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NO. 47641-0-II  
COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

OLYMPIC STEWARDSHIP FOUNDATION, et al., CITIZENS'  
ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY,  
CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND,  
MATS MATS BAY TRUST, JESSE A. STEWART REVOCABLE  
TRUST, and CRAIG DURGAN, and HOOD CANAL SAND &  
GRAVEL LLC dba THORNDYKE RESOURCE,

Appellants,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE  
HEARINGS OFFICE, acting through the WESTERN WASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD; STATE OF  
WASHINGTON, DEPARTMENT OF ECOLOGY; and JEFFERSON  
COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

**PETITIONERS OLYMPIC STEWARDSHIP FOUNDATION, et al.  
ANSWER TO AMICUS CURIAE BRIEF OF FUTUREWISE AND  
WASHINGTON ENVIRONMENTAL COUNCIL**

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P/M: 7/6/16

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## I. INTRODUCTION

Amici curiae Futurewise and Washington Environmental Council (WEC) are sincere and passionate. But they are special interest groups that have a demonstrated history of advocating for laws or positions that elevate the environment above private property rights and other rights secured by the State and Federal Constitutions. In fact, as detailed in the amicus curiae brief filed by Pacific Legal Foundation (PLF), WEC was the organization that drafted the failed “Shoreline Protection Act,” which would have expressly prioritized the environment over property rights. *See* PLF Amicus Br. at 3-6 (citing James C. Barron, *Shoreline Management – What are the Choices?* Wash. State Univ., Ext. Mimeograph 3524, pp. 2-4 (Dec. 1971)). Washington’s voters and legislature rejected WEC’s environment-first proposal by a significant margin, opting instead to approve the compromise embodied by the Shoreline Management Act (SMA), which embraced a policy of “balancing use and protection.” *Id.* at 5-6 (quoting *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 244, 189 P.3d 161 (2008) (J.M. Johnson, J., lead opinion)).

The amicus brief filed by Futurewise and WEC is more an ideological statement than a legal brief and should be rejected. The solution is not for this court to change the law, but for Amici to approach the Washington State Legislature to seek the changes they desire.

Amici first ask this Court to disregard the State’s policy of balancing the various goals of the SMA in favor of what they call “the *right* balance”—which, according to Futurewise and WEC, can only be achieved by tipping the scales in favor of the environment when developing shoreline use regulations. That, however, is not the law. Indeed, both the Department of Ecology and Jefferson County (the parties that amici claim to support) agree that the SMA is properly interpreted to require that local and state government balance the Act’s “multiple goals” when developing a Shoreline Master Program (SMP). Jeff. Co. Resp. Br. at 16-17; *see also* Ecology Resp. Br. at 7-10 (recognizing that priority development is one of the three “primary goals” of the Act).

Futurewise and WEC are similarly mistaken in asserting that the SMA and WAC Guidelines do not require local governments to develop a scientific record demonstrating the baseline condition of the shorelines. The SMA plainly requires that, prior to adopting an SMP Update, each local government must demonstrate the functions and values on the shoreline and show how any proposed regulations are necessary to protect those existing conditions. Such a showing is absolutely necessary to measure “no net loss.” Again, Amici’s argument against the baseline requirement merely advances the environment-first ideology that was rejected the by

Legislature and voters in adopting the SMA. And, moreover, amici's claim contradicts the position taken by all parties to this case.

## II. ARGUMENT

Amici's contention as to the "right balance" is intellectually interesting, but that balance is not answered by resort to fragments of language or case law taken out of context, or by personal subjective desires. Here, for the SMA, it has been answered by Legislative directive as approved by the citizens of Washington State since the SMA was an initiative from the Legislature to the people.

The term "balance" is defined as follows: "a state in which different things occur in equal or proper amounts or have an equal or proper amount of importance." (<http://www.merriam-webster.com/dictionary/balance>).

