

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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**LOUISE LAUER and DARRELL de TEINNE,**

*Respondents,*

v.

**PIERCE COUNTY; and MIKE and SHIMA GARRISON,**

*Appellants.*

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ON APPEAL FROM THE SUPERIOR COURT OF  
PIERCE COUNTY, STATE OF WASHINGTON  
Superior Court No. 08-2-06665-2

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
09/15/08 - 3 PM L. G.  
BY [Signature] DEPUTY

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REPLY BRIEF OF APPELLANTS GARRISON

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## I. INTRODUCTION

Respondents Lauer and deTienne<sup>1</sup> have filed a response brief that fails to address several substantive issues raised in the opening *Brief of Appellants Garrison* (hereafter “*Appellants’ Opening Brief*” or “*Opening Brief*”). Respondents have failed to establish standing and to meet their burden of establishing error by the Hearing Examiner as required by RCW 36.70C.130. Furthermore, the County’s critical areas ordinance has not been reviewed by the Department of Ecology in accordance with RCW 90.58.030, and therefore the issue of whether the Appellants vested to the 2005 variance criteria is moot. This Court should reverse the Superior Court decision and affirm the decision of the Hearing Examiner granting Appellants’ variance.<sup>2</sup>

## II. STATEMENT OF THE CASE

Respondents take free liberty with several statements of fact to which they fail to cite to the record.<sup>3</sup> Such an approach is improper and

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<sup>1</sup> Pierce County has filed a brief response indicating their agreement with Respondents Lauer and deTienne regarding the issue of “mootness” under *Futurewise v. Western Washington Growth Management Hearings Bd*, 164 Wn.2d 242, 189 P.3d 161 (2008), and *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board*, 152 Wn.App. 190, 198, 217 P.3d 365 (2009). Pierce County offers no substantive arguments regarding this issue or any others.

<sup>2</sup> Due to the limitations imposed by the Court rules regarding the length of reply briefs, Appellant will be relying extensively upon the arguments previously made in their opening brief, which specifically addressed many of Respondents’ arguments. RAP 10.4(b).

<sup>3</sup> By way of example, on page 6 of the *Brief of Respondent*, Respondents state “Garrison commenced construction and poured the foundation squarely within the buffer that they

any such alleged facts should be disregarded by the Court.<sup>4</sup>

As the Court can see from a comparison of *Appellants' Opening Brief* and the Respondents' response, there are many facts that are undisputed. What is disputed, is the Respondents' characterization of the facts – which is an undisguised attempt to portray the Appellants in the most negative light possible.<sup>5</sup> Respondents' characterizations of the Appellants are largely based on their own interpretation of the facts. As discussed in *Appellants' Opening Brief*, there is no evidence that Appellants intentionally mislead or misstated facts in their building permit application. See, *Appellants' Opening Brief*, at 6-7 and 41.

Respondents make several allegations that the Appellants' site plan characterized an alleged trail as a "road." Respondents appear to be intentionally exaggerating the facts. The site plan refers to the trail areas as an "existing drive." AR 263. There is nothing in the record that would suggest that the Appellants ever characterized this area as a "road" or that they claimed that it had any structures within it, or that they alleged it was

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had been ordered to re-vegetate." Respondents' assertion is unsupported by the record. There are several other similar factual assertions for which Respondents offer no citation to the record and therefore should be ignored.

<sup>4</sup> *Lawson v. Boeing Co.*, 58 Wn.App. 261, 271, 792 P.2d 545 (1990), ("The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel and on this court.").

<sup>5</sup> For Example, Respondents argue that the Hearing Examiner improperly considered their proposal "in light of the unlawful clearing and construction..." *Brief of Respondent*, at 12-13. Respondents have alleged no error in the Hearing Examiner's application of the variance criteria. CP at 1-32.

anything other than a dirt area wide-enough for vehicles. AR 1-338, and RP 1-43.

Respondents fail to respond to certain factual allegations which are significant to the issues on this appeal:

1. Respondents never raised or questioned whether the building permit was “vested” until October 2007, nearly 3 1/2 years after the building permit application was filed. *Appellants’ Opening Brief*, at 6, citing AR 236-214.
2. The site plan submitted by Appellants clearly depicts a drainage course at the location of the stream. *Appellants’ Opening Brief*, at 6, citing AR 263.
3. The County staff was very familiar with the site before the building permit application was ever filed. *Appellants’ Opening Brief*, at 6, citing AR 176-186.
4. The stream at issue in this case is non-fish bearing and in an extremely degraded condition. *Appellants’ Opening Brief*, at 9-10, citing AR 211, 230, and 235; and RP at 5, 9-10, 38-39.
5. The entire project is within 200 feet of the shoreline. AR at 111
6. The County, who has particular experience and expertise in the administration of its regulations, has never challenged the completeness of the application. *Appellants’ Opening Brief*, at 11.

