

NO. 45269-3-II  
(Clark County Superior Court Cause No. 12-2-02455-7)

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

---

KLICKITAT COUNTY,

Appellant/Cross Respondent,

v.

FRIENDS OF THE WHITE SALMON RIVER and  
FRIENDS OF THE COLUMBIA GORGE,

Respondents/Cross Appellants.

---

**RESPONDENTS/CROSS APPELLANTS' REPLY BRIEF**

---

Ralph O. Bloemers, WSBA #30216  
Crag Law Center  
917 SW Oak Street, Suite 417  
Portland, OR 97205  
(503) 525-2727  
ralph@crag.org

Nathan J. Baker, WSBA #35195  
Friends of the Columbia Gorge  
522 SW 5th Ave, Suite 720  
Portland, OR 97204-2100  
(503) 241-3762, x101  
nathan@gorgefriends.org

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. REPLY IN SUPPORT OF CROSS APPEAL ..... 5

    A. Because the County Unlawfully Delegated its Zoning Authority to Individual Landowners and Unlawfully Authorized Spot Zoning, the County’s Actions are Ultra Vires and Therefore Void ..... 5

        1. Unlawful Delegation ..... 5

        2. Spot Zoning ..... 6

        3. The Court of Appeals Should Vacate the County’s Ordinance and Resolution ..... 7

    B. Because the Rezone Was Adopted In Violation of SEPA, it is Ultra Vires ..... 7

        1. The County’s SEPA Violations Were Not a Mere “Procedural Irregularity” ..... 10

        2. The Preliminary Injunction “Balancing” Test Does Not Apply to the Issue of Final Relief ..... 13

        3. The County has *Not* Complied with SEPA’s Policies ..... 14

III. CONCLUSION..... 18

## TABLE OF AUTHORITIES

### CASES

<i>ASARCO Inc. v. Air Quality Coalition</i> , 92 Wn.2d 685, 601 P.2d 501 (1979).....	15
<i>Chrobuck v. Snohomish County</i> , 78 Wn.2d 858, 480 P.2d 489 (1971).....	6
<i>Dioxin/Organochlorine Ctr. v. Pollution Control Hr'gs Bd.</i> , 131 Wn.2d 345, 932 P.2d 158 (1997).....	8
<i>Eastlake Community Council v. Roanoke Assocs., Inc.</i> , 82 Wn.2d 475, 513 P.2d 36 (1973).....	8
<i>King County v. Wash. St. Boundary Review Bd.</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993).....	8
<i>Klickitat County Citizens Against Imported Waste v. Klickitat County</i> , 122 Wn.2d 619, 860 P.2d 390 (1993), op. revised, 866 P.2d 1256 (1994).....	8
<i>Kucera v. State DOT</i> , 140 Wn.2d 200, 995 P.2d 63 (2000).....	9, 13, 14, 15
<i>Lane v. Port of Seattle</i> , 178 Wn. App. 110, 316 P.3d 1070 (2013).....	12
<i>Lassila v. City of Wenatchee</i> , 89 Wn.2d 804, 576 P.2d 54 (1978).....	8
<i>Leonard v. Bothell</i> , 87 Wn.2d 847, 557 P.2d 1306 (1976).....	6
<i>Lince v. City of Bremerton</i> , 25 Wn. App. 309, 607 P.2d 329 (1980).....	6
<i>Lutz v. City of Longview</i> , 83 Wn.2d 566, 520 P.2d 1374 (1974).....	6
<i>Noel v. Cole</i> , 98 Wn.2d 375, 655 P.2d 245 (1982).....	8, 11
<i>Norway Hill Preservation &amp; Protection Ass'n v. King County Council</i> , 87 Wn.2d 267, 552 P.2d 674 (1976).....	16
<i>Pierce v. King County</i> , 62 Wn.2d 324, 382 P.2d 628 (1963).....	7
<i>Save Our State Park v. Bd. of Clallam County Comm'rs</i> , 74 Wn. App. 637, 875 P.2d 673 (1994).....	6
<i>Sisley v. San Juan County</i> , 89 Wn.2d 78, 569 P.2d 712 (1977).....	16
<i>Smith v. Skagit County</i> , 75 Wn.2d 715, 453 P.2d 832 (1969).....	6

<i>South Tacoma Way, LLC v. State,</i> 169 Wn.2d 118, 233 P.3d 871 (2010).....	8, 10, 11, 12
<i>State v. Grays Harbor County,</i> 122 Wn.2d 244, 857 P.2d 1039 (1993).....	8

