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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LOUISE LAUER and DARRELL deTIENNE

Respondents,

v.

PIERCE COUNTY and MIKE AND SHIMA GARRISON,

Appellants.

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

OPENING BRIEF OF RESPONDENTS LOUISE LAUER
AND DARRELL deTIENNE

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I. INTRODUCTION

This Land Use Petition Act appeal comes to the Court with an extensive history. In 2003, appellants Mike and Shima Garrison (“Garrison”) illegally cleared property that constituted a protective stream buffer. Garrison’s actions resulted in an enforcement action and a cease and desist order was issued. In 2004, Garrison submitted an application to construct a second home on the property, however, the building foundation was proposed to be located within this same protective stream buffer. Rather than seek a buffer variance at the time the building application was submitted, Garrison included misleading information on the building permit application. Garrison stated that there was an “existing drive” in the stream buffer, when in reality, there was no drive, but only a narrow trail. The inaccurate representation resulted in the incorrect impression that there was existing development within the buffer (eliminating the need for a variance) and the building permit was issued. Thereafter the building foundation was unlawfully constructed in the stream buffer. When the County learned the real facts, a second cease and desist order was issued. The cease and desist order was sustained following an appeal.

In 2007, Garrison finally applied for a buffer variance to authorize the unlawful building foundation. Despite that the 2005

building permit application was based upon false and misleading information and did not include the requisite variance application, Garrison seeks a determination by this Court that its 2007 variance application vested under the laws in effect at the time of the building permit application. Thus, Garrison seeks to avoid application of the critical areas regulations that Pierce County adopted in 2005. Garrison also seeks to avoid application of the 2005 regulations by asking this Court to conclude that the 2008 plurality decision in *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 242, 189 P.3d 161, rendered Pierce County's 2005 critical areas regulations wholly unenforceable within the shorelines, even though the regulations were not directly challenged.

Garrison's attempt to vest on violation of the laws must be rejected. Vesting rights are intended to preserve rights that arise from complete development applications, not applications that do not accurately portray the facts. It is time for Garrison to comply with the laws. This includes obtaining a variance under the current codes or restoring the stream buffer that was illegally graded and developed.

II. COUNTER STATEMENT OF RELEVANT FACTS

Garrison owns 1.38 acres of real property abutting Henderson Bay located at 8122 SR 302 in Gig Harbor, Washington (tax parcel no.

0122233025). (Administrative Record "AR" at 68-69). Garrison purchased the property in December of 2002. (AR 84). At that time, the property had the following improvements:

- A single-family residence adjacent to the west property line in towards the center of the property;
- A detached garage approximately half way between the residence and the SR 302;
- A pumphouse adjacent to the east side of the residence;
- A shed at the southwest corner; and
- A protective bulkhead across the shoreline.

(AR 89 at p. 4.) A narrow trail also provided access from the residence downhill through the thickly vegetated property to the bulkhead and tidelands below. (AR at 122, 126-128.) The trail paralleled a stream that crossed the southwestern portion of their property before emptying into the Bay through a culvert in the bulkhead. (AR at 97-98, Finding 22.)

A. The County Cited Garrison For Unlawfully Removing Vegetation Within the 35-Foot Buffer Protecting the Stream in 2003.

Though there was an existing residence, Garrison desired to construct another residence closer to the water. Garrison proposed to convert the existing residence into an accessory dwelling unit and storage area and construct a new residence closer to the water.

Prior to commencing these plans, Garrison illegally logged and cleared the vegetation area surrounding the stream. (AR at 33, Finding 5.) The vegetation included approximately 50 year-old fir trees that provided shade and habitat around the stream for a host of creatures in the area. (Report of Proceedings (“RP”) at 26: 21-27; 27:1-3, 25-26; 28:1-6). Garrison logged and cleared that vegetation adjacent to the stream that crossed their property without a permit. (AR at 178.) In late February of 2003, neighbors witnessed the devastation and promptly contacted Pierce County who sent an inspector to the site on March 5, 2003. (AR at 45.)

On March 7, 2003, Pierce County issued a “Correction Notice/Cease and Desist Order.” (AR at 162.) The County cited Garrison for illegally clearing vegetation within 35 feet of the stream:

On March 5, 2003, I conducted a site inspection from the public beach and confirmed that logging activities were occurring within a stream and its buffer, on the property located at 8122 SR 302. Initiation of these activities within a stream or its buffer, without County review and approval is a violation of Pierce County Code (Title 18E, Critical Area Regulations).

The un-permitted work is specifically in violation of:

- ***Chapter, 18E.20—Use and Activity Regulations***

- *Chapter, 18E.60—Fish and Wildlife Habitat Areas*
- *Chapter 18.140—Compliance*

(AR at 162) (emphasis added). Garrison met with County officials on March 17, 2003 to discuss the violation. (AR at 178.) Garrison did not dispute that a regulated stream crossed their property, nor did they dispute the violation. The County summarized the meeting in a letter Garrison stating that Garrison must replace the cleared area west of the trail with native vegetation. (AR at 178.) Rather than require Garrison to replace the vegetation that was unlawfully removed with similar vegetation, the County allowed Garrison to re-vegetate the area with low growing shrubs so not to “impede [their] view.” (AR at 178.) Garrison filed an application to re-vegetate the buffer around the stream on March 27, 2003. (AR at 45, #2.)

B. Garrison Submitted A Building Permit Application in March of 2004. The Application Failed to Identify the Stream and Placed the Residence Squarely Within the Buffer.

Garrison submitted a permit to construct the new residence in March of 2004. (AR at 302, 329.) Although Garrison was plainly aware that a regulated stream crossed the property and was subject to a 35-foot buffer, Garrison failed to include that information in the application even though it was specifically required. PCC 18.40.020.

(AR at 133.) Moreover, the application, unbeknownst to County officials, placed the home squarely within the 35 foot protective buffer.

Based on the incomplete application, County officials approved the permit. Garrison commenced construction and poured the foundation squarely within the buffer they had been ordered to re-vegetate. Respondents Lauer and deTienne contacted the County and informed them that Garrison had again impinged upon the buffer surrounding the stream. The County conducted a site visit and immediately issued another Stop Work Order for “Building with the 35 foot stream/drainage buffer.” (AR at 167-170.)

Garrison appealed the Stop Work Order to the Pierce County Hearing Examiner. (AR at 78.) Remarkably, Garrison’s primary argument was that a regulated stream did not cross their property even though the County previously cited Garrison for logging and clearing that same area less than one year earlier. In the prior proceeding, Garrison acknowledged the regulated stream and agreed to re-vegetate the buffer. (AR at 90, Finding 7.A.) The site plan Garrison prepared for the re-vegetation plan identified the stream running. (AR at 97-98.) Nevertheless, in this second proceeding, Garrison insisted that no stream crossed their property. (AR at 90.)

C. The Hearing Examiner Affirmed the Stop Work Order Citing the “Overwhelming Evidence” that a Stream Crossed the Property.

