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NO. 90398-1

(Court of Appeals No. 71363-9-1)

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SUPREME COURT OF THE STATE OF WASHINGTON

SAVE OUR SCENIC AREA and
FRIENDS OF THE COLUMBIA GORGE,

Respondents,

v.

SKAMANIA COUNTY,

Petitioner.

WASHINGTON STATE ASSOCIATION OF COUNTIES
AMICUS CURIAE BRIEF
IN SUPPORT OF SKAMANIA COUNTY

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GLOSSARY

FOCG	Friends of the Columbia Gorge, Inc. and Save Our Scenic Area
GMA	Growth Management Act, Ch. 36.70A RCW
County	Skamania County
Counties	Washington's 39 counties, including Skamania County
Planning Enabling Act	Planning Enabling Act, Ch. 36.70 RCW
WSAC	Washington State Association of Counties

1. INTRODUCTION

Washington's Counties require finality when making land use decisions. When a comprehensive plan is adopted, it is widely understood by local jurisdictions, the Legislature, and judiciary that it must be appealed within 60 days. There is no endless "open season" on a comprehensive plan if a petitioner alleges there is an inconsistency between the plan and regulations. Yet, under the Court of Appeals decision, an alleged inconsistency creates a "failure to act" which can result in years of litigation exposure. Over 30 years of judicial precedent says otherwise. WSAC joins Skamania County in requesting that this Court affirm the Superior Court's dismissal of FOCG's appeal as time barred.

2. IDENTITY AND INTEREST OF AMICUS

WSAC is a non-profit association whose membership includes elected county commissioners, council members and executives from all of Washington's 39 counties. WSAC provides a variety of services to its member counties including advocacy, training and workshops, and a forum in which to network and share best practices. Voting within WSAC is limited to county commissioners, council members and executives; however WSAC also serves as an umbrella organization for affiliate organizations representing county road engineers, local public health officials, county administrators, emergency managers, county human service administrators, clerks of county boards, and others. WSAC is

represented in this matter by Josh Weiss, General Counsel for WSAC. Skamania County is a member of WSAC.

3. STATEMENT OF THE CASE

WSAC adopts Skamania County's Statement of the Case, but writes to emphasize two points. First, during FOCG's five year delay in appealing, Skamania County adopted implementing legislation, including zoning regulations and map amendments. For all Counties, considerable legislative activity can occur over a five year period, in reliance on an earlier plan. Appeals should be promptly resolved to reduce uncertainty as to the relevant planning and regulatory structure. Local jurisdictions should not have to wait five years to know if a specific legislative decision will end up in court. Second, local resources are finite both within Skamania County, and generally. Conserving those resources by respecting finality supports local land use planning within all the Counties.

3.1. The County Adopted Development Controls After Adopting the 2007 Plan. FOCG Did Not Appeal.

After Skamania County adopted its 2007 Comprehensive Plan, it subsequently adopted implementing legislation, including over 31 pages of new zoning text, plan revisions, subarea plans, and over 42,663 acres of zoning map amendments.¹ FOCG did not appeal these decisions. Instead, FOCG used an appeal of a single moratorium ordinance to reach back in time and challenge the 2007 Plan as being inconsistent with the current zoning structure. FOCG alleged:

¹ CP 60-65, 30 pages of adopted zoning code referenced at CP 63; CP 21, ¶¶ 2-3.

The “allowable uses” listed for the “Unmapped” lands in SCC § 21.64.020 are inconsistent with the Conservancy designation of the Comprehensive Plan and violate the consistency requirement of RCW 36.70.545....

[County] development regulations ... are inconsistent with the Conservancy designation of the Comprehensive Plan and that violate[s] the consistency requirement of RCW 36.70.545.²

This is a consistency challenge. When a challenge is raised that the plan and zoning are inconsistent, the ordinance creating the inconsistency must be timely appealed.

In the fact section of its supplemental briefing, and for the first time in this litigation, FOCG references RCW 36.70.780.³ This provision does not require zoning controls. It simply provides for adopting certain protective measures when lands are unzoned.⁴ The lands within the County designated "Unmapped" do have both a Plan and zoning designation. But, even assuming the statute applies, the County has these protections. These controls are set forth in the County zoning ordinance. The specific requirements include minimum lot sizes of ten acres, minimum lot depths, and compliance with County platting requirements.⁵ Even if FOCG had earlier raised this issue, there is no compliance concern. And, as with the consistency claim, FOCG did not timely appeal these requirements.

