

NO. 44269-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

SAVE OUR SCENIC AREA and
FRIENDS OF THE COLUMBIA GORGE, INC.,

Appellants,

v.

SKAMANIA COUNTY,

Respondent.

REPLY BRIEF OF APPELLANTS

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GLOSSARY OF ACROYNMS

GMA	Growth Management Act
GMHB	Growth Management Hearings Board
PEA	Planning Enabling Act
RP	Verbatim Report of Proceedings for the November 9, 2012 proceedings before the Clark County Superior Court
SCC	Skamania County Code
SEPA	State Environmental Policy Act
SOSA	Appellant Save Our Scenic Area

I. INTRODUCTION

Contrary to Skamania County's arguments on appeal, it still has not completed periodic review of its natural resource lands designations under the Growth Management Act, nor updated its zoning ordinance (SCC Title 21) to achieve consistency with its Comprehensive Plan as required by the Planning Enabling Act—despite making numerous findings of fact and statements acknowledging it had not yet fulfilled these statutory responsibilities but was working to do so. Plaintiffs' GMA and PEA claims, which are based on the County's *inactions* in completing these statutory responsibilities, were timely filed.

The Court should reject the County's invitations to evaluate the substantive lawfulness of the County's GMA resource lands designations and the merits of Plaintiffs' PEA consistency claims. Those issues are not within the scope of the appeal, which is limited to the procedural issues of whether the County has completed periodic review and whether Plaintiffs' GMA and PEA claims are time-barred.

The County also fails to demonstrate that its decision to repeal its five-year development moratorium from thousands of acres of land was exempt from environmental review under SEPA. Finally, having unsuccessfully moved for summary judgment before the Superior Court in challenging Plaintiffs' standing to bring the SEPA claims, the County is

precluded from reasserting these arguments on appeal. In any event, Plaintiffs have standing to bring the SEPA claims.

II. REPLY TO STATEMENT OF THE CASE

The County devotes considerable portions of its “Statement of Facts” to allegations about its economy and social programs, including lengthy discussions of its budget. *See, e.g.*, County Br at 2–5, 10–12. The County’s only references to these statements later in its Brief are in its SEPA arguments, where it apparently maintains that it repealed the moratorium from thousands of acres of land in an attempt to facilitate development and thereby increase property tax revenue for the County’s budget. *See* County Br. at 33, 39. Other than these arguments, the County’s budget is irrelevant and need not be considered by the Court. The County offers no legal authority even suggesting otherwise.

The County also offers a number of statistics about its land base and land uses, several of which are not only irrelevant, but also inaccurate or misleading. For example, the County implies that the Columbia River Gorge National Scenic Area contains no residential or commercial uses. County Br. at 2–3. That is not accurate. The Scenic Area Act expressly allows both residential and commercial uses in the majority of the Scenic

Area,¹ and also designates four “urban areas” in Skamania County, where residential and commercial uses are allowed.²

The County also alleges that in 2005, it “designated roughly half the land it has direct regulatory control over as GMA forest resource land.” County Br. at 3. This allegation is not accurate, either. The County is referring to 39,416 acres of “forest land” inside the National Scenic Area.³ A substantial portion of that land is *federal* land,⁴ and the County concedes that its regulatory authority over federal land is “limited” because of federal preemption.⁵ The County designated these federal lands inside the Scenic Area as “forest land,”⁶ even though it does not have “direct regulatory control” over them.

In contrast, the majority of the County’s *nonfederal* lands containing commercial timber are located *outside* the Scenic Area.⁷ The County does have direct regulatory control over these lands. But thousands of acres of these lands remain unzoned, undesignated as forest land, and—

¹ See 16 U.S.C. §§ 544d(d)(7), (8).

² See CP 206–07; 16 U.S.C. §§ 544b(e), 544d(c)(5)(B). The four urban areas in Skamania are North Bonneville, Stevenson, Carson, and Home Valley.

³ See CP 34 (cited in County Br. at 3 n.4).

⁴ Most of this federal land inside the Scenic Area is owned by and under the direct control of the U.S. Forest Service. See 16 U.S.C. §§ 544f, 544g.

⁵ County Br. at 5; see also *id.* at 3.

⁶ CP 34.

⁷ See CP 13, 20, 21, 26, 213–14.

as the County itself articulated in its moratorium ordinances—under threat of unregulated development.⁸

The County acknowledges that 14,117 acres of private- and County-owned lands are currently unzoned,⁹ and that Ordinance 2012-08 modified the moratorium on these lands to apply to only 4,500 acres (the High Lakes area),¹⁰ thus stripping the moratorium’s protections from 9,617 acres (15.03 square miles) of land. These 9,617 acres of land (hereinafter “subject lands”) are the central focus of this appeal.¹¹

The County asserts, based on a declaration of its Planning Director, that “there have been no development applications on properties previously under the moratoria.”¹² Of course, with the repeal of the moratorium from the majority of the unzoned lands, there is now no requirement to submit a development application to the Planning

⁸ See, e.g., CP 256–57 (Ordinance No. 2007-10), 320–21 (Ordinance No. 2012-08).