The Pierce County Hearing Examiner held a hearing on the appeal. The Examiner flatly rejected Garrison’s arguments. In a written decision issued on February 4, 2005, the Hearing Examiner concluded:

The appellants’ appeal is denied as overwhelming evidence establishes that an historic drainage course not associated with short plat parcel has conducted water across the appellants’ parcel for many years. The drainage course meets the definition of a DNR Type 4 or 5 watercourse and therefore requires a 35 foot wide, undisturbed buffer. . . .

(AR at 90) (emphasis added). The Examiner specifically listed all of the evidence that supported his determination. (AR at 90-91.) Perhaps most persuasive was that the site plan Garrison prepared in response to the 2003 enforcement action specifically identified the stream. (AR at 91, Finding 9.G. See *also* AR 97-98, Finding 22.)

The Examiner also noted Garrison’s misleading attempt to re-characterize the trail on their property as a road. Recall that the trail lay between the stream and the foundation for the proposed residence. The Pierce County Code requires that that 35-foot buffer remain undisturbed unless a substantial development such as an improved road, levee, or permanent structure interrupted the buffer. PCC 18E.60.050. In the site plan submitted with the building permit,

Garrison affirmatively labeled the trail as an existing road. Because of this misrepresentation, the Examiner refused to allow Garrison to take refuge in the fact that a building permit was issued and an inspector allowed them to proceed with construction:

Appellants correctly assert that a Pierce County building inspector approved the location of the footings for the new residential dwelling within 35 feet of the drainage swale. However, as shown in the appellants' building permit application site plan, an "existing drive" separates the footing location from the drainage course (Attachment C to Exhibit "4"). Section 18E.60.050(A) PCC provides that the buffer for a DNR Water Type stream does not extend landward beyond "an existing substantial improvement such as an improved road, dike, levee, or a permanent structure." Thus, the inspector considered the buffer as ending at the edge of [the] drive. However, the 2003 site plan prepared by the appellants in response to a Pierce County enforcement action regarding illegal clearing shows a "trail" alongside the drainage course in the same location as the "existing drive." Numerous exhibits and substantial testimony show that a trail and not a "drive" existed historically along the east side of the drainage course. Appellants cannot, therefore, assert that they justifiably relied upon the Pierce County inspector's approval of the footing location. (Emphasis added.)

(AR at 97-98). Ultimately, the cease and desist order was sustained. Unless a buffer variance was sought and approved, Garrison was required to remove the foundation and restore the buffer. (AR 78, 99.)

Rather than submit a variance application when the decision was issued in February 2005, Garrison continued to challenge the Examiner's finding that a regulated stream traverses the property and filed a LUPA petition. (AR at 103, 106, 335.) The LUPA appeal was never decided on the merits and Garrison agreed to dismiss the appeal and submit a variance application. (AR at 335.) By that time, however, the County Code had changed. On March 1, 2005 a planned overhaul of the County's Critical Areas Ordinance took effect and significantly altered the development regulations for Garrison's project.

D. Pierce County Made Significant Changes to Its Critical Areas Ordinance on March 1, 2005.

When Garrison submitted the building permit application County regulations required that Type 4 streams be protected by a 35-foot buffer consisting on undisturbed native vegetation. PCC 18E.60.050(A), (C) (1997 Pierce County Ordinance No. 97-84 § 8). Additionally, PCC 18E.60.050(D) provided that a minimum set back of eight feet from the buffer shall be required for construction of any impervious surface greater than 120 square feet of base coverage. No clearing, grading or construction could occur within the buffer or

setback unless the property owner first applied for and received a Fish and Wildlife variance. A variance would not be approved unless the applicant demonstrated the remaining buffer was sufficient to:

- a. Maintain proper water temperature;
- b. Minimize sedimentation; and
- c. Provide food and cover for critical fish species.

PCC 18E.10.070(D)(4)(1997 Pierce County Ordinance No. 97-84 § 8).

On March 1, 2005, Pierce County's amendments to the buffer regulations became effective. The buffer requirement increased from 35 to 65 feet. PCC 18E.40.060. The criteria for granting a variance also became much more stringent. Under the new regulations, a variance may only issue upon demonstration of the following:

- (1) There are special circumstances applicable to the subject property or to the intended use such as shape, topography, location, or surroundings that do not apply generally to surrounding properties or that make it impossible to redesign the project to preclude the need for a variance;
- (2) The applicant has avoided impacts and provided mitigation to the maximum practical extent;
- (3) The buffer reduction proposed through the variance is limited to that necessary for the preservation and enjoyment of a substantial property right or use possessed by other similarly situated property, but which because of special

circumstances is denied to the property in question; and

(4) Granting the variance will not be materially detrimental to the public welfare or injurious to the property or improvement.

....

c. In lieu of criteria 18E.20.060 D.3.a.(1)-(4), above, an applicant may pursue a fish and wildlife habitat buffer variance through demonstration of all of the following criteria:

(1) The variance will not adversely impact receiving water quality or quantity.

(2) The variance will not adversely impact any functional attribute of the habitat area.

(3) The variance will not jeopardize the continued existence of species listed by the Federal government or the State as endangered, threatened, sensitive, or documented priority species or priority habitats.

(4) The applicant has avoided impacts and provided mitigation, pursuant to Section 18E.40.050 to the maximum practical extent.

PCC 18E.20.070(D)(3).

E. Garrison's Applied for and the Examiner Approved an After-The-Fact Fish and Wildlife Variance to Allow Them to Maintain the Illegal Structure in the Buffer.

Garrison finally applied for an after-the-fact Fish and Wildlife Variance on August 9, 2007; almost two years after the critical area amendments. (AR at 44.) Although the Hearing Examiner heard the

prior appeal involving this particular property, the Deputy Hearing Examiner conducted the public hearing for the variance request. (AR at 27, 103.) The Deputy Examiner acknowledged that whether the project vested under prior regulations was central to the appeal. The Deputy Examiner noted that Garrison could only vest if they submitted a valid and complete building application that proposed a project that was permitted under the existing land use ordinances. (AR at 8.) The Examiner failed, however, to reference RCW 19.27.095(2) which states that a complete building permit application is defined by local ordinance. Moreover, the Deputy Examiner made no attempt to review the County requirements for a complete application, much less compare the application against those requirements to see if all of requisite components for a complete application were present. (AR at 27-38.) Rather, the Examiner summarily concluded without any analysis that the project vested simply because Garrison submitted the building application before March 1, 2005. (AR at 35.)

Moreover, the Deputy Examiner analyzed the proposal based upon the property as it existed after the illegal activity. Normally, a variance is sought before any construction activity. The idea is that a variance should not be granted if it possible for the applicant to

complete his project within the parameters of the regulations. The Department of Fish and Wildlife confirmed this point in a letter:

For the benefit of fish and wildlife and their habitat WDFW prefers that buffers required for streams under the critical areas ordinances not be reduced. However, on marginal lots where structures cannot be relocated because of physical limitations of the lot, then reduced buffers are preferable to placing streams in culverts, which in general has no benefit to fish and wildlife. Therefore, if the lot would be unusable without reducing the proposed buffer WDFW has no objection to the proposed variance.