² CP 14-15, ¶¶ 7.5 and 7.6; *see also* Respondents' Supplemental Brief, FN 3.

³ Respondents' Supplemental Brief, pg. 5.

⁴ RCW 36.70.780.

⁵ AR 84 (the reference to Ordinance No. 1981-03 is the County's subdivision ordinance).

3.2. Municipal Resources are Finite: If Not Conserved, the Ability to Engage in Planning Will Be Eroded.

Local jurisdictions do not have open-ended resources to address the degree of litigation exposure the Court of Appeals decision would invite. For Skamania, the record thoroughly documents the strained local resources and lack of grants for further work.

The County government moved to four ten hour shifts instead of a five-day week in order to cut overhead costs in 2011. In 2011, the Community Development Department Division was faced with cutting half of its staff for 2012, and the Board of County Commissioners is looking at further reductions next year (2013).

Skamania County does not have any regular GMA grants to fund its planning work.⁶

This is a valid concern for the Counties.⁷ Skamania County's briefing further details high unemployment levels; socio-economic challenges, including domestic violence and high subsidized school lunch rates; and continued tax base erosion.⁸

Like the Counties, Skamania County has attempted to improve this economic trajectory, but has been stymied by litigation. For example, the one bright spot for the County was a "150 million dollar capital

⁶ CP 393; *see also* CP 87-92, 326-27 (County work plan and project lists).

⁷ Respondents' Supplemental Brief, pgs. 19-20.

⁸ Supplemental Brief of Petitioner Skamania County, § 3.1; Response Brief of Skamania County, § 2.1. At Plan adoption, half the County budget depended on the Federal Secure and Rural School and Community Self-Determination Act. CP 208. (The Act was originally intended as a temporary measure to address revenue losses associated with forest industry decline with the spotted owl listing and critical habitat designations.)

investment in locally produced renewable energy which could almost double the tax base."⁹ But, with four appeals challenging the project, despite a unanimous Supreme Court decision upholding the project, that bright spot has dimmed considerably.¹⁰ This illustrates that even when a land use appeal is successfully defended, litigation costs, both direct and indirect, are high.

If finality is not respected with respect to land use legislation, it will cause local jurisdictions to ask whether the litigation exposure is worth it. This is one reason why the Legislature and courts have embraced finality, in addition to providing certainty for citizens as to relevant appeal periods and certainty for property owners and the general public as to the relevant planning and regulatory structure.

WSAC recognizes that land use decisions may be appealed. However, this Court should hold, as the Superior Court properly determined, that appeals of land use decisions five years after the fact, are time barred.

⁹ Response Brief of Skamania County, pg. 12, citing to CP 394.

¹⁰ Response Brief of Skamania County, pg. 12, citing to CP 394; *Friends of the Columbia Gorge, Inc. v. EFSEC*, 178 Wn.2d 320, 310 P.3d 780 (2013).

4. ARGUMENT

4.1. To Challenge Plan and Zoning Consistency, an Appellant Must Timely Appeal the Ordinance Creating the Inconsistency.

4.1.1. Upon Adoption, a Comprehensive Plan is Final and Appealable.

A comprehensive plan, whether adopted under GMA or the Planning Enabling Act, is final and appealable upon adoption. If a plan is to be challenged, it must be timely appealed. If a party wishes to raise allegations that a comprehensive plan is inconsistent with the local regulatory structure, it may not lay in wait; it must timely appeal. This is well established.¹¹

FOCG has alleged only that the County Comprehensive Plan and zoning are inconsistent under RCW 36.70.545. To the degree there could be any inconsistency, the Plan created it, and FOCG had a duty to immediately appeal, a duty FOCG was aware of, as it did file an initial appeal.¹² However, it failed to prosecute that appeal, did not contest the