**STATUTES**

RCW 36.70.600 .....	6
RCW 36.70.620 .....	6
RCW 36.70.650 .....	6
RCW 36.70.440 .....	6
RCW 43.21C.030(2)(c).....	15, 16

**REGULATIONS**

WAC 197-11-460(5).....	8, 12, 15
------------------------	-----------

## **GLOSSARY**

<b>BiOp</b>	Biological Opinion
<b>BZ Corner</b>	BZ Corner Rural Center
<b>CAO</b>	Critical Areas Ordinance
<b>Comp. Plan</b>	Klickitat County Comprehensive Plan
<b>Condit Dam EIS</b>	Environmental Impact Statements for the Condit Dam Removal
<b>County</b>	Klickitat County
<b>CRBG</b>	Columbia River Basalt Group aquifer
<b>DNS</b>	Determination of Non-Significance
<b>DOE</b>	Washington Department of Ecology
<b>EIS</b>	Environmental Impact Statement
<b>ESA</b>	Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44
<b>FERC</b>	Federal Energy Regulatory Commission
<b>FFR</b>	Forests, Farming, and Ranching Resource Protection Project
<b>Forest Service</b>	United States Forest Service
<b>Friends</b>	Friends of the White Salmon River and Friends of the Columbia Gorge
<b>FWA</b>	Fordyce Water Association
<b>HE</b>	Klickitat County Hearing Examiner

<b>Husum</b>	Husum Rural Center
<b>KCC</b>	Klickitat County Code
<b>MDNS</b>	Mitigated Determination of Non-Significance
<b>NMFS</b>	National Marine Fisheries Service
<b>Ordinance</b>	Klickitat County Ordinance No. O060512-1
<b>ORV</b>	Outstandingly Remarkable Value
<b>PEA</b>	Planning Enabling Act, ch. 36.70 RCW
<b>RL</b>	Resource Lands zoning
<b>RR-2</b>	Rural Residential zoning with a two-acre minimum lot size
<b>RR-2 Overlay</b>	The component of the Rezone that authorized individual landowners to rezone their properties from RL zoning to RR-2 zoning
<b>Resolution</b>	Klickitat County Resolution No. 08612
<b>Rezone</b>	The changes in zoning and allowable densities authorized by the Ordinance and Resolution
<b>River or White Salmon</b>	White Salmon River
<b>SEPA</b>	State Environmental Policy Act, ch. 43.21C RCW
<b>WDFW</b>	Washington Department of Fish and Wildlife
<b>Wild &amp; Scenic EIS</b>	Final Environmental Impact Statement for the Lower White Salmon National Wild and Scenic River Management Plan
<b>Wild &amp; Scenic MP</b>	Lower White Salmon National Wild and Scenic River Management Plan

## **I. INTRODUCTION**

There is one focused issue for the Court of Appeals to resolve in this cross appeal: whether to issue the remedy of vacating the County's Rezone, given the Superior Court's rulings that the Rezone is substantively and procedurally unlawful.

The County explains in its Response Brief that it wishes to proceed as though the Superior Court's rulings simply never occurred, and uses the question of remedy as a forum to make irrelevant, impertinent, and incorrect assertions about Friends and the Superior Court's rulings on the merits. The Court of Appeals should reject the County's arguments.

Established precedent dictates that the Rezone is ultra vires and void for three reasons. First, the Superior Court held that the Rezone unlawfully delegated the County's zoning powers. Second, the Superior Court held that the Rezone unlawfully authorized spot zoning. And finally, the Superior Court held that the County violated the purposes and requirements of SEPA in multiple ways in adopting the Rezone. For each of these reasons, the County acted outside its authority and the Rezone is invalid. Accordingly, Friends request that the Court of Appeals issue the remedy Friends are legally entitled to by vacating the Rezone.

The County attempts to use this narrow cross-appeal proceeding, which is limited to remedies, to relitigate the merits of the case.<sup>1</sup> The County employed the same failed strategy before the Superior Court by attempting to reargue the case and present post-hoc rationalizations during the remedy phase. For example, the County argued to the Superior Court that the increases in density caused by the Rezone would be more protective than the prior zoning, to which Judge Johnson replied, “I’m not sure this relates to the issues before the Court. Counsel, you’re—it seems to me you’re trying to persuade the plaintiff that this zoning was better than what previously existed.”<sup>2</sup>

The County uses its Response Brief to, once again, reargue the merits of the Rezone as compared to the preexisting zoning, for example, arguing unconvincingly that the Rezone would somehow *reduce* density.<sup>3</sup> The County’s arguments are irrelevant in this remedy proceeding, and are also not grounded in reality. The purpose of the Rezone, according to the County’s own Ordinance, is to “increase capacity for growth in the areas being rezoned.”<sup>4</sup> This was confirmed by the Superior Court: “[I]t appears conclusively here, everybody concedes, [the Rezone] provides for greater

---

<sup>1</sup> See, e.g., *Cnty. Resp. Br.* at 65–68.