The SMA, RCW 90.58.020, calls for balance. The law utilizes the terms "utilization, protection, restoration and preservation." Within this context, the law gives priority to single-family residences. It mandates consideration of socio-economic effects, and protecting private property rights. Part of the allowed balance is alteration of the natural condition of the shoreline for preferred uses. That is a mandatory requirement so long as resulting impacts to the ecology and environment are minimized "... insofar as practical." This is the "right balance" of the SMA, not the subjective interpretation of interest groups.

Balance is best assessed by the consequences of the regulations in question. OSF believes that the Court should look at those consequences.

The SMP at issue has the following impacts:

- The buffers and setbacks in question take 14.49 square miles of real property without compensation, an amount of land that is larger than the 9.5 square miles that makes up the area for the City of Port Townsend. *See* OSF Opening Brief, p.3.
- The SMP is purposely an unbalanced document. The County expressed a desire to “go beyond” the “minimum” required by the SMA to provide for a “net gain” (rather than “no net loss”) for important shoreline ecological processes and functions. *See* OSF Opening Brief, p.12.
- Neither the County nor Ecology gave consideration to the efficacy of existing shoreline regulations as part of its update. Without taking into effect existing regulations, the SMP over-regulates because it fails to implement the SMA’s “minimization” standard. *See* OSF Opening Brief, p.13.
- The onerous new buffer and setback requirements severely impact residential home development and use. OSF Opening Brief, p.15.
- Since 2012, there has been a drop of 18.5 percent in property values after the County adopted its shoreline master program and sent it on

for approval to the Department of Ecology. This equates to approximately one billion dollars. Declaration of Eugene (Gene) Farr (“Farr Decl.”), dated February 19, 2016, ¶¶ 16-17, pp.11-12.

A shoreline master program is one of many tools to regulate the shoreline. It is inappropriate to talk about “balance” only in that context. One tool is State funded restoration through the Puget Sound Partnership and its “action plan.”<sup>1</sup> Yet another is the “coordinated planning” provisions of the SMA. *See* OSF Opening Brief, pp.5-6. And yet another are the laws and regulations administered by state and federal agencies other than the Department of Ecology and Jefferson County. The Jefferson County SMP is out of balance because of the failure to fully recognize or employ these other tools.

**A. The SMA Requires the Government to Balance the Act’s Various Goals When Developing an SMP**

Both the plain language of the SMA and case law interpreting the Act require that government balance the environment and property rights when developing an SMP. *See* RCW 90.58.020; *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 697, 169 P.3d 14 (2007) (J.M. Johnson, J., lead opinion) (The SMA to “embodies a legislatively-determined and voter-approved balance between protection of state shorelines and

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<sup>1</sup> *The 2016 Action Agenda for Puget Sound*, Puget Sound Partnership, June 2016.

development.”); *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring); *see also Nisqually Delta Ass’n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985); *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 243, 189 P.3d 161 (2008) (J.M. Johnson, J., lead opinion); *see also Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 761, 954 P.2d 304 (1998) (The purpose of the SMA “is to allow careful development of shorelines by balancing public access, preservation of shoreline habitat and private property rights through coordinated planning . . .”). The Supreme Court’s interpretation of the SMA establishing a policy of “balancing use and protection” (*Futurewise*, 164 Wn.2d at 244), is final. *King Cty. v. Central Puget Sound Growth Mgmt. Hr’ngs Bd.*, 142 Wn.2d 543, 555 14 P.3d 133 (2000). Amici’s failure to address this binding precedent renders its argument against balancing baseless.

