97187-1

Court of Appeals No. 50406-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FUTUREWISE,

Appellant,

v.

CITY OF RIDGEFIELD, MILT BROWN, RDGB ROYAL FARMS LLC, RDGK REST VIEW ESTATES LLC, RDGM RAWHIDE ESTATES LLC, RDGF RIVER VIEW ESTATES LLC, and RDGS REAL VIEW LLC,

Respondents.

FUTUREWISE'S PETITION FOR REVIEW BY THE SUPREME COURT OF THE STATE OF WASHINGTON

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I. THE IDENTITY AND DESIGNATION OF THE PETITIONER

Futurewise, the appellant, is filing this petition for review.

II. CITATION TO THE COURT OF APPEALS DECISIONS

Futurewise seeks review of the unpublished opinion of the Court of Appeals Division II in *Futurewise v. City of Ridgefield, RDGB Royal Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View Estates LLC, RDGS Real View LLC, and Milt Brown*, Court of Appeals Case No. 50406-5-II filed on January 29, 2019 in Appendix A.

Futurewise also seeks review of the Order Denying Motion for Reconsideration of the Court of Appeals Division II in *Futurewise v. City of Ridgefield, RDGB Royal Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View Estates LLC, RDGS Real View LLC, and Milt Brown,* Court of Appeals Case No. 50406-5-II filed on April 10, 2019 in Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the court of appeals' decision conflicts with the Washington Supreme Court's *Schnitzer West* decision when the court of appeals concluded that a specific party had not initiated the rezone challenged in this case?

2. Whether Futurewise had representational standing to challenge the annexation and rezone at issue in this appeal and whether this is an issue of substantial public interest or the court of appeals decision conflicts with the Washington State Supreme Court's *SAVE v. Bothell* opinion?

IV. STATEMENT OF THE CASE

Clark County updated its Comprehensive Land Use Plan on June 28, 2016.[1] As part of this update, Clark County dedesignated 111 acres of agricultural land of long-term commercial significance and included this land in the Ridgefield urban growth area (UGA).[2] Futurewise appealed the agricultural lands dedesignation and the UGA expansion, along with other issues, to the Growth Management Hearings Board on July 22, 2016.[3] The Board concluded that the agricultural lands dedesignation and UGA expansion violated the Growth Management Act (GMA) on March 23, 2019.[4] This decision is under appeal, but is still good law.

On September 8, 2016, the Ridgefield City Council adopted Ordinance No. 1216 which annexed 111.42 acres north of the City and zoned this land Residential Law Density 6 (RLD-6) with an Urban Holding 10 (UH-

[1] Clerk's Papers (CP) 157, *Clark County Citizens United, Inc., Friends of Clark County, and Futurewise v. Clark County*, GMHB Case No. 16-2-0005c, Final Decision and Order (March 23, 2017), at 4 of 101.
[2] CP 175 – 76, CP 190 – 96, *Id.* at 22 – 23, 37 – 43 of 101.
[3] CP 157, CP 171 – 72, & CP 186, *Id.* at 4, 18 – 19, 33 of 101.
[4] CP 175 – 76, CP 190 – 96, *Id.* at 22 – 23, 37 – 43 of 101.

10) overlay.[5] The City of Ridgefield refers to this annexation as the Brown Annexation.[6] The annexation became effective on October 14, 2016.[7]

The RLD-6 zone is a low-density residential zone that allows single-family and duplex residences with a density of six dwelling units per net acre.[8] The UH-10 zone overlay requires a density of one dwelling unit per ten acres until provisions are made to provide the public facilities and services needed to support the density of the underlying RLD-6 zone.[9]

The annexation and rezone were initiated by an annexation petition filed by RDGB Royal Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View Estates LLC, and RDGS Real View LLC (hereinafter the LCCs) and signed by Mr. Brown.[10] According to the "Introductory Statement for Annexation" Mr. Brown and the LLCs requested low density single-family uses.[11]

In Clark County Superior Court Case No. 16-2-01813-4, Futurewise appealed the annexation under several causes of action including a complaint and petition for declaratory judgment filed under the Uniform

[5] CP 22, City of Ridgefield Ordinance No. 1216 p. 3.
[6] CP 20, City of Ridgefield Ordinance No. 1216 p. 1.
[7] CP 23, City of Ridgefield Ordinance No. 1216 p. 4.
[8] Chapter 18.210 Ridgefield Development Code (RDC) - Residential Low Density Districts (RLD-4, RLD-6, RLD-8).
[9] RDC 18.210.015C.
[10] CP 22, City of Ridgefield Ordinance No. 1216 p. 3; CP 348 – 49, Notice of Intend to Annex pp. *1 – 2.
[11] CP 355, Milt Brown Ridgefield Master Use Application p. 6.

Declaratory Judgments Act, chapter 7.24 RCW.[12] Also in Superior Court Case No. 16-2-01813-4, Futurewise appealed the City of Ridgefield's rezones under the Land Use Petition Act, chapter 36.70C RCW.[13]

The Clark Regional Wastewater District "operates a system of sewer facilities, including the collection system for the City of Ridgefield."[14] On an agenda bill dated February 28, 2017, the District staff recommended that the district authorize the General Manager to sign a Developer Agreement with Pioneer Place Ridgefield LLC.[15] The agreement requires Pioneer Place Ridgefield LLC to "construct and install" the Pioneer Place Pump Station on land "owned by Milt Brown and/or related corporations …."[16] This land is within the Brown Annexation.[17] The Pioneer Place Pump Station was needed to serve the Pioneer Place subdivision "as well

[12] CP 13 – 17, Complaint and Petition For Judicial Review Under RCW 36.70C; Petition For Declaratory Judgment Under RCW 7.24; Petition For Declaratory Judgment under Article IV, Section 6 of the Washington State Constitution; Petition For Writ of Certiorari Under RCW 7.16; Petition For Writ of Certiorari under Washington Constitution, Article IV, Section 6; Petition For Writ of Review Under Washington Constitution, Article IV, Section 6 or The Common-Law 11 – 15. Hereinafter Complaint.
[13] CP 12 – 13, Complaint 10 – 11.
[14] CP 261, AB # 17-00X Clark Regional Wastewater District Agenda Bill Subject: Pioneer Place Developer Reimbursement p. 1 (Agenda Date: 02/28/17).
[15] *Id.*
[16] CP 262, Developer Extension, Reimbursement and Service Agreement between Clark Regional Wastewater District and Pioneer Place Ridgefield LLC p. *1.
[17] CP 28, City of Ridgefield Ordinance No. 1216 Exhibit 2 Map of Annexation Area; CP 260, Pioneer Place map; CP 263, Developer Extension, Reimbursement and Service Agreement between Clark Regional Wastewater District and Pioneer Place Ridgefield LLC p. *2; CP 115, Declaration of Cynthia A. Carlson p. 2 (March 1, 2017); CP 356, Vicinity Map.

as an area that was recently added to the Urban Growth Boundary."[18] The area added to the UGA was the Brown Annexation.[19]

The Developer Agreement acknowledged that the land on which the Pioneer Place Pump Station will be constructed, the "project land," is the subject of this lawsuit even including Clark County Superior Court Case No. 16-2-01813-4.[20] The parties to the Developer Agreement "also agree that the Project Land, and the ability of the Owner to construct and install the Project, could be adversely affected by the Court Case …."[21]

The Developer Agreement provided that Pioneer Place Ridgefield LLC "must receive from the City of Ridgefield a permit or approval for the Project," the Pioneer Place Pump Station [22] This pump station was "being constructed adjacent to our [the Carlson's] southernmost property on parcel 213076000, with pipes and a temporary gravel roadway and ditch on part of parcel 213075000" on March 1, 2017.[23] This is after the Brown Annexation's October 14, 2016, effective date.[24]

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[18] CP 261, AB # 17-00X Clark Regional Wastewater District Agenda Bill Subject: Pioneer Place Developer Reimbursement p. 1 (Agenda Date: 02/28/17).
[19] CP 261 – 66, *Id.* at pp. 1 – 5 (Agenda Date: 02/28/17); CP 115, Declaration of Cynthia A. Carlson p. 2 (March 1, 2017).
[20] CP 263 – 64, Developer Extension, Reimbursement and Service Agreement between Clark Regional Wastewater District and Pioneer Place Ridgefield LLC pp. *2 – 3.
[21] CP 264, *Id.* at p. *3.
[22] CP 264, *Id.* at p. *3.
[23] CP 115 & 118, Declaration of Cynthia A. Carlson p. 2 & p. 5 (March 1, 2017).
[24] CP 23, City of Ridgefield Ordinance No. 1216 p. 4.