<sup>2</sup> TR (Hearing, July 19, 2013) at 30:18–21.

<sup>3</sup> See, e.g., *Cnty. Resp. Br.* at 1, 65–66.

<sup>4</sup> AR 5 (Ordinance: D-8); see also AR 6 (Ordinance: E-4) (explaining a landowner’s ability to “increase development density” under the RR-2 Overlay).

density, not less density.”<sup>5</sup> The Rezone would shift development away from the two existing, designated rural centers (Husum and BZ Corner) where the development of community infrastructure is feasible, and instead would spread future development out across surrounding farmland and forestland and along the federally designated Wild and Scenic River.<sup>6</sup> The County’s mischaracterizations of the Rezone are misplaced, do not belong in a discussion of remedy, and regardless, are entirely without merit.

In its Response Brief, the County makes every effort to confuse the issues,<sup>7</sup> miscast the positions of other agencies,<sup>8</sup> falsely impugn Friends’

---

<sup>5</sup> TR (Summary Judgment Hearing, Feb. 28, 2013) at 47:14–15.

<sup>6</sup> See *Friends’ Op. Br.* at 15, 30, 43–44, 55–59, 66–67; AR 211577 (Ex. 115) (WDFW Oct. 29, 2010 Comment); AR 404–05 (Mark Yinger Comment); AR 421–22 (Ted Labbe Comment).

<sup>7</sup> For instance, the County repeatedly refers to a licensing board complaint filed against the County’s consultants by Mr. Yinger, which occurred separate from the proceedings below. *Cnty. Resp. Br.* at 67, 69; see also *id.* at 3, 4, 13, 19, 43. Mr. Yinger felt compelled by ethical obligations to file the complaint; however, neither his complaint nor the resolution of his complaint had any bearing on the Superior Court’s rulings under applicable law that the County violated SEPA, unlawfully delegated zoning authority, and unlawfully authorized spot zoning, and, likewise, the complaint has nothing to do with the appropriate remedies for the County’s violations.

<sup>8</sup> The County miscasts the positions of other agencies as “widespread agency support” for the Rezone. *Cnty. Resp. Br.* at 69. The County is wrong: there was *not* widespread agency support. See *Friends’ Op. Br.* at 3, 12–17, 36–37, 42, 44, 48–49, 58, 66 (discussing substantial concerns raised by several agencies). In fact, the U.S. Forest Service was so concerned about the Rezone that it filed an appeal, which the County refused to accept, despite its obligation to consult with other state and federal agencies, because the appeal was filed late. See *id.* at 17; AR 211221–25 (Ex. 105). In any event, the positions of other agencies cannot absolve the County of its independent duty to comply with the law.

interests in the County's decision-making processes,<sup>9</sup> and even threaten that if the County is required to comply with the law for this Rezone, it will "question whether [it] should bother to plan at all."<sup>10</sup> The Court should reject the County's attempts to reframe this case. This case is ultimately about the rule of law and accountability. The Superior Court received extensive briefing, considered the whole record, and exercised its considered judgment to hold that the County unlawfully delegated its zoning power to individual landowners, authorized illegal spot zoning, and violated SEPA. Friends respectfully requests the remedy they are legally entitled to: a ruling that vacates the Rezone, or alternatively, a ruling that remands the action to the Superior Court with instructions to vacate the Rezone.

---

<sup>9</sup> The County makes numerous irrelevant, impertinent, and unsubstantiated ad hominem attacks on Respondents Friends of the White Salmon River and Friends of the Columbia Gorge, including false statements regarding these organizations' memberships and missions, and even the reasons for their participation in the County's public processes and the funding sources for this action. *See Cnty. Resp. Br.* at 4, 8, 50–51, 68–70. Contrary to the County's assertions about Respondents being "outsiders," *see id.* at 50, Friends' members live, work, recreate, own property, and raise their families in Klickitat County in the White Salmon River valley. CP 1561–1614 (Declarations Jan Muir, Paul Poknis, Joy Markgraf, Steve Stampfli, David Turner, Patricia L. Arnold, David Hammond, Keith Brown, and Marlene Woodward. These local property owners and active users of the White Salmon River are affected by the Rezone .

<sup>10</sup> *Cnty. Resp. Br.* at 68.