Regardless, *Futurewise* and WEC insist that private property rights must be treated as “secondary” to the goal of protecting the environment when developing an SMP. This claim, however, ignores the Legislature’s statement that “[i]t is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses.” RCW 90.58.020. Indeed, every citation that the amici brief makes to the SMA’s policy section carefully omits any mention the SMA’s property rights goal, including the statutory direction that

“single-family residences and their appurtenant structures [shall be given priority].” *Id.*; *see* Futurewise Amicus Br. at 1-2, 5-6, 14-15. Moreover, Amici fail to address the SMA Guideline requirement that “regulations and mitigation standards” must be designed and implemented “in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property.” WAC 173-26-186(8)(b)(i). Those criteria are essential to carrying out the Legislature’s intent.

Instead of addressing the SMA’s entire policy statement, Futurewise and WEC base their argument for environment-first “balancing” on language cherry-picked from inapposite cases. But, as Justice Ginsburg recently noted when responding to a similarly cherry-picked quote offered without context: “the first rule of case law as well as statutory interpretation is: Read on.” *Arkansas Game & Fish Commission v. United States*, \_\_ U.S. \_\_, 113 S. Ct. 511, \_\_ (2012). The direction to “read on” is particularly appropriate here.

Contrary to amici’s argument, the Supreme Court has not elevated any one statutory goal above the others during the process of developing an SMP. Indeed, *Buechel v. Dept. of Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994) cited by Amici, did not even involve a challenge to the adoption of an SMP. Instead, *Buechel* concerned a variance application to build a house on a lot where residential use was prohibited by the underlying zone. 125

Wn.2d at 199-200, 208-09. Further, the variance sought permission to build on top of a deteriorating bulkhead and in violation of the local SMP's shoreline setback and minimum lots size requirements. *Id.* In discussing "the criteria for variances under the SMA," the Court stated that courts interpret SMP provisions "to protect the state shorelines as fully as possible." *Id.* at 203 (citing RCW 90.58.900 ("This chapter is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objectives and purposes for which it was enacted.")). The Court did not address the SMA's property rights goal because the Court concluded that the variance denial did not deprive the landowner of his investment-backed expectations—he could still make other reasonable uses of the small lot, consistent with zoning and neighboring uses. *Id.* at 208-09.

Nothing in *Buechel* states that, when developing an SMP, property rights (including priority development rights) must be treated as "secondary" to the "primary" goal of protecting the environment. Nor does the direction to interpret SMP provisions to protect the environment compel such a conclusion. To the contrary, the SMA requires that government balance property rights and provide for priority development as part of the process of developing the SMP. Thus, the SMP, if enacted in accordance with the SMA and Guidelines, will already embody the required balance. The fact that courts are directed to later interpret an SMP to protect the

environment in the context of an adjudicative appeal of a variance denial does not extinguish the Legislature's command that property rights be balanced when enacting an SMP.

The Court of Appeals decision in *Lund v. State Dept. of Ecology*, 93 Wn. App. 329, 969 P.2d 1072 (1998), did not speak to the legislative process either. That case involved an appeal from Ecology's denial of a conditional use permit to build a new over-water residence where the local SMP prohibited such development. *Id.* at 332. In discussing the criteria for issuing a conditional use permit, the Court adopted the same standard *Buechel* had applied to variances. *Id.* at 336-37. Again, nothing in the opinion speaks to legislative balancing of the Act's multiple goals.

The fact that *Buechel* and *Lund* speak only to the criteria for reviewing variance and condition use permit decisions is confirmed by a large body of binding precedent holding that, in the context of legislative actions, the SMA embraces both the environment and property rights goals, specifically providing for priority development and use of the shorelines. *See, e.g., Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 697, 169 P.3d 14 (2007) (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring); *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985); *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 243, 189 P.3d 161 (2008) (J.M.

Johnson, J., lead opinion); *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 761, 954 P.2d 304 (1998); *State, Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 963, 275 P.3d 367 (2012).

Futurewise and WEC's reliance on *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 202 P.3d 334 (2009), is similarly unavailing. First, the portion of the opinion they rely on is merely the Court's summary of the government's argument—it is not part of the Court's ruling. See *Samson*, 149 Wn. App. at 47-49. And second, the Court held that private docks do not constitute a priority development right under the Act. *Id.* at 50. Thus, *Samson* did not address the issue at hand—whether the Board erred when it concluded that government must treat priority development rights as “secondary” to the goal of protecting the environment when developing an SMP.