AR 1-338.

7. The Hearing Examiner determined that the Appellants' variance application *fully satisfied* each of the requirements for a variance under the County's code. The Respondents have never challenged this determination. *Appellants' Opening Brief*, at 11-12 and 49, citing AR 28-40. See also, CP 1-32.
8. Pierce County never adopted the 2005 Critical Areas Ordinance as part of its shoreline plan until October 16, 2007, which is after the variance application was filed. That ordinance was later repealed. *Appellants' Opening Brief*, at 12, citing Appendix<sup>6</sup> A. See also Appendix B.

Furthermore, certain important undisputed facts have been conceded by the Respondents:

1. Appellants submitted their application for a building permit in March of 2004. *Brief of Respondent*, at 5.
2. Appellants submitted their application for a variance August 9, 2007. *Brief of Respondent*, at 11.
3. Respondents never submitted Appellants' complete building permit application as part of the record. *Brief of Respondent*, at 26, fn1.

### III. ARGUMENT

Before responding to the specific arguments of Respondents it is important to keep in mind that Appellants – not the Respondents – own the property that is at issue in this case. They pay taxes on the property and are responsible for its upkeep and maintenance. They are entitled to the use and enjoyment of their property without unnecessary interference from their neighbors or the County.

The basic rule in land use law is still that, *absent more, an individual should be able to utilize his own land as he sees fit.* U.S.Const. amends. 5, 14. ...While local governments exist to provide necessary public services... exercise of this authority must be reasonable and rationally related to a legitimate purpose of government such as avoiding harm or protecting health, safety and general [welfare], not local or parochially conceived, welfare.<sup>7</sup>

As such, any regulations of private property “must be *strictly construed* in favor of property owners” or be subject to a challenge for breach of due process.<sup>8</sup> To avoid a violation of due process it is necessary that the County’s Codes be interpreted as “achieving a legitimate public purpose” and that the means used are “*necessary* to achieve that purpose.”<sup>9</sup>

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<sup>6</sup> The Appendices A and B are attached to the *Appellants’ Opening Brief*.

<sup>7</sup> *Norco Const., Inc. v. King County*, 97 Wn.2d 680, 684-685, 649 P.2d 103 (1982). [Internal Citations Omitted.] [Emphasis Added.].

<sup>8</sup> *Cox v. Lynnwood*, 72 Wn.App. 1, 7, 863 P.2d 578 (1993) (*quoting Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956)).

<sup>9</sup> *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330-332, 787 P.2d 907, *cert.*

A. THE SUPERIOR COURT ERRED IN FAILING TO STRIKE THE CLAIM ALLEGED IN PARAGRAPH EIGHT OF THE PETITION FOR REVIEW BECAUSE THE FACTS ASSERTED IN THE CLAIM ARE NOT SUPPORTED BY FACTS IN THE RECORD.

Respondents argue that they should be permitted to establish standing to file a LUPA Petition by submitting affidavits after the close of the administrative record. *Brief of Respondent*, at 15. In support of this argument, Respondents cite to *Suquamish Indian Tribe v. Kitsap County*, 92Wn.App.816, 831,965 P.2d 636 (1998). Unfortunately, the *Suquamish* case does nothing to further their argument. In *Suquamish*, the Court did review “affidavits” but the facts of the case fail to demonstrate when those “affidavits” were filed, or whether they were, in fact, originally part of the underlying Administrative Record.<sup>10</sup> Furthermore, the Court in *Suquamish* was not asked to decide whether this process was appropriate and the case offers no analysis as to the propriety of reviewing facts after a open-record hearing has closed.<sup>11</sup>

While it might seem appealing to allow parties to supplement the record on standing after the hearing has closed, the fact that there is no fact-finding to vet or contest the facts alleged creates a significant due

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*denied*, 498 U.S. 911, 111 S.Ct. 284, 112 L.Ed.2d 238 (1990); *see also Guimont v. Clarke*, 121 Wn.2d 586, 608-09, 854 P.2d 1 (1993). [Emphasis Added].

<sup>10</sup> *Suquamish*, 92Wn.App. at 831.

<sup>11</sup> *Suquamish*, 92Wn.App. at 831.

process issue for the person whose property is the subject of the appeal.<sup>12</sup>

The threshold determination of whether a party has standing is necessary to protect a property owner from being forced to endure the expense and delay of a Land Use Appeal – something that should not be casually disregarded.