## II. REPLY IN SUPPORT OF CROSS APPEAL

### A. Because the County Unlawfully Delegated its Zoning Authority to Individual Landowners and Unlawfully Authorized Spot Zoning, the County's Actions are Ultra Vires and Therefore Void.

The County concedes that when it takes ultra vires zoning actions, those actions are void.<sup>11</sup> During the proceedings below, the Superior Court held that the County unlawfully delegated its zoning authority to individual landowners and unlawfully authorized spot zoning.<sup>12</sup> In its Response to the Cross Appeal, the County does not contest the remedy that is required for the Superior Court's rulings on unlawful delegation and spot zoning: namely, declaring the Rezone ultra vires and vacating the Rezone.<sup>13</sup> The Court of Appeals should award Friends the relief it is legally entitled to: the Court should vacate the Ordinance and Resolution by which the County adopted the Rezone.

#### 1. Unlawful Delegation

First, the Superior Court correctly held that the County unlawfully delegated its zoning authority to individual landowners by allowing them to choose their own zoning.<sup>14</sup> As the Washington Supreme Court has held, the power to adopt specific zones for specific properties is a quasi-judicial

---

<sup>11</sup> See *Cnty. Resp. Br.* at 61–62 (conceding that “[u]ltra vires acts are void.”).

<sup>12</sup> CP 1542.

<sup>13</sup> See *Cnty. Resp. Br.* at 61–68.

<sup>14</sup> See CP 1542; *Friends' Op. Br.* at 20, 62–64.

zoning power<sup>15</sup> that rests solely with the legislative authority (here, the Board of County Commissioners).<sup>16</sup> Unless authorized by statute, the legislative body of a local government *cannot* delegate away its zoning powers; any attempt to do so is *ultra vires* and therefore void.<sup>17</sup> The County’s delegation of its zoning powers to individual landowners is void.

## 2. Spot Zoning

The Superior Court also correctly held that in adopting the Rezone, the County unlawfully authorized spot zoning.<sup>18</sup> As with the County’s unlawful delegation, the County has no authority to allow spot zoning; any action that authorizes spot zoning is *ultra vires* and void.<sup>19</sup>

The County’s actions are therefore void.

---

<sup>15</sup> See *Leonard v. Bothell*, 87 Wn.2d 847, 850, 557 P.2d 1306 (1976) (“We also have characterized rezone decisions as quasi-judicial acts by the municipal legislative body.”).

<sup>16</sup> See *Lutz v. City of Longview*, 83 Wn.2d 566, 568–70, 520 P.2d 1374 (1974) (“What is the legal nature and effect of the act of imposing a [specific zone] upon a specific parcel of land? We hold that it is an act of rezoning which must be done by the city council because the council’s zoning power comes from the statute and that is what the statute requires. It is inescapable that application of [a specific zone] to [a specific] tract constitute[s] an act of rezoning . . . . Only the legislative body is empowered to adopt a zoning map . . . . Obviously the state has vested the authority to zone and rezone solely in the city council.”) (citations omitted). In the instant case, the Planning Enabling Act authorizes *solely* the Board of County Commissioners to adopt (and amend) zoning. See *Save Our State Park v. Bd. of Clallam County Comm’rs*, 74 Wn. App. 637, 875 P.2d 673 (1994); see also RCW 36.70.440, 36.70.600, 36.70.620, 36.70.650.

<sup>17</sup> See *Lince v. City of Bremerton*, 25 Wn. App. 309, 310–13, 607 P.2d 329 (1980) (“trial court was correct in invalidating [an] ordinance” that unlawfully delegated away city council’s zoning power).

<sup>18</sup> See CP 1542; *Friends’ Op. Br.* at 20, 62–69.

<sup>19</sup> See *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 859, 863, 871–73, 480 P.2d 489 (1971) (Superior Court correctly “void[ed]” rezoning action because it constituted spot zoning); *Smith v. Skagit County*, 75 Wn.2d 715, 745–46, 453 P.2d 832 (1969) (because county resolution was “illegal spot zoning . . . the amendments to the interim

**3. The Court of Appeals Should Vacate the County's Ordinance and Resolution.**

In conclusion, if the Court of Appeals affirms either or both of the Superior Court's holdings that the County unlawfully delegated its zoning authority to individual landowners and unlawfully authorized spot zoning, the Court of Appeals should find such actions ultra vires and should vacate the County's Ordinance and Resolution.

