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NO. 90398-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SAVE OUR SCENIC AREA and  
FRIENDS OF THE COLUMBIA GORGE, INC.,

Respondents,

v.

SKAMANIA COUNTY,

Petitioner.

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BRIEF OF RESPONDENTS IN ANSWER TO *AMICI CURIAE*  
BRIEF OF FUTUREWISE *ET AL.* AND *AMICUS CURIAE* BRIEF  
OF WASHINGTON STATE ASSOCIATION OF COUNTIES

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ORIGINAL

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## **GLOSSARY OF ACROYNMS**

GMA	Growth Management Act, Chapter 36.70A RCW
PEA	Planning Enabling Act, Chapter 36.70 RCW
SCC	Skamania County Code
SOSA	Save Our Scenic Area

## I. INTRODUCTION

Futurewise *et al.* have filed an *amici curiae* brief in support of Respondents, and the Washington State Association of Counties (“WSAC”) has filed an *amicus curiae* brief in support of Petitioner Skamania County (“County”). As permitted by RAP 10.2(g), Respondents Friends of the Columbia Gorge (“Friends”) and Save Our Scenic Area (collectively, “SOSA”) file this brief in answer to both *amici* briefs.

Much of the content of the *amici* briefs was addressed in SOSA’s prior briefing. Accordingly, this brief will focus on the legal and policy issues raised by the *amici*.

SOSA asks that the Court reject the arguments of the County and WSAC. Further, the Court should hold that SOSA’s failure-to-act claims under the PEA and GMA are timely, should decide that the County has not completed periodic review of its resource lands designations, and should remand to the Superior Court for further proceedings.

## II. FACTUAL BACKGROUND

This case involves approximately 9,600 acres of land in Skamania County that remain “unmapped,” *i.e.*, these lands have never been zoned in the County’s zoning ordinance.<sup>1</sup> In addition, none of these lands have ever

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<sup>1</sup> See CP 21, 26, 256, 314. Another 4,500 acres of unzoned, privately owned lands are located in the northwest corner of the County, in the area known as the High Lakes. CP 22, 26, 322. Those lands are not the focus of this case, although the same statutory duties under the GMA and PEA apply to them.

been designated as forest lands under the GMA, although the vast majority of these lands are “currently used as commercial forest land.”<sup>2</sup>

On August 3, 2005, the County designated natural resource lands (forest lands and agricultural lands) pursuant to the GMA, but chose to designate such lands only within the Columbia River Gorge National Scenic Area, at the southern end of the County.<sup>3</sup> Since then, no additional resource lands have been designated, and the County has never completed a periodic review of its resource lands designations as required by RCW 36.70A.130(1)(b).

On July 10, 2007, the Skamania County Commissioners adopted the County’s first comprehensive plan in thirty years (hereinafter, the “2007 Plan”). The 2007 Plan was welcomed by County residents and conservation organizations that had labored to bring it to fruition.<sup>4</sup> This was the first time that the County had extended planning to the majority of the County’s forested lands; the long outdated 1977 Comprehensive Plan had “only guided development south of the southern boundary of the Gifford Pinchot National Forest, which is roughly the lower quarter of Skamania County.”<sup>5</sup>

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<sup>2</sup> CP 256.

<sup>3</sup> CP 34–35.

<sup>4</sup> The adoption of the Comprehensive Plan was preceded by twenty-three public meetings. CP 200–01.

<sup>5</sup> CP 198.

The 2007 Plan not only covered these forested lands for the first time, but also included them within a Conservancy designation “intended to provide for the conservation and management of existing natural resources in order to achieve a sustained yield of these resources, and to conserve wildlife resources and habitats.”<sup>6</sup> The 2007 Plan also noted that “preservation and protection of the natural environment is an essential piece of Skamania County livability.”<sup>7</sup> Finally, the 2007 Plan recognized that the County “must comply with those sections of the GMA relating to . . . the designation of Natural Resource Lands.”<sup>8</sup>

The 2007 Plan was only part of the planning effort. There was “another shoe to drop” for land use planning in Skamania County, as stated in the 2007 Plan:

The Comprehensive Plan provides the overall community vision, goals and general policies for future development in Skamania County. It does not, however, provide all the details. Precise standards, such as building setbacks, permitted uses within a particular zoning district or appropriate types of stormwater management systems[,] are included in the various implementing ordinances (official controls).<sup>9</sup>

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<sup>6</sup> CP 213, 221.