⁹ County Br. at 9 (citing CP 21).

¹⁰ County Br. at 9–10 (citing CP 22, 30–32).

¹¹ The County attempts to downplay the significance of the amount of land involved by expressing it in terms of a percentage of the County’s entire land base. County Br. at 9 (“1.3% of the County”). But the County made that same argument in a prior case, and it was rejected by the Skamania County Hearing Examiner. See CP 356 (“The significance of the County action is not diminished by the fact that only a small fraction of the County located outside of the scenic area and the incorporated areas is privately owned.”). The 9,617 acres of land involved in this appeal is a substantial amount of land. It is roughly equal to three times the size of nearby Washougal, Washington. CP 138. It is also more than twelve times the size of a 783-acre annexation for which the Washington Supreme Court held an environmental impact statement was required under SEPA. See *King County v. Wash. State Boundary Review Bd. for King County*, 122 Wn.2d 648, 662–67, 683, 860 P.2d 1024 (1993).

¹² County Br. at 11 (citing CP 393).

Department or otherwise obtain zoning approval for numerous uses (such as residential development) on these lands, because the uses are *exempt from zoning review*.¹³ Thus, a lack of development applications filed with the Planning Department signifies nothing.¹⁴

With regard to critical areas compliance, the County asserts that Plaintiffs did not prevail on this issue before the Superior Court because Plaintiffs “did not move for summary judgment.” County Br. at 8. However, the County itself raised critical areas compliance in its summary judgment motion and conceded the issue.¹⁵ Plaintiffs responded that the County was not in compliance¹⁶ and asked the Superior Court to “find as a matter of fact, as it may in a summary judgment motion, that the County is not in compliance with [the GMA’s] critical area[s]” requirements. RP 21. In its decision, the Superior Court implicitly concluded that the County was out of compliance by ordering that “[t]he County shall complete its GMA Critical Areas Update by December 1, 2013.” CP 415. Thus, Plaintiffs prevailed on the merits of the County’s noncompliance with its

¹³ See CP 180 (statement of Planning Director Karen Witherspoon) (“[T]here is not a planning review.”); SCC § 21.64.020 (“The standards, provisions, and conditions of [Title 21] shall not apply to unmapped areas.”) (quoted at CP 14).

¹⁴ In addition, the County mischaracterizes the facts in the record. The County asserts “there *have been* no development applications”—implying there have been no applications up until the present—but cites a declaration dated November 1, 2012 for that proposition. County Br. at 11 (emphasis added) (citing CP 393). The record is silent on the presence or absence of development applications after that date.

¹⁵ “[W]ith respect to the critical areas ordinance update, the County is conceding this issue.” RP 10; *see also* CP 106–07; RP 3, 11–12, 29–30, 43–44.

¹⁶ CP 144–47; RP 20–21, 36, 40–41, 43.

statutory deadline, notwithstanding the fact that Plaintiffs would have preferred an earlier *court-ordered* deadline as a remedy.

Finally, the County makes a number of irrelevant factual allegations and legal arguments about the Whistling Ridge Energy Project. *See* County Br. at 12–13 & n.55, 31 n.118, 38–39. The County is inappropriately attempting to inject into this appeal issues that have been squarely presented to the Washington Supreme Court in another, separate appeal.¹⁷ The Court of Appeals should reject the County’s attempts to litigate these issues here. The only relevance of the Whistling Ridge Project in the instant appeal is that it is an example of a type of development (and of the significant environmental impacts that flow from it) currently threatened on Skamania County’s unzoned lands.

III. ARGUMENT IN REPLY

A. The Court should reject the standards of review proffered by the County.

1. Legal arguments made by the County solely during litigation, rather than as part of a decision-making process, are not entitled to any deference.

The County argues it should be given “[c]onsiderable judicial deference” in this matter, but fails to point to any specific findings or conclusions where it believes any County decision makers actually

¹⁷ *Friends of the Columbia Gorge v. State Energy Facility Site Evaluation Council*, Washington Supreme Court No. 88089-1. Oral arguments before the Washington Supreme Court took place on June 27, 2013.

interpreted the law.¹⁸ The County never adopted any findings or conclusions on the issues presented in this appeal: (1) whether the County completed periodic review under the GMA, (2) whether Plaintiffs' GMA and PEA claims are time-barred, and (3) whether the County's decision to revoke the moratorium from thousands of acres of land necessitated review under SEPA. Instead, the County took positions on these issues *only during litigation*. Thus, the County is not entitled to any deference.¹⁹

B. The County fails to demonstrate that it met the Growth Management Act's statutory deadline for completing periodic review of its natural resource lands designations.