**B. Because the Rezone Was Adopted In Violation of SEPA, it is Ultra Vires.**

The Superior Court correctly held that the County violated SEPA in multiple ways, in particular by failing to prepare an environmental impact statement ("EIS") prior to rezoning approximately one thousand acres of sensitive lands for sprawling residential development.<sup>20</sup> As correctly determined by the Superior Court, the County violated SEPA by failing to consider a reasonable range of alternatives, failing to consider adverse impacts, improperly relying on incomplete mitigation measures, and failing to prepare an EIS.<sup>21</sup> Because compliance with SEPA is statutorily required *before* the County may take action, the Rezone was unlawfully enacted and must be vacated.

---

zoning code, maps and comprehensive plan . . . are *void*") (emphasis added); *Pierce v. King County*, 62 Wn.2d 324, 340, 382 P.2d 628 (1963) (spot zoning was "void").

<sup>20</sup> See CP 1541-42.

<sup>21</sup> See *id.*

As explained in Friends’ Opening/Response Brief, agency actions taken without the environmental review and disclosure required by SEPA are ultra vires and void.<sup>22</sup> Further, the SEPA rules expressly prevented the County from adopting and implementing the Rezone without first issuing the required EIS.<sup>23</sup>

The County responds by attempting to shift the goalposts. First, it repeatedly cites *South Tacoma Way, LLC v. State*,<sup>24</sup> a case that does not even apply SEPA but rather interprets government land sale rules, for a novel and unprecedented argument that SEPA violations are mere “procedural irregularities” that may be ignored by local governments and

---

<sup>22</sup> See *Friends’ Op. Br.* at 71 (citing *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 626–29, 632, 860 P.2d 390 (1993), *op. revised*, 866 P.2d 1256 (1994) (trial court invalidated solid waste management plan update because county failed to prepare EIS prior to adoption); *State v. Grays Harbor County*, 122 Wn.2d 244, 256 n.12, 857 P.2d 1039 (1993) (“[A]gency action which does not comply with SEPA is unlawful and outside the agency’s authority.”) (citing *Settle* § 20(h), at 263 (1993)); *Noel v. Cole*, 98 Wn.2d 375, 379–81, 655 P.2d 245 (1982) (because an agency failed to prepare a required EIS, its action was ultra vires), *superseded by statute on other grounds by Dioxin/Organochlorine Ctr. v. Pollution Control Hr’gs Bd.*, 131 Wn.2d 345, 932 P.2d 158 (1997); *King County v. Wash. St. Boundary Review Bd.*, 122 Wn.2d 648, 667, 860 P.2d 1024 (1993) (“In cases involving reversal of a DNS, it is necessary to remand to the agency for preparation of an EIS and enjoin the agency action until the statement is complete.”); *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 817–18, 576 P.2d 54 (1978) (vacating comprehensive plan amendment for failure to make threshold determination under SEPA); *Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wn.2d 475, 487–98, 513 P.2d 36 (1973) (renewal of building permit issued for lakeside development was unlawful and invalid because city failed to prepare EIS)). The County cites no authority for its incorrect assertion that this established body of SEPA precedent is “no longer good law.” *Cnty. Resp. Br.* at 64.

<sup>23</sup> See *Friends’ Op. Br.* at 71 (citing WAC 197-11-460(5) (“Agencies shall not act on a proposal for which an EIS has been required prior to seven days after issuance of the FEIS.”)).

<sup>24</sup> 169 Wn.2d 118, 233 P.3d 871 (2010).

reviewing courts.<sup>25</sup> The County’s novel argument stands in stark contrast to SEPA precedent, is unconvincing given the declared statutory purposes of SEPA, and is flatly contradicted by the express requirements of the SEPA rules.

Next, the County argues that *Kucera v. State DOT*<sup>26</sup>—a case involving the propriety of issuing a *preliminary injunction*—controls the cross appeal in the instant case, even though the cross appeal involves final relief on the merits rather than an injunction. *Kucera* simply does not apply to a final ruling providing relief on the merits for violations of SEPA.

Finally, the County attempts to distinguish decades of established SEPA precedent on the spurious ground that the County’s actions in the instant case, despite being held to violate SEPA, were somehow “consistent with SEPA policy.”<sup>27</sup> This argument is contrary to law and logic: the County’s SEPA violations rendered its action ultra vires. The Court of Appeals should vacate the Rezone or should remand to the Superior Court with instructions to do so.

---

<sup>25</sup> See *Cnty. Resp. Br.* at 61–64.

<sup>26</sup> 140 Wn.2d 200, 995 P.2d 63 (2000).

<sup>27</sup> *Cnty. Resp. Br.* at 66–68.