(AR at 208.) Yet, rather than review the proposal as if it were being applied for, the Examiner reviewed the proposal in light of the unlawful clearing and construction already accomplished by Garrison.

Respondents Lauer and deTienne continued their vigorous opposition to the application and, specifically, the County's use of an out-dated code to review the variance application. (AR at 236-241.) After the Deputy Examiner summarily decided that Garrison had a vested right to have the application reviewed under the old County Code, Respondents promptly filed for reconsideration. Respondents specifically called to the Examiner's attention the County requirement that an application must contain a site plan that identifies all watercourses in order to be deemed complete for purposes of vesting

and that Garrison's application did not contain this information. (AR at 16-20; 7-11.) The Examiner responded:

Despite the stream not being depicted on the site plan and in the application, the building permit application was complete for purposes of vesting. All other information was submitted and paid for by the applicants. No changes have been made to the use that was proposed in the original application.

(AR at 2.) The Deputy Examiner acknowledged that the building application did not contain all of the requisite information for a complete application, yet concluded that application was complete because everything else was submitted.

III. ARGUMENT

A. THE SUPERIOR COURT PROPERLY DENIED GARRISON'S MOTION TO STRIKE AND TO DISMISS RESPONDENTS' CLAIM FOR LACK OF STANDING.

1. The Statement of Facts Demonstrating Standing Do Not Have To Be Included or Supported by the Record.

An appeal of a final land use decision is commenced by filing a land use petition. A land use petition is statutorily required to include certain information to appraise the court of the matter before it, including facts demonstrating that the petitioner has standing to seek judicial review under RCW 36.70C.060. RCW 36.70C.090(6). LUPA does not, however, require that the facts demonstrating a petitioner's

has standing to seek judicial review be included or supported by the administrative record below and the court may decide the issue based on supporting affidavits. *See also Suquamish Tribe*, 92 Wn. App. 830, 831, 965 P.2d 636 (1998) (reviewing the affidavits of Petitioners for purposes of establishing standing). Respondents submitted to the trial court declarations attesting to the injuries they have suffered and will continue to suffer if the Examiner's decision is allowed to stand. (Clerk's Papers ("CP") at 109-111; 114-116.)

Nevertheless, relying on the closed record review provision of LUPA, 36.70C.120 RCW, Garrison argues that Respondents do not have standing because the facts demonstrating standing alleged in their LUPA petition are not found in or supported by the administrative record. This section of LUPA, however, is directed towards review of the merits of the underlying land use decision being appealed, not the information that is statutorily required to be included in a land use petition. The phrase "shall be confined to the record created" expressly qualifies "judicial review of the factual issues and conclusions drawn from the factual issues" that led to the land use decision:

When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent

with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, except as provided in subsections (2) through (4) of this section.

RCW 36.70C.120(1) (emphasis added, italicizing the phrase emphasized by Garrison). This section has no application to the independent requirement that the petitioner demonstrate facts supporting standing in their initial petition.

Regardless, the record does support Respondents' standing. Respondents testified that the development would negatively impact their property. Ms. Lauer specifically testified about the impacts of development within the buffer zone on erosion and increased turbidity in the Henderson Bay. (RP at 28:8-9, 21-22; 29:14-15, 20-23; 31:20-32:14.) Mr. de Tienne testified about the impact of Garrison's removal of vegetation within the buffer zone. (RP at 35:7-15.)

2. The Superior Court Properly Concluded that Respondents have Standing to File and Pursue this Petition.

a. Standard of Review.

In reviewing a motion to dismiss based upon standing, the Superior Court employs a summary judgment standard of review which requires the court to view the evidence and allegations in favor of the

non-moving party. See *Suquamish Tribe v. Kitsap County*, 92 Wn. App. 816, 831, 965 P.2d 636 (1998). This Court, in turn, reviews summary judgment motions de novo, engaging in the same inquiry as the court below. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). If the Court finds that a genuine issue of material fact exists with respect to Respondents' standing it must deny the motion. *Id.* at 832.

b. Respondents are Aggrieved Persons.

Respondents' standing to challenge this variance permit is beyond any reasonable dispute. Persons "aggrieved or adversely affected by the land use decision" have standing under LUPA, RCW 36.70C.060. The 4-part test for when a person is "aggrieved or adversely affected" is set out in RCW 36.70C.060(a)-(d). Respondents have satisfied each element.

The first two parts, requiring prejudice and a cognizable interest, are similar to the requirements under the Administrative Procedure Act, chapter 34.05, which require an injury in fact and apply a zone of interest test. *Suquamish Indian Tribe*, 92 Wn. App. at 829. First, under the injury in fact test, it is generally accepted that "parties owning property adjacent to a proposed project and who allege that the project will injure their property have standing." *Chelan County v.*

Nykreim, 146 Wn.2d 904, 934, 52 P.3d 1 (2002) (citing *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 829-30, 965 P.2d 636 (1998)); see also *Biermann v City of Spokane*, 90 Wn. App. 816, 960 P.2d 434 (1998). Here, Respondents are adjacent property owners. (AR at 32; CP at 109, 114.) They are prejudiced by the decision because it allows Garrison to maintain an intrusion into a mandatory protective buffer. That intrusion has already damaged Respondent Lauer by altering the flow of stormwater into and over the bulkhead causing to fail. (CP at 115.) The removal of vegetation around the buffer has also resulted in a noticeable decrease in wildlife. (CP at 116.) Respondent de Tienne is also injured by the variance because the decision allows Garrison to maintain the stream in its present location. That location is 6 to 7 feet closer to his property than where it was historically located. (CP at 110.)

Second, “[t]he zone of interest test focuses on whether the ordinance intended that the agency protect the party’s interest and is not intended to be especially demanding.” *Asche v. Bloomquist*, 132 Wn. App. 784, 792, 133 P.2d 475 (2006) (citing *Nykreim*, 146 Wn.2d at 937). As neighboring property owners, Respondents’ primary interest is in enforcement of the development regulations requiring a protective stream buffer. Under PCC 18.40.020(B)(8), the County was

required to consider applicable development regulations as part of Garrison's building permit application. Further, Respondents' also argue that the County should have applied the more stringent criteria for a variance that were adopted after Garrison submitted their building permit application. These criteria are more protective of neighboring property interests and give the Deputy Examiner greater flexibility to impose conditions and deny the variance because of impacts to neighboring properties. (See CP at 64-69.) Respondents and their properties are better protected under the more recent regulations and it is in their interest and their right to seek protection under these regulations. See *Asche*, 132 Wn. App. at 793-94.

The third element, redress, is also met. If the relief requested by Respondents through their LUPA petition is granted, Respondents will obtain the benefit of the current regulatory protections. This will serve to remedy the injuries caused by the Deputy Examiner's decision.