1. Petitioners' assignments of error regarding periodic review are properly before this Court.

The County argues that Plaintiffs "impermissibly raise[] a new argument on appeal regarding compliance with RCW 36.70A.130 (GMA's

¹⁸ County Br. at 16 & n.61 (quoting *Keller v. City of Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979), and citing *East v. King County*, 22 Wn. App. 247, 256, 589 P.2d 805 (1978)). Both *Keller* and *East* were limited to interpretations of local ordinances by local decision makers as applied to specific projects, and thus do not supply the appropriate standard of review for cases involving state statutory requirements, such as the requirements of the GMA, PEA, and SEPA involved here. Moreover, in both *Keller* and *East*, the decision makers construed and applied local ordinances *prior to making decisions* (unlike in the instant case). See *Keller*, 92 Wn.2d at 728 (city council actively examined land use proposal and solicited two letter opinions from city attorney *before* approving project); *East*, 22 Wn. App. at 252, 255–56 (county zoning adjustor and county administrative appeals board interpreted and applied local zoning code during administrative review of project).

¹⁹ See *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co.*, 464 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *Somer v. Woodhouse*, 28 Wn. App. 262, 272, 623 P.2d 1164 (1981) ("[A]gency action cannot be sustained on post hoc rationalizations supplied during judicial review.").

periodic review requirement), which was not raised in Superior Court.”²⁰ To the contrary, the issue of compliance with RCW 36.70A.130, including specifically for resource lands, was raised and thoroughly addressed by all parties below²¹ and was part of the Superior Court’s decision.²²

The gravamen of the County’s objection appears to be that because the County, rather than Plaintiffs, moved for summary judgment on this issue below, Plaintiffs may not assign error to the Court’s ruling on appeal.²³ But Plaintiffs need not have been the moving party in order to assign error and obtain relief on appeal.²⁴ The Court should reject the County’s arguments and conclude that this issue is properly before the Court of Appeals.

2. Skamania County has not completed periodic review.

The County argues that with the adoption of the two-page Resolution 2005-35 (CP 34–35), the County designated natural resource lands, initiated the process for periodic review of those same designations,

²⁰ County Br. at 13–14; *see also id.* at 6, 15, 19, 24 (same).

²¹ *See, e.g.*, CP 143 (“As determined by the . . . Department of Commerce, Skamania County is ‘out of compliance with [the] . . . *resource land regulation update requirement* under the GMA.’”) (emphasis added) (quoting CP 165); *see also* CP 4–6, 12, 98–100, 125, 140, 144–46, RP 4–6, 10–12, 18–21, 30–31, 36, 40, 43–44.

²² CP 414 (“With respect to the County’s GMA Natural Resource Designation *and Update* requirements, the County addressed these GMA requirements in 2005, through Resolution 2005-35.”) (emphasis added).

²³ *See* County Br. at 24 (“As [Plaintiffs] never moved for summary judgment below, the Court [of Appeals] cannot grant summary judgment in favor of [Plaintiffs].”).

²⁴ *See Impehoven v. Dep’t of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752, 755 (1992) (appellate court may reverse the trial court’s decision and order entry of summary judgment for the nonmoving party).

and completed that periodic review process—all within the four corners of the same resolution. County Br. at 20. The fundamental flaw in the County’s argument, however, is that nowhere does Resolution 2005-35 cite RCW 36.70A.130 or even *mention* periodic review—let alone indicate that the County intended to complete periodic review. Nor is there any evidence in the record that the County intended, before the fact, for the resolution to complete periodic review.

At most, Resolution 2005-35 was only the starting point for compliance with the GMA, consisting of an initial designation of resource lands inside the Scenic Area pursuant to RCW 36.70A.170. Indeed, prior to 2005, the County had not made *any* GMA resource lands designations. By statute, the required resource lands designations occur first, and periodic review of these designations occurs later.²⁵ The adoption of Resolution 2005-35 could not have satisfied both statutory steps at the same time.

Having failed in 2005 to document and explain that periodic review was even occurring—let alone that it was being *completed*—the County cannot now legitimately claim, after the fact, that Resolution 2005-35 completed periodic review and triggered an appeal period.²⁶ The

²⁵ See RCW 36.70A.170, 36.70A.130(1)(b), (4), (5).