<sup>7</sup> CP 231.

<sup>8</sup> CP 198.

<sup>9</sup> CP 210.

This procedural direction is consistent with settled Washington law that a comprehensive plan is a “guide” or “blueprint” and “is not a document designed for making specific land use decisions.”<sup>10</sup>

In a formal policy in the 2007 Plan, the County further recognized its responsibility to adopt zoning consistent with the Plan:

All zoning regulations and other implementing regulations shall be consistent with and guided by the comprehensive plan or specific subarea plan maps and policies.<sup>11</sup>

This policy is consistent with the PEA, which mandates that “[b]eginning July 1, 1992, the development regulations of each [partial planning] county . . . shall not be inconsistent with the county’s comprehensive plan.”<sup>12</sup>

On July 3, 2007, one week prior to the adoption of the 2007 Plan, Skamania County’s Planning Director, Karen Witherspoon, reminded the County Commissioners that “over 15,000 acres of private land . . . is located outside of the zoning classification areas [in the zoning ordinance] but [would be designated by] the 2007 Comprehensive Plan.”<sup>13</sup>

Also on July 3, 2007, Ms. Witherspoon reminded the Commissioners of the County’s plans for upcoming public processes for adopting zoning for “all un-zoned land”:

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<sup>10</sup> *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997).

<sup>11</sup> CP 214.

<sup>12</sup> RCW 36.70.545.

<sup>13</sup> CP 259.

[T]he process to establish zoning on *all un-zoned land* is scheduled to begin [with] workshops with the Planning Commission in September 2007.<sup>14</sup>

To assure the integrity of the zoning process, Ms. Witherspoon recommended a moratorium on development activity:

As these legislative planning processes are not yet complete and the legislative process should be protected from circumvention by developers the Board of County Commissioner[s] should establish a moratorium on the acceptance and processing of [a variety of development permits] for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification . . . .<sup>15</sup>

The Commissioners heeded Ms. Witherspoon's advice and unanimously adopted a moratorium via Ordinance 2007-10 on July 10, 2007,<sup>16</sup> the same day the Comprehensive Plan was adopted. The stated purposes of the County's moratorium were to address an emergency<sup>17</sup> and to "maintain the status quo" pending adoption of zoning:

**WHEREAS**, the Board of County Commissioners finds a sufficient basis to establish the moratorium, believe that the above mentioned circumstances constitute an emergency, and that it is in the public's best interest (to protect the public's safety, health and general welfare) to maintain the

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<sup>14</sup> CP 259 (emphasis added). Before any official controls such as zoning can be adopted, a county must hold a public hearing before its planning commission. RCW 36.70.580.

<sup>15</sup> CP 259.

<sup>16</sup> CP 256-58.

<sup>17</sup> It is well-settled Washington law that "[l]egislative declarations of fact, such as the existence of an emergency, are deemed conclusive unless they are 'obviously false and a palpable attempt at dissimulation.'" *City of Tacoma v. Luvene*, 118 Wn.2d 826, 851, 827 P.2d 1374 (1992) (quoting *State ex rel. Hamilton v. Martin*, 173 Wn. 249, 257, 23 P.2d 1 (1933)).

status quo of the area pending the County's consideration of developing zoning classifications for the areas covered by the newly adopted 2007 Comprehensive Plan; . . . .<sup>18</sup>

Other legislative declarations of fact in Ordinance 2007-10 include the following:

- “[M]ost of the area within unincorporated Skamania County that is not currently covered by a zoning classification is currently used as commercial forest land . . . .” (CP 256.)
- “[T]he Growth Management Act requires all counties in the State of Washington to provide protections for commercial forest land from the encroachment of residential uses . . . .” (CP 256.)
- “[C]ontinued unplanned and uncontrolled residential growth in the areas of commercial forest lands . . . . could potentially increase the risk of forest fires and other emergency events . . . .” (CP 257.)
- “Skamania County is . . . beginning the process to adopt zoning classifications for all land within unincorporated Skamania County . . . .” (CP 256.)
- The unzoned lands “are located in existing forest land areas that during the review process of the Comprehensive Plan and pending zoning classification process, the County Commissioners are determining which areas will be designated as commercial forest land and protected from the encroachment of residential uses as required by the Growth Management Act . . . .” (CP 256.)
- “[A]llowing new construction on . . . parcel[s] created through an unregulated exempt process prior to the County Commissioners completing the zoning classification process essentially is circumventing the legislative process and could endanger the public's safety, health and general welfare . . . .” (CP 257.)
- “[A] work plan for the Comprehensive Plan and related zoning classification process has been developed . . . .” (CP 258.)

