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NO. 90398-1
(Court of Appeals No. 71363-9-I)

SUPREME COURT OF THE STATE OF WASHINGTON

SAVE OUR SCENIC AREA and
FRIENDS OF THE COLUMBIA GORGE,

Respondents,

v.

SKAMANIA COUNTY,

Petitioner.

**SKAMANIA COUNTY'S RESPONSE TO
AMICI CURIAE BRIEFS OF FUTUREWISE ET AL., AND
WASHINGTON STATE ASSOCIATION OF COUNTIES**

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GLOSSARY

County	Skamania County
FOCG	Friends of the Columbia Gorge, Inc. and Save Our Scenic Area
GMA	Growth Management Act, Ch. 36.70A RCW
Planning Enabling Act	Planning Enabling Act, Ch. 36.70 RCW
WSAC	Washington State Association of Counties

1. INTRODUCTION

GMA and over three decades of appellate precedent uniformly require land use legislation to be promptly appealed. Allegations that a comprehensive plan and development regulations are inconsistent do not void the appeal period. The only exception to the 60 day appeal period is if the legislature creates a duty to act and the jurisdiction does not act. As (1) FOCG has failed to identify any such duty; and, (2) as the County has acted, FOCG's appeal is barred.

The County, which plans primarily under the Planning Enabling Act, is not required to adopt zoning controls. But, it has. **After** the 2007 Comprehensive Plan update, the County adopted both rezones and development regulations. The County acted, and FOCG did not timely appeal.

The County voluntarily updated its Comprehensive Plan in 2007, it voluntarily enacted 42,663 acres in rezones in 2012, and it voluntarily enacted 31 pages of new zoning legislation in 2012. Only after the appeals periods had run, did the County allow the moratorium to lapse. FOCG could have appealed the County's legislative decisions. It did not. Instead, FOCG appealed a moratorium ordinance. FOCG cannot use this late appeal to reach back in time and challenge earlier decisions it views as inadequate. If FOCG wishes the County to be subjected to a duty to take further action, its remedy lies with the legislature, not the courts.

2. ARGUMENT

2.1. FOCG Had 60 Days to Appeal the County's 2007 Comprehensive Plan, 2012 Rezones, and 2012 Development Regulations. FOCG Failed to Timely Appeal.

Skamania County voluntarily updated its 1977 Comprehensive Plan in 2007,¹ voluntarily enacted 42,663 acres in rezones in 2012,² and voluntarily adopted over 31 pages of development regulations in 2012.³ None of this legislation was timely appealed. If an appellant believes enacted legislation creates an inconsistency under RCW 36.70.545, as FOCG alleges, that appellant has 60 days to appeal.⁴ FOCG did not appeal the rezones, legislation, or Plan. Its appeal is now time barred.

2.2. Skamania County Has No Duty to Take Additional Action: The Planning Enabling Act Does Not Require Zoning Controls

Skamania County is not required to adopt additional zoning controls beyond what it has already adopted. Because there is no requirement for further action, there can be no failure to act claim.

The Planning Enabling Act enables, but does not require, planning. It does not require counties to adopt development controls. It only requires development regulations to be consistent with the comprehensive plan. RCW 36.70.545, the only provision of the Planning Enabling Act FOCG relies upon, states in full:

¹ CP 37-39; CP 75 (reference to 1977 Plan); CP 195-97 (summary of planning history).

² CP 21, ¶ 3.

³ CP 60-63.

⁴ RCW 36.70A.290(2); *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007); *Brutsche v. City of Kent*, 78 Wn. App. 370, 898 P.2d 319 (1995); see also Supplemental Brief of Petitioner Skamania County, section 4.1.

Beginning July 1, 1992, the development regulations of each county that does not plan under RCW 36.70A.040 shall not be inconsistent with the county's comprehensive plan. For the purposes of this section, "development regulations" has the same meaning as set forth in RCW 36.70A.030.⁵

This does not create a duty to act. It just states that if development regulations are adopted after 1992, those new regulations must be consistent with the existing comprehensive plan.

The legislature knew how to create a duty to act, as it did just that with GMA. GMA specifically requires fully planning counties to adopt implementing development regulations by a date certain.