²⁶ The County’s argument that it should not be required to “re-review” its initial designations, County Br. at 24, is a misnomer, given that the County has not completed

County is attempting to play a shell game, trying to claim the benefit of an appeal period without ever making it known that the appeal period would begin to run. The Court should reject the County's arguments, just as it did on similar facts in the *Thurston County* case.²⁷

Moreover, over the next several years after adopting Resolution 2005-35, the County adopted a series of findings effectively admitting it was out of compliance and that it was working to complete periodic review. For example, the County repeatedly concluded that it was "determining which areas [outside the Scenic Area] will be designated as commercial forest land and protected from the encroachment of residential uses as required by the Growth Management Act."²⁸ And on September 6, 2012, the Department of Commerce, which tracks all counties' periodic review compliance, stated that Skamania County had not yet completed periodic review. CP 163.²⁹

The County attempts to divert the Court off on tangents outside the scope of the procedural issues involved in this appeal, arguing that its

periodic review in the first place.

²⁷ See *Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 137 Wn. App. 781, 797-98, 154 P.3d 959 (2007), *aff'd in part and rev'd in part on other grounds*, 164 Wn.2d 329, 190 P.3d 38 (2008).

²⁸ See, e.g., CP 256 (Ordinance 2007-10), 321 (Ordinance 2012-08).

²⁹ The County argues that Commerce is not statutorily responsible for tracking partial planning counties' compliance. County Br. at 23. This argument does not change that fact that Commerce does in fact track these counties' compliance, nor that Commerce lists Skamania County as out of compliance. CP 163. Further, Commerce is required to adopt rules for designations of resource lands, which serve as "minimum guidelines that apply to *all jurisdictions*." RCW 36.70A.050(3) (emphasis added).

designations are presumed to be substantively valid upon adoption and that it is not required to make changes to its natural resource designations unless the law has changed.³⁰ These arguments would require the Court to evaluate the substantive adequacy of the County's resource lands designations under the GMA, an inquiry outside the scope of the procedural issues on appeal. This appeal involves only two questions under the GMA: (1) Has the County completed the statutorily required periodic review of its resource lands designations? (2) Are Plaintiffs' claims against the County for failure to complete periodic review time-barred? The Court should order entry of summary judgment in favor of Plaintiffs on both questions and should disregard the County's arguments regarding the substantive adequacy of its designations.³¹

Having failed to complete the GMA's periodic review requirement with the adoption of Resolution 2005-35 or by other means, Skamania County is out of compliance with RCW 36.70A.170. The County's failure

³⁰ See County Br. at 17–18, 20–24 (citing *Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d 329, 343–45, 190 P.3d 38 (2008); RCW 36.70A.320).

³¹ In the event this Court wishes to consider and resolve the County's arguments regarding substantive compliance, the County is wrong. Contrary to the County's assertions, the substantive law applicable to the designation of natural resource lands has in fact changed since the County made its initial designations. For example, on February 19, 2010, the Department of Commerce adopted WAC 365-190-060, which contains new "minimum guidelines that apply to all jurisdictions [for] the classification of . . . forest lands," RCW 36.70A.050(3); see also *Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 157 Wn.2d 488, 502, 139 P.3d 1096 (2006) (Commerce's rules apply to resource lands designations) (citing *Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 959 P.2d 1173 (1998), *review denied*, 137 Wn.2d 1018, 984 P.2d 1033 (1999)).

to act under the statute has not triggered any appeal period. The Court should reverse the Superior Court's decision, order entry of summary judgment in favor of Plaintiffs, and remand for the Superior Court to establish a compliance schedule for completion of the County's periodic review responsibilities for its natural resource lands designations.

C. The County fails to demonstrate that Plaintiffs' Planning Enabling Act claims are time-barred.

Like the GMA claims addressed above, Plaintiffs' PEA claims are based on *inaction* by the County, not on an action that triggered any appeal period. Plaintiffs brought their PEA consistency claims in the Superior Court because the County failed to revise or update SCC Title 21 to achieve consistency with its Comprehensive Plan,³² despite repeatedly acknowledging this statutory requirement and declaring its intentions to comply.³³ Because the PEA provides no remedy for governmental

³² The County misstates the substantive standard for consistency under the PEA, claiming that it is whether "[t]he Plan and [z]oning are consistent." County Br. at 28. In the statute itself, the Comprehensive Plan is the controlling authority in the hierarchy, and the development regulations must be brought into conformity with the Plan. *See* RCW 36.70.545 ("[T]he development regulations of each [partial planning] county . . . shall not be inconsistent with the county's comprehensive plan."); *Glenrose Community Ass'n v. City of Spokane*, 93 Wn. App. 839, 848, 971 P.2d 82 (1999) (a county's development regulations must "comply with its comprehensive plan.").

³³ *See e.g.*, CP 256 (Skamania County Ordinance No. 2007-10) (announcing a "pending zoning classification process"), 257 (same), 258 (stating that a "work plan for the . . . zoning classification process has been developed" and imposing a development moratorium "until the zoning classifications related to the 2007 Comprehensive Plan . . . are complete"), 259 (Planning Director statement that "the process to establish zoning classifications on *all* un-zoned land is scheduled to begin . . . in September 2007") (emphasis added), 261 (Ordinance No. 2008-01) ("Skamania County is currently in the process of updating zoning classification[s] for all land within unincorporated Skamania

inaction, Plaintiffs brought the claims as writ claims. *See* Opening Br. at 28–29.

