

No. 84187-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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KITTITAS COUNTY and CENTRAL WASHINGTON HOME  
BUILDERS ASSOCIATION, et al.,

Petitioners,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS  
BOARD, et al.,

Respondents.

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CITY OF ROSLYN'S MOTION FOR LEAVE TO FILE AMICUS  
BRIEF IN SUPPORT OF RESPONDENTS KITTITAS COUNTY  
CONSERVATION, RIDGE AND FUTUREWISE

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I. IDENTITY OF MOVING PARTY

This motion to file an amicus brief is brought by the City of Roslyn.

II. STATEMENT OF RELIEF SOUGHT; REQUEST FOR SUMMARY DETERMINATION

Under RAP 10.6(a) and (b), the City of Roslyn seeks this Court's leave to file its "Amicus Curiae Brief of the City of Roslyn in Support of Respondents Kittitas County Conservation, Ridge and Futurewise." That brief is filed with this Motion.

III. FACTS RELEVANT TO THIS MOTION

The parties have completed briefing in this case. Oral argument is set for October 19, 2010. Undersigned counsel has contacted counsel for Respondents, and Respondents have no objection to the City of Roslyn filing an amicus brief.

IV. GROUND FOR RELIEF AND ARGUMENT

A. Identification and Interest of Amicus Curiae.

The City of Roslyn ("City" or "Roslyn") seeks to file an amicus curiae brief in support of Respondents Kittitas County Conservation, Ridge and Futurewise. Roslyn is a small city, with a population of almost 1,000, located in northern Kittitas County ("County"). The City is a former coal mining community, nearly all of which has been designated as a National Historic District. The City is incorporated as an optional code city under Title 35A RCW, and it has prepared and is implementing a

Comprehensive Plan in accordance with the provisions of the Washington State Growth Management Act, Ch. 36.70A RCW (“GMA”).

The City is concerned that if the County’s designation of three-acre rural zones and other development regulations (*e.g.*, those allowing cluster and planned unit developments) are allowed to stand, the County will be violating one of the most basic principles of the GMA: that urban growth should be confined to urban areas (cities), and that only “rural” growth should be permitted in unincorporated county areas. Further, allowing Kittitas County’s development regulations to stand would be fundamentally inconsistent with Roslyn’s own planning goals and requirements within the Urban Growth Area (“UGA”) and the City’s adopted Comprehensive Plan.

As noted by the Respondents, under Kittitas County’s zoning code, a planned unit development (“PUD”) has no maximum density. Presently, Roslyn is faced with responding to PUD applications filed with Kittitas County that, if approved, would result in the construction of 1,774 dwelling units and a population increase of over 6,200 – six times the current Roslyn population - in rural areas of the County. More specifically, the following PUD developments have been proposed and are currently being processed by the County:

1. Proposed re-zone of 520 acres outside of any UGA or Limited Area of More Intense Rural Development (“LAMIRD”). The proposal seeks to rezone land zoned Rural 3 (R-3) and Forest and Range, to a PUD zone. The proposal seeks

to construct 443 new residences in a designated rural area to serve an estimated population of 2,630. Phase 1 includes a proposed 225 lot subdivision on 120 acres.

2. Proposed rezone of 286 acres located outside of the Roslyn UGA, and between Roslyn's UGA and the recently created Ronald LAMIRD, from Rural 3 (R-3) to PUD, in order to construct 286 single and multi-family dwelling units in seven phases. Phase 1 consists of a short plat and the construction of 80 multi-family units on 18 acres.

3. Proposed rezone of 295 acres, located outside of but adjacent to the Roslyn UGA, from Rural 3 (R-3) to PUD in order to construct 509 multi-family dwelling units, 536 single family dwelling units, 96 acres of Open Space, and 30 acres of neighborhood commercial services. Phase 1 consists of a proposed short plat of 2.5 acres into 10 lots to be developed at a density of 8 dwelling units to the acre.

