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BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD

CITIZENS PROTECTING CRITICAL AREAS, FRED)
HILL MATERIALS, INC., AND OLYMPIC)
STEWARDSHIP FOUNDATION, et al.,)
Petitioners,)
v.)
JEFFERSON COUNTY,)
Respondent.)

No. 08-2-0029c

**PETITIONER OLYMPIC
STEWARDSHIP FOUNDATION'S
OBJECTION TO *AMICUS*
MOTION AND NOTICE OF
INTENT TO PARTICIPATE**

Olympic Stewardship Foundation Petitioners (OSF) respectfully object to Futurewise's last minute notice of intent to participate and amicus on behalf of Amici Port Gamble S'Klallam Tribe, Jamestown S'Klallam Tribe, and Futurewise (Collectively "Futurewise") in support of Jefferson County's Statement of Actions Taken. On July 1, 2009, eight months after this Board issued the briefing and hearing schedule, Futurewise sent the parties an e-mail containing a last minute motion for leave to participate as an amicus at the compliance hearing. This motion—filed 10 judicial days before the scheduled hearing—fails to provide the parties and the Board with sufficient notice or justification to participate in the compliance hearing and should be denied.

1 ARGUMENT

2 I

3 THE AMICUS MOTION IS UNTIMELY

4 A. The Motion for Leave To File an Amicus Brief in Support
5 of Jefferson County's Statement of Actions Taken Is a Month Late

6 Futurewise's motion seeks leave to participate as an amicus in support of Jefferson
7 County's Statement of Actions Taken. Motion at 1-2. According to the Board's rules, Futurewise
8 was required to file its motion and proposed brief "no later than the time set for filing of the brief
9 for the party whose position the amicus supports." WAC 242-02-280(2)(d); *Camano Action For*
10 *A Rural Environment v. Island County*, WWGMHB No. 08-2-0026c at 5 (Final Decision and
11 Order, Nov. 17, 2008) (motion for leave to file amicus brief late when filed 1 day after deadline
12 for prehearing brief). This deadline passed over a month ago, on June 1, 2009. *See* November 19,
13 2008, Final Decision and Order (FDO) at 50 (briefing schedule for compliance hearing).
14 Futurewise missed the deadline for bringing its amicus motion and its request should be denied.

15 B. An Untimely Amicus Brief Would Require New Briefing
16 Schedule and Delay Compliance Hearing

17 The rule requiring an amicus to file its proposed brief no later than the deadline for the brief
18 that the amicus supports is intended to provide the opposing party with due notice and a meaningful
19 opportunity to respond to the amicus' arguments. *See Petree v. Whatcom County*, WWGMHB No.
20 08-2-0021c at (Final Decision and Order, Oct. 13, 2008) (filing amicus brief at same time as a
21 party's primary brief is not prejudicial because it provides the opposing party with sufficient time
22 to draft a reply). Here, despite having received notice of the briefing schedule 8 months ago,
23 Futurewise delayed bringing its motion until *10 court days* before the scheduled hearing. Granting
24 its motion in this circumstance would require the Board to cancel and reschedule the July 15, 2009,
25 compliance hearing and issue a new briefing schedule. Such extraordinary actions are not justified
where Futurewise failed to act in a timely manner and failed to adequately support its motion.

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II

**FUTUREWISE FAILS TO IDENTIFY ISSUES
WARRANTING LAST MINUTE AMICUS PARTICIPATION**

A. Adopting Another Party's Position Does Not Warrant Amicus Participation

Futurewise's motion primarily seeks leave to provide oral argument "join[ing] in the arguments in Jefferson County's Statement of Actions Taken." Futurewise Motion at 1-2. This is an insufficient basis for granting amicus participation:

The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigants' brief. Such amicus briefs should not be allowed. They are an abuse. The term "amicus curiae" means friend of the court, not friend of a party.

Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997).¹ Amicus participation should only be allowed where "the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be declined." *Ryan*, 125 F.3d at 1063. Futurewise's request to "join" in the County's arguments should be denied.

B. Amicus Motion Fails To Identify Specific Issues To Be Addressed

If this Board denies its request for oral argument, Futurewise alternatively requests leave to file an amicus brief. However, an amicus motion will only be granted where the party identifies the "[s]pecific issues to which the amicus curiae brief will be directed" such that the Board and parties can evaluate whether the proposed amicus involvement offers any unique insight into the issues that will assist the Board. WAC 242-02-280(2)(c). Futurewise has failed to satisfy the requirement of specificity; instead, proposing the following:

¹ The compliance hearing schedule already provides Jefferson County with 45 minutes of argument to present its case as opposed to OSF's 30 minutes for argument. If this Board considers Futurewise's motion, it should either divide the County's time between the County and amici or provide OSF with additional time to respond.

1 The [Tribes] and Futurewise will address Jefferson County's compliance with the
2 Growth Management Act based on the unique interests and expertise of the tribes
3 and Futurewise's familiarity with the Supreme Court's [*Futurewise v. Western
Washington Growth Management Hearings Board*, 164 Wn.2d 242 (2008)]
4 decision as one of the parties to that case.

4 Futurewise Motion at 3.

5 Futurewise's motion identifies two impermissibly generalized topics for amicus
6 participation. First, Futurewise proposes to address the County's "compliance with the Growth
7 Management Act." Futurewise Motion at 3. This is perhaps the broadest possible issue statement
8 that could be asserted in a GMA challenge and does not put the Board or parties on notice of any
9 specific issue. With 10 court days until the scheduled hearing and no proposed amicus brief,
10 Futurewise's request to brief "compliance with the GMA" is wholly inadequate and should be
11 denied.