The County now apparently abandons the arguments it previously made before the Superior Court that Plaintiffs were supposed to have challenged the adoption of Title 21 in 1986, four years before the PEA’s consistency requirement was even enacted. *See* CP 106. The Court of Appeals should reverse the Superior Court’s implied holding that an appeal period for challenging Title 21 began to run in 1986. *See* CP 415.

The County’s only remaining argument regarding the timeliness of Plaintiffs’ PEA claims is that Plaintiffs “[f]ailed to [a]ppel the 2007 Comprehensive Plan.” County Br. at 25. The County mischaracterizes the nature of Plaintiffs’ claims. Plaintiffs have always *supported* the 2007 Comprehensive Plan and never had any reason to appeal it. *See* CP 150.

Plaintiffs’ concerns are not with the Comprehensive Plan, but rather with Title 21. *See* CP 14–15. And importantly, *the County took no action in 2007 adopting or modifying Title 21*. Thus, no appeal period for challenging Title 21 could have begun to run in 2007.

Plaintiffs are still waiting for the County to follow through on its numerous findings of fact and statements over several years

County to be consistent with the adopted Comprehensive Plan”) (emphasis added), 320 (Ordinance No. 2012-08) (same).

acknowledging that it needed to bring Title 21 into compliance with the Comprehensive Plan and that it was working to do so.³⁴ The fact that the County *immediately* began making such findings and statements (and began protecting the subject lands via its moratorium ordinances) on July 10, 2007,³⁵ *the very same day it adopted the 2007 Comprehensive Plan*, only further undermines any notion that Plaintiffs were supposed to have predicted the County’s inaction years in advance and filed suit in 2007.

The only possible appealable action the County has taken here to amend its development regulations was when the County modified and repealed its five-year development moratorium from the subject lands via the adoption of Ordinance 2012-08 (CP 320–22), thus lifting the moratorium’s protections from these lands.³⁶ Plaintiffs timely filed this action 21 days later (CP 18)—well within the 60-day appeal period alluded to in *Moore v. Whitman County* for partial planning counties.³⁷

³⁴ See *supra* note 33.

³⁵ CP 256–60.

³⁶ A development moratorium—especially a long-term moratorium like that involved in the instant case and in *Master Builders*—is a “development regulation” because it places “controls . . . on development or land use activities.” RCW 36.70A.030(7); see also *Master Builders Ass’n of King & Snohomish Counties v. City of Sammamish*, No. 05-3-0030c, 2005 WL 2227925, at *8 (Cent. Puget Sound Growth Mgmt. Hr’gs Bd. Aug. 4, 2005) (multi-year moratorium “‘placed controls on development’ that prohibit application[s] for residential subdivisions, short plats, and multi-family housing [and its] controls fall squarely within the statutory definition of development regulations”).

³⁷ See *Moore v. Whitman County*, 143 Wn.2d 96, 104, 18 P.3d 566 (2001). *Moore* involved GMA claims, rather than PEA claims. However, the GMA’s 60-day appeal period can be applied for appropriate PEA claims by analogy. When a statute does not provide an appeal period, courts may apply analogous appeal periods from other

Finally, as it did with the GMA issues, the County invites this Court to go beyond the scope of the PEA issues on appeal. Specifically, the County asks the Court to evaluate whether the current Title 21 is consistent with the 2007 Comprehensive Plan. *See* County Br. at 28–29. But the only PEA issue in this appeal is whether Appellants’ PEA claims were timely raised in the Superior Court. *See* Opening Br. at 3–4, 25–34. The Court should reject the County’s invitations to evaluate the substantive merits of Plaintiffs’ PEA consistency claims, and should instead refer such questions to the Superior Court.³⁸

In conclusion, the County fails to demonstrate that Plaintiffs’ Planning Enabling Act claims are time-barred. The Court of Appeals should reverse the Superior Court’s ruling on the claims’ timeliness and should remand to the Superior Court for an adjudication of the claims.

statutes, and when more than one analogous source of law contains an appeal period, the longer period is applied. *See, e.g., Akada v. Park 12-01 Corp.*, 103 Wn.2d 717, 719, 695 P.3d 994 (1985); *City of Fed. Way v. King County*, 62 Wn. App. 530, 538–39, 815 P.2d 790 (1991); *Bothell v. King County*, 45 Wn. App. 4, 10–11, 723 P.2d 547 (1986).