Notably, Ecology—the agency charged with interpreting the SMA—does not devote a single word in support of the Growth Board's conclusion that an individual's rights in property are inferior to the environment. Ecology Resp. Br. at 7-10. Instead, Ecology agrees that the Act requires that the competing interests be balanced via the “no net loss” policy. *Id.* The Board's conclusion that the SMA renders property rights a “secondary” interests was clearly erroneous and must be reversed.

Futurewise and WEC's arguments in support of that conclusion are baseless.

**B. The SMA Requires That Government Develop a Scientific Record Sufficient to Establish Baseline Conditions on the Shoreline**

All of the parties to this appeal agree that the SMA and Guidelines require that the government develop a scientific record showing the baseline conditions on the shorelines before imposing critical area restrictions, like buffers. *See Ecology Resp. Br.* at 17-20 (arguing that the record established the required baseline); *Jeff. Co. Resp. Br.* at 21-22 (arguing that the record was sufficient to show existing shoreline conditions). Indeed, the Growth Board has long-concluded that, when developing critical area restrictions, the government must first determine the baseline conditions of the subject property, from which potential harm can be measured and avoidance/mitigation strategies evaluated. *See, e.g., Blair v. City of Monroe*, GMHB No. 14-3-0006c, at 24-25 (Aug. 26, 2014) (Under the GMA, the local government must first establish baseline of existing conditions before adopting regulations designed to address potential environmental impacts); *see also Wallingford v. Seattle*, SHB 04-012 (Order Denying Summary Judgement, Jan 24, 2005) (Establishing baseline conditions necessary to demonstrate degree and permanence of shoreline impacts).

Futurewise and WEC's claim that the SMA does not require that the government demonstrate a baseline from which to measure "no net loss" is completely without merit and should be rejected for three reasons. *See* Futurewise Amicus Br. at 6-14. First, courts will typically not address issues raised only by an amicus. *See Noble Manor Co. v. Pierce County*, 133 Wash.2d 269, 272 n. 1, 943 P.2d 1378 (1997). Second, the argument is unsupported by law or fact. And third, Amici's proposal would strip the SMA of any legitimacy and result in wide-scale violations of the Due Process and Takings Clauses by burdening (and exacting) property without any rational connection between the proposed land use and the government objective.

The SMA plainly requires local governments to develop a scientific record establishing baseline conditions on the shorelines as part of the SMP update process. The SMA requires that SMPs "shall provide a level of protection to critical areas ... necessary to sustain shoreline natural resources." RCW 36.70A.480(6). At the same time, the Act requires that such protective measures be limited in size and scope so as not to unduly burden private property rights. WAC 173-26-186(8)(b)(i); WAC 173-26-201(2)(e)(ii)(A). Consistent with those directives, the Guidelines require that local governments analyze existing conditions on the shorelines *prior* to developing shoreline regulations. *See* WAC 173-26-201(3)(d) ("Before

establishing specific master program provisions, local governments shall analyze information gathered ... and as necessary to ensure effective shoreline management provisions, address the topics below, where applicable.”). Among the information required, the Guidelines direct local government to: (1) identify the ecological processes and functions present on regulated shorelines; (2) assess them; and (3) identify specific measures necessary to protect and/or restore the ecological functions and ecosystem-wide processes. WAC 173-26-201(2)(d)(A)(i)-(iii). Similarly, WAC 173-26-201(3)(d)(i)(v) requires that the government produce information documenting the extent of existing structures and shoreline development, existing conditions and regulations which could affect shorelines, and an evaluation of the information gathered. WAC 173-26-201(3)(d). This information must be gathered *before* a SMP can be updated. *Id.*