**1. The County’s SEPA Violations Were Not a Mere “Procedural Irregularity.”**

The County relies on *South Tacoma Way* for a novel argument that the County’s flawed SEPA review—held by the Superior Court to violate SEPA on four separate grounds—amounts to a mere “procedural irregularity.”<sup>28</sup> A review of *South Tacoma Way*, however, reveals two points. First, *South Tacoma Way* is not a SEPA case and did not establish any precedent for SEPA. Second, *South Tacoma Way* discusses a prior SEPA case that *confirms* that actions taken in violation of SEPA are ultra vires and void.

In *South Tacoma Way*, the Washington Supreme Court interpreted state law governing the sale of surplus land. The State Department of Transportation had sold surplus property to an abutting landowner, but mistakenly failed to comply with a regulation requiring notice to all abutting landowners of the intent to sell.<sup>29</sup> In response to a suit by other abutting landowners to have the sale declared void, the Court determined that the State was “generally authorized” to sell surplus property and that the underlying purpose of the regulation requiring notice to other property owners, “to protect the public from governmental fraud or collusion,” had

---

<sup>28</sup> See *Cnty. Resp. Br.* at 61–62.

<sup>29</sup> 169 Wn.2d at 121–22.

not been violated based on the facts of the case.<sup>30</sup> The Court characterized the State’s violation of the notice requirement as merely procedural<sup>31</sup> and explained that “the law recognizes a distinction between government acts that are ‘ultra vires’ and acts that suffer from ‘some procedural irregularity.’”<sup>32</sup> The case did not apply or establish new SEPA precedent.

The Court in *South Tacoma Way* did discuss a SEPA case, *Noel v. Cole*,<sup>33</sup> as an example of a case involving a law that imposes meaningful procedural requirements that if violated, render government actions ultra vires and void.<sup>34</sup> The County fails to disclose this key distinction.

In *Noel*, the Court reviewed the State’s decision to sell timber rights on public land to a private company without first preparing an EIS. The *Noel* Court held that the State’s failure to comply with SEPA rendered the timber contract ultra vires and void.<sup>35</sup>

The *South Tacoma Way* Court, in turn, cited *Noel* as an example of a case where a government action was ultra vires. As the *South Tacoma Way* Court noted, by failing to prepare an EIS, the State in *Noel* had “also failed to act in accordance with the policy underlying SEPA.”<sup>36</sup> That

---

<sup>30</sup> *Id.* at 123–24.

<sup>31</sup> *Id.* at 126.

<sup>32</sup> *Id.* at 122.

<sup>33</sup> 98 Wn.2d 375, 655 P.2d 245 (1982).

<sup>34</sup> *S. Tacoma Way*, 169 Wn.2d at 125–26 & n.4 (citing *Noel*, 98 Wn. 2d at 378–81).

<sup>35</sup> *Noel*, 98 Wn.2d at 380–81.

<sup>36</sup> *S. Tacoma Way*, 169 Wn.2d at 126 (citing *Noel*, 98 Wn. 2d at 380).

policy, emphasized by the Court in *Noel*, is that “presently unquantified environmental amenities and values will be given appropriate consideration in decision making.”<sup>37</sup> In contrast, the *South Tacoma Way* Court expressly held that the mere violation of a general notice requirement for sales of surplus land was not analogous to the SEPA violation (failure to prepare an EIS) in *Noel*.<sup>38</sup>

Just as in *Noel*, and in contrast to *South Tacoma Way*, Klickitat County here has “thwarted one of the central purposes of SEPA—to ensure that environmental impacts are considered before a decision is made”—by failing to prepare an EIS, failing to consider alternatives, and failing to disclose impacts.<sup>39</sup> The County’s violations all rendered its actions ultra vires.

In addition, *South Tacoma Way* did not involve the SEPA rules, which expressly provide that “[a]gencies shall not act on a proposal for which an EIS has been required prior to seven days after issuance of the FEIS.”<sup>40</sup> Here, the County adopted *and continues to implement* the Rezone without ever having prepared the EIS that the Superior Court determined was legally required. The County is directly violating the policies and

---

<sup>37</sup> RCW 43.21C.030(2)(b) (cited in *Noel*, 98 Wn.2d at 380).

<sup>38</sup> *S. Tacoma Way*, 169 Wn.2d at 125–26 & n.4.

<sup>39</sup> *Lane v. Port of Seattle*, 178 Wn. App. 110, 123–24, 316 P.3d 1070 (2013) (emphasizing the distinctions between the statutes and violations involved in *Noel* and *South Tacoma Way*).

<sup>40</sup> WAC 197-11-460(5).

standards of the SEPA statute and rules, quite unlike the technical notice violation in *South Tacoma Way*.