For the next five years, the Commissioners continued to adopt moratoria virtually identical to the first.<sup>19</sup> In each ordinance, the

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<sup>18</sup> CP 258.

<sup>19</sup> CP 261–324.

Commissioners protected the unmapped lands and restated the County's commitments to zone these lands and to protect commercial forest lands.<sup>20</sup>

However, in August 2012, the Commissioners modified the moratorium to actively revoke its protections from the 9,600 acres of land that are the subject of this case,<sup>21</sup> making these lands "unregulated."<sup>22</sup> This suit followed.

### III. ARGUMENT

**A. SOSA is not appealing any County action; rather, SOSA filed failure-to-act claims in a declaratory judgment and constitutional and statutory writ action.**

Futurewise's brief refers to SOSA's GMA and PEA claims as a failure to act "appeal."<sup>23</sup> The WSAC brief similarly refers to SOSA's action as an "appeal."<sup>24</sup> SOSA wishes to clarify that it has not filed an appeal,<sup>25</sup> and does not seek to appeal any County action. Rather, because

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<sup>20</sup> See CP 261–324.

<sup>21</sup> See CP 322.

<sup>22</sup> CP 321.

<sup>23</sup> Futurewise Br. at 8, 16, 17, 20.

<sup>24</sup> WSAC Br. at 1–3, 5–8, 10–14.

<sup>25</sup> However, this may be a purely semantical distinction; failure-to-act claims are commonly referred to by various names, such as failure-to-act *actions*, failure-to-act *appeals*, and failure-to-act *challenges*, all of which mean the same thing. *Northgate Mall P'ship v. City of Seattle*, No. 93-3-0009, 1993 WL 839723 at \*10 n.12 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Nov. 8, 1993) ("failure to act' action"); *Kittitas County Conservation v. Kittitas Cnty.*, No. 10-1-0013, 2011 WL 3528244 at \*3 (E. Wash. Growth Mgmt. Hr'gs Bd. June 6, 2011) ("failure to act appeals"); *Futurewise v. Snohomish Cnty.*, No. 05-3-0020, 2005 WL 2227920 at \*4 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. May 23, 2005) ("failure to act challenge"); *Kitsap Citizens for Rural Pres. v. Kitsap Cnty.*, No. 94-3-0005, 1994 WL 907903 at \*14 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. July 27, 1994) ("failure to act challenge"); *Friends of the Law v. King Cnty.*, No. 94-3-0003, 1994 WL 907889 at \*5 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Apr. 22, 1994) ("failure-to-act challenge").

the County has failed to take statutorily required actions and SOSA had no other remedy available at law, SOSA filed its claims as a declaratory judgment and constitutional and statutory writ action.<sup>26</sup> Where a plaintiff has no adequate remedy available at law and the defendant's actions are arbitrary, capricious, or contrary to law, a court may issue a constitutional writ, statutory writ, or declaratory judgment.<sup>27</sup>

In its Complaint for Declaratory and Injunctive Relief, SOSA asserts in pertinent part that the County has failed to complete periodic review of its resource lands designations<sup>28</sup> and failed to adopt zoning for the unmapped lands consistent with the 2007 Plan.<sup>29</sup> SOSA seeks declaratory, injunctive, and mandatory relief on these claims.<sup>30</sup>

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<sup>26</sup> CP 1, 16–18.

<sup>27</sup> See, e.g., *Fed. Way School Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 261 P.3d 145 (2011) (constitutional and statutory writs); *Clark County PUD No. 1 v. Wilkinson*, 139 Wn.2d 840, 844–46, 991 P.2d 1161 (2000) (constitutional and statutory writs); *Saldin Secs., Inc. v. Snohomish County*, 134 Wn. 2d 288, 292–94, 949 P.2d 370 (1998) (constitutional writ); *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992) (statutory writ); *Norco Const., Inc. v. King County*, 649 P.2d 103, 97 Wn.2d 680 (1982) (writ of mandamus); *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 302–05, 268 P.3d 892 (2011) (declaratory judgment); *Glenrose Community Ass'n v. City of Spokane*, 93 Wn. App. 839, 971 P.2d 82 (1999) (declaratory judgment).