The Department of Ecology agrees with OSF and PLF on this question: the SMA requires a baseline analysis. According to Ecology, the Cumulative Impacts Analysis is the document in which the County attempts to satisfy the baseline analysis. *See Ecology Resp. Br.* at 17-20. Futurewise and WEC do not respond to Ecology’s concession on this point. Nor do they respond to OSF’s argument on the merits, which demonstrates how the science failed to establish a sufficient baseline to establish how the SMP regulations will ensure “no net loss.” Instead, for whatever reason,

Futurewise and WEC choose to focus solely on PLF's amicus brief, repeatedly asking why PLF did not address the merits of OSF's baseline science argument. The answer is obvious: an amicus brief should address broad issues of law and policy. Here, PLF's brief discussed the history of the "no net loss" policy and explained the reasons why a baseline analysis is necessary to achieve a manageable, meaningful, and workable standard. The fact that PLF allowed the parties to argue the merits of the case does not undermine either OSF's position or PLF's policy arguments.

**C. None of the Parties Argue That The SMA Requires That An SMP Allow All Development Without Limit**

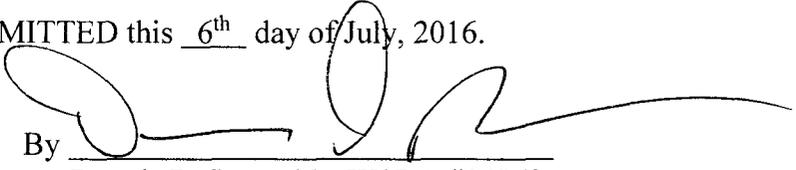
The final argument offered by Futurewise and WEC does not relate to any of the claims made in this case and should be disregarded. On page 14 of their brief, Amici broadly assert that "SMPs are not required to allow all uses on all shorelines." No party has made such an argument – which is probably why this argument section contains no citations to party briefs or the record. Indeed, careful review of the opening and reply briefs will reveal that OSF has limited its argument to development defined by the SMA as a "priority" use of the shoreline such as single-family homes (and recognized fundamental, constitutionally protected attributes of property ownership). *See, e.g.*, OSF Opening Br. at 8-10, 21-22. Amici's attempt to insert a new

argument into this appeal – or grossly distort actual arguments – should be disregarded.

### III. CONCLUSION

For the foregoing reasons, this Court should reject the arguments raised by Futurewise and WEC.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of July, 2016.

By 

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## CERTIFICATE OF SERVICE

I hereby certify that on this 6<sup>th</sup> day of July, 2016, I caused the foregoing document to be filed via Priority U.S. Mail as follows:

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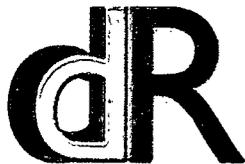
I further certify that on this date, I caused a copy of the foregoing document to be delivered to the following via e-mail and Priority U.S. mail as follows:

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Declared under penalty of perjury under the laws of the State of  
Washington at Bainbridge Island, Washington this 6<sup>th</sup> day of July, 2016.

  
\_\_\_\_\_  
Christy A. Reynolds, Legal Assistant



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July 6, 2016

By Priority U.S. Mail

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Re: *Olympic Stewardship Foundation, et al. v. Washington State Department of Ecology, et al.* (Jefferson County Superior Court, Cause No. 15-2-00084-4)  
Court of Appeals Case No. 47641-0-II

Dear Clerk:

Enclosed for filing in the above-captioned matter please find the original of **Petitioners Olympic Stewardship Foundation, et al. Answer to Amicus Curiae Brief of Futurewise and Washington Environmental Council.** Also enclosed is a face sheet to be conformed and returned in the stamped, self-addressed envelope provided. Thank you..

Sincerely,

DENNIS D. REYNOLDS LAW OFFICE

Jon Brenner  
Paralegal

cc: All Counsel (by email and mail)

DDR/jb