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IN THE SUPREME COURT
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CLARK COUNTY, WASHINGTON et al.,
Petitioners,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARING
BOARD et al.,
Respondents.

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STATE OF WASHINGTON
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**AMICUS CURIAE BRIEF ON BEHALF OF
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON**

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I. INTRODUCTION

The Court of Appeals decision in *Clark County, Washington, et al. v. Western Washington Growth Management Hearings Review Board, et al.*, includes issues of substantial public interest affecting finality and certainty in land use planning. In addition, Amicus BIAW believes the Court of Appeals decision will encourage litigation. If left to stand, the decision by the Court of Appeals will have far-reaching, detrimental effects on the housing industry.

II. ISSUE OF CONCERN TO AMICUS CURIAE

Whether the Court of Appeals had jurisdiction to consider the validity of local government planning decisions that are the subject of a pending appeal?

III. IDENTITY AND INTEREST OF AMICUS CURIAE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

The Building Industry Association of Washington (“BIAW”) represents over 8,500 member companies who employ tens of thousands of Washingtonians. BIAW is made up of 16 affiliated local associations: the Building Industry Association of Clark County, Central Washington Home Builders Association, Jefferson County Home Builders Association, Master Builders Association of King and Snohomish Counties, Home

Builders Association of Kitsap County, Lewis-Clark Building Contractors Association, Lower Columbia Contractors Association, North Central Home Builders Association, North Peninsula Building Association, Olympia Master Builders, Master Builders Association of Pierce County, San Juan Builders Association, Skagit-Island Counties Builders Association, Spokane Home Builders Association, Home Builders Association of Tri-Cities and the Building Industry Association of Whatcom County.

BIAW's members are engaged in every aspect of the residential construction industry, from the initial investment stage to the marketing and selling of homes. These are the individuals who apply for permits and pay the fees, taxes and upfront investment cost in reliance on local regulations and planning decisions. They are affected by any change in development regulations and any change in the way the Growth Management Act is implemented. Therefore, the Court of Appeals decision has a unique and direct impact on BIAW members.

IV. STATEMENT OF THE CASE

Amicus BIAW adopts and incorporates the statement of facts set forth in Petitioners' Joint Petition for Review to this Court and Petitioner Sterling Savings Bank's Supplemental Brief, pages 2 through 6.

V. ARGUMENT

The Court of Appeals decision adversely affects the housing industry and should be reversed because it is in conflict with the public policy in favor of finality and certainty in land use planning and because the Court of Appeals lacked jurisdiction to consider and rule on the validity of land use decisions during the period of time they are under review.

The Court of Appeals concluded that, in order to review the errors assigned by the parties, it had to address “the timing and effective date of the UGA boundary amendments, the effect of County and Growth Board actions on issues pending review before [the Court of Appeals], and the proper standard for dedesignating ALLTCS.” *Clark County v. Western Washington Growth Mgmt. Hearings Bd.*, 161 Wn. App. 204, 216, 254 P.3d 862 (2011).

The Court of Appeals then established a new land use finality rule: “[C]ounty GMA planning decisions are not final when they have been appealed and have an unresolved legal status. *Id* at 249.

This decision is new law in Washington State. Landowners and the industry serving them can no longer rely on the planning decisions by local governments.

Petitioners have thoroughly briefed the Court on the jurisdictional issues. Amicus BIAW will focus on the importance of finality to the homebuilding industry and the practical effect of the Court of Appeals decision on our state's economy, which is largely driven by the health of the housing sector.

A. The Court of Appeals decision is not consistent with public policy in favor of finality in land use planning and will have a detrimental effect on builders and developers.

This Court has repeatedly emphasized the strong public policy supporting finality in a variety of land use decisions. Finality and certainty are the foundation for land use planning. Without a clear set of rules to rely on, the average builder or developer cannot and will not proceed with spending the resources necessary for property development. The Court of Appeals ruling that County legislative actions are not final until appeals are finished is inconsistent with prior decisions of this Court.

1. Repeated decisions of this court have emphasized finality and certainty as a critical foundation to the land use system.

The public policy favoring finality and certainty has been addressed by this Court in a variety of land use contexts, from vesting to time limitations under the Land Use Petition Act.

In *West Main Associates v. City of Bellevue*, 106 Wash.2d 47 (1986), this Court considered the application of the vested rights doctrine

to a city ordinance. The Court in *West Main* reasoned that “society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.” *West Main*, 106 Wash.2d at 53. In *West Main*, this Court concluded that the city “misused its power by denying developers the ability to determine the ordinances that will control their land use.” *Id.*

The danger presented by the Court of Appeals decision in this case is that land use decisions will be tied up for years in court, leaving no rule in place on which a landowner or developer can rely. This Court considered this danger as early as 50 years ago.

“An owner of property has a vested right to put it to a permissible use as provided for by prevailing zoning ordinances. The right accrues at the time an application for a building permit is made. The moves and countermoves of the parties hereto by way of passing ordinance and bringing actions for injunctions, should had did avail the parties nothing. A zoning ordinance is not retroactive so as to affect rights that have already vested.”

State ex rel. Ogden v. City of Bellevue, 45 Wash. 2d 492, 496, 275 P.2d 899, 902 (1954) citing to *State ex rel. Hardy v. Superior Court for King County*, 155 Wash.2d 244, 284 P. 93 (1930). See also *Eastlake Cmty. Council v. Roanoke Associates, Inc.*, 82 Wash. 2d 475, 484, 513 P.2d 36, 42 (1973) (“In the pursuit of certainty in the date of vesting of rights. . .”).