<sup>28</sup> WSAC repeats the County's false assertion that periodic review compliance was not raised at the Superior Court. WSAC Br. at 13. The County's failure to comply with its periodic review (*i.e.*, "update") duty at RCW 36.70A.130(1)(b) was squarely raised in SOSA's Complaint (in the Second Cause of Action, at CP 12), was fully litigated below, and was decided by the Superior Court. See SOSA's Reply Br. at 7–8.

<sup>29</sup> CP 12–15.

<sup>30</sup> CP 16–18.

**B. This Court should apply the same timing principles for failure-to-act claims against partial planning counties as are applied to full planning counties.**

As noted by Futurewise, citizen actions are the principal means by which the mandatory duties of the GMA and PEA are enforced.<sup>31</sup> Citizens should not be barred from the courthouse when a partial planning county fails to take a statutorily required action, as Skamania County and WSAC urge here. If citizens were so barred, counties would rarely be held accountable when they fail to take required planning actions.

This Court should adopt the rule of law proposed by Futurewise: failure-to-act claims against partial planning counties should be subject to the same timing principles that apply to full planning counties.

When the applicable law does not provide a limitation period, courts may use limitation periods from other sources of law by analogy.<sup>32</sup> Thus, in the instant case, which involves a partial planning county, it is appropriate to look to limitation periods for failure-to-act claims against full planning counties.

As Futurewise has explained, failure-to-act claims against full planning counties are timely if they are ripe when filed, *i.e.*, a deadline or similar statutory obligation to act has arisen without action by the county.<sup>33</sup> The same timing principles should be applied to partial planning counties.

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<sup>31</sup> See Futurewise Br. at 1, 8.

<sup>32</sup> See *Akada v. Park 12-01 Corp.*, 103 Wn.2d 717, 695 P.3d 994 (1985).

<sup>33</sup> See Futurewise Br. at 16–17, 20.

**C. SOSA supports the 2007 Plan.**

WSAC asserts that SOSA “challenge[s] the 2007 Comprehensive Plan as being inconsistent with the current zoning structure.”<sup>34</sup> This assertion is incorrect; WSAC and the County both continue to misrepresent Respondents’ claims to the Court. SOSA has *continuously supported the 2007 Plan*, and has made that position clear from the commencement of this litigation.<sup>35</sup> The provisions in the 2007 Plan for conserving commercial forest lands and applying a “Conservancy” designation to these lands are entirely consistent with SOSA’s express views.<sup>36</sup>

This misrepresentation of SOSA’s position is essential to the arguments of WSAC and the County. In order to make their case that this action is a belated appeal, they need to point to an action that SOSA is supposedly trying to challenge after an appeal deadline has expired. But SOSA is not challenging the 2007 Plan; continuous repetition of this false assertion by WSAC and County does not make it so.

WSAC notes that, in the years following the adoption of the 2007 Plan, the County adopted some new zoning text and map amendments.<sup>37</sup> WSAC further points out that SOSA did not appeal any of these amendments,<sup>38</sup> which are now final. However, none of those amendments

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<sup>34</sup> WSAC Br. at 2.

<sup>35</sup> See Resps.’ Suppl. Br. at 13–14; CP 13–15, 150–52.

<sup>36</sup> See CP 213–14.

<sup>37</sup> WSAC Br. at 2, 10.

<sup>38</sup> *Id.* at 2, 10.

affected the 9,600 acres of forest land that are the subject of this action.<sup>39</sup> Thus, SOSA had no reason to challenge them, and does not seek to challenge them now.