Fourth and finally, Respondents were not required to appeal the County's determination that Garrison's application was complete in order to exhaust their administrative remedies for at least two reasons. First, that determination was not a land use decision under LUPA. In order to qualify as a "land use decision" for purposes of LUPA must be a "final determination" on "an application for a project permit or other

governmental approval.” RCW 36.70C.020(1). A finding that an application is complete is simply a preliminary, administrative step leading up to the final determination on a permit or approval—in this case a variance. Prior to issuing its “final determination” with respect to Garrison’s variance application, the Deputy Examiner had to determine which code to apply to the application. This determination was made by making a finding with respect the date the applicant submitted a complete application. The very definition of vesting in the Pierce County Code qualifies it as a prerequisite to any final determination on an application or approval. See PCC 18.160.010(C).

Second, if Garrison’s building permit was immune from “collateral attack,” Pierce County could not have issued the Stop Work Order Notice seven months after the permit was issued. (See AR at 166-177.) This Stop Work Order Notice advised that construction within the buffers was contrary to Pierce County Code (did not comply with applicable law) and the decision was sustained by the Hearing Examiner. (AR at 77-101.) Garrison abandoned the LUPA appeal of that decision and it is now final. Garrison certainly never claimed in that proceeding that the County could not challenge the building permit because there was no timely appeal. Of course, they could not, because the building permit was issued based upon incomplete and

inaccurate information. (See AR at 263, 97-98; Finding 22.) Garrison cannot apply a different standard to Respondents. Thus, each element of standing under LUPA is satisfied and the Superior Court properly denied Garrison's motion to dismiss for lack of standing.

B. GARRISON'S BUILDING PERMIT APPLICATION DID NOT QUALIFY AS A COMPLETE APPLICATION AND, THUS, DID NOT CONFER VESTED PROPERTY RIGHTS.

1. Standard of Review.

Garrison correctly states the standard of review set forth in LUPA. Garrison also asserts, however, that this Court must give "substantial deference" to the County's legal determination. (Appellants' Brief at 24.) This overstates the deference to be accorded to the County's decision. Washington courts have consistently held that, with regard to interpretation of local ordinances, deference is only afforded when the local jurisdiction interprets an ambiguous ordinance – it must be susceptible to more than one reasonable meaning. If the ordinance is unambiguous, the court is simply directed to apply its plain meaning. *Waste Management of Seattle, Inc. v. Utilities and Transp. Comm'n*, 123 Wn. 2d 621, 627-28, 869 P. 2d 1034 (1994) ("Absent ambiguity, however, there is no need for the agency's expertise in construing the statute"). Garrison makes no claim in their

brief that applicable ordinances are ambiguous. See also, *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007).

Even when deference is accorded to a local jurisdiction's interpretation of an ordinance, LUPA only directs the court to give "such deference as is due to a local jurisdiction with expertise." (RCW 36.70C.130(1)(b) (emphasis added). Moreover, LUPA does not require that reviewing courts blindly defer to any interpretation of a land use ordinance that a local jurisdiction might concoct. Instead both LUPA and recent Supreme Court precedent mandates that deference may not be provided unless there is an established pattern of enforcement. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007) (holding that "[the City] bears the burden to show its interpretation was a matter of preexisting policy").

Ultimately, authority to make legal determinations, including interpretations of statutes and ordinances, lies with the court. *Waste Management of Seattle, supra*, 123 Wn. 2d at 627; see also *Clay v. Portik*, 84 Wn. App. 553, 557, 929 P. 2d 1132 (1997) (under the error of law standard, the court may substitute its judgment for that of the agency). In this case, the Examiner was bound by the rules on vested rights established by State law and Washington's courts and did not carry any unique expertise that requires deference from the courts.

2. The Vested Rights Doctrine.

In order to vest an application on a date certain, the applicant must submit an application for a project that is fully complete and allowed outright under the zoning or land use ordinances:

(1) A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.

(2) The requirements for a fully completed application shall be defined by local ordinance

RCW 19.27.095; see also *Abbey Road Group, LLC v. City of Bonney Lake*, 141 Wn. App. 184, 193, 167 P.3d 1213 (2007) (explaining common law vesting rules protected developers who took substantial steps to develop property in reliance upon existing regulations). The rationale for this rule was explained by the Washington Supreme Court:

This court recognized the tension between public and private interests when it adopted Washington's vested rights doctrine. The court balanced the private property and due process rights against the public interest by selecting a vesting point which prevents "permit speculation", and which demonstrates substantial commitment by the developer, such that

the good faith of the applicant is generally assured.

Erickson & Assoc. v. McLerran, 123 Wn.2d 864, 874, 872 P.2d 1090 (1994).

Thus, in order to successfully vest an application must: (1) be valid and fully complete, as defined by local government; and (2) propose a structure or use that is permitted under zoning or other land use ordinances at the time. RCW 19.27.095(1). If an application fails to satisfy any one these criteria it is insufficient to vest. See *Stone v. Southwest Suburban Sewer Dist.*, 116 Wn. App. 434, 438, 65 P.3d 1230 (2003) (reciting the oft-quoted rule that courts (and hearing examiners) lack the authority to construe a clear and unambiguous statute). Accordingly, while Respondents assert that Garrison failed to meet both of these requirements, this Court need only find that the Garrison failed to meet one in order to affirm the trial court's decision reversing the Deputy Examiner's Decision.

3. **Garrison's building permit application was not complete because it did not satisfy the requirements of RCW 19.27.095 or the Pierce County Code.**

The Legislature expressly delegated to local government the responsibility to dictate what constitutes a "fully complete application." RCW 19.27.095(2). The Pierce County Code defines a complete application as:

[A]n application submitted to the County pursuant to Title 18 that contains all of the information described in Section 18.40.020.

PCC 18.25.030; 18.160.010.A (emphasis added). PCC 18.40.020

requires that an application meet the following submittal standards:

A. Form and Content. The Department shall prescribe, on a Submittal Standards Checklist, the form and content for complete applications made pursuant to this Title including, but not limited to: Building Permits, Site Development Permits, Use Permits, Wetland Permits, Preliminary Plats, Short Plats, Final Plats, Binding Site Plans, and Large Lot Divisions.

B. Check for Complete Application. An application shall be considered complete when it contains the following:

* * *

3. the correct number of documents, plans, or maps identified in the applicable Development Regulation, on the Department Submittal Standards form or application, as appropriate for the proposed project;

* * *

8. proposed applications shall be consistent with the Comprehensive Plan and applicable development regulations.

PCC 18.40.020 (emphasis added). The actual submittal instructions and standards for residential building permits are further defined in a

County publication. (AR at 132-133.) In order for an application to be complete for purposes of vesting it must include a site plan that identifies:

SURFACE WATER DRAINAGE

Including shorelines, wetlands, ponds,
ditches and streams.

(Pierce County Submittal Checklist, AR at 133) (emphasis added).

Although Garrison argues that the requirements of Chapter 18.40 PCC do not apply to building permits (Brief at 29), as noted earlier, PCC 18.40.020 expressly states that its requirements apply to building permit applications. Thus, the requirements of PCC 18.40.020 and PCC 17.20.160 and Table 17C.20-1-A-9 are collective or combined requirements, not mutually exclusive requirements. Accordingly, the permit was incomplete and could not have vested until that information was properly submitted.¹ RCW 19.27.095(1).