Furthermore, as in this case, if post-hearing affidavits were allowed, a person filing a petition can simply assert any facts they want to support their claim of standing, regardless of the merit of such assertions, essentially undermining the purpose and intent of *requiring the petitioner to establish* standing under RCW 36.70C.060 and 36.70C.070. It should never be just enough to say “I am prejudiced.” There must be proof. The clear requirements of RCW 36.70C.120(1) limits the Court’s review to the record, the only exceptions being specifically listed in paragraphs (2)-(4) of the statute. RCW 36.70C.120(1). Respondents argue that this section is limited to a review of the ultimate issues on appeal; however, the statute is written more broadly to include any “judicial review of factual issues and the conclusions.” RCW 36.70C.080 requires the Court to review

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<sup>12</sup> In cases, such as this one, that involve highly technical issues it is particularly important to have an opportunity to contest the alleged facts. All of the “facts” alleged by Respondents in their affidavits to establish standing are highly technical in nature. Neither Respondent is an expert or qualified to render opinions regarding the impacts of this project on fish and wildlife, stormwater drainage, engineering, etc. Regarding the importance of due process when addressing private property rights, see, e.g. *Norco Const., Inc. v. King County*, 97 Wn.2d 680, 684-685, 649 P.2d 103 (1982); and *Cox v. Lynnwood*, 72 Wn.App. 1, 7, 863 P.2d 578 (1993).

standing at the initial hearing. Clearly the determination as to whether a party has standing involves a “judicial review of factual issues and the conclusions.”

**B. THE SUPERIOR COURT ERRED IN FAILING TO DISMISS THE PETITION FOR REVIEW BECAUSE RESPONDENTS FAILED TO ESTABLISH STANDING UNDER RCW 36.70C.060(2).**

In their response, Respondents have offered facts and argument regarding standing, which go beyond those asserted in their Petition. *Brief of Respondent*, at 18.<sup>13</sup> The facts alleged in the Petition are limited to the following two assertions by Respondents: 1) the project will “negatively impact” their property; and 2) the impacts are specifically “related to development near and alteration of an existing stream that crosses Garrison’s property, including erosion caused to surface water flows and increased turbidity in Henderson Bay.” CP at 2-3, 16-19 and 42. Respondents disregard the fact that the entire project is located on Appellants property and that when the stream leaves the Appellants’ property it empties into Henderson Bay. AR at 111. Neither Respondent is even potentially “impacted” by erosion or turbidity.

In this case, the Hearing Examiner issued *uncontested* findings

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<sup>13</sup> Respondents’ argument also goes beyond the facts within the record. Respondents state that this “decision allows Garrison to maintain the stream in its present location.” *Brief of Respondent*, at 18. First, this claim is based solely on a declaration filed in support of standing, and there has never been an opportunity to contest it. Second, there is nothing within this record that suggests that the 2005 regulations would require the

that contradict the alleged prejudices and clearly demonstrate that the proposed project will not result in increased “erosion” or “turbidity.” AR at 30-31, 36, 42-48, and 54-55; RP 4-5, 12-16, and 38-40. As noted previously, the Respondents did not appeal the Hearing Examiners findings and conclusions that held that the Appellants variance application fully satisfies the County’s criteria, and they are therefore deemed verities.<sup>14</sup>

1. Respondents Do Not Have Standing Because They are Not Prejudiced or Likely to be Prejudiced by the Decision.

As noted in *Appellants’ Opening Brief*, in order to have standing under LUPA, a Respondent must establish an “injury in fact” which is more than just “the simple and abstract interest of the general public...”<sup>15</sup>

Respondents argue that they will be injured by the *project*. This argument ignores the fact that it is not the *project/variance* they have appealed but the decision that the building permit *vested* in 2004. There is simply no evidence that the determination that the project was vested prejudices the Respondents. Furthermore, the Respondents alleged “prejudices” as detailed in their response, focuses on what has happened in the *past*, and not on the actual project which will result in

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stream to be moved, that it needed to be moved, or that it had ever been moved.

<sup>14</sup> *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995).

<sup>15</sup> *Nykreim*, 146 Wn.2d at 934-935.

“enhancements [that] will actually improve the area.” AR at 30. Finally, none of the alleged prejudices are supported by competent testimony; the enumerated “prejudices” are highly technical in nature yet are merely offered by lay witnesses with no demonstrated expertise. CP at 109-121. These claims are directly contradicted by the record and the uncontested expert testimony presented to the hearing examiner – none of which were identified as erroneous by the Respondents. AR at 30-31, 36, 42-48, and 54-55; RP 4-5, 12-16, and 38-40; and CP 1-32.

2. Respondents Do Not Have Standing Because Their Interests are Not Among Those that the Local Jurisdiction Was Required to Consider.