**D. The Court should not adopt a rule mandating judicial interference with local government land use processes.**

As described *supra* Part II, on July 10, 2007 the County adopted its 2007 Plan and its moratorium, and expressly linked the two. On the same date, the County announced that it was beginning a process to adopt zoning consistent with its new comprehensive plan.<sup>40</sup> The County adopted legislative findings, including promises that future action would be taken to adopt zoning consistent with the 2007 Plan. Completing the zoning process was sufficiently important for the County to declare an emergency and to keep the moratorium in effect to “maintain the status quo”<sup>41</sup> and to ensure that “the legislative process [would] be protected from circumvention by developers.”<sup>42</sup>

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<sup>39</sup> In fact, the Skamania County zoning ordinance does not apply to unmapped lands, including the 9,600 acres: “The standards, provisions, and conditions of [SCC Title 21, the County’s zoning code] shall not apply to unmapped areas.” SCC § 21.64.020.

<sup>40</sup> WSAC misleadingly argues that zoning is optional. WSAC Br. at 8–10. WSAC is wrong. It is the comprehensive plan that is optional, not zoning. So long as a County has a comprehensive plan in place, the County is statutorily required to adopt zoning consistent with that plan, RCW 36.70.545, and the zoning must eventually apply to “all property within [the] county,” RCW 36.70.780. Moreover, in the instant case, Skamania County correctly recognized its duty to adopt consistent zoning throughout five years of moratorium ordinances and in the 2007 Plan itself. *See* CP 214, 256–324.

<sup>41</sup> CP 258.

<sup>42</sup> CP 259; *see also* CP 257 (“[A]llowing new construction on these parcel[s] created through an unregulated exempt process prior to the County Commissioners completing the zoning classification process essentially is circumventing the legislative process and could endanger the public’s safety, health and general welfare.”).

Against this background, WSAC requests the Court to adopt a rule that, notwithstanding all of the County's findings and promises, SOSA should have filed suit immediately to challenge the County's lack of zoning and its failure to complete review of resource lands. But WSAC fails to answer a core question: *what purpose would such a rule serve?* If WSAC's proposed rule were in place, Skamania County would have had to contend with litigation while it was in the midst of "the process to adopt zoning classifications."<sup>43</sup> In that context, Skamania County (and WSAC) would undoubtedly have claimed such action was premature and argued to the court that the County should be allowed to complete its planned public and legislative hearing processes prior to judicial intervention. Indeed, SOSA would undoubtedly have been accused of trying to circumvent the legislative process themselves by forcing the County into court.

WSAC's proposed rule is contrary to this Court's long history of requiring that courts stay out of administrative or legislative processes until a final decision is made. This court has continuously applied the federal ripeness doctrine articulated in *Abbott Laboratories*:

The ripeness doctrine exists "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision

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<sup>43</sup> CP 256.

has been formalized and its effects felt in a concrete way by the challenging parties.”<sup>44</sup>

Moreover, during the time the moratorium was in effect, the County itself provided remedies to SOSA for their zoning concerns. First, the County allowed public participation in its forthcoming hearing processes for adopting zoning and reviewing resource lands designations. Second, the County maintained the “status quo” on the affected lands pending final action.

Requiring litigation before a zoning process is complete would amount to the premature interruption of the County’s processes. Further, what purpose would be served by a premature challenge, when the outcome of the zoning process might well be a zoning code fully acceptable to SOSA and other participants in the public hearing process? It is far more efficient to recognize the County’s promises and allow the County to complete (or in this case, abandon) its zoning processes before litigation is commenced.

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<sup>44</sup> *Asarco Inc. v. Dep’t of Ecology*, 145 Wn.2d 750, 759, 43 P.3d 471 (2002) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)).

**E. Any zoning uncertainties were created by Skamania County.**

WSAC claims that awaiting Skamania County's final zoning decisions prior to judicial review would create "enormous uncertainty," which in turn would affect "investment decisions by property owners . . . who would otherwise rely on the finality of these decisions."<sup>45</sup>

At the outset, it is significant that the record here contains no objection to the moratorium from even a single private property owner. In addition, most of the cases cited by WSAC involve harm to private property owners, not a local government, and involve land use decisions, not legislative actions. WSAC even falsely claims that the County's failures to act are "land use decisions,"<sup>46</sup> when in reality they are failures to take legislative actions to implement mandatory requirements of the GMA and PEA. WSAC fails in its attempts to bring municipal governments under the same umbrella of protections applicable to private property owners. It is in the nature of legislative bodies to change regulations and plans, just as the County intended to do here during the time its moratorium was in effect.

Moreover, at issue in this case is the County's failure to take zoning action for the unmapped lands, as it had promised to do from the beginning of its moratoria. Any uncertainty for property owners was the

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<sup>45</sup> WSAC Br. at 11; *see also id.* at 5, 7 (similar arguments).