³⁸ If this Court does wish to evaluate the merits of Plaintiffs’ consistency claims, it should conclude that the list of uses allowed on Unmapped lands, found at SCC § 21.64.020, is inconsistent with the list of allowed uses for the Conservancy Designation in the Comprehensive Plan. *See* CP 13–14, 150–52. Further, the Court should reject the County’s argument that “if a parcel has both a Conservancy designation and an Unmapped Zoning designation, the two are [automatically] consistent.” County Br. at 28. The County fails to acknowledge that the 2007 Comprehensive Plan refers to “*potential*” Unmapped zoning classifications and states that information in the Plan “is necessary to determine when, where and under what circumstances these designations should be applied *in the future*.” CP 210 (emphasis added). Thus, the 2007 Comprehensive Plan referred to zoning that *might exist in the future*, rather than evaluating actual lands zoned as Unmapped in the then-current zoning ordinance. Because the Superior Court rejected Plaintiffs’ PEA consistency claims solely on timeliness grounds (CP 415), it never reached these issues.

D. The County fails to demonstrate that its decision to repeal the protections of its five-year development moratorium from thousands of acres of land was exempt from environmental review under SEPA.

By failing to even *consider* SEPA prior to taking action, Skamania County did not comply with the statute's most basic procedural mandates: the requirements to prepare an environmental checklist and threshold determination.³⁹ Because the County ignored these requirements when it repealed its five-year moratorium from thousands of acres of land, thereby opening up these lands to unregulated development, the County failed to review the environmental consequences of its action.⁴⁰

Rather than admit it never considered SEPA, the County now attempts to defend its violations with a series of erroneous *post-hoc* rationalizations. *See* County Br. at 29–36. Given the County's serious noncompliance with SEPA and the absence of any County findings, reversal and remand is the required outcome.⁴¹

1. The affirmative modification and repeal of a long-term development moratorium is a governmental action subject to SEPA's environmental disclosure requirements.

The County's SEPA arguments are premised on a fundamental mischaracterization of the actions it took to modify its development

³⁹ *See* WAC 197-11-960 (environmental checklist), 197-11-310 (threshold determination).

⁴⁰ *See* Opening Br. at 34–49.

⁴¹ *See Lassila v. Wenatchee*, 89 Wn.2d 804, 817, 576 P.2d 54 (1978).

moratorium. The County repeatedly suggests that, with respect to the approximately 9,600 acres of subject lands involved in this appeal, the moratorium “lapsed,” “ceased,” or “expired.”⁴² These mischaracterizations could not be any further from the truth.

Prior to Ordinance 2012-08, the moratorium applied to “any parcel of land that is not currently located within a zoning classification,” *i.e.*, it applied to *all unzoned lands*. CP 316. After Ordinance 2012-08, the moratorium applied only to the unzoned lands in the High Lakes area. CP 322. The change was made by the enactment of Ordinance 2012-08, which expressly “modif[ied]” the moratorium and removed its protections from all unzoned lands not in the High Lakes area. CP 320–22.⁴³

The County’s repeated references to “statutory lapse” and “automatic lapse” ignore the plain facts in the record. Tellingly, the County never offers a date when it believes the moratorium “automatically lapsed” for the 9,600 acres of land involved in this appeal. That is because the moratorium did *not* automatically lapse for these lands. Just because

⁴² See County Br. at 1–2, 29–39; see also *id.* at 9–10, 13.

⁴³ In the event the Court concludes that the ordinance is ambiguous, it may look to the County Commissioners’ statements in the record as evidence of legislative intent. See *City of Tacoma v. Price*, 137 Wn. App. 187, 197, 152 P.3d 357 (2007). The Commissioners’ statements in the record document that the motivation behind the ordinance was to open up the majority of the unzoned lands (everything but High Lakes) to unregulated development. See CP 179–81.

the moratorium *could have* lapsed does not mean that preemptively revoking the moratorium was the legal equivalent of lapse.

The County attempts to avoid the highly persuasive precedent of *Byers*⁴⁴ and *Master Builders*. See County Br. at 31–32. In *Byers*, the Supreme Court concluded that the serial adoption of “interim zoning” under the PEA’s interim zoning authority (RCW 36.70.790) was subject to SEPA.⁴⁵ Similarly, in *Master Builders*, the GMHB concluded that a development moratorium is a development control, *i.e.*, a governmental action, and that a serial development moratorium is subject to SEPA review.⁴⁶ The County fails to distinguish these authorities, which stand for the straightforward proposition that SEPA applies to governmental actions taken to adopt development regulations on a long-term, serial basis, even if such actions are officially deemed “interim” measures.

The County concedes that the intent behind the modifications it made via Ordinance 2012-08 was to encourage development in an attempt to increase the County’s tax base. See County Br. at 33, 39. According to the County, the impact of the five-year development moratorium was “far worse” than losing out on the potential revenue from allowing unregulated development on the unzoned lands. *Id.* at 33. Increasing the County’s

⁴⁴ *Byers v. Board of Clallam County Comm’rs*, 84 Wn.2d 796, 529 P.2d 823 (1974).