- a. Garrison’s misrepresentation on their building permit application and related Site Plan rendered the application incomplete.**

¹ Garrison also argue that a complete copy of the building application was “necessary” for the trial court to reverse the Examiner’s decision. See e.g. Brief at 27-28. In fact, this argument actually works against Garrison’s position. If the Examiner’s decision must conform to the evidence submitted, then the Examiner’s decision that Garrison vested is erroneous. The application itself is a necessary prerequisite to the Examiner’s decision on vesting and since Garrison carried the burden of proof on vesting, the Examiner could not have concluded that their application vested. Nevertheless, it is not necessary that the complete application be submitted as there is no dispute as to its contents.

The Examiner simply ignored the unambiguous requirements in addition to the undisputed evidence that Garrison did not include this important information with the building permit application. (AR at 35-36, Findings 9-11.) Prior to submitting the building permit application and site plan in March 2004, Garrison received a Stop Work Notice after they illegally cleared trees in 2003. In that Notice Garrison was expressly advised of the code provisions governing activities in the stream and the stream buffers and the permits that were required for development. (AR at 162-163.) After that Stop Work Notice and before they submitted the Site Plan in March 2004, Garrison received from the County six letters in which they were informed that (1) there is a Type 5 stream or drainage course on their property; (2) they must re-vegetate all areas within the stream buffer and (3) the stream buffers must remain undisturbed. (AR at 178, 176, 180, 182, 184 and 186.) Garrison acknowledged the letters and prepared a Site Plan to show the re-vegetation plan and accurately depicted the “existing trail” east of the stream. (AR at 258-60.)

It is thus remarkable that, when Garrison submitted the requisite Site Plan and Site Plan Development Permit Application with the Building Permit Application, that they omitted the Type 4 or 5 Stream and the requisite setbacks and that they affirmatively misrepresented the “existing trail” as an “existing drive.” Garrison

knew that there was a stream on the property with associated buffers that could not be disturbed. (AR at 263.)

Rather than follow the plain meaning of the statute and the County requirements, the Deputy Examiner concluded that it made no difference whether Garrison submitted a complete application or not:

The variance application would have applied standards in effect at the time of the building permit application whether or not a stream was notated the building permit or not.

(AR at 36, Finding 11.) Yet the issue is not whether the variance application would have been judged by the standard in effect at the time of application regardless of whether the stream was properly identified, but whether failure to properly identify the stream on the site plan rendered Garrison's application incomplete.

It is not entirely surprising that the Deputy Examiner erred in this regard. His decision, like the County Staff Report, is devoid of any reference to the Pierce County requirements for a complete application. In fact, while the Deputy Hearing Examiner quotes RCW 19.27.095(1) in its entirety, he neglects to even mention the companion subsection:

(2) The requirements for a fully completed application shall be defined by local ordinance

RCW 19.27.095. It is these County requirements that determine whether an application is in fact complete for purposes of vesting. Moreover, this Court will find no reference to Pierce County Code's clear requirements for a complete application in the Deputy Examiner's decision. Instead the Examiner chose to ignore the requirements for a complete application and justified his decision with such inconsequential statements such as:

The request for a variance is not changing anything that was submitted in the initial building permit application. . . . The use that was requested in the application is still being requested pursuant to this variance request. Therefore, the variance criteria that was in effect at the time of the building permit application is applicable to his particular request based on the Vested Rights Doctrine.

(AR at 35, Finding 9.)

In sum, in order to vest an application must contain all of the requisite information set forth by the County. RCW 19.27.095. The County clearly and unambiguously requires that streams and drainage courses be clearly identified on the site plan. PCC 18.25.030; 18.40.020. (AR at 133.) Garrison's application did not contain this information and thus, the application did not vest. The result was that

they submitted an application that did not comply with applicable code as is required to be a complete application.

- b. Garrison's application did not vest because it was not permitted under the land use ordinances in effect.

Similarly, in order to vest, the structure proposed by the application must be permitted under the zoning or other land use ordinances in effect. This requirement is statutory, but Pierce County's ordinances echo that requirement by requiring that a proposed application be consistent with the Comprehensive Plan and applicable development regulations. PCC 18.40.020(B)(8). With regard to the building permit application requirements set forth in PCC 17.20.160 and Table 17C.20-1-A-9, the County Code provides: "Any land use permits required to approve the building permit application shall be applied for prior to or with the building permit application." The County's Residential Building Permit Submittal Instructions provided by the County states: "Land Use application is required for all projects that are not permitted outright in the zone." (AR at 132.) The rationale for this rule is clear: a developer cannot have a reasonable expectation that he will be permitted to develop a project that does not comply with applicable zoning ordinances.

At the time Garrison submitted the building permit application and associated site plan, their property was subject to PCC Title 18E as adopted by 1997 Pierce County Ordinance No. 97-84 § 8. PCC 18E.60.050(A) requires that streams in the County be protected by buffers consisting of undisturbed natural vegetation along the stream. PCC 18E.60.050(C) requires that, for DNR Type 4 and 5 streams, a buffer be maintained with a minimum width of 35 feet. Additionally, PCC 18E.60.050(D) provides that a minimum set back of eight feet from the buffer shall be required for construction of any impervious surface greater than 120 square feet of base coverage. No clearing, grading or construction may occur within the buffer or setback unless the property owner applies for and receives a Fish and Wildlife variance. Garrison's failure to submit a variance application along with the building permit application that proposed construction within a stream buffer also rendered the application incomplete.

Garrison will argue that the application complied with existing land use ordinances because the County Code permits a variance. Yet, such an argument is unpersuasive. An application may only vest if the government's review of the application is purely ministerial. See *Crown Cascade v. O'Nea*, 100 Wn.2d 256, 260, 668 P.2d 585 (1983) (reaffirming that the issuance of a building permit that complies with

zoning regulation is a ministerial act for which mandamus will lie). The decision whether to grant a variance, on the other hand, is not a purely ministerial act. It is a discretionary act that is quasi-judicial in nature. Thus, a building permit application that proposes a project that is not allowed outright by the existing land use ordinances cannot vest. See *Hull v. Hunt*, 53 Wn.2d 125, (stating that requirement that permits be consistent with zoning ordinances and building codes helps avoid permit speculation). Contrary to Garrison's assertions, Respondents do not "radically" claim that only an application for development that is permitted outright may vest.² If the development is not permitted outright, the building permit application must be accompanied by the requisite discretionary development applications (in this case a variance application) before the development request may be deemed complete sufficient to vest.³

² Garrison also assert that Respondents failed to raise this issue before the Hearing Examiner. This assertion is not supported by the record. See AR at 239- 240.

³ Garrison presents the following quote in their Brief: "Demonstrating 'compliance' cannot be a threshold to invoking a process to assess compliance." The quote is attributed to a Seattle Law Review article by Wynn. R. Wynn, *Washington Vested Rights Doctrine: How We Have Muddled A Simple Concept And How We Can Reclaim It*, 24 Seattle University Law Review 851, 889 (Winter 2001). The author concluded that it is not necessary to determine if a permit will ultimately be granted to determine compliance. *Id.* This is different from determining if a land use application, such as a variance application, is a prerequisite to compliance. The author concluded that the legal compliance requirement definitely remains a requirement in application of the vested rights doctrine. *Id.* at 889-90, *citing Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 868, 872 P.2d 1090 (1994).