Each of these proposed PUD re-zones involve a proposed rezone from Rural 3 which, would permit residential development at a density of three dwelling units to the acre, to a PUD zone which would permit development at three times the underlying density of Rural 3 Each of the proposed PUDs would require the extension or provision of numerous urban services into designated rural areas, including water and sewer services. At least two of the proposed PUDs would result in the development of a new community larger than the City of Roslyn - but outside of the Roslyn City limits and the City's approved Urban Growth Area. In fact, the Draft Environmental Impact Statement ("EIS") prepared

for one of the proposed PUDs makes frequent reference throughout the document to the proposed development being comparable to “adding a new small city” in the County. (Emphasis added.) Another of the proposed PUDs also includes 30-acres of land designated for commercial development, which the applicant claims is necessary to serve the proposed development, but which is hardly rural in scale or character.

In all three instances cited, such urban developments are only possible within the rural County area because the County’s code permits rural lands, including Rural 3, to be rezoned to PUD without any maximum density or any measures to ensure that the rural character of these designated “rural” areas are protected. This underscores that the lack of any maximum density in the County’s Planned Unit Development (“PUD”) ordinance essentially takes an already dense, non-rural designation of Rural 3 and essentially allows any density. If upheld, this will force the City of Roslyn to have to somehow plan for the impact of urban growth on the City’s infrastructure, such as streets, utilities, libraries, police and fire, as well as water rights, without any ability to actually control or plan for the growth, and significantly, without the benefit of receiving the property tax, retail sales, and real estate excise tax from such development that will be necessary to pay for the services to serve the new development. The City will be adversely affected by such intense development, without any revenue or without any way to plan or

regulate that growth. Such a result would be completely contrary to the entire purpose of the GMA.

The County's refusal to abide by its obligations under the GMA has a second impact on the City of Roslyn: it negatively affects the City's ability to provide water to the City and urban growth associated with the City, while simultaneously allowing the County to avoid the most basic water planning and protection obligations which apply as a matter of law to Roslyn and other local jurisdictions. For example, RCW 36.70A.070(1), .040 and .060 require that the City and the County protect "critical areas," which include areas for the recharge of aquifers used for public water supplies. In addition, under RCW 58.17.110, before approving any new subdivision the County and City are required to determine that the subdivision applicant has provided "evidence of an adequate water supply for the intended use." Roslyn, after having conducted the requisite planning required under the GMA, operates a Class A municipal water system that is subject to curtailment of its water supply due to limited water resources available in the Yakima River basin.<sup>1</sup> Kittitas County, however, apparently intends to try to approve the large, new urban-scale developments without any proof of water

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<sup>1</sup> As used here, "curtailment" means the imposition of the Yakima County Superior Court's REVISED ORDER LIMITING POST-1905 DIVERSIONS DURING PERIODS OF SHORTAGE in *Department of Ecology v. Acquavella*, Yakima County Superior Court No. 77-2-01484-5, dated Mar. 10, 2005, or if that order is not in force, other action that requires the reduction or cessation of Roslyn's diversion of water from Domerie Creek to protect Total Water Supply Available or a senior water right holder from impairment.

availability whatsoever. Notwithstanding the intensity and nature of the above proposed PUD zone developments, not one of the PUD proposals is required by the County to meet any kind of showing regarding protection of ground water or surface water, or to provide proof of water rights that would meet the requirements of RCW 90.44.050, or the requirements set forth in *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn2d 1, 43 P.3d 4 (2002). Instead, the County is apparently asserting that it has the right to approve the developments now, while leaving future owners of the new lots the ability to attempt to claim a domestic well exemption in the future, and thereby escape the requirement to obtain a water right.

The County's attempted "end around" on GMA and state Water Code requirements is not academic, but will have real consequences for the City and other water providers. One of the proposed PUD re-zones would adversely impact the City of Roslyn Watershed. Another project applicant alleges that it will serve the site with water from the Easton Water District, even though the project site is outside of the Easton Water District ("District") service area and the water required to serve it exceeds the capacity of the District. Such a scenario would leave the District with no water to serve the recently created Easton LAMIRD. Finally, any and all of the proposed PUDs could result in curtailment of Roslyn's water supply during periods of shortage.

The foregoing examples demonstrate sufficient interest to justify the City of Roslyn's participation as an *amicus curiae* here.

B. Roslyn's Familiarity with the Issues.

The undersigned counsel for Roslyn has read the briefs submitted in this case. Counsel is familiar with the issues involved in the case and with the scope of the arguments presented by the parties. Counsel is also a member of the Washington State Bar and serves as the City Attorney for the City of Roslyn.

