. Washington's liberal vesting rules were in place long before the GMA was enacted.

But even if a different result could arise in a county that does not plan under the GMA, that is irrelevant to the current controversy. By definition, counties that do not fully plan under the GMA are treated differently than those that must comply with GMA rules. GMA jurisdictions are subject to much more rigorous planning policies than

non-GMA jurisdictions. RCW 36.70A.210; RCW 36.70A.070. The fact that different results may arise in non-GMA planning counties is neither surprising nor significant to the correctness of the Court of Appeals' decision in this case. It is undisputed that Snohomish County is a GMA planning county, and is subject to the GMA's statutory provisions relative to vesting.

C. The Court of Appeals' Decision Does Not "Further Expand" Washington's Vesting Doctrine.

Futurewise argues that this Court should avoid "further expanding" Washington's liberal vesting rules. But as explained in earlier briefing in this appeal, the Court of Appeals' decision does nothing to expand Washington's vesting rules. Rather, the decision is consistent with the language of the GMA (RCW 36.70A.302(2)), and with settled vesting principles in the context of ordinances which are later determined to be noncompliant or invalid.

In Hale v. Island County, 88 Wn. App. 764, 772, 94 P.2d 1192 (1997) the Court of Appeals held that a party which filed a permit application with Island County was vested to the then-effective county zoning ordinance, even though the ordinance was subsequently found by the Growth Board to be "invalid." Here, as the parties have repeatedly noted, Snohomish County's Urban Center Development Regulations were not even found to be invalid, but only non-compliant. There is nothing about the Court of Appeals' decision which expands existing vesting rules.

The decision is in full conformance with Washington statutes and caselaw relative to vesting of private development applications.

D. Speculation That the BSRE Property May Someday be Annexed by a City is Irrelevant.

Both Futurewise and the Shoreline Coalition argue that the Court of Appeals' decision in this case should be overturned because sometime in the future the BSRE land may be subject to annexation by an adjoining city. First, no such annexation has occurred to date, and speculation as to such a future event is hypothetical. In any event, it is undisputed that BSRE was subject to Snohomish County's regulations at the time its complete applications were submitted to the County. Under Washington's vesting rules, it is the then-current regulations of the applicable jurisdiction that are determinative. The fact that a different jurisdiction may sometime in the future annex County land, and that different regulations may therefore apply to new land use applications in the annexed area is immaterial to the vesting of BSRE's applications.

Neither Futurewise nor the Shoreline Coalition offer any legal support for the notion that Washington's vesting rules can be ignored when there is a possibility that sometime in the future an annexation by a different municipal entity may occur.

E. Neither the GMA Nor the Court of Appeals Has "Eviscerated SEPA."

In its amicus brief, Futurewise makes the startling statement that the Court of Appeals' decision has "eviscerated SEPA." Nothing could be

further from the truth. Under the GMA, cities and counties must still undertake SEPA analysis in connection with their proposed ordinances, and their decisions as to SEPA compliance are subject to appeal. Moreover, landowners submitting land use applications must still comply with SEPA's project-level requirements. Thus, in this case BSRE will be required to comply with the requirements of SEPA before its development receives approval.

Further, the suggestion that BSRE filed its application "illegally" or that it was "racing" to gain an unfair advantage is supported by no evidence in the record. To the contrary, BSRE's applications were extremely detailed and expansive, and were the product of many months of preparation. In any event, BSRE did not obtain an advantage by filing its application before the Growth Board issued its decision. To the contrary, because the Growth Board did not invalidate the Snohomish County Urban Center Development Regulations, BSRE would have vested to those very same regulations even if it had filed its complete application weeks or months after the Growth Board's decision. During the compliance process ordered by the Growth Board, Snohomish County's Urban Center regulations remained in place, and BSRE's development applications would have vested to those regulations even if submitted after the Growth Board's decision.

III. CONCLUSION

Neither Futurewise nor the Shoreline Coalition for Open Government provides relevant Washington case authority supporting their argument that the Court of Appeals' unanimous decision was incorrect. This Court should affirm that decision.

DATED this 10th day of October, 2013.

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DECLARATION OF SERVICE

Nancy Randall declares as follows:

I am a resident of the State of Washington, employed at Karr Tuttle Campbell, 701 Fifth Avenue, Suite 3300, Seattle, WA 98104. I am over the age of 18 years and am not a party to this action. I certify under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the Answer to Amicus Curiae Briefs of Futurewise and Shoreline Coalition for Open Government was served to the following via electronic mail and first class mail, postage prepaid:

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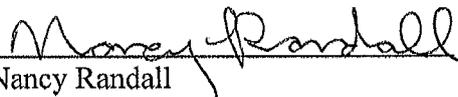
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Attached for filing with the Court is BSRE's Answer to Amicus Curiae Briefs of Futurewise and Shoreline Coalition for Open Government.

The case name is Town of Woodway and Save Richmond Beach v. Snohomish County and BSRE Point Wells, LP
The case number is 88405-6

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