Ms. Carlson wrote that as part of the construction of the Pioneer Place Pump Station, "[w]ater has been pumped from the pump station construction site, harming our property and nearby creeks used by salmon."[25] Because the land was annexed to Ridgefield, the land in the Brown Annexation no longer had to comply with the municipal storm water permit required storm water regulations adopted and enforced by Clark County, resulting in harm to Ms. Carlson's property.[26]

In addition to the storm water injuries in fact, the construction of the Pioneer Place Pump Station adjacent to Ms. Carlson's property damaged her real and personal property by repetitively cutting her back fence allowing cows to escape from her property.[27] Ms. Carlson and her husband were forced to relocate their cattle to their front pasture.[28] During the time the fence was cut, they did not have adequate pastureland for their cattle.[29] An agent for a developer killed one of their calves by mowing over the calf with a brush hog during a survey for the Pioneer Pump Station.[30]

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[25] CP 116, Declaration of Cynthia A. Carlson p. 3 (March 1, 2017).
[26] CP 271, State of Washington Department of Ecology, *Who's Covered Under the Municipal Stormwater Permits?* webpage; CP 276, State of Washington Department of Ecology, Phase I Municipal Stormwater Permit p. 5 of 75 (Modified August 19, 2016).
[27] CP 115 – 16, Declaration of Cynthia A. Carlson pp. 2 – 3 (March 1, 2017).
[28] CP 116, Declaration of Cynthia A. Carlson p. 3 (March 1, 2017).
[29] CP 116, Declaration of Cynthia A. Carlson p. 3 (March 1, 2017).
[30] CP 116, Declaration of Cynthia A. Carlson p. 3 (March 1, 2017).

Ms. Carlson is a member of Futurewise.[31] At least four other Futurewise members own property adjacent to the Brown Annexation and their properties have been harmed by the annexation and the construction that followed the annexation.[32]

This is the second time that Clark County has illegally expanded its UGAs onto agricultural lands and cities annexed some of that land.[33] The County, cities, and developers then claim that the Growth Management Hearings Board cannot review the GMA violations on the annexed land.[34] Ridgefield annexed illegal UGA expansions after both the 2007 and 2016 Clark County comprehensive plan updates.[35]

V. ARGUMENT

1. The court of appeals' decision conflicts with the State Supreme Court's *Schnitzer West* decision by concluded that a specific party had not initiated the rezone and so an appeal of the rezone was not authorized by the Land Use Petition Act.

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[31] CP 115, Declaration of Cynthia A. Carlson p. 2 (March 1, 2017).
[32] CP 5 – 6, Complaint and Petition pp. 3 – 4; CP 93 – 94, Affidavit of Edward Niece pp. 2 – 3; CP 95 – 97, Affidavit of Janice Myev pp. 1 – 3; CP 106 – 112, Affidavit of Newt Rumble and Barbara Kusik pp. 2 – 8.
[33] *Clark Cty. Washington v. W. Washington Growth Mgmt. Hearings Review Bd.*, 161 Wn. App. 204, 245 – 46, 254 P.3d 862, 881 (2011) *vacated in part Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd*., 177 Wn.2d 136, 298 P.3d 704 (2013); CP 174 – 76, CP 190 – 96, *Clark County Citizens United, Inc., Friends of Clark County, and Futurewise v. Clark County*, GMHB Case No. 16-2-0005c, Final Decision and Order (March 23, 2017), 21—23 & 37 – 43 of 101.
[34] *Id.*
[35] *Clark Cty. Washington*, 161 Wn. App. at 245 – 46, 254 P.3d at 881; CP 174 – 76, CP 190 – 96, *Clark County Citizens United, Inc., Friends of Clark County, and Futurewise v. Clark County*, GMHB Case No. 16-2-0005c, Final Decision and Order (March 23, 2017), 21—23 & 37 – 43 of 101.

Rule of Appellate Procedure (RAP) 13.4(b)(1) provides that one of the reasons that a petition for review will be accepted by the Supreme Court is "[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court …" This Court's *Schnitzer West* decision addressed the question of when a zoning change is requested by a specific party.[36]

The Land Use Petition Act, chapter 36.70C RCW, "grants the superior court exclusive jurisdiction to review a local jurisdiction's land use decisions, with the exception of decisions subject to review by bodies such as the" Growth Management Hearings Boards (GMHBs).[37] "GMHBs do not have jurisdiction over challenges to site-specific land use decisions because site-specific land use decisions do not qualify as comprehensive plans or development regulations."[38] One type of site-specific land use decision that must be challenged under LUPA is a site specific rezone authorized by a then-existing comprehensive plan.[39]

"A site-specific rezone requires three factors: (1) a specific tract of land, (2) a request for a classification change, and (3) a specific party

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[36] *Schnitzer W., LLC v. City of Puyallup*, 190 Wn.2d 568, 577–80, 416 P.3d 1172, 1178–79 (2018).
[37] *Schnitzer W., LLC*, 190 Wn.2d at 575, 416 P.3d at 1177.
[38] *Schnitzer W., LLC*, 190 Wn.2d at 575, 416 P.3d at 1177.
[39] *Spokane Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 572, 309 P.3d 673, 681 (2013) *review denied Spokane Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 179 Wn.2d 1015, 318 P.3d 279 (2014).

making the request."[40] At issue in this case is whether a specific party made the rezone request.[41]

The *Schnitzer West* decision concluded that "the government can be a specific party for the purpose of a site-specific rezone classification."[42] *Schnitzer West* cited the *Feil v. Eastern Washington Growth Management Hearings Board* decision. There the Washington State Parks and Recreation Commission filed a consolidated application with Douglas County to "establish an [Recreational Overlay] R–O district and to obtain a site development permit …"[43]. The establishment of the R-O district was found "to be a rezone."[44] The Supreme Court concluded that the

> project, which permits application of a district overlay to a site-specific proposal on an individual property, is a site-specific land use decision. We conclude that, under the GMA statutory scheme, the [Eastern Washington Growth Management Hearings Board] EWGMHB did not erroneously interpret or misapply the law when it determined that it did not have jurisdiction to review this site-specific decision."[45]

While *Feil* did not interpret the specific party requirement it does support the proposition that a government can be a specific party for the

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[40] *Schnitzer W., LLC*, 190 Wn.2d at 576, 416 P.3d at 1177.
[41] *Futurewise v. City of Ridgefield*, Wash. Ct. App. No. 50406-5-II Slip Op. 12, 2019 WL 366838, at *6 (Jan. 29, 2019) (unpublished).
[42] *Schnitzer W., LLC*, 190 Wn.2d at 579, 416 P.3d at 1178.
[43] *Feil v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 367, 373, 259 P.3d 27, 229–30 (2011), as corrected (Sept. 29, 2011), as corrected (Jan. 10, 2012).
[44] *Feil*, 172 Wn.2d at 375, 259 P.3d at 230.
[45] *Feil*, 172 Wn.2d at 380, 259 P.3d at 233.