V. ISSUE OF AMICUS CURIAE

The City of Roslyn's proposed amicus curiae brief is limited to the following issues:

- 1) Whether the Growth Board Correctly Ruled that Kittitas County's Rural Clusters and Planned Unit Developments Violate the Growth Management Act.
- 2) Whether the County's Failure to Protect Surface and Ground Water Resources as Required by RCW 36.70A.020 Provides an Independent Ground Upon Which This Court May Affirm the Growth Board.

In addressing the foregoing issues, the City of Roslyn will argue that this Court should uphold the Growth Board's decision, apply Washington law as outlined in the Respondents' briefs, and reject the positions of the County and the Building Industry Association of Washington ("BIAW").

VI. REASON FOR ADDITIONAL ARGUMENT ON SPECIFIC  
ISSUE

As a municipality in Kittitas County, Roslyn is in a unique position to address the issues regarding GMA compliance as it relates to the requirements applicable to rural versus urban zoning. The City is required to plan for urban densities within the City and the City's UGA. The County's attempt to designate three-acre rural zones that allow unlimited cluster and planned unit developments constitutes "urban" rather than rural growth, and will amount to a *de facto*, unilateral adjustment to the City's UGA. This is contrary not only to the GMA, but also to the assertion in the County's Comprehensive Plan that provides that cities are responsible for developing a final urban growth area boundary, and that cities are responsible for the future land use plans for the unincorporated portion of their respective urban growth areas and the provision of related services to that urban growth.

Additionally, the City of Roslyn is the only entity that is before this Court that has a Class A municipal water system that is subject to curtailment of its water supply. The risk of curtailment makes it imperative that the County meet its obligations to provide for protection of surface and groundwater supplies, as well as its obligation to require new development in the County to demonstrate that the new development has an appropriate and adequate water supply and will not adversely affect existing water right holders. The County's failure to meet this obligation may result in the City being subject to a more frequent curtailment of its water supply as a result of improper and illegal use of water, which may in

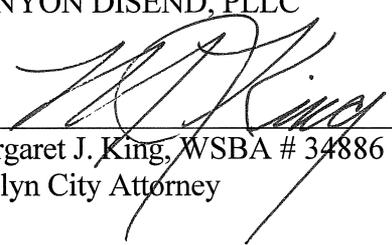
turn result in a more frequent call by senior water users. The City's unique position in this regard warrants additional briefing to this Court.

## VII. CONCLUSION

Because the City of Roslyn offers a unique perspective as an entity required to plan and provide services under the GMA, and as an entity subject to water curtailment, Roslyn can provide additional analysis and argument that will assist the Court in deciding this case. Pursuant to RAP 10.6(a), the City respectfully requests this Court's permission to file the proposed *amicus* brief submitted along with this motion.

DATED this 20<sup>th</sup> day of September, 2010.

KENYON DISEND, PLLC

By: 

Margaret J. King, WSBA # 34886  
Roslyn City Attorney

## CERTIFICATE OF SERVICE

I, Kathy I. Swoyer, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 20 day of September, 2010, I served a true copy of the foregoing *City of Roslyn's Motion for Leave to File Amicus Brief in Support of Respondents Kittitas County Conservation, Ridge and Futurewise; and Brief of Amicus City of Roslyn*, on the following counsel of record using the method of service indicated below:

<p>Tim Trohimovich Futurewise 814 Second Avenue, Suite 500 Seattle, WA 98104</p>	<p><input checked="" type="checkbox"/> First Class, U.S. Mail, Postage Prepaid  <input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Overnight Delivery  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> E-Mail: <a href="mailto:tim@futurewise.org">tim@futurewise.org</a></p>
<p><i>Attys for Respondent Eastern Washington Growth Management Hearings Board:</i></p> <p>Martha Lantz City of Tacoma Attorney's Office 747 Market Street, Room 1120 Tacoma, WA 98402-3726</p>	<p><input checked="" type="checkbox"/> First Class, U.S. Mail, Postage Prepaid  <input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Overnight Delivery  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> E-Mail: <a href="mailto:mlantz@ci.tacoma.wa.us">mlantz@ci.tacoma.wa.us</a></p>
<p><i>Attys for Respondent Futurewise, Ridge and Kittitas County Conservation:</i></p> <p>Keith Patrick Scully Gendler &amp; Mann LLP 1424 4th Ave Ste 715 Seattle WA 98101-2297</p>	<p><input checked="" type="checkbox"/> First Class, U.S. Mail, Postage Prepaid  <input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Overnight Delivery  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> E-Mail: <a href="mailto:keith@gendlermann.com">keith@gendlermann.com</a></p>