<sup>46</sup> WSAC Br. at 5.

result of the County’s own delays to take mandatory legislative actions, as well as its ultimate abandonment of its zoning plans. Does WSAC claim that Skamania County residents are entitled to the certainty that there will *never* be a zoning code?<sup>47</sup>

Skamania County specified in its several moratorium ordinances that it would “maintain the status quo of the [unmapped lands] pending the County’s consideration of developing zoning classifications.”<sup>48</sup> Thus, according to the County’s own findings, it would maintain the status quo and there would be no final action on zoning until it completed its “consideration of developing zoning classifications” for these lands.<sup>49</sup> This is consistent with this Court’s recent decision in *Durland v. San Juan County*,<sup>50</sup> in which the Court emphasizes the finality requirement:

[W]here the permitting authority creates an administrative review process, a building permit does not become “final” for purposes of LUPA until administrative review concludes. Only then is there a final land use decision that can be the subject of a LUPA petition. *Ferguson v. City of Dayton*, 168 Wn. App. 591, 277 P.3d 705 (2012) (no land use decision prior to final determination by planning commission, which was entity with the last word on the permit).<sup>51</sup>

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<sup>47</sup> WSAC fails to mention that the County did prepare a draft zoning code in the Fall of 2008, but never pursued that draft zoning code to fruition. *See* Resps.’ Suppl. Br. at 7 n.10.

<sup>48</sup> CP 258.

<sup>49</sup> *Id.*

<sup>50</sup> \_\_\_ Wn.2d \_\_\_, 340 P.3d 191 (Dec. 11, 2014).

<sup>51</sup> *Durland*, 340 P.3d at 196. The *Ferguson* court rejected the concept that a “government could immunize itself from LUPA petitions simply by making its administrative process last longer than 21 days.” 168 Wn. App. at 708 n.4.

In the present case, Skamania County's promise of legislative action extended over five years. Only in August 2012 did the County abandon the protections of its moratorium for the affected 9,600 acres of land and abandon its zoning plans for these lands.<sup>52</sup> SOSA promptly thereafter filed this action.

**F. Governmental resources would be eroded by the rule proposed by WSAC.**

WSAC claims that the financial resources of Skamania County are eroded by having to defend against SOSA's claims.<sup>53</sup> But the rule proposed by WSAC would result in wasteful expenditures of funds by both the County and SOSA.

WSAC contends SOSA should have challenged the County's lack of zoning immediately when the 2007 Plan was adopted, even though the County took no action on its zoning ordinance in 2007<sup>54</sup> and instead enacted a moratorium, representing that it was actively pursuing the adoption of zoning. But SOSA's claims are that the County *must take action* to adopt zoning consistent with the 2007 Plan; that final County action on zoning has not occurred. Would it promote sound land use planning or enhance judicial efficiency to require an abstract argument of the meaning of the comprehensive plan *before* final zoning action by the

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<sup>52</sup> See CP 322.

<sup>53</sup> WSAC Br. at 4.

<sup>54</sup> WSAC and the County fail to cite a single authority for their proposition that an appeal period somehow began to run in 2007 for challenging a zoning code that was not amended in 2007.

County? And would the expenditure of County resources on such litigation be worthwhile? The parties could expend thousands of dollars in legal fees enduring such litigation, but never get to a resolution on the merits because the final zoning code itself is not yet available.

The rule espoused by WSAC makes no practical sense in the context of this case, nor at all. It would simply force parties (including the counties themselves) into premature litigation.

What WSAC appears to really be after is a rule that would create a trap for citizens who rely in good faith on governmental promises: if elected officials fail to follow through on their promises to comply with statutory mandates and implement planning through zoning, citizens will be faulted for failing to bring challenges at the time the promises were first made. But if citizens commence a failure-to-act challenge before zoning proceedings reach finality, they will be faulted for acting prematurely.

**G. SOSA promptly filed this action once Skamania County reneged on its commitments to adopt zoning for its unzoned, commercially forested lands.**

For more than five years, Skamania County adopted legislation (the moratoria) in which the County expressly committed itself to take action to adopt zoning for all of its unmapped, commercially forested lands consistent with its comprehensive plan. In addition, pending the final outcome of its zoning efforts, the County protected these lands to, in the

County's own words, "maintain the status quo."<sup>55</sup> During that time period the County did zone some lands, but in August 2012, the County Commissioners abruptly ended the moratorium for the 9,600 acres of land involved in this case and abandoned its planning efforts for these lands.