Additionally, Respondents note that PCC 17.20.160 and Table 17C.20-1-A-9 instruct that a complete building permit application must include a Site Development Permit application (for which completeness is also governed by Chapter 18.40 PCC). The Table also requires that the Site Plan depict all existing structures as well as all required set backs. Of course, Garrison's Site Plan (AR at 263) included a structure that did not exist – an existing drive in the area of the Type 4 Stream. The Site Plan also did not depict the Type 4 stream or the requisite setbacks to the stream. Thus, the application was incomplete for these failures as well.

4. **Garrison's Building Permit Application, which included misleading information, was not deemed complete so as to render it immune from subsequent attack by RCW 36.70B.070.**

Garrison claims that the building permit was deemed complete by operation of law pursuant to RCW 36.70B.070. This argument is, again, without merit. To be "complete" the application must meet procedural requirements. RCW 36.70B.070(2). As demonstrated earlier, Garrison did not satisfy this requirement. More importantly, the argument presumes that an applicant can provide misinformation and, then, if the County subsequently relies upon the misinformation and either issues the permit or deems it complete, all future challenges are barred.

There is no legal support for Garrison's application of RCW 36.70B.070. To accept the argument would be to authorize developers to defraud the government and then be immune from consequences for their action. Garrison should not be allowed to benefit from their illegal actions. The building permit application did not comply with applicable regulations and did not achieve the status of a "complete application" that provided vested rights to Garrison.

C. GARRISON'S GOOD FAITH IS RELEVANT TO THE ISSUE OF VESTING.

Garrison defended before the Deputy Hearing Examiner by asserting that "good faith has never been a requirement of vesting." (AR at 337.) To the contrary, good faith is a touchstone of the vested rights doctrine. Courts have consistently referred to the carefully balanced approach to determine when a developer's rights vest as a means to avoid "permit speculation." It necessarily follows that an applicant that misrepresents information in their application crosses that line between good faith applicant and permit speculator.

The Deputy Examiner, however, avoided this issue entirely by finding that Respondents did not have unclean hands:

It is undisputed that the applicants submitted a building permit application in 2004. It did not acknowledge that a stream existed on the property and that there were associated buffers. This does

not mean that they have come to this hearing with unclean hands.

(AR at 36, Finding 11). This is a factual finding and, unlike the other issues is reviewed under the substantial evidence standard. Substantial evidence is evidence sufficient to convince an unprejudiced, rational person that a finding is true. *Isla Verde Int'l Holdings v. City of Camas*, 146 Wn.2d 740, 751-52, 49 P.3d 867 (2002).

Garrison argued, and the Deputy Examiner accepted, that Garrison's failure to identify that their proposal would interfere with the buffer was unintentional. (AR at 336; 36.) There is no evidence in the record, however, to support such a finding. To the contrary, the overwhelming evidence in the record that clearly demonstrates that Garrison was fully aware of the stream, the buffer, and the prohibition against further intrusion and yet did not identify it on their site plan submitted with their application. (AR at 162-163). The County cited Garrison for illegally clearing vegetation within the 35 foot buffer prior to their building permit application. (AR at 176, 178, 180, 182, 184 and 186.) Garrison did not dispute the presence of the stream and agreed to re-vegetate the area. (AR 258-60.)

Regardless of this notice, Garrison submitted a site plan with the building permit application that failed to identify the stream even though the County's submittal instructions clearly required that

watercourse be identifies. Similarly, the site plan placed the residence squarely within the area they were just cited for unlawfully clearing. Finally, when Garrison was issued the second stop work order after neighbors informed the County of further development activity in the buffer they did not assert that they had made a mistake; rather they continued to insist that a stream did not exist on their property. (AR at 90, Finding 7.) These actions are not consistent with an unintentional mistake. To the contrary the unequivocally demonstrate that Garrison intentionally left the stream off of the site plan with the hope that they could gain permit approval without having to obtain a variance.

Relying on cases that address whether a complete permit application was diligently pursued so as to retain vested rights⁴ (as opposed to where misinformation was provided on the application), Garrison argues that good faith has no application in a vesting analysis. The cases cited will not support this argument. To begin, good faith has remained a consideration for Washington courts in addressing vested rights. See *Mercer Enterprises, Inc. v. City of Bremerton*, 93 Wn.2d 624, 631, 611 P.2d 1237 (1980); *Parkridge v. City of Seattle*, 89 Wn.2d 454, 466, 573 P.2d 359 (1978). As noted in the article cited by Garrison:

⁴ See Brief at 40, footnote 64.

Courts have reminded developers that the issue of good faith is relevant to their conduct as well. The Supreme Court has noted that a developer must pursue and application diligently, not just submit a complete application, in order to reap the law-freezing benefits of the vested rights doctrine. ...

...the relative good faith of both developers and local governments continues to influence application of the vested rights doctrine.

R. Wynn, *Washington Vested Rights Doctrine: How We Have Muddled A Simple Concept And How We Can Reclaim It*, 24 Seattle University Law Review 851, 885-86 (Winter 2001).

More importantly, Garrison cites no authority that they should be able to rely upon an application that contains incomplete and misleading information to obtain vested rights. In their appeal of the 2004 Stop Work Order, Garrison tried to rely upon the issuance of the permit and County inspections to absolve them of responsibility for the illegal action of building within the stream buffer. The Examiner in that proceeding expressly found that Garrison cannot shift responsibility for their own illegal acts because they knew about the applicable law and the information on their site plan was not consistent with their own knowledge. More specifically, the trail lay between the stream and the footprint for the proposed residence. The Pierce County Code requires that that 35-foot buffer remain

undisturbed unless a substantial development such as an improved road, levee, or permanent structure interrupted the buffer. PCC 18E.60.050. In their site plan, Garrison specifically labeled the trail as an existing road. Thus, the Hearing Examiner provided the following response to Garrison's argument that a County inspector approved the foundation even though it was within the buffer and therefore should lift the stop work order:

Appellants correctly assert that a Pierce County building inspector approved the location of the footings for the new residential dwelling within 35 feet of the drainage swale. However, as shown in the appellants' building permit application site plan, an "existing drive" separates the footing location from the drainage course (Attachment C to Exhibit "4"). Section 18E.60.050(A) PCC provides that the buffer for a DNR Water Type stream does not extend landward beyond "an existing substantial improvement such as an improved road, dike, levee, or a permanent structure." Thus, the inspector considered the buffer as ending at the edge of [the] drive. However, the 2003 site plan prepared by the appellants in response to a Pierce County enforcement action regarding illegal clearing shows a "trail" alongside the drainage course in the same location as the "existing drive." Numerous exhibits and substantial testimony show that a trail and not a "drive" existed historically along the east side of the drainage course. Appellants cannot, therefore, assert that they justifiably relied upon the Pierce County

inspector's approval of the footing location.