In *Asche v. Bloomquist*, and *Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002), the courts addressed the “zone of interest test.”<sup>16</sup> The test is whether the underlying ordinance or regulation “was intended to protect Respondents’ interest.”<sup>17</sup> Simply being a neighbor to a project is not enough to establish standing.<sup>18</sup> The assertion that the Respondents would be “better protected” by the 2005 regulations is both conclusory, and fails to establish an interest that is different than the general public’s.

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<sup>16</sup> *Asche v. Bloomquist*, 132 Wn.App. 784, 794, 133 P.3d 475 (2006), *review denied*, 153 P.3d 195 (2007). In *Asche*, the County was applying a code that specifically required the County to consider the visual impacts of a project on adjacent property.

<sup>17</sup> *Nykreim*, 146 Wn.2d at 937; and *Asche*, 132 Wn.App. at 794-795.

<sup>18</sup> *See, e.g. Larsen v. Town of Colton*, 94 Wn.App. 383, 391, 973 P.2d 1066 (1999).

3. Respondents Do Not Have Standing Because the Requested Relief will Not Eliminate or Redress the Prejudice Asserted by Respondents.

Respondents have failed to establish how the 2005 regulations will provide any greater protection to redress the prejudice (erosion and turbidity) alleged. Respondents have failed to establish that they have standing to request reversal of the Hearing Examiner's decision.

4. Respondents Do Not Have Standing Because Respondents Have Failed to Exhaust Their Administrative Remedies.

Under LUPA a "land use decision" is defined as including an "*interpretative or declaratory decision* regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property."<sup>19</sup> Respondents argue that they are not required to exhaust administrative remedies because the determination that the Appellants' building permit application was complete is "not a land use decision." *Brief of Respondent*, at 19.

The issue of whether a project application is vested is a decision that falls directly within the definition of a "land use decision." It is a government approval required by law and/or is an interpretive or declaratory decision regarding the rules/laws that regulate the proposed

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<sup>19</sup> RCW 36.70C.020(1). [Emphasis Added].

improvement to the Appellants' property.<sup>20</sup> The determination by the County that the application is "complete" is fundamental to all decisions made thereafter. If the County had determined that the application was not "complete" the Appellants would have had the right to appeal such a determination.<sup>21</sup> As noted by Respondents, this decision determines what development regulations will apply.<sup>22</sup> The fact that it is potentially one decision in a series of decisions does not change the fact that it is a "land use decision" appealable under LUPA.<sup>23</sup> It is inconceivable that such a fundamental issue can be raised nearly *four years* after the fact, and still be subject to review.

Furthermore, it is well settled that "ministerial" and "interpretive" decisions are subject to the provisions of LUPA.<sup>24</sup> As discussed above, it is uncontested that the Respondents did not appeal the 2004 determination of completeness within fourteen (14) days of the decision and that the Respondents did not raise this issue until the hearing before the Hearing Examiner in late 2007.<sup>25</sup> Because they failed to properly and timely

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<sup>20</sup> RCW 36.70B.070.

<sup>21</sup> *Abbey Road Group, LLC v. City of Bonney Lake*, 141 Wn.App. 184, 190, 167 P.3d 1213 (2007) (Appeal of Director's determination that a project was not vested to hearing examiner.).

<sup>22</sup> PCC 18.160.010(C).

<sup>23</sup> See, e.g., *Nickum v. City of Bainbridge Island*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_ WL 4043370, at paragraphs 15-17 (Decided 11/24/2009); and *Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology*, 162 Wn.2d 825, 843, 175 P.3d 1050 (2008).

<sup>24</sup> *Nykreim*, 146 Wn.2d at 929-930; and *Asche*, 132 Wn.App. at 791.

<sup>25</sup> PCC 1.22.090

exhaust their administrative remedies, they cannot raise the issue now.<sup>26</sup> This is an improper collateral attack on the decision issued in 2004.<sup>27</sup> The Respondents failed to properly exhaust their administrative remedies.

Respondents' theory, if accepted, would completely undermine the purposes of LUPA in supporting administrative finality in land use decisions.<sup>28</sup> Persons who are dissatisfied with the results of any land use decision could raise the issue of vesting at any time even when, as in this case, several *years* have passed from the determination that the application was complete. Such a result would be disastrous to the fundamental purposes of finality, particularly in such cases where a project proponent have spent months if not years and thousands of dollars developing the project proposal.

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<sup>26</sup> 36.70C.060.

<sup>27</sup> *Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology*, 162 Wn.2d 825, 844, 175 P.3d 1050 (2008) *citing*, *Columbia River Gorge Comm'n*, 144 Wash.2d 30; *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410, 120 P.3d 56 (2005) (Footnote 7 - Collateral attack of permit extensions cannot be made in petition for revocation when 21-day appeal period was not followed); and *Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wn.2d 440, 463, 54 P.3d 1194 (2002) (Failure to timely appeal underlying land use decision bars DOE from a collateral challenge of that decision in a shoreline appeal).