¹¹ *Thurston County v. Western Washington Growth Mgmt. Hrgs. Board*, 164 Wn.2d 329, 344-45, 190 P.3d 38 (2008) (absent new GMA legislation, periodic review requirements do not open up previously adopted legislative decisions to appeal); *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007) (appeal of site specific land use decision could not be used as a “back door” to raise GMA compliance issues); *Montlake Community Club v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 110 Wn. App. 731, 43 P.3d 57 (2002) (where challenged provisions of subarea plan did not amend previously adopted comprehensive plan, no new appeal period was triggered); *Concerned Organized Women and People Opposed to Offensive Proposals, Inc. v. The City of Arlington*, 69 Wn. App. 209, 847 P.2d 963 (1993) (analogous appeal period imported and comprehensive plan appeal, along with other claims, dismissed as time barred); see also Supplemental Brief of Skamania County, § 4.1.

¹² CP 372-77 (Save Our Scenic Area's 2008 complaint). Plan and zoning inconsistency claim at CP 374-6, § B.

2012 dismissal,¹³ but instead filed a second, new appeal, raising the same issues it raised five years earlier.¹⁴

With such an approach, after a plan is adopted, a litigant may lay in wait for years, bypass multiple opportunities to appeal ordinances implementing that initial legislative action, and then years later appeal, if the appellant can allege there is an inconsistency between the plan and regulations. This introduces enormous uncertainty into whether the plan and subsequent legislation are valid and enforceable, and is directly contrary to established appellate precedent.¹⁵

**4.1.2. Challenges Alleging Plan and Zoning
Inconsistency Must Be of the Ordinance
Creating the Inconsistency.**

This case arises under the Planning Enabling Act. This statute, like GMA, does not create an “ongoing”¹⁶ and unspecified appeal period for raising inconsistency claims. The only citation FOCG has relied upon, RCW 36.70.545, requires plans and regulations to be consistent. Such consistency requirements have uniformly been interpreted to require immediate appeal of claims that a plan and zoning are inconsistent.¹⁷ It may be that a jurisdiction will continually amend its zoning code, and over

¹³ CP 381 (“No party has taken action of record in this case or filed a status report pursuant to the Clerk’s Notice of Dismissal for Want of Prosecution.”), without emphasis.

¹⁴ CP 1-19. Plan and zoning consistency claim at CP 13-15, § C.

¹⁵ See FN 11 above. This Court has recently emphasized the importance of “certainty, predictability, and finality for land owners and the government,” with respect to the finality of land use decisions. *Durland v. San Juan County*, ___ Wn. 2d ___ (December 11, 2014) (despite lack of notice, untimely appeal of building permit was time barred).

¹⁶ Respondents’ Supplemental Brief, pg. 15.

¹⁷ See FN 11 above.

a period of years, that jurisdiction may address many, but not necessarily all, of a litigant's concerns, as occurred here. But, the fact that a jurisdiction is engaging in ongoing plan implementation, including rezone and zoning control revisions, does not alleviate the litigant's duty to timely appeal. That litigant may file a timely appeal of any one of those zoning decisions, as well as the original comprehensive plan, but that is not what happened in this case.

FOCG appealed a moratorium ordinance to raise the consistency arguments, under the theory that if there is an inconsistency between a comprehensive plan and development regulation, that inconsistency may be appealed at any time. That theory is not consistent with appellate precedent.¹⁸ In fact, FOCG's position dispenses with any time limit whatsoever so long as a party can identify some County inaction that it alleges is inconsistent with the comprehensive plan.

The Planning Enabling Act does not require the County to adopt additional zoning controls. This statute differs from GMA in a key respect, and that is its fundamentally voluntary nature. Unlike GMA, under the Planning Enabling Act, there is no requirement to adopt a comprehensive plan, unless a local jurisdiction voluntarily elects to create a planning agency.¹⁹ However, the comprehensive plan need not apply to the entire county, and while a county “may” consider and adopt zoning controls, the statute does not mandate it.

¹⁸ See FN 11 and 15 above.

¹⁹ RCW 36.70.320 (planning agency to prepare plan for county, or portion of county).