purposes of a rezone as the *Schnitzer West* opinion stated.[46] In resolving this question, the *Schnitzer West* opinion noted that the government regularly approves its own actions[47] and that not recognizing governments as a specific party would undermine LUPA's "primarily focus on ensuring that a party impacted by a land use decision was treated fairly by the decision-maker, in process and in substance."[48] Finally, the Puyallup Municipal Code "names the city council as a specific party that has the authority to initiate a site-specific rezone application."[49] So the *Schnitzer West* opinion held "that site-specific rezones—regardless of the initiating party—are reviewable under LUPA."[50]

In this case, the court of appeals first concluded that the LLCs requested an annexation, not that "the City adopt any particular zoning on the property."[51]

The court of appeals then concluded that

> the City did not adopt the zoning for the annexed property based on any request. Instead, the City's adoption of RLD-6 zoning with a UH-10 overlay was mandated by the City's municipal code. Ridgefield Municipal Code (RMC) 18.210.015(B) states, "The city shall designate all newly annexed RLD land as RLD-6 or greater density." RMC 18.210.015(C) states, "The city shall place an urban

[46] *Schnitzer W., LLC*, 190 Wn.2d at 579, 416 P.3d at 1178.
[47] *Schnitzer W., LLC*, 190 Wn.2d at 578, 416 P.3d at 1178.
[48] *Schnitzer W., LLC*, 190 Wn.2d at 579, 416 P.3d at 1179.
[49] Schnitzer W., LLC, 190 Wn.2d at 580, 416 P.3d at 1179.
[50] *Schnitzer W., LLC*, 190 Wn.2d at 583, 416 P.3d at 1180.
[51] *Futurewise*, Ct. App. No. 50406-5-II Slip Op. p. 12, 2019 WL 366838, at *6.

> holding (UH) overlay on all lands which are not adequately served by necessary capital facilities." The ordinance expressly states that the City adopted these zoning classifications as required by RMC 18.210.015(B) and (C).[52]

But some party must initiate a rezone. Ridgefield Development Code (RDC) 18.210.015(B) requires "RLD-6 or greater density." The City Council could have adopted a higher density zone. Similarly, the City Council had to decide if the lands were not adequately served by necessary capital facilities and if so whether to adopt the Urban Holding 10 (UH-10) overlay. If the LCCs' request for low density single-family uses controlled, the LCCs were the specific party making the request.[53] Alternatively, the City was the specific party requesting for the RLD-6 zoning. RDC 18.320.030(B) provides that "[a]s the city annexes land, it may be necessary for the city to apply zoning districts and overlay districts to ensure compliance with the [Ridgefield Urban Area Comprehensive Plan] RUACP. In such cases, the city shall apply zoning at the time of annexation." RDC 18.320.040 also provides that "[t]he planning director, city council or planning commission, or petition of the property owner may initiate a petition to amend the RUACP." The RUACP is defined to

[52] *Id.*
[53] CP 355, Milt Brown Ridgefield Master Use Application p. 6; CP 22, City of Ridgefield Ordinance No. 1216 p. 3.

include the City zoning map.[54] So like the Puyallup City Council, the Ridgefield City Council is authorized to initiate a site-specific rezone. And the Ridgefield City Council adopted the zoning appealed in this case.[55]

The court of appeals' fixation on whether a person or the municipal code initiated the rezone is contrary to the *Schnitzer West* "hold[ing] that site-specific rezones—regardless of the initiating party—are reviewable under LUPA."[56] So this decision is inconsistent with *Schnitzer West.*

Futurewise recognizes that *Schnitzer West* was a plurality opinion.[57] This case gives the Court the opportunity to correct the inconsistency with the court of appeals decision and to reaffirm *Schnitzer West.*

2. Futurewise had representational standing to challenge the annexation and rezone at issue in this appeal and this is an issue of substantial public interest or the decision conflicts with *SAVE v. Bothell*.

RAP 13.4(b)(4) provides that one of the reasons that a petition for review will be accepted by the Supreme Court is "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Under *SAVE v. Bothell*, Futurewise had representational standing to challenge the annexation and rezone. This is an issue of substantial public interest that should be determined by the Supreme

[54] RDC 18.010.010(B) and RDC 18.200.020.
[55] CP 22, City of Ridgefield Ordinance No. 1216 p. 3.
[56] *Schnitzer W., LLC*, 190 Wn.2d at 583, 416 P.3d at 1180.
[57] *Schnitzer W., LLC*, 190 Wn.2d at 583–84, 416 P.3d at 1181.

Court. Further, since the decision in this case is inconsistent with *SAVE*, RAP 13.4(b)(1)'s criterion calling on the Court to review decisions that conflict with State Supreme Court decisions also applies.

In *Grant County Fire Protection District No. 5 v. City of Moses Lake*, the State Supreme Court set out the requirements for standing under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW:

> This court has established a two-part test to determine standing under the UDJA. The first part of the test asks whether the interest sought to be protected is "'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152–53, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)). The second part of the test considers whether the challenged action has caused "'injury in fact,'" economic or otherwise, to the party seeking standing. *Id.* at 866, 576 P.2d 401. Both tests must be met by the party seeking standing.[58]

The *Grant County Fire Protection District No. 5* case was a UDJA challenge to an annexation[59] as is this case. When standing is challenged, the plaintiffs must present testimony, affidavits, or declarations showing they have standing.[60]

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[58] *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419, 423 (2004).
[59] *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 801 – 03, 83 P.3d at 423.
[60] *Anderson v. Pierce Cty.*, 86 Wn. App. 290, 299, 936 P.2d 432, 438 (1997); *Snohomish Cty. Prop. Rights All. v. Snohomish Cty.*, 76 Wn. App. 44, 47–48, 882 P.2d 807, 808–09 (1994) *review denied Snohomish Cty. Prop. Rights All. v. Snohomish Cty.*, 125 Wn.2d 1025, 890 P.2d 464 (1995).

The State Supreme Court has held "that a non-profit corporation or association which shows that one or more of its members are specifically injured by a government action may represent those members in proceedings for judicial review."[61] Futurewise's members meet both parts of the standing requirement.

First, the Growth Management Act (GMA), one of the statutes in question in this appeal, protects and regulates a variety of interests including the conservation of agricultural land of long-term commercial significance, the protection of agricultural operations, the protection of the environment including the protection of the quality and quantity of groundwater and surface water quality, the protection of wildlife habitat, reducing sprawl, and protecting property rights.[62] At least five Futurewise members live and own property adjacent to the Brown Annexation. Futurewise seeks to represent their interests protected by the GMA through this lawsuit.[63]

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[61] *Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn. 2d 862, 867, 576 P.2d 401, 404 (1978).
[62] CP 5 – 6, Complaint and Petition pp. 3 – 4; RCW 36.70A.020(2), (3), (6), (8), (9), (10), (11); RCW 36.70A.035; RCW 36.70A.040(3); RCW 36.70A.060; RCW 36.70A.070(1); RCW 36.70A.070(6).
[63] CP 5 – 6, Complaint and Petition pp. 3 – 4; CP 93 – 94, Affidavit of Edward Niece pp. 2 – 3; CP 95 – 97, Affidavit of Janice Myev pp. 1 – 3; CP 106 – 112, Affidavit of Newt Rumble and Barbara Kusik pp. 2 – 8; CP 116 – 18, Declaration of Cynthia A. Carlson pp. 3 – 5.