<sup>28</sup> *Nykreim*, 146 Wn.2d at 931-932, *quoting Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001), (alterations in original) (*quoting Deschenes v. King County*, 83 Wn.2d 714, 716-17, 521 P.2d 1181 (1974)). *See also Grundy v. Brack Family Trust*, 116 Wn.App. 625, 67 P.3d 500 (2003), *reversed on other grounds*, 155 Wn.2d 1, 117 P.3d 1089 (2005).

C. THE SUPERIOR COURT SHOULD HAVE AFFIRMED THE HEARING EXAMINER'S DECISION BECAUSE APPELLANTS' APPLICATION WAS VESTED TO THE 1997 PIERCE COUNTY CODE PROVISIONS.

In the thirteen pages Respondents dedicate to addressing the issue of vesting; it is noteworthy that they cite virtually no cases in support of their legal arguments, and certainly none that are on point. Nor do Respondents dedicate any of their response to addressing the significant legal authority presented by Appellants in their *Opening Brief*. *Brief of Respondent*, at 21-34.

1. Respondents Failed to Meet their Burden of Establishing that Appellants' Application Was Incomplete Under RCW 19.27.095(2).

In a footnote the Respondents simply brush-off the argument that they failed to carry their burden of establishing error because they did not submit a complete copy of the building permit application submitted by the Appellants. (*Brief of Respondent*, at 26, fn 1). Respondents fail to acknowledge two critical issues in their response. First, as the persons appealing the underlying land use decision, it is *their burden* to establish error. The response that "there is no dispute as to its contents" ignores the fact that the entirety of the application is relevant to determining if the application contained the alleged missing data. Second, because vesting was not the issue brought before the Hearing Examiner *by Appellants*, it

was never their burden to produce it at the hearing.

2. Respondents Failed to Meet their Burden of Establishing that Appellants' Application Was Incomplete Under the Pierce County Code.

***a. Respondents Argument that Appellants' Application is Incomplete under PCC 18.40.020 is Misplaced.***

Respondents repeatedly ignore the very clear provisions of PCC 18.160.030 "Applicability" which limits the application of the "vesting" rules for building permits. "Vesting of building permit applications are governed by the rules of RCW 19.27.095 and Title 15 PCC." PCC 18.160.030. [Emphasis Added].

***b. Appellants' Application Satisfied the Requirements of the Pierce County Submittal Checklist.***

As discussed in *Appellants' Opening Brief*, the Appellants provided a professionally prepared site plan which clearly identified the drainage area in the topography, as well as the culvert. *Appellants' Opening Brief*, at 31-32. Respondents repeatedly ignore this fact and continue to argue that Appellants failed to disclose the drainage course on their site plan.

Respondents have offered not one case to support their theory that the permit cannot vest if there is any "failure" in the application. Furthermore, they failed to respond to the fact that the law clearly provides that an application may be deemed complete – even if additional

information is required.<sup>29</sup>

***c. Respondents Have Failed to Establish that Only “Outright Permitted” Permit Applications Vest at the Time of Application.***

Respondents have offered *two cases* in support of their inventive theory that only outright permitted and ministerial applications can vest. The first case is *Crown Cascade v. O’Neal*, 100 Wn.2d 256, 260, 668 P.2d 585 (1983). Respondents cite this case in support of the argument that “[a]n application may only vest if the government’s review of the application is purely ministerial.” *Brief of Respondent*, at 31. The *Crown Cascade* case, however, has nothing to do with vesting. This case stands solely for the conclusion that the *issuance of a building permit* is a ministerial act.<sup>30</sup> A clear example of a permit application that will vest a project, but which is not “ministerial,” is a preliminary plat application. RCW 58.17.033. Preliminary plats require extensive review and usually a public hearing. See, e.g RCW 58.17.090 – 58.17.120.

The second case cited by Respondents is *Hull v. Hunt*, 53 Wn.2d 125, 331 P.2d 856 (1958). Respondents argue that *Hull* stands for the proposition that “a building permit application that proposes a project that is not allowed outright by the existing land use ordinance cannot vest.”

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<sup>29</sup>RCW 19.27.095(5); RCW 36.70B.020(2); *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 493-496, 275 P.2d 899 (1954); and *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 48, 720 P.2d 782 (1986).

*Brief of Respondent*, at 32. The *Hull* case, however, stands merely for the basic rules of vesting – which have continued to be further refined by subsequent cases. The *Hull* Court certainly did not address the ultimate question for which Respondents cite it as authority, specifically whether only “outright permitted” land use applications can vest.<sup>31</sup>

Finally, and significantly, Respondents have completely ignored the substantial legal precedence cited by Appellants which clearly establishes that projects do not have to be “outright permitted” nor “ministerial” to vest. *Appellants’ Opening Brief*, at 34-35.