[I]f the county has a population of fifty thousand or more, the county and each city located within the county **shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994....**⁶

There is no corresponding language in the Planning Enabling Act. As the legislature knew how to create a duty to act, and only did so for those 29 counties which fully plan under GMA,⁷ there can be no failure to act claim.

WSAC's amicus briefing addresses this in further detail, citing specifically to the Planning Enabling Act, which uses the term "may" in

⁵ RCW 36.70.545.

⁶ RCW 36.70A.040(3), emphasis added.

⁷ CP 28 (map of counties which fully plan under GMA).

describing the development regulations the County is authorized, but not required, to enact following comprehensive plan adoption.⁸ Under the Planning Enabling Act, official controls "may" be recommended and "may" be approved, but are not required.⁹ As WSAC addressed, the appellate courts are in accord, having held that neither zoning nor regulations are required.¹⁰

The Legislature allows, but does not require, counties to adopt maps as part of an official control. RCW 36.70.020(11), .560. ... Jefferson County did not violate the Planning Enabling Act when it failed to include a map with the Code.¹¹

As FOCG failed to timely appeal the County's legislation or to identify a legal duty to take additional action, the Superior Court correctly dismissed FOCG's appeal.

2.3. The Plan and Unmapped Zoning Designation are Consistent: Futurewise Admits the County's Plan Specifically Provides for the Unmapped Zoning Designation

Even if FOCG had timely appealed, there is no inconsistency between the 2007 County Comprehensive Plan and development regulations. Futurewise concedes:

⁸ Washington State Association of Counties Amicus Curiae Brief in Support of Skamania County, section 4.1.2.

⁹ RCW 36.70.550, .620. The County set forth the Unmapped zoning designation in its zoning code along with the protective controls it deemed "appropriate and necessary." CP 84; RCW 36.70.780. Even if FOCG's claim had been premised on provisions other than RCW 36.70.545, the County has no duty to take further action.

¹⁰ *Barrie v. Kitsap County*, 93 Wn.2d 843, 848, 613 P.2d 1148 (1980); *Leavitt v. Jefferson County*, 74 Wn. App. 668, 684, 875 P.2d 681 (1994).

¹¹ *Leavitt v. Jefferson County*, 74 Wn. App. at 684.

The 2007 Comprehensive Plan Table 2-1, Plan Designation to Zoning Classification Consistency Chart, does indicate that the “Unmapped” zone is consistent with the Conservancy comprehensive plan designation.¹²

Despite having conceded the Plan specifically provides for the Unmapped zoning designation, and without addressing the relevant review standard, which requires arbitrary and capricious action,¹³ Futurewise still attempts to identify inconsistencies.

Contrary to Futurewise’s assertions, the 2007 Comprehensive Plan does not place any limit on the types of uses which may be located within the Conservancy designation. The Plan specifically identifies the Unmapped zoning designation, which necessarily includes the uses identified therein, as a designation which is consistent with and may be used on lands designated Conservancy. The Unmapped zoning designation allows any use which has not been determined to be a nuisance by a resolution, ordinance, court, or statute.¹⁴ In addition to identifying the Unmapped zoning designation as consistent with the Plan,

¹² Amici Curiae Brief of Futurewise, et al., pg. 19, emphasis added.

¹³ *Barrie v. Kitsap County*, 93 Wn.2d 843, 849-50, 613 P.2d 1148 (1980). GMA's review standard imposes a presumption of validity on legislation and places the burden on the petitioner to demonstrate action is "clearly erroneous." RCW 36.70A.320 (1) and (3). But, this review standard is for GMA actions appealed to the Growth Management Hearings Board.

¹⁴ CP 84.

the Plan identifies a non-exclusive list of uses "appropriate" for the Conservancy designation.

Conservancy, for purposes of the County's Plan, does not mean park-like conservation uses. It means resource conservation uses, *i.e.*, uses which put County resources to commercial use. "Conservancy areas are intended to conserve and manage existing natural resources in order to maintain a sustained resource yield and/or utilization."¹⁵ Such uses the Plan identifies as "appropriate" include mining camps, aircraft landing strips, telecommunication facilities, utility substations, recreational vehicle parks, surface mining, and logging.¹⁶

Despite the wide range of uses identified, development intensities throughout the entire County are strictly limited by topography and infrastructure. All development, regardless of the zoning designation, is subject to platting, health department, and critical areas regulations, which limit development intensities and lot sizes.¹⁷ Futurewise may prefer to read the Plan differently, but there is no inconsistency between the Plan and development regulations. A plan is a "guide" which may be implemented in various ways.