In *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1 (1992), this Court considered a takings challenge by a developer that arose from a city low-income housing ordinance. The benefits of administrative finality to both the land owner and the government were once again pointed out: “[i]ncreasingly, this court is called upon to resolve disputes concerning land use regulation, and the trend is likely to continue,” then explaining its objective in resolving these disputes: “[a] body of cogent, workable rules upon which regulators and landowners alike can rely is essential to the task.” *Sintra*, 119 Wash.2d at 5.

Finally, in a case involving adherence to strict time limits for appeal under our state’s Land Use Petition Act, this Court re-iterated the same public policy goal: explaining that it has long “recognized strong public policy supporting administrative finality in land use decisions.” *Chelan County v. Nykreim*, 146 Wash.2d at 904, 931 (2002) (citing *Skamania County*, 144 Wash.2d at 49 and *Wenatchee Sportsmen Association v. Chelan County*, 141 Wash.2d 169, (2000).

Amicus BIAW believes the Court of Appeals is inconsistent with the foregoing reasoning, which has served to be a deciding factor in numerous land use decisions by this Court.

2. Finality and certainty must exist for the building industry to function.

This Court once again recently and clearly articulated the practical effect of finality to the building industry. The case involved Thurston County's compliance with the GMA; at issue was whether "failure to revise" challenges should be limited to those aspects of a comprehensive plan directly affected by new or substantively amended GMA provisions. Unanimously ruling to limit these challenges, this Court emphasized the public policy of preserving finality: "Finality is important because '[i]f there were not finality, **no owner of land would ever be safe in proceeding with development of his property**'." *Thurston County v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wash. 2d 329, 345, 190 P.3d 38, 45 (2008) (quoting *Deschenes v. King County*, 83 Wash.2d 714, 717, 521 P.2d 1181 (1974), *overruled in part by Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wash.2d 840, 991 P.2d 1161 (2000).) (emphasis added).

This statement sums up *Amicus* BLAW's concern with the Court of Appeals decision. If the housing industry cannot rely on the finality of legislative decisions by a local government, no property owner or developer will be safe in proceeding.

From the building industry's perspective, it is critical to point out that the land development process – from feasibility studies to being "shovel-ready" – is a long and expensive one. The law in Washington

state for subdividing property for development, allows for years to go by between preliminary plat application and final plat application, for example. Each application made to a city or county represents an extraordinary cost to the developer or builder. Even relatively simple projects range in the thousands of dollars for “paperwork” fees.¹

Battles over growth management can easily be tied up in litigation for a decade. *Amicus* BIAW and a BIAW member were Petitioners in another recent GMA case². In that case, the original appeal was filed immediately after the County passed its comprehensive plan update ordinance in December 2006. The Supreme Court issued its decision in July 2011. This case took years to resolve, despite the fact that motions for discretionary review was granted by the Court of Appeals, and the Court of Appeals then consolidated the two cases into one and certified it for review by the Supreme Court. This case took the most direct route possible to the Supreme Court, and it was still unresolved for nearly five years.

¹ Using Thurston County as an example, the “base fee” for site plan review is over \$2,000. This does not include Critical Areas Review, Design Review, Environmental Assessment, Environmental (SEPA) Checklist, Hearing Examiner Review (required for many large projects), or administrative “conference fees” – *each* of these additional items also runs in the thousands of dollars.

² *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wash.2d 144, 256 P.3d 1193 (2011).

If land use decisions are left up in the air for years and years during appeals, developers simply will not assume the risk – either by choice or because they will not be able to find a lender willing to assume the risk. For the housing sector to function, it must have finality and certainty.

B. The Court of Appeals decision has the potential to encourage litigation.

The Karpinski parties and GM Camas, LLC settled part of their dispute by entering into a Stipulated Order concerning the de-designation of the Camas property. Despite this Order being entered, the Court of Appeals considered and ruled on this property. If left to stand, *Amicus* BIAW believes this sua sponte action by the Court of Appeals will serve to chill future efforts to settle land use matters. This is especially concerning given the complicated nature of GMA cases. Rarely do parties to these difficult cases find common ground and resolve issues voluntarily. *Amicus* BIAW believes this reality will become even more pronounced if the Court of Appeals can later pick up an issue that the parties have spent tens of thousands of dollars in attorneys' fees to resolve. As both a public policy and practical matter, BIAW encourages the Court to consider the potential effect of the Court of Appeals decision on a party's willingness to sit down at the negotiation table and reach a voluntary settlement.

VI. CONCLUSION

Repeatedly, this Court has concluded that it is critical to the land use system to provide certainty, predictability and finality to both the land owners and the government. In this case, the Court of Appeals holding that a County's comprehensive plan change is not final until appeals are finished is in direct conflict with this public policy and its review of Clark County's planning decisions. If left to stand, this decision will have broad, detrimental effect on the residential housing industry in Washington state. *Amicus* BIAW therefore requests this Court reverse the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 14th day of May, 2012.

By 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies a true and complete copy of the foregoing **Motion for Leave to File Amicus Brief and Amicus Brief on Behalf of Building Industry Association of Washington**, was electronically filed with the Washington Supreme Court and was caused to be served by email and first class U.S. Mail on May 14, 2012, on counsel of record at the addresses shown below.

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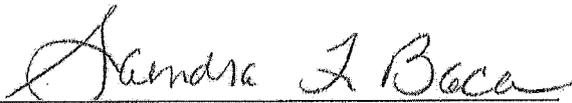
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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 14th day of May, 2012, in Shelton, Washington.



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Please find attached in one PDF file:

Motion to File Amicus Curiae Brief of the Building Industry Association of Washington in Supreme Court Case No. 85989-2 and *Amicus Curiae* Brief of the Building Industry Association of Washington.

We are also mailing paper copies to the attorneys for the parties.

Thank you,

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