3. Appellants’ Application Was Deemed Complete by Operation of Law.

Respondents ignore the plain language of RCW 36.70B.070, which unequivocally establishes a time parameter for an application to be deemed “complete.” This statute puts the onus on the County to either tell an applicant that their application is “incomplete” in a timely manner or it will automatically be deemed complete by operation of law. RCW 36.70B.070. This statute is clearly intended to further the express purpose of Chapter 36.70B RCW of promoting efficiency and reducing the regulatory burden placed on the public. RCW 36.70B.010.

Respondents present a “Pandora’s Box” defense in an effort to

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<sup>30</sup> *Crown Cascade*, 100 Wn2d at 260.

<sup>31</sup> *Hull*, 53 Wn.2d at 130.

encourage the Court to ignore the plain language of the statute.<sup>32</sup> Respondents argue that if a permit is deemed vested by operation of law it will prevent “future challenges” to the application and make applicants “immune from consequences for their actions.” *Brief of Respondent*, at 33-34.

This argument presents a true red-herring. It cannot be disputed that all vesting does is “allow developers to determine, or ‘fix,’ the rules that will govern their land development.”<sup>33</sup> A finding that a permit application is vested is not tantamount to guaranteeing a developer the ability to build. “A vested right merely establishes the ordinances to which a building permit and subsequent development must comply.”<sup>34</sup> In essence, vesting sets the “rules” by which all the parties must abide, but the applicant will *still be required to abide* by the rules. No one vests to the right to ignore the law. In this case, it is undisputed that the variance application submitted by the Appellants fully complied all of the criteria under the County’s Code.

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<sup>32</sup> *Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002) (Courts must give effect to a statute’s plain meaning and should assume the Legislature meant exactly what it said. Courts are “obliged to give the plain language of a statute its full effect, *even when its results may seem unduly harsh.*”).

<sup>33</sup> *West Main*, 106 Wn.2d at 51.

<sup>34</sup> *West Main*, 106 Wn.2d at 53.

D. WHETHER APPELLANTS HAD UNCLEAR HANDS IS NOT MATERIAL TO THE ISSUE OF VESTING.

Respondents rely on two cases in support of their argument that “good faith” is relevant to the Court’s consideration of vested rights.<sup>35</sup> *Brief of Respondent*, at 36. The first case, *Mercer Enterprises, Inc. v. City of Bremerton*, 93 Wn.2d 624, 631, 611 P.2d 1237 (1980), does mention the words “good faith” in reference to the applicant. This case, however, does not stand for Respondents’ suggested reversal of Washington’s rejection of a subjective (“good faith”) review of the intent of the parties in favor of a “date certain” bright-line rule on vesting.<sup>36</sup> A closer reading of the case makes clear that the issue of good faith in *Mercer* was related to the applicant’s *belief* that it had submitted all of the materials necessary to complete its application. Mercer Enterprises had several exchanges back and forth with the City, and was never made aware of any defects in its application until after the City passed a moratorium.<sup>37</sup> The Court held

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<sup>35</sup> Respondents also assert that Appellants “[cite] no authority that they should be able to rely upon an application that contains incomplete and misleading information to obtain vested rights. *Brief of Respondent*, at 37. Respondents have apparently chosen to ignore the Appellants’ detailed discussion regarding the legal requirements for a “sufficiently complete” application. *Appellants’ Opening Brief*, at 29-32.

<sup>36</sup> See *Eastlake Community Council v. Roanoke Associates, Inc.* 82 Wn.2d 475, 481, 513 P.2d 36 (1973), citing *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958) (“We prefer not to adopt a rule which forces the court to search through the moves and countermoves of parties ...”); see also, *Allenbach v. Tukwila*, 101 Wn.2d 193, 199 676 P.2d 473 (1984). (Under the Washington vested rights doctrine, there is no need for Courts to inquire into the “good faith” of the applicant.)

<sup>37</sup> *Mercer Enterprises*, 93 Wn.2d at 625-629 and 631. This case predates the adoption of RCW 36.70B.070 which would have protected Mercer Enterprises from such a claim.

that the initial application vested as it satisfied the City's requirements.<sup>38</sup>

The second case cited by Respondents is *Parkridge v. City of Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978). The *Parkridge* case does not stand for the proposition that "good faith" is relevant to a determination of vested rights. In fact, the only mention of "good faith" in the case relates to the Court's directive to the City of Seattle to "process Parkridge's building permit application promptly, diligently and in good faith."<sup>39</sup> The case does, however, reiterate that Washington Courts have rejected a "good faith" requirement for vesting.<sup>40</sup>

E. THE SUPERIOR COURT SHOULD HAVE DISMISSED THE PETITION AS RESPONDENTS' APPEAL WAS RENDERED MOOT PURSUANT TO THE WASHINGTON STATE SUPREME COURT'S DECISION IN *FUTUREWISE v. WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD*.