12 Second, Futurewise proposes to provide additional argument on the Supreme Court's
13 decision in *Futurewise v. Western Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242
14 (2008). Futurewise Motion at 3. But additional argument on this case is irrelevant to the
15 compliance hearing. In its Final Decision and Order, this Board determined the effect of
16 *Futurewise* on Jefferson County's CAO, concluding that "[t]hose portions of the CMZ which are
17 located within the 200-foot shoreline jurisdiction are regulated by the [Shoreline Management Act
18 (SMA)]." FDO at 49 (Conclusion of Law H). This conclusion of law has not been challenged.²

19 Indeed, Jefferson County acknowledged the Growth Board's conclusion in the preamble
20 to its remand ordinance. (Ord. 06-0511-09 at 1 ("Critical areas in the jurisdiction of the SMA are
21 governed only by the SMA.")), and stated that it was the County's intent only to regulate those
22 areas of channel migration zones that fall outside the jurisdiction of the SMA. Ord. 06-0511-09
23 at 1-2 (citing ESHB 1933, Laws of 2003, ch. 321 § 1; *Futurewise*, 164 Wn.2d 242). The only live

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25 ² Any additional argument on the impact of *Futurewise* would constitute an improper motion for
reconsideration – which is beyond the role of an amicus and for which the deadline passed last
November. WAC 242-02-832.

1 issue relating to *Futurewise* is whether the Ordinance’s preamble conflicts with regulatory language
2 that applies critical area restrictions to areas within the exclusive jurisdiction of the SMA.
3 Because *Futurewise* failed to identify a “specific issue” regarding the *Futurewise* decision that is
4 subject to the compliance hearing, its motion should be denied.

5 **III**

6 **THE TRIBES FAILED TO ADHERE TO THE**
7 **BRIEFING SCHEDULE AND CANNOT**
8 **PARTICIPATE AT ORAL ARGUMENT**

9 *Futurewise* alternatively submits a notice of intent to participate to “join in the arguments
10 in Jefferson County’s Statement of Actions Taken” on behalf of the amici tribes.³ *Futurewise*
11 Motion at 1-2. Persons that participated in the proceedings to enact legislation in response to the
12 Board’s order may participate in the compliance hearing if they (1) abide by the briefing schedule
13 set in the Final Decision and Order *and* (2) provide timely notice of intent to participate. WAC
14 242-02-89201. Here, the tribes failed to adhere to the briefing schedule; they should not be granted
15 leave to participate in oral argument.

16 **HEARING ON THE MOTION**

17 Because this motion may require re-scheduling of the hearing and issuance of a new
18 briefing schedule, the matter should be decided with oral argument, which will likely take 30
19 minutes and can be conducted via telephone.

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25 ³ *Futurewise* admits that it did not participate in the remand proceedings – *Futurewise* cannot
participate under WAC 242-02-89201.

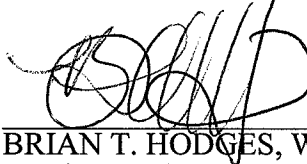
1 **CONCLUSION**

2 For these reasons, Petitioner OSF respectfully requests that this Board deny Futurewise's
3 motion for leave to participate as an amicus at the compliance hearing and alternative motion to
4 file an amicus brief in support of the County's Statement of Actions Taken.

5 DATED: July 2, 2009.

6 Respectfully submitted,

7 BRIAN T. HODGES

8 

9
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16
17 Attorney for Olympic Stewardship Foundation
18 and Individual OSF Petitioners
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1 **DECLARATION OF SERVICE**

2 BRIAN T. HODGES declares as follows:

3 I am a resident of the State of Washington, employed at 10940 NE 33rd Place, Suite 210,
4 Bellevue, Washington 98004. I am over the age of 18 years and am not a party to this action.

5 On the below date, true copies of Petitioner Olympic Stewardship Foundation's Objection
6 to Amicus Motion and Notice of Intent to Participate were served to the following parties as
7 indicated:

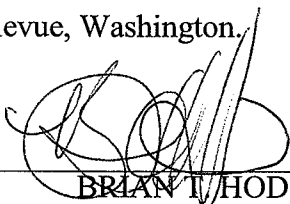
8 Mark R. Johnsen
9 Karr Tuttle Campbell
10 1201 Third Avenue, Suite 2900
11 Seattle, WA 98101-3028
12 206-223-1313
13 *Attorney for Jefferson County*
14 *(Via E-Mail and U.S. Mail)*

15 David Alvarez
16 Jefferson County Prosecuting Attorney
17 1820 Jefferson Street
18 Port Townsend, WA 98368
19 360-385-9219
20 *Attorney for Jefferson County*
21 *(Via E-Mail and U.S. Mail)*
22 Western Washington Growth
23 Management Hearing Board
24 319 7th Avenue SE, Suite 103
25 Olympia, WA 98501
*(Via E-Mail and U.S. Mail(1 original & 4
copies))*

Robert Beattey
Tim Trohimovich
Futurewise
814 Second Avenue, Suite 500
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*Attorney for Amici Futurewise, Port Gamble
S'Klallam Tribe and Jamestown S'Klallam
Tribes*
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*Attorney for Amici Port Gamble S'Klallam
Tribe and Jamestown S'Klallam Tribes*
(Via E-Mail and U.S. Mail)

21 I declare under penalty of perjury that the foregoing is true and correct and that this declaration
22 was executed this 2nd day of July, 2009, at Bellevue, Washington.

23 
24 _____
25 BRIAN T. HODGES