In conclusion, the Superior Court correctly held that in adopting the Rezone, the County violated SEPA on multiple grounds.<sup>41</sup> The County's violations of the purposes and standards of SEPA render the Rezone ultra vires and void. Therefore, it must be vacated.

## **2. The Preliminary Injunction “Balancing” Test Does Not Apply to the Issue of Final Relief.**

The County next advances an argument about the “balancing” standard for issuing an injunction, and cites *Kucera*, a case involving a preliminary injunction.<sup>42</sup> This argument completely misses the mark. Friends are not asking the court to issue a preliminary or permanent injunction. The multi-factor “balancing” test cited by the County applies in the preliminary injunction context, and does *not* apply to a determination of whether an unlawfully taken action is ultra vires and void, nor to a final ruling for relief on the merits.

In *Kucera*, the Washington Supreme Court dissolved a preliminary injunction because the trial court had failed to apply the “established prerequisites for issuance of a preliminary injunction.”<sup>43</sup> The *Kucera* Court was neither issuing a final remedy nor ruling whether an action was

---

<sup>41</sup> See CP 1541–42.

<sup>42</sup> See *Friends’ Op. Br.* at 62–64.

<sup>43</sup> 140 Wn.2d at 203 (emphasis added).

ultra vires or void. As the Court expressly stated, “[w]ere we to hold SEPA does or does not apply to the State’s actions here, our decision would be the equivalent of a decision on the merits, a task for which this court is ill suited.”<sup>44</sup>

In contrast, in the instant case, Friends have requested that this Court provide the relief that Friends are legally entitled to: declare the Rezone void and vacate the Ordinance and Resolution adopting it.<sup>45</sup> Friends have not requested that this Court issue an injunction; indeed, an injunction would be superfluous in light of Friends’ requested relief of vacatur. The County fails to show why injunctive standards should be applied to a final determination of whether an action is ultra vires and void.

### **3. The County has *Not* Complied with SEPA’s Policies.**

The County’s final argument is that, despite the fact that it failed to comply with SEPA, the County somehow acted “consistent with SEPA *policy*.”<sup>46</sup> Apparently, according to the County, any mere attempt to comply with SEPA meets “SEPA’s underlying policy”<sup>47</sup>—*even in cases*

---

<sup>44</sup> 140 Wn.2d at 217.

<sup>45</sup> *Friends’ Op. Br.* at 4, 70, 71, 72, 73.

<sup>46</sup> *Cnty. Resp. Br.* at 66–68 (emphasis added).

<sup>47</sup> *Id.* at 66.

where an agency's SEPA analyses and determinations are overturned on judicial review. The County's argument is wrong and must be rejected.

As the *Kucera* Court acknowledged, “[t]he reversal of a DNS [when ruling on the merits] necessarily implies that a particular proposal is likely to have a significant adverse environmental impact, thus mandating the preparation of an EIS.”<sup>48</sup> That is exactly the case here. The County attempts to argue that the Rezone does not involve “significant and irreversible impacts,”<sup>49</sup> but the arguments are nothing more than a thinly veiled attempt by the County's counsel to reargue the merits of the case and make post-hoc, unsupported rationalizations for the County's failure to prepare an EIS.

An EIS is required whenever a proposal has probable significant, adverse effects,<sup>50</sup> and a final EIS must be issued at least seven days before a proposal can be acted upon.<sup>51</sup> A failure to prepare a required EIS thwarts SEPA's fundamental purposes and policies.<sup>52</sup>

---

<sup>48</sup> 140 Wn. 2d at 219.

<sup>49</sup> *Cnty. Resp. Br.* at 61–62.

<sup>50</sup> See RCW 43.21C.030(2)(c).

<sup>51</sup> WAC 197-11-460(5).

<sup>52</sup> “The policy of the act, which is simply to ensure via a ‘detailed statement’ the full disclosure of environmental information so that environmental matters can be given proper consideration during decision making, is thwarted whenever an incorrect ‘threshold determination’ is made. The purpose of the broad scope of review is to ensure that an agency, in considering the need for an EIS, does not yield to the temptation of expediency thus short-circuiting the thoughtful decision-making process contemplated by SEPA.” *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 700–01, 601 P.2d 501 (1979) (citing *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87

In arguing that its SEPA violations are somehow consistent with SEPA policy, the County summarizes its earlier arguments on the merits and provides a list of documents that purportedly disclose the Rezone's impacts.<sup>53</sup> Rearguing the same points during the remedy phase does not resolve the glaring omissions in the documents referenced by the County. As but one example, these documents do not address the impacts of the proposed Rezone on the listed salmon and steelhead species that began repopulating the White Salmon River after Condit Dam was removed.<sup>54</sup> The County is required by SEPA to review the impacts of the Rezone on these fish species and their habitat.<sup>55</sup>

“A basic purpose of SEPA is to require local governmental agencies, including counties, to consider total environmental and ecological factors to the fullest extent when taking ‘major actions significantly affecting the quality of the environment.’”<sup>56</sup> The County

---

Wn.2d 267, 273, 552 P.2d 674 (1976); *Sisley v. San Juan County*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977)).