¹⁵ CP 213.

¹⁶ CP 213-14; *see also* FOCG's 2008 Complaint, CP 375; *Friends of the Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 345, 310 P.3d 780 (2013).

¹⁷ SCC, Title 17 (subdivision code, *see e.g.*, SCC 17.64.040 and .155); SCC Ch. 8.68; CP 67; CP 49, 393-94 (natural and utility infrastructure constraints).

While this court -- like the statute in question -- has stated that a comprehensive plan is a "guide" to adoption of zoning regulations, it also has characterized it as a "blueprint which suggests various regulatory measures." Strict adherence has not been required.¹⁸

In *Barrie*, where a policy stated urban businesses should be located four miles apart, and the businesses at issue were located two and a half miles apart, the proposal was found consistent with the comprehensive plan. Given Skamania County's Plan specifically authorizes the Unmapped zoning designation, there is no inconsistency.

2.4. The County Objects Not to Planning, but to Untimely Appeals

Futurewise devotes a good portion of its briefing to describing in very general terms the benefits of land use planning, as if to imply the County objects to planning. Skamania County does not object to planning. The County supports planning, as evidenced by the **voluntary** update in 2007 of its 30-year-old Comprehensive Plan, the **voluntary** 42,663 acres in rezones, and the **voluntary** adoption of over 31 pages of zoning legislation.¹⁹ What the County objects to is the untimely appeal of final planning decisions.

In addition to inserting regulatory uncertainty into the planning structure, untimely appeals divert critical resources from planning, thus

¹⁸ *Barrie v. Kitsap County*, 93 Wn.2d 843, 848-49, 613 P.2d 1148 (1980), internal case citations omitted; *see also Woods v. Kittitas County*, 162 Wn.2d 597, 613, 174 P.3d 25 (2007), internal cites omitted ("Comprehensive plans serve as guides or blueprints to be used in making land use decisions.").

¹⁹ CP 37-39; CP 21 ¶ 3; CP 60-63.

undermining the County's ability to plan. Futurewise believes the County "should be able to expeditiously and economically" rezone 9,600 acres.²⁰ To support this claim, it relies on a citation not to a staff report or other document suggesting this is an easy job, but to litigation FOCG filed against the County after the County attempted to do exactly what Futurewise suggests is easy: rezone all Unmapped acreage within the County.²¹ The litigation cited to resulted in a 2009 hearing examiner decision requiring the County to prepare an environmental impact statement before continuing with the rezone effort.²² Because the County lacked the funds for that endeavor, the rezone effort stalled.²³ However, instead of entirely abandoning planning, the County took a different tack.

First, given its limited funds, and as a portion of the legislation was designed to accommodate a pending wind development proposal, the County urged a wind project applicant to apply to the state for a permit, instead of the County.²⁴ Second, the County more narrowly focused on the lands which could be rezoned without costly environmental review.

²⁰ Amici Curiae Brief of Futurewise, et al., pg. 20.

²¹ Amici Curiae Brief of Futurewise, et al., pg. 20, citing to CP 333.

²² CP 357.

²³ CP 75; CP 393, ¶¶ 2-3.

²⁴ See CP 394, ¶ 9 (detailing project litigation history); CP 383-39 (Superior Court decision certifying state approval for Supreme Court review). The approval was upheld. *Friends of the Columbia Gorge, Inc. v. The State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 310 P.3d 780 (2013). As the zoning code permitted the project outright, the project could likely have been sited within the County. However, given the many local and state requirements which would apply, the County was concerned with review and litigation costs which could accompany the project regardless of zoning.

This effort took an additional three years, but did result in the County rezoning 75% of the acreage previously zoned as Unmapped.²⁵

If anything, Futurewise's citation to the prior litigation over the County's rezone efforts emphasizes that rezones are often controversial, can easily result in litigation and, as in this situation, are unlikely to be "expeditiously and economically" accomplished. Futurewise has likely never had to pay for a 9,600 acre rezone and defend the appeals almost certain to ensue. In contrast, the County has completed a 42,663 acre rezone.²⁶ That effort was highly controversial and took significant resources.²⁷ It also took five years and resulted in several appeals.