Second, the Brown Annexation has caused current and will cause future injuries in fact to the Futurewise members, including economic injuries. In *SAVE v. City of Bothell,* the case the *Grant County Fire Protection District No. 5* court cited for the standing requirements applicable to UDJA lawsuits challenging annexations,[64] Bothell rezoned a "parcel of farm land to permit construction of a major regional shopping center …"[65] SAVE sued "alleging that the rezone will have serious detrimental effects on both the environment and the economy of the area."[66] The State Supreme Court found that "SAVE has adequately alleged direct and specific harm to its members which would flow from the building of a shopping center near their homes in North Creek Valley."[67]

The same fact pattern applies in this lawsuit. Here Ridgefield has annexed and rezoned farmland for urban development.[68] Futurewise's members live next to the annexed and rezoned farmland.[69] They will be

[64] *Grant Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 802, 83 P.3d at 423.
[65] *Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 863–64, 576 P.2d 401, 402 (1978).
[66] *SAVE*, 89 Wn.2d at 865, 576 P.2d at 403.
[67] *SAVE*, 89 Wn.2d at 868, 576 P.2d at 404–05.
[68] CP 22, City of Ridgefield Ordinance No. 1216 p. 3; CP 10, Complaint and Petition p. 8.
[69] CP 93, Affidavit of Edward Niece p. 2; CP 95, Affidavit of Janice Myev p. 1; CP 106, Affidavit of Newt Rumble and Barbara Kusik p. 2; CP 115, Declaration of Cynthia A. Carlson p. 2.

directly and specifically harmed by the urban residential development on the adjacent Brown Annexation.[70]

Cynthia A. Carlson has already suffered economic harm along with other injuries in fact. After Ridgefield annexed this land, the construction of a sewer pump station on part of the adjacent Brown Annexation repetitively cut her back fence allowing cows to escape from her property.[71] The City of Ridgefield calls the sewer pump station the Pioneer Pump Station and it will serve the Brown Annexation and at least two other subdivisions.[72] Ms. Carlson and her husband were forced to relocate their cattle to their front pasture.[73] During the time the fence was cut, they did not have adequate pastureland for their cattle.[74] An agent for a developer killed one of their calves by mowing over the calf with a brush hog during a survey for the Pioneer Pump Station.[75] Clark County has designated the Carlsons' property as agricultural lands of long-term commercial significance and their agricultural operations are being

[70] CP 93 – 94, Affidavit of Edward Niece pp. 2 –3; CP 96 – 97, Affidavit of Janice Myev pp. 2 –3; CP 115 – 18, Declaration of Cynthia A. Carlson pp. 2 – 5; CP 106 – 09, Affidavit of Newt Rumble and Barbara Kusik pp. 2 – 8.
[71] CP 115 – 18, Declaration of Cynthia A. Carlson pp. 2 – 5 (March 1, 2017); CP 22, City of Ridgefield Ordinance No. 1216 p. 3.
[72] CP 115, Declaration of Cynthia A. Carlson p. 2 (March 1, 2017).
[73] CP 116, Declaration of Cynthia A. Carlson p. 3 (March 1, 2017).
[74] CP 116, Declaration of Cynthia A. Carlson p. 3 (March 1, 2017).
[75] CP 116, Declaration of Cynthia A. Carlson p. 3 (March 1, 2017).

interfered with by adjacent land uses.[76] Protecting agricultural operations is an interest protected by the GMA.[77]

Water was pumped from the pump station construction site, harming Ms. Carlson's property and nearby creeks used by salmon.[78] The protection of water quality and wildlife habitat are all interests protected by the GMA.[79] Other Futurewise members who live and own property adjacent to the Brown Annexation are also harmed by the lack of storm water protections. Development upstream in Ridgefield has increased the frequency, length of time, and depth that Allen Creek floods the Rumble-Kusik property where they live.[80] The increased flooding caused by upstream development also deposits silt on Mr. Rumble's and Ms. Kusik's land.[81] The increased stream flows have also caused the water table to rise, further contributing to flooding on the Rumble-Kusik property.[82] However, the City of Ridgefield has not effectively addressed Mr. Rumble's and Ms. Kusik's flooding problems.[83]

The annexation is the direct cause of the Futurewise members storm water injuries in fact. Clark County is required to comply with the State of

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[76] *Id.*; *See also* CP 5 – 6, Complaint and Petition pp. 3 – 4.
[77] RCW 36.70A.020(8); RCW 36.70A.060(1).
[78] CP 116, Declaration of Cynthia A. Carlson p. 3 (March 1, 2017).
[79] RCW 36.70A.020(9), (10); RCW 36.70A.040(3); RCW 36.70A.060.
[80] CP 107, Affidavit of Newt Rumble and Barbara Kusik p. 3.
[81] CP 108 – 09, Affidavit of Newt Rumble and Barbara Kusik pp. 4 – 5.
[82] CP 107, Affidavit of Newt Rumble and Barbara Kusik p. 3.
[83] CP 111 – 12, Affidavit of Newt Rumble and Barbara Kusik pp. 7 – 8.

Washington Department of Ecology's *Phase I Municipal Stormwater Permit*.[84] So Clark County is required to adopt and enforce storm water regulations that will control storm water from construction sites and reduce storm water runoff from development and redevelopment including controls on the amount of storm water allowed to leave the development site, water quality controls on runoff, and the use of low impact development techniques.[85] But Ridgefield is not covered by any Municipal Stormwater Permit and does not have to meet any permit standards to protect downstream property owners.[86] In Clark County the company constructing the Pioneer Sewer Pump Station would have had to control the storm water from the construction site and could not have pumped water onto the neighbor's property as the construction company did on Ms. Carlson's property, damaging her land.[87] Because the Pioneer Place Pump Station was constructed after the annexation, the municipal storm water permit required storm water regulations adopted and enforced by

[84] CP 271, State of Washington Department of Ecology, *Who's Covered Under the Municipal Stormwater Permits?* webpage; CP 276, State of Washington Department of Ecology, Phase I Municipal Stormwater Permit p. 5 of 75 (Modified August 19, 2016).
[85] CP 282 – 83, CP 286 – 90, State of Washington Department of Ecology, Phase I Municipal Stormwater Permit pp. 11 – 12, pp. 15 – 19 of 75 (Modified August 19, 2016).
[86] CP 271, State of Washington Department of Ecology, *Who's Covered Under the Municipal Stormwater Permits?* webpage.
[87] CP 116, Declaration of Cynthia A. Carlson p. 3 (March 1, 2017).

Clark County no longer applied to the land in the Brown Annexation.[88] Since Ridgefield is not required to adopt and enforce storm water controls like Clark County, the Futurewise members have and will continue to experience greater storm water runoff, flooding, and siltation then they would have if the annexation had not occurred.

In this case, the court of appeals concluded that "*SAVE* is inapplicable here because the City did not approve the Brown annexation to permit the construction of a specific project that would have obvious detrimental effects on surrounding properties."[89] But *SAVE* was a rezone case just like this case and *Grant County* applied this test to annexations.[90] As was documented above, the annexation has resulted in harm to Futurewise's members. The court of appeals misinterpreted *SAVE* on the standing issue.