<sup>53</sup> *Cnty. Resp. Br.* at 67–68

<sup>54</sup> The County continues to ignore the significant salmon and steelhead habitat within the Rezone area, characterizing this existing habitat as speculative. *See Cnty. Resp. Br.* at 14 (“[F]ish runs . . . may exist in the future.”), 22 (“fish runs which may exist following [the breach of Condit Dam in] 2011.”). Further, the County attempts to paint a picture that the four species of ESA-listed fish species dependent on the White Salmon River and its tributaries are all “extinct” or “extirpated or nearly so.” *Id.* at 42 (citing to County memorandum that relies on pre-dam-removal ESA status reports for listed species). The County’s position ignores the elephant in the room: the removal of Condit Dam has restored access to high-quality habitat for steelhead and salmon, and these fish have now returned to the River in significant numbers. *See Friends’ Op. Br.* at 8–10.

<sup>55</sup> *See Friends’ Op. Br.* at 28–36.

<sup>56</sup> *Sisley*, 89 Wn.2d at 82 (quoting RCW 43.21C.030(2)(c)).

cannot seriously argue that it complied with this policy, given that it failed to prepare an EIS, failed to consider a reasonable range of alternatives, failed to evaluate adverse impacts, and failed to adequately address mitigation measures.<sup>57</sup> It is improper for the County to reargue the merits of its flawed SEPA review during a remedy proceeding. The County's arguments undermine and violate the purposes and requirements of SEPA, and therefore must be rejected.

The Court should also reject the County's meritless argument that the proposed Rezone would somehow *reduce* impacts.<sup>58</sup> The County's proposal has already been found by the Superior Court to pose a threat of unmitigated, significant adverse environmental impacts.<sup>59</sup> Furthermore, this issue is not relevant for the remedy questions presented in the cross appeal.<sup>60</sup>

Finally, the County insists on continuing to process land use applications under the Rezone, as if the Rezone had never been judicially declared unlawful.<sup>61</sup> The County's actions create uncertainty and risk for property owners, leaving them without clear direction on the status of the

---

<sup>57</sup> See CP 1541–42.

<sup>58</sup> See *Cnty. Resp. Br.* at 65.

<sup>59</sup> See CP 1541–42.

<sup>60</sup> See *supra* Part I.

<sup>61</sup> See, e.g., *Friends' Op. Br.* at 70–71.

County's zoning. Friends seeks a ruling from the Court of Appeals that eliminates the uncertainty by vacating the Rezone.

### **III. CONCLUSION**

Friends asks this Court to affirm the Superior Court's holdings on the merits and to award Friends the relief they are legally entitled to by vacating the Ordinance and Resolution or remanding to the Superior Court with specific instructions to do so.

Respectfully submitted,

/s/ Ralph O. Bloemers  
Counsel for Friends of the White Salmon River and  
Friends of the Columbia Gorge

## CRAG LAW CENTER

**August 25, 2014 - 10:33 AM**

### Transmittal Letter

Document Uploaded: 452693-Respondents Cross-Appellants' Reply Brief.pdf

Case Name: Friends of White Salmon River et al. v. Klickitat County

Court of Appeals Case Number: 45269-3

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion:  \_\_\_\_\_

Answer/Reply to Motion:  \_\_\_\_\_

Brief: Respondents Cross-Appellants' Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes:  \_\_\_\_\_

Hearing Date(s):  \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other:  \_\_\_\_\_

### Comments:

Dear Clerk [--Non Valid Argument--] This is the final brief to be filed in this case. The case is now ready for presentation to the Court of Appeals and may be scheduled for oral argument. Regards, Ralph Bloemers

Sender Name: Ralph O Bloemers - Email: [ralph@crag.org](mailto:ralph@crag.org)

A copy of this document has been emailed to the following addresses:

[susan@susandrummond.com](mailto:susan@susandrummond.com)

[nathan@gorgefriends.org](mailto:nathan@gorgefriends.org)

[lorih@co.klickitat.wa.us](mailto:lorih@co.klickitat.wa.us)

[oliver@crag.org](mailto:oliver@crag.org)