The County's actions present a fundamental issue of follow-through on governmental promises. In their briefing, SOSA and Futurewise have conclusively established that limitation periods do not apply to failure-to-act claims. However, even if they did, our courts have routinely held that false assurances by a defendant may form a basis for allowing equitable exceptions to limitation periods:

"The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). "Assuming that a failure to exhaust administrative remedies can be cured through the application of equity, equity cannot be invoked in the absence of bad faith on the part of the defendant and reasonable diligence on the part of the plaintiff." *Prekeges v. King County*, 98 Wn. App. 275, 283, 990 P.2d 405 (1999).<sup>56</sup>

Here, on the same day it adopted the 2007 Plan, Skamania County adopted as a legislative finding that it was "beginning the process to adopt zoning classifications for *all* land within unincorporated Skamania

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<sup>55</sup> CP 258.

<sup>56</sup> *Nickum v. City of Bainbridge Island*, 223 P.3d 1172, 153 Wn. App. 366 (2009).

County,”<sup>57</sup> and continued thereafter to provide multiple assurances (every six months for five years) that zoning and resource lands designations were being prepared. The County even prepared a draft zoning ordinance and map that would have “[z]one[d] all previously unmapped land,”<sup>58</sup> and SOSA diligently participated in the County’s public processes following issuance of that draft ordinance. Yet the County’s five years of assurances ultimately proved hollow: in August 2012, the County abandoned any illusions that it would zone or adopt resource lands designations for the 9,600 acres of land involved in this case.

The Court should reject WSAC’s suggestions that SOSA should have been required to file its claims at the beginning, rather than the end, of the County’s zoning process. It is critical to the orderly conduct of zoning and planning laws that local governments should not be allowed to insulate themselves from judicial review by making, and then reneging on, formal promises to act.

#### IV. CONCLUSION

Skamania County has never completed the statutorily required periodic review of its natural resource lands designations as required by the GMA. Nor has the County adopted zoning for its unmapped lands consistent with its 2007 comprehensive plan as required by the PEA.

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<sup>57</sup> CP 256 (emphasis added).

<sup>58</sup> CP 333.

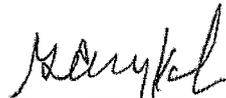
For years, the County recognized these statutory responsibilities and announced its intentions to comply with them, as well as its plans to adopt zoning for “all land within unincorporated Skamania County.”<sup>59</sup> To protect the public interest, and give itself breathing room to adopt zoning provisions and resource lands designations, the County adopted five years of moratoria. However, for reasons not disclosed in the record, in August 2012 the County said “never mind” to adopting zoning and resource lands designations for the 9,600 acres of unmapped lands that are the focus of this case. SOSA then timely brought this action to challenge the County’s failures to comply with its statutory responsibilities.

This Court should conclude that SOSA’s failure-to-act claims were timely, should decide that the County has unlawfully failed to complete periodic review of its natural resource lands designations, and should remand to the trial court for further proceedings.

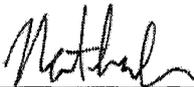
RESPECTFULLY SUBMITTED this 5th day of February, 2015.



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<sup>59</sup> CP 256.

NO. 90398-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SAVE OUR SCENIC AREA and  
FRIENDS OF THE COLUMBIA GORGE, INC.,

Respondents,

v.

SKAMANIA COUNTY,

Petitioner.

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DECLARATION OF SERVICE for BRIEF OF RESPONDENTS IN  
ANSWER TO *AMICUS CURIAE* BRIEFS

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ORIGINAL

I am an employee in the law offices of Aramburu & Eustis, LLP,  
over eighteen years of age and competent to be a witness herein.  
On the date below, I e-mailed and mailed paper copies as shown  
below of the BRIEF OF RESPONDENTS IN ANSWER TO *AMICI*  
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I declare under penalty of perjury under the laws of the State  
of Washington that the foregoing is true and correct to the best of  
my knowledge and belief.

DATED: February 4, 2015. for 2/5/15 delivery.

Carol W. Cohen