One of the reasons that this question is an issue of substantial public interest that should be determined by the Supreme Court is that Clark County and its cities are using annexation as an end run around the normal checks and balances that apply to urban growth area expansions. Clark County does not have a does not have a boundary review board or a

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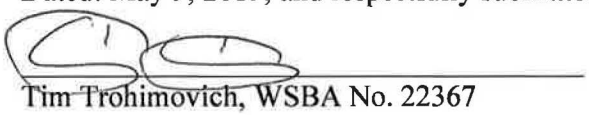
[88] CP 271, State of Washington Department of Ecology, *Who's Covered Under the Municipal Stormwater Permits?* webpage; CP 276, State of Washington Department of Ecology, Phase I Municipal Stormwater Permit p. 5 of 75 (Modified August 19, 2016).
[89] *Futurewise*, Ct. App. No. 50406-5-II p. 17, 2019 WL 366838, at *9.
[90] *Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 864, 576 P.2d 401, 403 (1978); CP 22, City of Ridgefield Ordinance No. 1216 p. 3; *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419, 423 (2004).

county annexation review board.[91] So there is no administrative review of a city decision to annex land at the county level. This is also the second time that Clark County has illegally expanded its UGAs onto agricultural lands and Ridgefield and other cities annexed some of those lands.[92] The County, cities, and developers then claim that the Growth Management Hearings Board cannot review the GMA violations on the annexed land.[93] This undermines the administrative review at the state level mandated by chapter 36.70A RCW.

VI. CONCLUSION

In sum, this Court should take review of this court of appeals decision because that decision conflicts with the *Schnitzer West* opinion by concluded that a specific party had not initiated the rezone and so a LUPA appeal was barred. The decision also misinterprets the *SAVE* decision to conclude that Futurewise did not have representational standing. This Court should correct the conflict with *SAVE*.

Dated: May 9, 2019, and respectfully submitted,



Tim Trohimovich, WSBA No. 22367

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[91] Verbatim Report of Proceedings 16-2-01813-4 (RP) 52.
[92] *Clark Cty. Washington v. W. Washington Growth Mgmt. Hearings Review Bd.*, 161 Wn. App. 204, 245 – 46, 254 P.3d 862, 881 (2011); CP 174 – 76, CP 190 – 96, *Clark County Citizens United, Inc., Friends of Clark County, and Futurewise v. Clark County*, GMHB Case No. 16-2-0005c, Final Decision and Order (March 23, 2017), 21—23 & 37 – 43 of 101.
[93] *Id.*

CERTIFICATE OF SERVICE

The undersigned declares on penalty of perjury under the laws of the State of Washington that on this 9th day of May 2019, the undersigned caused the electronic original and true and correct copies of the following documents to be served on the persons listed below in the manner shown: **Futurewise's Petition For Review by the Supreme Court of the State of Washington** in Case No. 50406-5-II.

State of Washington Court of Appeals Division II 950 Broadway, Ste 300, MS TB-06 Tacoma, WA 98402-4454 Electronic Original	Ms. Janean Parker City Attorney of the City of Ridgefield Law Office of Janean Z. Parker PO Box 298 Adna, WA 98532 Tel: 360-748-7200
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[ ] By Legal Messenger or Hand Delivery	[ ] By Legal Messenger or Hand Delivery
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Signed and certified on this 9th day of May 2019,

Tim Trohimovich, WSBA No. 22367
Attorney for Futurewise

Filed
Washington State
Court of Appeals
Division Two

January 29, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FUTUREWISE, Appellant, v. CITY OF RIDGEFIELD, RDGB ROYAL FARMS LLC, RDGK REST VIEW ESTATES LLC, RDGM RAWHIDE ESTATES LLC, RDGF RIVER VIEW ESTATES LLC, AND RDGS REAL VIEW LLC, Respondents, MILT BROWN, Defendant.	No. 50406-5-II UNPUBLISHED OPINION

MAXA, C.J. – This case arises out of the City of Ridgefield's enactment of ordinance 1216, which annexed approximately 111 acres of farmland (referred to as the Brown annexation) in unincorporated Clark County and adopted residential zoning for the annexed property. Five limited liability companies (collectively the LLCs), which owned all the parcels in the annexed property, initiated the Brown annexation by direct petition.

Futurewise, a nonprofit membership organization, filed a lawsuit in superior court challenging the Brown annexation and the zoning of the annexed property. The LLCs filed a motion to dismiss Futurewise's claims, arguing that the superior court did not have jurisdiction to consider the claims and that Futurewise did not have standing to bring such claims. The superior court granted the motion to dismiss.

We hold that (1) the trial court had jurisdiction under the Uniform Declaratory Judgment Act (UDJA) to consider whether the Brown annexation violated the Growth Management Act (GMA); (2) the trial court did not have jurisdiction under the Land Use Petition Act (LUPA) to consider Futurewise's challenge to the zoning of the annexed property; and (3) Futurewise does not have representational standing to challenge the Brown annexation because Futurewise has not demonstrated that its members have suffered or will suffer any harm relating to the annexation itself. Accordingly, we affirm the superior court's dismissal of Futurewise's claims.

FACTS

Brown Annexation

The LLCs owned all 18 legal lots in an approximately 111-acre parcel north of the City that was located in unincorporated Clark County. The property was outside of the City's urban growth area and was designated by Clark County as agricultural lands of long-term commercial significance.

In June 2016, Clark County enacted an ordinance updating its comprehensive land use plan as required by the GMA. The amended comprehensive plan expanded the City's urban growth area to include the 111-acre parcel. The comprehensive plan amendment also removed the agricultural designation from the expanded area. Futurewise later challenged Clark County's amended comprehensive plan in a petition to the Growth Management Hearings Board (GMHB).

The LLCs initiated the Brown annexation by filing a notice of intent to annex the 111-acre parcel pursuant to RCW 35A.14.120. Milt Brown was listed as the contact person for the property owners. The City accepted the notice of intent and authorized commencement of annexation proceedings.

On September 8, 2016, the City enacted ordinance 1216. Section 1 of the ordinance annexed the 111-acre parcel into the City. Section 2 stated that the annexed area would be zoned as Residential Low Density 6 (RLD-6) with an Urban Holding 10 (UH-10) overlay.

Futurewise Complaint

Futurewise filed a complaint in superior court, naming the City, the LLCs, and Brown as defendants/respondents. Futurewise asserted six claims: (1) a petition for review under LUPA, (2) a request for a declaratory judgment under the UDJA, (3) a request for a declaratory judgment under article IV, section 6 of the Washington Constitution, (4) a writ of certiorari under RCW 7.16.040, (5) a writ of certiorari under article IV, section 6 of the Washington Constitution, and (6) a writ of review under article IV, section 6 of the Washington Constitution.

Futurewise alleged that it was a nonprofit corporation. It alleged participation and representational standing because a number of its members were landowners and residents of Clark County and the City who were affected and aggrieved by the annexation and zoning adopted by ordinance 1216.

The complaint challenged both components of ordinance 1216: the approval of the annexation and the zoning adopted for the annexed property. First, Futurewise alleged that the annexation violated the procedures in chapter 35A.14 RCW for annexation by code cities and violated certain provisions of the GMA. Futurewise asserted that the superior court had jurisdiction over these claims under the UDJA as well as the Washington Constitution, the common law, and chapter 7.16 RCW (writ of certiorari).

Second, Futurewise alleged that the adoption of zoning for the annexed property in ordinance 1216 violated multiple provisions of the GMA and Ridgefield Development Code

(RDC) 18.320.050D. Futurewise claimed that the superior court had jurisdiction over these claims under LUPA.

The complaint also included a series of allegations that Clark County's expansion of the City's urban growth area to include the annexed property violated the GMA. However, Clark County was not named as a defendant in the complaint. And Futurewise acknowledged in the complaint that it had appealed the urban growth area expansion to the GMHB.