During that five year period, FOCG appealed the very environmental review Futurewise references²⁸ along with a separate appeal of the 2007 Comprehensive Plan. That Plan appeal raised the same issues raised here.²⁹ Along with other allegations, FOCG asserted back in 2008 that, "[t]he uses allowed by the 'Unmapped Designation' are inconsistent with the uses allowed by the conservancy designation of the Comprehensive Plan and conflict with the consistency requirement of RCW 36.70.545."³⁰ This is the same issue raised with this litigation. In

²⁵ CP 21, ¶ 3.

²⁶ CP 21, ¶ 3.

²⁷ CP 21, ¶ 3; CP 75.

²⁸ CP 329 ("Skamania County seeks to amend the text and maps of its zoning code... Save Our Scenic Area, and a group of organizations including Friends of the Columbia Gorge ... filed appeals" of the SEPA determination "on October 22, 2008.").

²⁹ CP 372-81.

³⁰ CP 376, ¶ 5.6.

total, FOCG has filed three appeals related to the 2007 Plan, and subsequent rezones and development regulations.

That can be the nature of a rezone action. The 9,600 acres at issue here will likely be no different, particularly as the acreage is spread throughout the County, rather than being concentrated in one location.³¹ Given the County's concerns over its limited resources,³² it is troubling a litigant would believe such an effort is likely to be "expeditious and economic."

Further, Futurewise's excerpted quotations, in addition to being from outside the Record,³³ have little relevance. The excerpts include quotations from documents addressing planning in King and Skagit counties, which, unlike Skamania County, fully plan under GMA and have significantly greater populations.³⁴ And, unlike Skamania County, they are not 90% owned by the federal and state governments, with virtually all of that land devoted to forest resource use; nor do they have over 80,000 acres located along the Columbia River, which are strictly protected through the Columbia River Gorge National Scenic Area Act,³⁵ including a significant portion devoted to agricultural and forest resource uses.³⁶

³¹ CP 26.

³² CP 393, ¶ 2; CP 386 ("Skamania County has pressing economic and fiscal constraints..."); *see generally* CP 71-75.

³³ *See Amici Curiae Brief of Futurewise, et al.*, pgs. 5-7, citing to a state agency strategic plan and several articles on urban planning.

³⁴ *See* CP 28 (map of counties which fully plan under GMA).

³⁵ CP 73, 206.

³⁶ CP 73; CP 34.

[O]ver eighty (88%) of the land within Skamania County is in public ownership within the Gifford Pinchot National Forest or is owned by the State of Washington.... [H]alf of the remaining twenty percent (12%) is located within the Columbia River Gorge National Scenic Area and is regulated locally with development regulations that are consistent with the Columbia River Gorge Management Plan and the National Scenic Area Act....³⁷

Even the County's Unmapped zoning designation now constitutes just 1% of the County,³⁸ and all development within this designation is subject to critical areas ordinance review.

Although no critical areas issues are before this Court as Futurewise suggests,³⁹ critical areas review within the County is important. This is due to the County's treacherous terrain, including steep slopes, landslide areas, and volcanic hazards.

Geologic processes that created spectacular resources, such as Mount Saint Helens, Mount Adams, the Columbia River Gorge and the Cascade Mountain Range, sculpted Skamania County. The wealth of geologic resources also makes Skamania County one of the most geologically hazardous counties in Washington State.⁴⁰

With Skamania County's rural population base, on the 1% of lands designated as Unmapped, use type is simply not as strong a concern as

³⁷ CP 34; *see also* CP 73.

³⁸ CP 21.

³⁹ Futurewise admits that "[w]hile the GMA does not require Skamania County to undertake comprehensive planning, it does require the county to address natural hazards such as frequently flooded areas and landslide hazards as part of the County's periodic review of its critical areas regulations." Amici Curiae Brief of Futurewise, et al., pg. 7, emphasis added. Frequently flooded areas and landslide hazards are addressed through the County's critical areas ordinance. RCW 36.70A.030(5); CP 67-69, amendments at CP 52-58.

⁴⁰ CP 49.

critical areas hazards, which effectively determine use type and development intensities.