1. Appellants are not Barred from Raising the *Futurewise* Issue.

Respondents have argued that the Court should not reach the merits of Appellants' argument because they contend that they are barred from raising it because it was not argued before the Hearing Examiner. *Brief of Respondent*, at 44.<sup>41</sup> It is worth noting that the *Futurewise*

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<sup>38</sup> *Mercer Enterprises*, 93 Wn.2d at 631.

<sup>39</sup> *Parkridge*, 89 Wn.2d at 456, 459, and 466.

<sup>40</sup> *Parkridge*, 89 Wn.2d at 464-465.

<sup>41</sup> Ironically, Respondents raise this argument for the first time in their *Brief of Respondent*, as they never made this argument in briefing to Superior Court. CP at 465-

decision was not issued until July 31, 2008, which was nearly a *year* after the hearing before the Hearing Examiner on October 24, 2007. See AR at 29.

It is well settled that a party can raise jurisdictional issues at any time.<sup>42</sup> As such, a party can challenge, at any time, the applicability of law when it is contrary statutory authority.<sup>43</sup> As noted by the Supreme Court “[a] trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it.”<sup>44</sup> A Court, even one sitting in an appellate capacity, has an “obligation to see that the law is correctly applied.”<sup>45</sup>

Thus, because this issue is one involving the jurisdiction and authority of the Hearing Examiner and the applicability of the County’s ordinance in violation of state law, it is not improper to have been raised for the first time in a motion to reconsider.

## 2. Futurewise as Plurality Decision

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495.

<sup>42</sup> *Harbor Lands LP v. City of Blaine*, 146 Wn.App. 589, 592, 191 P.3d 1282, 1284 (2008), citing, *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983); *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998); *Deaconess Hosp. v. Washington State Highway Comm'n*, 66 Wn.2d 378, 409, 403 P.2d 54 (1965); and RAP 2.5.

<sup>43</sup> See e.g. *State v. Riles*, 86 Wn.App. 10, 15, 936 P.2d 11, 13 - 14 (1997) (Court exceeds its jurisdiction when issues an order that is in excess of statutory authority.).

<sup>44</sup> *State v. Quismundo*, 164 Wn.2d 499, 505-506, 192 P.3d 342 (2008). See also, *Optimer Intern., Inc. v. RP Bellevue, LLC*, 151 Wn.App. 954, 961-962, 214 P.3d 954, 957 (2009).

<sup>45</sup> *Optimer*, 151 Wn.App. at 961-962.

Respondents argue that, as a plurality decision, the *Futurewise*<sup>46</sup> decision can not stand for the argument that the only land use regulations that apply within 200 feet of the shoreline are those that are adopted through the Shoreline Master Program approval process. They assert that *Futurewise* cannot be read as anything other than an affirmation of the Growth Board Decision that it “did not have jurisdiction to hear challenges to critical areas regulation that are applicable in the regulated shoreline.” *Brief of Respondent*, at 42-43. This argument is misplaced for two reasons.

First, this argument completely ignores the September 2009, decision of this court in *Kitsap Alliance of Property Owners (KAPO) v. Central Puget Sound Growth Management Hearings Board*, 152 Wn.App. 190, 217 P.3d 365 (2009), which is *not* a plurality decision. Putting aside the Supreme Court’s decision in *Futurewise* for the sake of argument, in *KAPO* this Court held that “only one plan – the [Shoreline Management Act] plan – can be in effect at one time” and that the critical areas ordinances adopted under the Growth Management Act was *reversed* and remanded to the County to “plan for the shoreland regions *under the SMA*.”<sup>47</sup>

Additionally, Respondents have misinterpreted the Growth Board

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<sup>46</sup> *Futurewise v. Western Washington Growth Management Hearings Bd*, 164 Wn.2d 242, 189 P.3d 161 (2008).