⁴⁵ 84 Wn. at 800.

⁴⁶ *Master Builders* at *3.

budget may be a meritorious goal, but it does not justify violating state law to get there.

The County also attempts an untenable spin of the statements in the record made by County Commissioner Paul Pearce. The County argues that “[i]n voting for the more limited moratorium, a former County Commissioner remained concerned that an emergency situation remained, and questioned how much land should be subject to the statutory lapse.” County Br. at 32–33. First, Commissioner Pearce was in office when the referenced statements were made. Second, Commissioner Pearce never discussed a “statutory lapse.” *See* CP 179–81. Commissioner Pearce’s statements do, however, explain that the intent behind the ordinance was to revoke the moratorium from the majority of the unzoned lands in order to encourage development and incite the public to “clamor[.]” for permanent zoning on the unzoned lands. CP 181. The County’s novel spin on the Commissioner’s statements is not supported by the evidence in the record.

In conclusion, Skamania County actively repealed its five-year development moratorium from 9,600 acres of unzoned lands in private and County ownership. The County’s decision to pass Ordinance 2012-08 into law—thereby modifying and repealing the moratorium from the majority of the unzoned lands—was an action subject to SEPA, not a “lapse” or “cessation” of the moratorium. The Court of Appeals should reverse the

Superior Court's holdings (CP 415) and should remand for further proceedings.

2. The adoption of Ordinance 2012-08 was neither an emergency action nor a procedural action.

In an attempt to dodge the substantive merits of Petitioners' appeal, the County argues that its actions were exempt from SEPA under the categorical exemption for emergency actions. Specifically, the County focuses on governmental decisions to *adopt* moratoria,⁴⁷ avoiding the real questions in this appeal: (1) Was Skamania County's decision to actively *revoke* its five-year development moratorium from thousands of acres of land a governmental action subject to SEPA? (2) If so, did any emergency justify immediate action to revoke the moratorium from these lands?

The County never answers these questions, mainly because it bases its arguments on the false premise that the moratorium "automatically lapse[d]" on these lands. County Br. at 34–35. As Petitioners have shown, however, the moratorium did *not* lapse on these lands, and the County's *post-hoc* allegations of "emergency" are fallacious: there was no emergency necessitating the immediate, premature revocation of the moratorium. *See* Opening Br. at 45–49.

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⁴⁷ *See* County Br. at 34.

The County quotes *Jablinske v. Snohomish County*,⁴⁸ but does not even attempt to explain the facts of that case or how they might relate to the instant case. In *Jablinske*, a county adopted a one-year interim zoning ordinance in response to immediate conflicts between competing proposals for residential and airport uses of the same area, in order to give the county time to adopt a permanent zoning plan before mutually incompatible land uses were established. 28 Wn. App. at 849–50, 852. The Court of Appeals concluded that the one-year ordinance was “a true interim measure” to respond to an “emergency situation,” given the danger that homes might be built in locations where they would be harmed by airplane noise. *Id.* at 852–53. Accordingly, SEPA’s exception for emergencies applied. *Id.* at 853 (citing WAC 197-10-180 (1981)).

In contrast, in the instant case, Skamania County’s moratorium had been in effect for *five years*—and under the County’s own decision would have continued for at least another three months⁴⁹—when the County suddenly decided to revoke the moratorium’s protections from thousands of acres of land. No emergency necessitated the immediate and premature revocation of the moratorium from these lands. Instead, the County Commissioners stated their intentions to *create* an emergency by returning

⁴⁸ 28 Wn. App. 848, 626 P.2d 543 (1981) (quoted in County Br. at 34).

⁴⁹ CP 316–17 (Ordinance No. 2012-04).

these lands to a threat of unregulated development. *See* CP 180–81. The emergency exemption at WAC 197-11-880 did not apply.

Finally, the County argues that “[m]oratorium cessation” is “exempt from SEPA” as a “[p]rocedural [m]atter.” County Br. at 35. The County presents this summary conclusion without any substantive argument applying the law to the facts of this case. Moreover, the County appears to be, once again, basing its arguments on the false premise that the moratorium “lapsed” on the subject lands. *See id.* The Court should reject the County’s premise, and also should conclude that the moratorium and its repeal involved substantive land use prohibitions and standards that affect the environment, rather than purely procedural measures.⁵⁰

The Court of Appeals should reverse the Superior Court’s holdings that the adoption of Ordinance 2012-08 was exempt from SEPA as an emergency action and procedural action (CP 415) and should remand for compliance with the basic requirements of SEPA, including the preparation of an environmental checklist and threshold determination.