RCW 36.70.550 provides that the commission **may** prepare official controls which further the plan's objectives and goals and **may** also draft regulations to preserve the plan's integrity.²⁰

In stark contrast, under GMA, this duty is clear. Regulations are to be adopted by specific deadlines.²¹ For partially planning counties, GMA requires jurisdictions to designate natural resource lands and adopt critical area regulations by certain deadlines.²² Had the Legislature intended to require partially planning counties which have an adopted comprehensive plan to also adopt zoning controls outside of those related to natural resource lands and critical areas, by a date certain, it knew how to do so. Had it wished to alter the voluntary Planning Enabling Act structure adopted decades before GMA's enactment for the ten counties which partially plan under GMA, it could have done so. It did not.

The Court of Appeals did what GMA does not do. It imported into the Planning Enabling Act requirements which do not exist. Melding the requirements of the Planning Enabling Act with GMA penalizes those smaller counties that, as the Legislature intended, are not required to adopt additional zoning controls, either because they cannot afford to or do not

²⁰ *Barrie v. Kitsap County*, 93 Wn.2d 843, 848, 613 P.2d 1148 (1980), emphasis added; *Leavitt v. Jefferson County*, 74 Wn. App. 668, 684, 875 P.2d 681 (1994) (Ch. 36.70 RCW did not require zoning map); RCW 36.70.550, .620 (Official controls "may" be recommended and "may" be approved); RCW 36.70.020(11) ("[O]fficial controls **may** include ... ordinances establishing zoning, subdivision control, platting, and adoption of detailed maps."), emphasis added.

²¹ See RCW 36.70A.040(3) (each county "**shall adopt** a comprehensive plan ... and **development regulations that are consistent with and implement** the comprehensive plan **on or before July 1, 1994...**"), emphasis added.

²² RCW 36.70A.170 ("**On or before September 1, 1991**, each county, and each city, **shall designate...**"), emphasis added.

need to undertake the rigorous planning GMA requires.²³ The Legislature has stood by its central decision that not all counties are subject to GMA's more extensive requirements. Not only has this exemption remained in place since GMA's adoption; in 2014, the Legislature expanded the exemption.²⁴

FOCG has not identified any provision requiring the County to adopt additional zoning controls, instead relying entirely on the Planning Enabling Act's consistency requirement. But, even if there were such a requirement, the County's 2007 Comprehensive Plan **specifically provides for the Unmapped zoning designation.**²⁵

Although the Plan specifically authorizes the Unmapped designation, FOCG preferred that the Plan not be implemented with that designation. The County responded to those concerns. Following Plan adoption, the County rezoned 75% of this acreage.²⁶ Not satisfied with the extent of the rezone effort, FOCG appealed, alleging an inconsistency between the Plan and zoning controls. But, instead of appealing either the Plan or zoning controls, FOCG appealed a moratorium ordinance. A moratorium ordinance cannot be used to reach back in time to challenge another decision made years ago, as FOCG has attempted to do. The Plan

²³ See e.g., *Moore v. Whitman County*, 143 Wn.2d 96, 98-99, 18 P.3d 566 (2001) (Due to its small population, "[t]he GMA does not require Whitman County to adopt a comprehensive land use plan or development regulations that are consistent with and implement the comprehensive plan...").

²⁴ Chapter 147, Laws of 2014, referred to as EHB 1224. The legislation amended RCW 36.70A.040, .060, and .280.

²⁵ CP 210-11, attached at Tab 4 to Supplemental Brief of Petitioner Skamania County.

²⁶ CP 21-22; see also Supplemental Brief of Petitioner Skamania County, § 3.2.

is final and specifically provides for the Unmapped zoning designation. There is no Planning Enabling Act provision which can “trump” the Plan’s finality. Thus, five years after the Plan’s adoption, FOCG’s claim is time barred.

4.2. Moratorium Ordinances Do Not Suspend Appeal Periods.

Every land use decision, whether quasi-judicial or legislative, has its own appeal period. Appellate precedent established for the past several decades²⁷ is directly contrary to FOCG’s basic premise that:

[T]he County’s moratorium ordinances were part of the County’s framework of development regulations that must be considered in evaluating consistency with the Comprehensive Plan.²⁸

This is not how the finality of land use decisions is dealt with in Washington. Once an ordinance is adopted, the appeal period begins to run. There is no individualized factual assessment on whether some other ordinances might have cured alleged defects and thus suspended the appeal period. The actual decision being challenged must be timely appealed. Subjecting basic legislative decisions to appeals over a period of years breeds enormous uncertainty as to the validity of these decisions. This in turn impacts investment decisions by property owners and causes uncertainty for the counties’ citizens, who would otherwise rely on the finality of these decisions. And, if the underlying decision is subject to

²⁷ See FN’s 11 and 15 above.