<sup>47</sup> *KAPO*, 152 Wn.App. at 198. [Emphasis Added].

decision that underlies the *Futurewise* decision. The Growth Board case involved a challenge to the City of Anacortes' ordinance *repealing* its Critical Areas Ordinance for shoreline areas until reviewed by Department of Ecology.<sup>48</sup> Contrary to the Respondents' argument, the Growth Board did not hold that it did not have "jurisdiction" to review the City's Critical Areas regulations as they applied to the shoreline. Instead, the Board found that the issue was not yet *ripe* for review because the Department of Ecology had not completed *its* review<sup>49</sup>

Thus, when considering the Growth Board Decision and the *KAPO* decision, *Futurewise* can be read at its most basic level to mean that no critical areas regulations will be effective within 200 feet of the shoreline unless and until they have been reviewed and approved by the Department of Ecology. In this case, these rulings are dispositive. The *entire* area that is the subject of Petitioners' variance application is within 200 feet of the shoreline and therefore subject solely to the jurisdiction of the SMA. RCW 90.58.030(2)(f) and AR at 111.

Additionally, as discussed in the *Appellants' Opening Brief*, the record is unequivocal that the County did not even *attempt* to adopt the 2005 critical areas regulations as part of its shoreline regulations until

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<sup>48</sup> *Evergreen Islands, Futurewise and Skagit Audubon Society v. Anacortes*, WWGHB Case No. 05-2-0016 (FDO, 12/27/2005), at 31-31.

<sup>49</sup> *Evergreen Islands*, at 31. [Emphasis Added].

after the variance application was filed. *Appellants' Opening Brief*, Appendix B, at 5. In accordance with state law, the ordinance was effective *only upon review and approval* by Department of Ecology. The County's Ordinance 2008-68 recognized this fact stating "that Critical Area regulations do not apply to the area of Shoreline Jurisdiction until these amendments have gone through the Department of Ecology's adoption process (WAC 173-26-201)."<sup>50</sup> As this review has not occurred, the County's ordinance is *not yet in effect*.<sup>51</sup> It is noteworthy that the Respondents' have chosen to utterly ignore this argument in their response.

Even under Respondents' theory of this case, Appellants' application vested no later than August 9, 2007. When reviewing the above set of facts in light of *Futurewise*, it is clear the 1997 regulations were the only critical areas regulations that could *possibly* have been legally effective on August 9, 2007 for development within 200 feet of the shorelines. The Hearing Examiner found that Appellants satisfied the 1997 variance criteria, and those findings have never been challenged by Respondents. Accordingly, based on *Futurewise*, Respondents' LUPA petition has been rendered moot

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<sup>50</sup> *Appellants' Opening Brief*, Appendix A, at 4, lines 22-28 and at 5, line 31.

<sup>51</sup> See *Opening Brief*, Appendix E, at 4, lines 22-28 and at 5, line 31. As noted in the Opening Brief, there is also no evidence that the pre-2005 critical areas ordinance was ever reviewed by the Department of Ecology. Neither Respondents nor the County have presented any argument to the contrary.

and it should have been dismissed by the Superior Court.

3. ESHB Makes No Distinction Between Critical Areas that Extend Outside the Shoreline Jurisdiction.

Respondents argue that *Futurewise* does not alter the regulation of stream buffers which extend outside the shoreline jurisdiction.<sup>52</sup> *Brief of Respondent*, at 48. Regardless of what *Futurewise* says or does not say, the legislature has spoken on this issue: “critical areas within the jurisdiction of the [SMA] shall be governed by the [SMA].” ESHB 1933 § 1(3). This language is clear. Respondents attempt to suggest that there is a distinction between “stream buffers” and “shoreline buffers” is not supported by the clear language of ESHB 1933.

#### IV. CONCLUSION

For the above-stated reasons, Appellants respectfully request that the Court reverse the decision of the Superior Court and affirm the decision of the Hearing Examiner.

Dated this 3<sup>rd</sup> day of December 2009

Respectfully submitted,

  
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Attorneys for Appellants Garrison

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<sup>52</sup> Contrary to Respondents’ claims, the *Futurewise* decision is not limited to “shoreline buffers” but specifically addresses “fish and wildlife” habitat areas. See, eg. *Evergreen Islands, Futurewise and Skagit Audubon Society v. Anacortes*, WWGHB Case No. 05-2-0016 (FDO, 12/27/2005), at 22.

CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day of December, 2009, a true and correct copy of the foregoing document was served upon counsel of record, via the methods noted below, properly addressed as follows:

**Counsel for Respondents Lauer and deTeinne:**

Margaret Archer	<u>      </u>	Hand Delivered
Gordon Thomas Honewell	<u>  X  </u>	U.S. Mail (first class, postage prepaid)
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**Counsel for Pierce County:**

Jill Guernsey	<u>      </u>	Hand Delivered
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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 3<sup>rd</sup> day of December 2009.

  
 \_\_\_\_\_  
 R. Kim Bennett

09 DEC -3 PM 4: 41  
 COURT OF APPEALS  
 DIVISION II  
 STATE OF WASHINGTON  
 BY \_\_\_\_\_  
 DEPUTY