(AR at 97-98) (emphasis added).

Garrison abandoned the LUPA appeal of this Examiner decision and the Examiners findings final and now verities. See, *Tapper v. Employment Security Department*, 122 Wn.2d 309, 402, 858 P.2d 494 (1993). Moreover, principals of res judicata and collateral estoppel apply to quasi-judicial proceedings such as the Hearing Examiner proceeding that followed Garrison's appeal of the Stop Work Order. *DeTray v. City of Olympia*, 121 Wn. App. 777, 90 P.3d 1116 (2003); *Hilltop Terrace Homeowners Ass'n v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29 (1993). Just as the Examiner would not allow Garrison to benefit from misleading application information in the Stop Work Order appeal, this Court should not allow Garrison to rely upon the same misleading site plan to establish vested rights and avoid compliance with current Pierce County zoning requirements.

D. RESPONDENTS ARE NOT ESTOPPED FROM CHALLENGING VESTED RIGHTS.

Garrison has not demonstrated that the elements of equitable estoppel were established. Equitable estoppel has three elements: (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reasonable reliance upon that act,

statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Department of Ecology v. Theodoratus*, 135 Wn. 2d 582, 599, 957 P. 2d 1241 (1998). Moreover, courts will not apply estoppel where the claimed representations or actions involve matters of law. *Id.* at 599-600.

In this case, there was no actionable representation or action by Respondents. That they did not affirmatively intervene into a lawsuit to prevent the possibility of a settlement agreement that effectively relaxed legal requirements for permitting cannot be the basis of estoppel. To the contrary, Garrison and the County knew that Respondents were interested in actions related to Garrison's prior illegal actions and authorizations for future construction and could have advised petitioners of the intended settlement. They chose not to, and instead reached a secret agreement that did not come to light until the public hearing. Regardless, whether the application legally resulted in any vested property rights is a question of law and estoppel has no application in this case.

Garrison next claims that Respondents are estopped from raising the vested rights issue in this LUPA appeal because Respondents could have intervened in the prior LUPA action that led to

the settlement agreement containing the “carefully bargained for term” allowing Garrison to vest the 2004 building permit application. (Brief at 42.) Of course, this argument assumes that Respondents could have prevented the County from entering into the settlement agreement with the County. Respondents had no such control. Regardless, the argument is without merit.

Notably, Garrison argued to the Examiner that they were entitled to vested rights based upon the Settlement Agreement. The Examiner rejected the argument and expressly found:

Though it is not necessary to analyze the argument of the applicant relating to any agreements reached between themselves and the County regarding vested rights, the Examiner does not find that argument persuasive. A private party and the County cannot subvert potential vesting issues by negotiating that issue. Any interested party has the right to argue against vesting as was done with this case.

(AR at 35-36, Finding 10.) No error was assigned to this finding and, accordingly, it is a verity on appeal. *Tapper, supra*, 122 Wn.2d at 402. A respondent in a LUPA appeal cannot assign error or challenge any Examiner findings unless the respondent also filed a LUPA appeal within the 21-day statute of limitations. *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 902, 83 P.3d 433 (2003). In any event, Respondents should not be required to intervene in any lawsuit

to ensure that the County adheres to its charge to apply the law rather than bargain away regulatory mandates.

E. GARRISON'S APPEAL IS NOT RENDERED MOOT BY THE STATE SUPREME COURT'S DECISION IN FUTUREWISE.

Garrison next argues that the July 2008 Supreme Court decision in *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 242, 189 P.3d 161 (2008), renders this LUPA appeal moot. Garrison asserts:

On July 31, 2008, the Washington Supreme Court issued an unequivocal decision regarding the application of a local government's critical area ordinances that are within the jurisdiction of the State's Shoreline Management Act (SMA), Chapter 90.58 RCW. ... Under the Supreme Court's ruling, areas that are within the 200 feet of a shoreline are governed solely by local governments' shoreline plans and not by their critical areas ordinances.

(Appellants' Brief at pp.43-44.) In short, Garrison argues that the plurality decision in *Futurewise* served to render Pierce County's 2005 critical areas regulations without affect and wholly enforceable.

The plurality decision (which addressed a direct challenge to newly adopted regulations rather than a project-specific permit) was far from "unequivocal" and certainly did not have the far reaching impact that Garrison asserts. As this Court noted in *Kitsap Alliance of*

Property Owners (KAPO) v. Central Puget Sound Growth Management Hearings Board, ___ Wn.2d ___, 217 P.3d 365, 368-69 (2009):

Our Supreme Court has not been able to garner a majority view for resolving the problem. When dealing with a plurality opinion, the holding of the court is the position of the justice(s) concurring on the narrowest grounds. In *Futurewise*, the narrowest position was that of Justice Madsen who concurred only in the result.

The result in that case was upholding a Growth Board decision that the Board did not have jurisdiction to review for GMA compliance newly adopted critical areas regulations that applied in regulated shorelines.

Contrary to Garrison's assertion, *Futurewise* did not hold 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." (Appellants' Brief at p. 45.) *Futurewise* addressed a direct challenge to newly adopted regulations timely filed with a Growth Board. The Growth Board held that, under the terms of ESHB 1933, it did not have jurisdiction to hear challenges to the critical areas regulations that are applicable in the regulated shoreline. The Growth Board's held its jurisdiction is limited to review of regulations governed by the GMA for compliance with the procedural and substantive requirements of the GMA. Since the newly adopted regulations were subject to the SMA, rather than the GMA, the Growth

Board held it could not review the regulations for compliance. *Evergreen Islands, Futurewise and Skagit Audubon Society, v. Anacortes*, WWGMHB Case No. 05-2-00016 (Final Decision and Order, December 27, 2007) at pp. 24-41 (“*Futurewise Board Decision*”).

The result of *Futurewise* was to adopt that Board’s holding regarding its own jurisdiction to review regulations that fall within the SMA’s jurisdiction. The *Futurewise* plurality decision does not hold that unchallenged critical areas regulations are uniformly without affect and unenforceable. *Futurewise* is not a license for landowners in Pierce County to unilaterally disregard the critical area regulations that Pierce County adopted in 2005. *Futurewise* certainly did not render this appeal moot.

1. Garrison’s Request for Relief is Beyond the Scope of this LUPA Appeal.

Garrison raised ESHB 1933, for the first time, on a reconsideration motion after the trial court made its decision on the LUPA appeal. (CP 389-464.) Thus, the issue of whether ESHB 1933 served to invalidate and render Pierce County’s 2005 critical areas regulations wholly unenforceable in the shorelines was not presented to the Hearing Examiner. Issues not raised to the Hearing Examiner cannot be raised in subsequent appeals. *Boehm v. City of Vancouver*, 111 Wn.2d 711, 722, 47 P.3d 137 (2002). Respondents

acknowledge that the *Futurewise* decision was not rendered until July 31, 2008. Nonetheless, the decision is based upon Legislative amendments enacted in 2003 and Garrison seeks to invalidate regulations adopted by the County in 2005. The basis of Garrison's argument (ESHB 1933) was available to Garrison long before the *Futurewise* decision was issued. Garrison should not be heard to request vast retroactive application of the *Futurewise* plurality decision but simultaneously ask this Court to shield Garrison from any obligation to timely raise the issue in this LUPA appeal. Under the rule articulated in *Boehm*, Garrison cannot raise this new issue after the administrative proceeding is concluded.