²⁸ Respondents’ Supplemental Brief, pg. 17.

appeal years after the fact, future litigation has the potential to impact years of legislative decisions made while appellants waited to appeal.

Of course, moratoria are not even development regulations. They are procedural measures designed to prevent application processing. This Court has so held generally, and with respect to Skamania County, specifically.²⁹ But, regardless of how they are characterized, there is no statute or appellate decision supporting the notion that an ordinance can suspend an appeal period on a decision enacted five years earlier.

4.3. A 2005 Periodic Review Deadline is Not Triggered if No Reviewable Action was Taken Until 2005.

GMA's periodic review provisions require local jurisdictions to review past decisions after the passage of eight years, and enact GMA revisions, "if needed."³⁰ When a local jurisdiction takes an action to comply with a GMA requirement the exact same year its periodic review requirement is due, there is no passage of time warranting imposition of the periodic review requirement.

²⁹ *Friends of the Columbia Gorge, Inc. v. EFSEC*, 178 Wn.2d 320, 330, 345-46, 310 P.3d 780 (2013); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 709, 169 P.3d 14 (2007) (moratoria do not amend established regulations). Skamania County's Supplemental Brief, § 4.2, including FN 38, addressed the dissenting legal analysis in *Biggers*, with which a majority largely concurred.

³⁰ RCW 36.70A.130(5) and (5) (c). The "look-back" period has not always been eight years, but has varied from seven-ten, in various iterations of RCW 36.70A.130.

FOCG conceded the County designated its natural resource lands in 2005,³¹ but raised a new issue on appeal, asserting the County needed to have also complied with GMA's periodic review requirement.³² However, GMA's periodic review deadline occurred the same year the County acted.³³ FOCG has referred to the deadline as being 2008.³⁴ This was an extension of the 2005 deadline the Legislature provided **after** the County designated its resource lands.³⁵ At the time the County designated its GMA resource lands in 2005, the periodic review deadline was also 2005.³⁶ Thus, it did not apply. Should the Court address the newly raised issue, it should clarify that when a periodic review deadline occurs simultaneously with a GMA action, a redundant review is not required.

5. CONCLUSION

FOCG seeks relief in a situation where the Legislature has declined to provide it. The Planning Enabling Act affords considerable discretion to counties which voluntarily update comprehensive plans originally adopted decades ago. While such plans may be timely appealed, neither the Legislature nor the judiciary has sanctioned taking five years to challenge such an update, particularly when an appeal raising the same issues was previously filed and dismissed.

³¹ See *e.g.*, Respondents' Supplemental Brief, pg. 11 ("Resolution 2005-35 was the County's initial designation of resource lands....").

³² Supplemental Brief of Skamania County, § 4.3.

³³ RCW 36.70A.130(4)(b).

³⁴ See *e.g.*, Brief of Appellants, pgs. i and 12-15.

³⁵ Laws of 2006, ch. 285, § 2, codified at RCW 36.70A.130(6)(b).

³⁶ RCW 36.70A.130(4)(b).

This Court should hold that the deadlines for appealing land use legislation may not be artificially extended and hold that FOCG's appeal is time barred.

RESPECTFULLY SUBMITTED this 2nd day of January, 2015.

WASHINGTON STATE
ASSOCIATION OF COUNTIES



Josh Weiss, WSBA #27647

CERTIFICATE OF SERVICE

I certify that on January 2, 2015, I served the foregoing AMICUS CURIAE BRIEF on the parties listed below by email and first class U.S. mail, postage prepaid.

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

Signed this 2nd day of January, 2015 at Kirkland, Washington.



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Attached please find Washington State Association of Counties' Amicus Curiae Brief and Motion, in support of Skamania County.

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

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