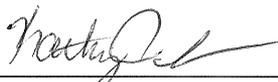
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<p><i>Attys for Respondent Washington Department of Commerce:</i></p> <p>Alan D. Copsey Jerald R. Anderson Assistant Attorney Generals Attorney General's Office 7141 Cleanwater Dr. S.W. P.O. Box 40109 Olympia, WA 98504-0109</p>	<p><input checked="" type="checkbox"/> First Class, U.S. Mail, Postage Prepaid  <input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Overnight Delivery  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> E-Mail: <a href="mailto:alanc@atg.wa.gov">alanc@atg.wa.gov</a>, e-mail address for Mr. Anderson unknown</p>
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<p><i>Attys For Petitioner American Forest Land Company:</i></p> <p>Alexander Weal Mackie Patrick W. Ryan Eric S. Merrifield Perkins Coie LLP 1201 Third Avenue, Suite 4800 Seattle, WA 98101-3099</p>	<p><input checked="" type="checkbox"/> First Class, U.S. Mail, Postage Prepaid  <input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Overnight Delivery  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> E-Mail: <a href="mailto:amackie@perkinscoie.com">amackie@perkinscoie.com</a>,  <a href="mailto:pryan@perkinscoie.com">pryan@perkinscoie.com</a>,  <a href="mailto:emerrifield@perkinscoie.com">emerrifield@perkinscoie.com</a>)</p>

<p><i>Attys for Petitioner Kittitas County:</i></p> <p>Neil Caulkins Kittitas County Prosecuting Attorneys 205 W. 5<sup>th</sup> Avenue, Room 213 Ellensburg, WA 98926-2887</p>	<p><input checked="" type="checkbox"/> First Class, U.S. Mail, Postage Prepaid  <input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Overnight Delivery  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> E-Mail: <a href="mailto:neil.caulkins@co.kittitas.wa.us">neil.caulkins@co.kittitas.wa.us</a></p>
<p><i>Attys for Petitioner Building Industry Association:</i></p> <p>Julie Nichols Timothy Harris Building Industry Association of Washington P.O. Box 1909 Olympia, WA 98501-2925</p>	<p><input checked="" type="checkbox"/> First Class, U.S. Mail, Postage Prepaid  <input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Overnight Delivery  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> E-Mail: <a href="mailto:julies@comcast.net">julies@comcast.net</a>,  <a href="mailto:timothymharris@msn.com">timothymharris@msn.com</a></p>
<p><i>Attys for Amicus Department of Ecology:</i></p> <p>Alan Myles Reichman Ofc of the Aty General/ Ecology Division PO Box 40117 Olympia WA 98504-0117</p>	<p><input checked="" type="checkbox"/> First Class, U.S. Mail, Postage Prepaid  <input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Overnight Delivery  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> E-Mail: <a href="mailto:alanr@atg.wa.gov">alanr@atg.wa.gov</a></p>
<p><i>Attys for Amicus Department of Ecology:</i></p> <p>Maia D Bellon Department of Ecology PO Box 47600 Olympia WA 98504-7600</p>	<p><input checked="" type="checkbox"/> First Class, U.S. Mail, Postage Prepaid  <input type="checkbox"/> Legal Messenger  <input type="checkbox"/> Overnight Delivery  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> E-Mail: <a href="mailto:maib461@ecy.wa.gov">maib461@ecy.wa.gov</a></p>

<p><i>Attys for Amicus Pacific Legal Foundation:</i></p> <p>Brian Trevor Hodges  Pacific Legal Foundation  10940 NE 33rd Pl Ste 210  Bellevue WA 98004-1432</p>	<p><input checked="" type="checkbox"/> First Class, U.S. Mail, Postage Prepaid</p> <p><input type="checkbox"/> Legal Messenger</p> <p><input type="checkbox"/> Overnight Delivery</p> <p><input type="checkbox"/> Facsimile</p> <p><input checked="" type="checkbox"/> E-Mail: <a href="mailto:bth@pacificlegal.org">bth@pacificlegal.org</a></p>
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20 September 2010, at Issaquah, Washington.


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 Kathy I. Swoyer