Motion to Dismiss

The LLCs filed a motion to dismiss under CR 12(b)(6). They asserted that the superior court had no jurisdiction over any of Futurewise's GMA claims because the GMHB had exclusive jurisdiction over those claims. They also argued that LUPA did not apply to Futurewise's challenge to the zoning of the annexed property. And the LLCs asserted that Futurewise did not have standing to assert any clams regarding the Brown annexation.[1]

In response, Futurewise submitted declarations by several of its members: Edward Niece, Janice Myev, Newt Rumble and Barbara Kusik, and Cynthia Carlson. They claimed that the change in the annexed property's use from agricultural to residential and the development of the property for housing would damage their properties.

As noted above, Futurewise had appealed Clark County's amended comprehensive plan to the GMHB. After hearing oral argument on the LLCs' motion to dismiss, the superior court deferred ruling on the motion pending the GMHB's decision. The GMHB subsequently ruled that Clark County had violated the GMA in expanding urban growth areas for three cities,

[1] The motion to dismiss also sought to dismiss Brown individually as a party. The superior court granted that motion. Futurewise does not appeal that ruling.

including Ridgefield. The GMHB remanded the Clark County ordinance amending the comprehensive plan for Clark County to achieve compliance with the GMA.[2]

The trial court then held additional oral argument on the LLCs' motion to dismiss. The trial court granted the motion and entered a judgment of dismissal.

Futurewise appeals the trial court's order granting the motion to dismiss.

ANALYSIS

A. STANDARD OF REVIEW

We review a trial court's ruling on a motion to dismiss de novo. *Wash. Trucking Ass'ns v. Emp't Sec. Dep't*, 188 Wn.2d 198, 207, 393 P.3d 761, *cert. denied* 138 S. Ct. 261 (2017). Dismissal is appropriate where it appears beyond doubt that a plaintiff will be unable to prove any set of facts that would justify recovery. *Id.* We assume the truth of the allegations in the plaintiff's complaint and may consider hypothetical facts not included in the record. *Id.*

Under CR 12(b)(6), the trial court can consider only the allegations contained in the complaint and cannot look beyond the face of the pleadings. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487 (2015). If the trial court considers information outside the complaint, the motion must be converted to a summary judgment motion under CR 56. *McNamara v. Koehler*, 5 Wn. App. 2d 708, 713, 429 P.3d 6 (2018). We review a trial court's ruling on summary judgment de novo. *Schibel v. Eymann*, 189 Wn.2d 93, 98, 399 P.3d 1129 (2017). "Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*; *see also* CR 56(c). When evaluating the evidence on summary judgment, we must view all facts and reasonable inferences

[2] An appeal of the GMHB's ruling is pending in this court.

therefrom in the light most favorable to the nonmoving party. *Piris v. Kitching*, 185 Wn.2d 856, 861, 375 P.3d 627 (2016).

Here, Futurewise submitted declarations regarding the harms suffered by its members and the GMHB's ruling striking down the Clark County comprehensive plan amendments. The trial court deferred its consideration of the motion to dismiss in order to consider how the GMHB ruled on Futurewise's appeal. And the trial court stated in its oral ruling on the standing issue that it was considering the supplemental declarations. Accordingly, we review the trial court's ruling under the CR 56 summary judgment standard.

B. JURISDICTION – ANNEXATION CHALLENGE

Futurewise argues that the superior court had jurisdiction over its claim that the Brown annexation adopted in section 1 of ordinance 1216 violated the GMA. We agree.

1. No GMHB Jurisdiction

Initially, we conclude that the GMHB does not have exclusive jurisdiction over Futurewise's challenge to the Brown annexation.

a. Legal Principles

The GMA requires counties subject to the GMA and cities within those counties to develop a comprehensive plan. RCW 36.70A.040(3)(d). In addition, those counties and cities must adopt development regulations that are consistent with and implement the comprehensive plan. RCW 36.70A.040(3)(d). RCW 36.70A.020 lists a number of goals that must guide the preparation of comprehensive plans and development regulations. Counties and cities must act in conformity with their comprehensive plans. RCW 36.70A.120. The legislature created the GMHB to hear petitions alleging violations of the GMA. RCW 36.70A.250, .280.

Under RCW 36.70A.280(1)(a), the GMHB "shall hear and determine only those petitions alleging" among other things, that "a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter." RCW 36.70A.290(2) states that a GHMB petition must relate to "an adopted comprehensive plan, development regulation, or permanent amendment thereto." Under these provisions, "GMHBs have limited jurisdiction and may decide *only* challenges to or amendments of comprehensive plans or development regulations." *Schnitzer W., LLC v. City of Puyallup*, 190 Wn.2d 568, 575, 416 P.3d 1172 (2018). Stated differently, the GHMB does not have jurisdiction "unless a petition alleges that a comprehensive plan or a development regulation or amendments to either are not in compliance with the requirements of the GMA." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000).

If the GMHB has jurisdiction over a claim that a government entity did not comply with the GMA in adopting or amending a comprehensive plan or development regulation, that jurisdiction is exclusive. *Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 176 Wn. App. 555, 569, 309 P.3d 673 (2013); *see also Woods v. Kittitas County*, 162 Wn.2d 597, 614-15, 174 P.3d 25 (2007). As a result, "[w]here a challenge is within the jurisdiction of the [GMHB], the superior court lacks jurisdiction over that challenge." *Davidson Serles & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 625, 246 P.3d 822 (2011); *see also Woods*, 162 Wn.2d at 614-15. In that situation, a party cannot invoke the superior court's jurisdiction through a UDJA action or a writ under article IV, section 6 of the Washington Constitution. *Davidson Serles*, 159 Wn. App. at 626-27.

We determine de novo whether the GMHB has jurisdiction over a challenge to a government action. *See Spokane County*, 176 Wn. App. at 569.

b. Analysis

Futurewise is not challenging Clark County's amendment to its comprehensive plan in this lawsuit. Instead, Futurewise is challenging the City's ordinance that annexed the LLCs' property. Therefore, the question here is whether the annexation ordinance was a "development regulation" for which the GMHB had exclusive jurisdiction. *See Wenatchee Sportsmen*, 141 Wn.2d at 178.

The GMA defines "development regulation" as,

> the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020.

RCW 36.70A.030(7)[3]; *see also* WAC 365–196–800(1) ("Development regulations under the [GMA] are specific controls placed on development or land use activities by a county or city"). As defined in RCW 36.70B.020(2)(a), a "project permit application" does not include an application for legislative approval such as annexations.

Applying the definition in RCW 36.70A.030(7), the Brown annexation was not a "development regulation." An annexation ordinance, standing alone, does not place "controls . . . on development or land use activities." RCW 36.70A.030(7). Instead, the annexation merely converted unincorporated county property to city property. This conclusion is consistent with the GMHB's ruling in Futurewise's challenge to the Clark County amended comprehensive plan that it did not have jurisdiction over city annexation ordinances.

[3] RCW 36.70A.030 was amended in 2017. Because those amendments do not affect our analysis, we cite to the current version of the statute.

We hold that section 1 of ordinance 1216 was not a development regulation and therefore that the GMHB did not have jurisdiction to consider Futurewise's challenge to section 1 of ordinance 1216.

2. Superior Court Jurisdiction

The City and the LLCs argue that even if Futurewise's challenge to the Brown annexation is not subject to the GMHB's jurisdiction, the superior court still does not have jurisdiction over the annexation. We disagree.

Futurewise asserts superior court jurisdiction under the UDJA. RCW 7.24.020 states,

> A person . . . whose rights, status or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder.

Courts have exercised jurisdiction under the UDJA for annexation challenges. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004); *Glenrose Cmty. Ass'n v. City of Spokane*, 93 Wn. App. 839, 845-47, 971 P.2d 82 (1999).