In short, the issues the County faces are unique to the County, and do not involve the sprawling development patterns more urbanized areas have had to address. Given its geographic limitations, land ownership patterns, and voluntarily enacted plan and regulatory protections, the County's natural and environmental resources are very likely more protected than in any other county in the state.

2.5. GMA Periodic "Reviews" are of PAST Action

The County designated its natural resource lands in 2005.⁴¹ That same year, GMA included a 2005 periodic review deadline.⁴² As the County did not designate its natural resource lands until 2005, the 2005 periodic review provision did not apply. The point of periodic review is not to review simultaneous GMA actions, but **past** GMA actions.

Of course, the 2005 action effectively served as a review, given the County reviewed its previously adopted 1993 development regulations protecting 43,656 acres of natural resource lands pursuant to the Columbia River Gorge National Scenic Area Act. In 2005, after considering the federal and state forest resource protections on almost 90% of its land

⁴¹ CP 34-35.

⁴² RCW 36.70A.130(4)(b).

base, the County further designated these 43,656 acres as its GMA natural resource lands.

[T]he development regulations in Skamania County Code (SCC) Title 22 - National Scenic Area designated 39,416.10 acres as forest land (SMA Forest, GMA Commercial Forest, and GMA Large Woodland) meeting the intent of RCW 36.70A, and designated 4,240.23 acres as agricultural land (SMA Agriculture and GMA Large-Scale Agriculture) meeting the intent of RCW 36.70A.⁴³

FOCG may not be satisfied with the adequacy of this action, but its appeal is time barred. This is FOCG's second appeal of the County's 2005 designation decision.⁴⁴ This second appeal was filed seven years too late, and the periodic review concern is a new issue first argued before the Court of Appeals.⁴⁵

Regardless, Skamania County is subject to an upcoming periodic review deadline.⁴⁶ The County will comply with it. This upcoming review will soon moot the question of whether the County is subject to both a past 2005, and future 2017, periodic review requirement.

3. CONCLUSION

FOCG failed to timely appeal the County's 2007 Comprehensive Plan, 2012 rezones, and 2012 development regulations, and has not identified any duty for the County to take further action. FOCG has

⁴³ CP 34.

⁴⁴ CP 373-74.

⁴⁵ See Supplemental Brief of Petitioner Skamania County, section 4.3.

⁴⁶ RCW 36.70A.130(5)(c) (setting 2017 deadline, with subsequent reviews occurring every eight years thereafter).

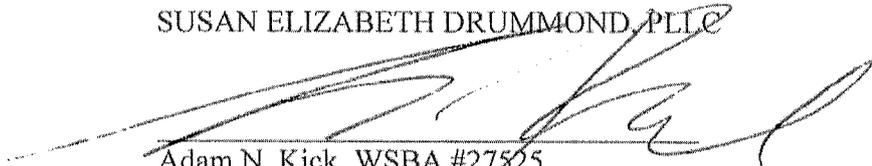
instead relied solely on RCW 36.70.545, which simply requires plan and regulation consistency, along with a periodic review requirement existing the same year the County designated its GMA natural resource lands. Neither of these provisions require the County to take additional legislative action.

If FOCG wishes the County to engage in further planning, its remedy is with the legislature, not the judiciary. The Superior Court properly dismissed FOCG's appeal as time barred, and the County asks this Court to affirm that decision.

RESPECTFULLY SUBMITTED this 5th day of February, 2015.

SKAMANIA COUNTY PROSECUTOR
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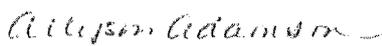
CERTIFICATE OF SERVICE

I certify that on February 5, 2015, I served the foregoing SKAMANIA COUNTY'S RESPONSE TO AMICI CURIAE BRIEFS OF FUTUREWISE ET AL., AND WASHINGTON STATE ASSOCIATION OF COUNTIES on the parties listed below by email and first class U.S. mail, postage prepaid.

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Signed this 5th day of February, 2015 at Kirkland, Washington.



Allyson Adamson, Legal Assistant

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Attached please find Skamania County's Response to Amici Curiae Briefs of Futurewise et al., and Washington State Association of Counties.

Case Name: *Save Our Scenic Area and Friends of the Columbia Gorge, Inc. v. Skamania County.*

Case Number: Supreme Court No. 90398-1 (Court of Appeals No. 71363-9-1).

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