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⁵⁰ *See* Opening Br. at 43–45; WAC 197-11-800(19) (“The proposal or adoption of legislation, rules, regulations, resolutions or ordinances, or of any plan or program relating solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment shall be exempt.”) (emphasis added).

3. The Court should reject the County’s arguments that Plaintiffs lack standing to bring claims under SEPA.

The County improperly reasserts arguments that Plaintiffs lack standing to bring their SEPA claims. *See* County Br. at 36–39. The County moved for summary judgment below on the same arguments,⁵¹ and the Superior Court implicitly denied the County’s motion when it evaluated and decided Plaintiffs’ SEPA claims, rather than dismissing the claims on the basis that Plaintiffs lack standing.⁵² Because the County unsuccessfully raised these arguments below and lost on summary judgment, it may not relitigate the same arguments on appeal.⁵³

In the event this Court elects to evaluate Plaintiffs’ standing, it should conclude that Plaintiffs have standing to challenge the County’s failure to review the environmental impacts of its decision to repeal its development moratorium from thousands of acres of land. Plaintiffs and their members have suffered concrete injuries in fact as a direct result of the County’s decision. Skamania County citizens Tom Drach and Keith Brown, members of SOSA and Friends respectively, provided declarations

⁵¹ *See* CP 109–110.

⁵² *See* CP 415.

⁵³ “Denial of a motion for summary judgment is generally not an appealable order.” *Sea-Pac Co., Inc. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 801–02, 699 P.2d 217 (1985) (citing RAP 2.2(a); *Roth v. Bell*, 24 Wn. App. 92, 104, 600 P.2d 602 (1979)). Further, although the Court of Appeals has authority to allow *discretionary* review of such decisions, review may be granted only where “[t]he superior court has committed an obvious error which would render further proceedings useless.” RAP 2.3(b)(1); *see also Sea-Pac*, 103 Wn.2d at 802 (citing *Rye v. Seattle Times Co.*, 37 Wn. App. 45, 52, 678 P.2d 1282 (1984)). The County makes no such showing.

demonstrating a direct stake in the controversy and harm from the County's actions.⁵⁴ Plaintiffs satisfy the criteria to bring suit on behalf of their members.⁵⁵ Further, the resource conservation interests that Plaintiffs seek to protect are germane to their organizational purposes.

In addition, Plaintiffs were denied their numerous procedural rights under SEPA to participate in the County's review of the environmental impacts of its actions.⁵⁶ The County argues that Plaintiffs' interests are "not within SEPA's zone of interests," but bases this argument on its frequently repeated false premise that the moratorium "lapsed," as well as its prior arguments that Ordinance 2012-08 was exempt from SEPA. County Br. at 38. As explained above, the County's arguments are in error. *See supra* Parts III.D.1, III.D.2. The Court of Appeals should reject the County's arguments that Plaintiffs lack standing.

⁵⁴ See CP 169–73 (Tom Drach) and 182–87 (Keith Brown). *Trepanier v. City of Everett*, 64 Wn. App. 380, 824 P.2d 524 (1992), cited by the County at page 37 of its Brief, is distinguishable. According to Skamania County's own statements in its Brief and in the record, the County repealed its five-year moratorium in an attempt to facilitate a higher level of development than was occurring. See County Br. at 33, 39; CP 180–81. The County's numerous statements and findings of fact demonstrate that the decision to pass Ordinance 2012-08 into law was an action that significantly affects the quality of the environment. See, e.g., CP 180–81 (statements of Commissioner Pearce), 256–58 (Ordinance 2007-10), 320–22 (Ordinance 2012-08). Further, the very real threat of large-scale energy development on the unzoned lands created by the County's decision to repeal its moratorium only heightens the harm to Plaintiffs and their members. See CP 80, 134, 341–52; County Br. at 12–13.

⁵⁵ See *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213–14, 45 P.3d 186 (2002).

⁵⁶ SEPA "recognizes that each person has a fundamental and inalienable right to a healthful environment." RCW 43.21C.020(3). Further, the SEPA rules provide procedural rights requiring notice of government actions and opportunities to comment in SEPA processes. See, e.g., WAC 197-11-500, 197-11-502, 197-11-510, 197-11-900(3).

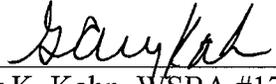
V. CONCLUSION

For the reasons stated above and in Plaintiffs' Opening Brief, the Court of Appeals should reverse the Superior Court's Order of Dismissal, order entry of summary judgment in favor of Plaintiffs, and remand to the Superior Court for further proceedings, including the establishment of a compliance schedule for completing periodic review under the GMA, the adjudication of Plaintiffs' consistency claims under the PEA, and compliance with the procedural requirements of SEPA.

RESPECTFULLY SUBMITTED this 3rd day of July, 2013.



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