The City emphasizes that the legislature has established a review process for annexations. Under RCW 35A.14.001, annexation actions may be subject to review by a boundary review board under chapter 36.93 RCW. RCW 36.93.030 provides that a county may establish a boundary review board, which reviews proposed boundary changes for a city including annexation. *See* RCW 36.93.090, .155. Under RCW 36.93.160(5), only an affected government unit or "any person owning real property or residing in the area affected by the decision" can appeal a boundary review board decision to superior court.

The City seems to argue that because Futurewise is not a person who can appeal a boundary review board decision under RCW 36.93.160(5), the superior court has no jurisdiction

over this lawsuit. However, RCW 36.93.160(5) is inapplicable here because Clark County does not have a boundary review board.

In addition, RCW 35A.14.160 establishes an annexation review board to review annexation proposals in counties not having a boundary review board. Under RCW 35A.14.210, only an affected government unit or "any person owning real property or residing in the area proposed to be annexed" can appeal an annexation review board decision to superior court. Again, the City seems to argue that because Futurewise is not a person who can appeal an annexation review board decision under RCW 35A.14.210, the superior court has no jurisdiction over this lawsuit. However, RCW 35A.14.210 is inapplicable here because Clark County does not have an annexation review board.

The City also seems to argue that by enacting these provisions limiting the ability to appeal boundary review board and annexation review board decisions, the legislature has removed jurisdiction from the superior court for annexations even if a county does not have a boundary review board or an annexation review board. But nothing in chapter 35A.14 RCW or chapter 36.93 RCW supports this position. The legislature has not limited the superior court's jurisdiction over annexation challenges. Therefore, we reject the City's argument.

We hold that the superior court had jurisdiction over Futurewise's challenge to section 1 of ordinance 1216.[4]

[4] This holding relates only to jurisdiction, not whether Futurewise can prevail on a claim that section 1 of ordinance 1216 violates the GMA. Some cases suggest that an action that does not constitute a development regulation cannot be challenged for noncompliance with the GMA. *Woods*, 162 Wn.2d at 614-16 (holding that a site-specific land use decision cannot be challenged for violations of the GMA); *Somers v. Snohomish County*, 105 Wn. App. 937, 943-44, 21 P.3d 1165 (2001) (holding that a challenge to a subdivision approval for noncompliance with the GMA in actuality was a claim that the applicable zoning ordinance violated the GMA, for which the GMHB had exclusive jurisdiction). We do not address this issue.

C. JURISDICTION – ZONING CHALLENGE

Futurewise argues that the superior court had jurisdiction under LUPA over its challenge to the zoning of the annexed property adopted in section 2 of ordinance 1216 because the ordinance was a site-specific rezone to which LUPA applies. We disagree.

Under RCW 36.70C.030(1), LUPA provides, with limited exceptions, the "exclusive means of judicial review of land use decisions." LUPA proceedings must be filed in the superior court. RCW 36.70C.040(1). But the superior court has no jurisdiction under LUPA unless the challenged action is a "land use decision" as defined by the statute. *Durland v. San Juan County*, 182 Wn.2d 55, 64, 340 P.3d 191 (2014).

RCW 36.70C.020(2)(a) defines land use decision to include "(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used . . . excluding applications for legislative approvals such as area-wide rezones and annexations." As stated in the definition, area-wide rezones are not land use decisions. Instead, zoning ordinances generally are development regulations as defined in the GMA. *See* RCW 36.70A.030(7) (development regulations include "zoning ordinances").

However, a challenge to a "site-specific rezone" is a project permit under RCW 36.70C.020(2)(a) and therefore must be brought under LUPA. *Woods*, 162 Wn.2d at 610; *see also Schnitzer W.*, 190 Wn.2d at 576.[5] "A site-specific rezone requires three factors: (1) a

[5] One exception to the rule that LUPA provides the exclusive means for judicial review of land use decisions is land use decisions that are subject to review by the GMHB. RCW 36.70C.030(1)(a)(ii). However, this exception does not apply to site-specific land use decisions because they do not qualify as comprehensive plans or development regulations under the GMA. *Woods*, 162 Wn.2d at 610.

specific tract of land, (2) a request for a classification change, and (3) a specific party making the request." *Schnitzer W.*, 190 Wn.2d at 576.

Here, the parties dispute whether the annexed property was a specific tract of land and whether adopting zoning for an area that previously lacked City zoning constituted a classification change. However, we need not decide these issues because Futurewise cannot establish that the LLCs requested the classification change.

Futurewise argues that the LLCs requested the zoning based on the notice of intent to annex, in which the LLCs stated that "[t]he annexation area is intended for low density single family residential use." Clerk's Papers at 355. But although the LLCs did request *annexation*, the notice of intent to annex did not request that the City adopt any particular zoning on the property. The LLCs only stated *their intent* regarding the annexed property.

Further, the City did not adopt the zoning for the annexed property based on any request. Instead, the City's adoption of RLD-6 zoning with a UH-10 overlay was mandated by the City's municipal code. Ridgefield Municipal Code (RMC) 18.210.015(B) states, "The city shall designate all newly annexed RLD land as RLD-6 or greater density." RMC 18.210.015(C) states, "The city shall place an urban holding (UH) overlay on all lands which are not adequately served by necessary capital facilities." The ordinance expressly states that the City adopted these zoning classifications as required by RMC 18.210.015(B) and (C).

We conclude that the adoption of zoning for the annexed property was not a site-specific rezone. Accordingly, we hold that the superior court did not have jurisdiction to consider Futurewise's challenge to the zoning for the annexed property under LUPA.

D. REPRESENTATIONAL STANDING – ANNEXATION CHALLENGE

Futurewise argues that it has representational standing to challenge the Brown annexation because its members already have been harmed by development in the area and the annexation will lead to further harm. The City and the LLCs argue that Futurewise has not established representational standing because ordinance 1216 does not provide for any particular development of the annexed property, and therefore the claims of Futurewise's members that the annexation will damage their property are speculative. We agree with the City and the LLCs.

1. Legal Principles

A party may obtain relief under the UDJA if the claim presents a justiciable controversy. *League of Educ. Voters v. State*, 176 Wn.2d 808, 816, 295 P.3d 743 (2013). A justiciable controversy exists if (1) there is an actual, present, or existing dispute, (2) the parties have genuine and opposing interests, (3) those interests are direct and substantial rather than potential or theoretical, and (4) the court's determination will be final and conclusive. *Lee v. State*, 185 Wn.2d 608, 616, 374 P.3d 157 (2016). The third element encompasses standing. *Id.* at 618.

We conduct a two-part inquiry to determine if a litigant has standing to bring a declaratory judgment action under the UDJA. *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 103, 369 P.3d 140 (2016). First, the plaintiff's interest in bringing the action must be within the zone of interests protected or regulated by the statute in question. *Id.* Second, the challenged action must have caused economic or other injury in fact to the person seeking standing. *Id.* Where the alleged harm is threatened but has not yet occurred, the plaintiff must show that " 'the injury will be immediate, concrete, and specific; a conjectural or hypothetical injury will not confer standing.' " *See Knight v. City of Yelm*, 173 Wn.2d 325, 341, 267 P.3d 973 (2011) (addressing injury in fact for LUPA standing)

(quoting *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 829, 965 P.2d 636 (1998)); *see also City of Burlington v. Wash. St. Liquor Control Bd.*, 187 Wn. App. 853, 869, 351 P.3d 875 (2015) (applying the same standing requirements to a challenge under the Administrative Procedure Act, ch. 34.05 RCW).

Where a corporation or nonprofit organization is the party seeking a declaratory judgment, the organization must demonstrate that at least one of its members has been or will be specifically and perceptibly harmed by the challenged action. *See Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 272-73, 413 P.3d 549 (2018).

The Supreme Court considered the parameters of standing and representational standing in the context of a city annexation in *Grant County Fire Protection District*, 150 Wn.2d 791. In that case, property owners and the fire district challenged an annexation under the UDJA, alleging that an annexation would harm their tax rates and tax base. *Id.* at 798-804. The court held that while the property owners were within the zone of interests of the annexation statutes and would clearly be harmed by changes in tax rates, the fire district was not. *Id.* at 802-04. The court also held that the fire district did not have representational standing where there was no evidence that the annexation would affect the fire district's capability to provide emergency services. *Id.* at 804.

Potential stormwater related flooding is an adequate injury in fact to establish standing. *Anderson v. Pierce County*, 86 Wn. App. 290, 299-300, 936 P.2d 432 (1997). In *Anderson*, the plaintiff was challenging Pierce County's decision not to require an environmental impact statement for a proposed project development under the State Environmental Planning Act, chapter 43.21C RCW. *Id.* at 294-96. A member of the Buckley Plateau Coalition who owned property abutting the proposed project site had alleged that Pierce County's decision did not

sufficiently protect his abutting property from potential stormwater runoff damage. *Id.* at 300. The court held that the allegation presented an adequate threatened injury to establish representational standing. *Id.*

2. Futurewise's Allegations of Harm

Futurewise submitted four declarations from its members to demonstrate the harm that would be caused by the Brown annexation. Edward Niece stated that his property abutted the Brown annexation and that the area around his home was primarily agricultural. He stated that the annexation, the change in use from agricultural to residential, and the development of the property for housing would cause more stormwater runoff, which would increase pollution and silt in a stream near his property and affect salmon in that stream. Niece also stated that residential development in the annexed area would increase traffic and make walking and biking along the roads more dangerous and less enjoyable.

Janice Myev stated in her declaration that her property abutted the Brown annexation and would be adversely impacted by the development that would result from the annexation. She stated that the City planned to construct a sewage pump station to serve the new residential areas, and that the proposed access road for the pump station would go through her house. Myev also suggested that development on the annexed property would affect wildlife, streams that support salmon runs, and the beauty of the area.

Newt Rumble and Barbara Kusik stated in their joint declaration that their property abutted the Brown annexation and that a creek ran through both the annexed property and their property. They stated that the creek had flooded their property more often as nearby developments had been constructed upstream and that development had caused areas of standing water on their property and siltation in the stream. Rumble and Kusik also stated that the

flooding prevented them from using their land as pasture for sheep and reduced the agricultural productivity of their property. They stated that the change in zoning from agricultural to residential would exacerbate these flooding and siltation problems on their property.

Cynthia Carlson stated in a declaration that her properties were adjacent to the Brown annexation and supported cattle grazing. She stated that the construction of a sewer pump station had impacted cattle grazing by repeatedly cutting fences and allowing cows out of the pasture, and that a calf was killed by a mower as part of the construction. Carlson also stated that the pump station construction and other nearby development projects had negatively impacted fish and bird habitat around her home, including causing intense light pollution, which diminished her enjoyment of her property and harmed its economic value.

3. Standing Analysis

The issue here is whether the Futurewise members have alleged sufficient injury *because of the annexation* to establish standing.

The declarations do not claim that this conversion of the property from county to city territory, standing alone, has caused any actual injury. The actual injury the declarations allege all predated the annexation and apparently was attributable to existing developments that were not within the annexed property. And there is no indication that any development has occurred on the annexed property.[6] Instead, the declarations *assume* that (1) residential development will occur on the annexed property at some time in the future, (2) the conditions placed on that

[6] Futurewise argues that the annexation allowed construction of the pump station referenced in Carlson's declaration and that the pump station has caused direct injury. But the evidence in the record shows that the construction of the pump station was allowed by Clark County's comprehensive plan amendment adding the property on which the pump station was built to the urban growth area. The annexation did not affect the urban growth area.

development during the permitting process will be inadequate, and (3) the future development will impact their property in the same way as other nearby developments.

However, the nature and extent of any development on the annexed property is unknown. The current zoning allows some type of residential development. But the annexation did not authorize any particular development and no specific development has yet been proposed or approved. If a development is approved at some time in the future, it is unknown whether the permit conditions placed on the development will be adequate to alleviate possible impact on the environment and surrounding properties. As result, Futurewise cannot show that their members will be specifically and perceptibly harmed by the annexation. The possible future injury to the Futurewise members is speculative.

Futurewise analogizes the facts here to *Save a Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978) (*SAVE*). In *SAVE*, the City approved an application to rezone property that was zoned for agricultural use to permit construction of a major shopping center. *Id.* at 863-65. SAVE members included people residing in areas adjacent to the rezoned property. *Id.* at 865. The court held that SAVE had standing because it "alleged direct and specific harm to its members which would flow from the building of a shopping center near their homes." *Id.* at 868.

SAVE is inapplicable here because the City did not approve the Brown annexation to permit the construction of a specific project that would have obvious detrimental effects on surrounding properties. The annexation merely converted the annexed property from unincorporated Clark County to the City. Certainly some development of the property for housing is contemplated at some time in the future. But unlike in *SAVE*, the specific nature of any future development remains unknown. And the impact of that unknown development on

surrounding properties remains unclear. As a result, the claim that such unknown development will injure adjacent property owners is speculative.

Futurewise argues that even if the technical standing requirements are not satisfied, we can take a more liberal approach to standing for matters of substantial public interest. *See Lee*, 185 Wn.2d at 618-19 (stating that a case may be justiciable under the public interest exception even where the requirements of standing are not strictly met). However, the only public interest Futurewise has identified is avoiding the conversion of agricultural land to urban land. This general interest does not allow us to ignore the requirements of representational standing.

The Brown annexation does not specifically authorize any development and Futurewise has not demonstrated that its members are subject to a specific and immediate threat of harm flowing from the annexation. Accordingly, we hold that Futurewise does not have representational standing to challenge ordinance 1216.

E. ATTORNEY FEES AND COSTS

The City requests attorney fees on appeal to be paid by Futurewise. Under RAP 18.1, we may award reasonable attorney fees to the prevailing party on appeal if allowed under the applicable law. The City argues that we should award reasonable attorney fees under RCW 4.84.185, which allows an award of attorney fees for defending against a frivolous claim or appeal. However, we do not agree that Futurewise's appeal was frivolous. Accordingly, we decline the City's request to award attorney fees on appeal.

The LLCs request an award of costs on appeal under RCW 4.84.010. A commissioner of this court will address the award of costs under RAP 14.1-14.5.

CONCLUSION

We affirm the trial court's order granting the LLCs' motion to dismiss.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, C.J.

MAXA, C.J.

We concur:

J.

LEE, J.

Melnick, J.

MELNICK, J.

Filed
Washington State
Court of Appeals
Division Two

April 10, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FUTUREWISE, Appellant, v. CITY OF RIDGEFIELD, RDGB ROYAL FARMS LLC, RDGK REST VIEW ESTATES LLC, RDGM RAWHIDE ESTATES LLC, RDGF RIVER VIEW ESTATES LLC, AND RDGS REAL VIEW LLC, Respondents, MILT BROWN, Defendant.	No. 50406-5-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Futurewise has moved for reconsideration of the court's January 29, 2019 unpublished opinion in the above entitled matter. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Lee, Melnick.

FOR THE COURT:

Maxa, C.J.

CHIEF JUDGE

FUTUREWISE

May 09, 2019 - 10:42 AM

Transmittal Information

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Superior Court Case Number:	16-2-01813-4

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