The *Boehm* rule is consistent with LUPA's definition of a "Land Use Decision" which includes "a final determination by a local jurisdiction's body or officer with the highest level of authority to hear appeals on ... [a]n application for a project permit or ... [a]n interpretive or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, [or] development ... of real property." RCW 36.70C.020(1)(a) and (b). Since Garrison did not raise the issue to the Hearing Examiner, there is no final decision or interpretation on this issue made by the Examiner. Likewise, Garrison has not sought from Pierce County an

administrative determination or interpretation of *Futurewise* as it applies to the enforceability of its 2005 critical areas regulations. There is no final local decision on the issue and is thus beyond the scope of this LUPA appeal.

Moreover, LUPA is intended to provide review for site-specific land use applications. It is not intended to be the means to assert wholesale challenges to the validity of land use regulations. See, RCW 36.70C.030. See also, *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 597 (2007); *Caswell v. Pierce County*, 99 Wn. App. 194, 198-99, 992 P.2d 534 (2000). LUPA is certainly not properly used as a collateral attack on a legislative act that occurred three years before the land use petition was filed.

If Garrison believes in earnest that *Futurewise* rendered Pierce County's critical areas regulations unenforceable within the shorelines, a more appropriate action would be to commence a declaratory judgment action so that the issue may be the full focus of the court's attention, rather than a belated ancillary matter. Of course, just as the issue is not timely raised here, such declaratory judgment action may likewise be barred as untimely.

Though the declaratory judgment statute does not contain a statute of limitations, courts have consistently held that "declaratory

judgment actions must be brought within a 'reasonable time'." *Cary v. Mason County*, 132 Wn. App. 495, 501, 132 P.3d 157 (2006), quoting *Brutsche v. City of Kent*, 78 Wn. App. 370, 376, 898 P.2d 319 (1995) and *Federal Way v. King County*, 62 Wn. App. 530, 536, 815 P.2d 790 (1991). What constitutes a reasonable time is determined by analogy to the time allowed for appeal of a similar decision as prescribed by statute or rule of court. *Federal Way*, *supra*, 62 Wn. App. at 536-37.

The appropriate statute of limitations to apply by analogy in this case would be the statute of limitations set forth in the GMA. This seems especially appropriate, since both *Futurewise* and *KAPO* were issued in the context of timely GMA appeals. Under the GMA, local ordinances are presumed valid upon adoption and, if objected to, must be appealed within 60 days. See RCW 36.70A.290(2), .310, .320(1). Of course, Garrison's challenge to the 2005 critical areas ordinance was not asserted within 60 days, but instead three years after the regulations were adopted.

Application of ESHB 1933 to the Garrison's permit application was not timely raised and is beyond the scope of this LUPA appeal.

2. Garrison's Request for Relief is Beyond the Scope of *Futurewise*.

Even if the issue was timely and properly raised in this appeal, the appeal is not moot because Garrison misconstrues *Futurewise*.

Unlike this site-specific land use application applying unchallenged regulations, *Futurewise* involved a direct challenge to the City of Anacortes' update to its shoreline master plan that included regulation of the shoreland area. The Growth Board held that it was without jurisdiction to review the new regulations for compliance with the GMA. *Futurewise Board Decision* at pp. 24-41. The plurality decision had the result of reinstating that Growth Board decision regarding jurisdiction. It has no further affect. The plurality decision must be narrowly applied to the same result. *KAPO, supra. Futurewise* may not be applied to invalidate previously adopted, unchallenged regulations.

Additionally, this case does not involve application of a shoreline buffer established through a critical areas ordinance as was the case in both *Futurewise and KAPO*. Rather, this appeal involves a stream buffer. Moreover, the stream does not exclusively traverse the shorelines, but extends far upland as well. In fact, the stream's origin is upland and the majority of the stream lies upland. There is no disputing that the those portions of the stream that lie more than 200 feet from the shoreline must be fully afforded the protections provided by the 2005 critical areas regulations, to include application of the buffers unless the variance criteria are fully satisfied. It defies common sense to hold that the stream protections terminate at the

point the stream crosses lands within 200 feet of the shoreline. The plurality *Futurewise* decision, which reinstates a Growth Board decision on its own jurisdiction, did not even address this issue, much less support such a result.

3. The Vested Rights Issue in this LUPA Appeal is not Moot.

Finally, the trial court did not unequivocally decide in this LUPA appeal that the 2005 critical areas ordinance is enforceable or must be applied. The trial court simply decided that the Garrison application was not vested under the 1997 critical areas regulations. The trial court stated:

Pierce County shall review any subsequent variance applications submitted by the Respondents Garrison with regard to the stream and associated buffers on the property located at 8122 SR 302 based on the Pierce County regulations at the time a complete application is submitted.

(CP at 381.) On remand, Garrison is free to raise to the Hearing Examiner that the 2005 critical areas regulations cannot be applied, regardless of the application's vesting status, because of the *Futurewise* decision. Thereafter, the County would be afforded the opportunity to make a decision on the issue. Presumably, that decision would be appealable.

A case is moot if the issues it presents are “purely academic”. *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968). It is not moot, however, if a court can still provide effective relief. *Pentagram Corp. v. Seattle*, 28 Wn. App. 219, 223, 622 P.2d 892 (1981). In this case the Court can provide effective relief. It can hold that the Garrison application is not vested and then allow the County to decide if the 2005 critical areas regulations may be applied later submitted applications in light of *Futurewise*. This important decision should not, however, be made in the context of a belated ancillary issue raised without any input from the Hearing Examiner, who is Pierce County’s highest local authority on the application of the County’s land use regulations.

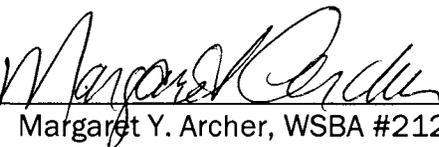
IV. CONCLUSION

This Court should affirm the decision of the trial court.

Dated this 2 day of November, 2009.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By 

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Lauer and deTienne

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DIVISION II

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No. 38321-7-II

STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LOUISE LAUER and DARRELL deTIENNE

Respondents,

v.

PIERCE COUNTY and MIKE AND SHIMA GARRISON,

Appellants.

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

CERTIFICATE OF SERVICE

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THIS IS TO CERTIFY that on this 2nd day of November, 2009, I
did serve true and correct copies of the following:

1. Opening Brief of Respondents Louise Lauer and Darrell
deTienne; and
2. Certificate of Service.

via U.S. Mail (or other method indicated below) by directing delivery to
and addressed to the following:

| | |
|--|--|
| <p><u>Attorneys for Mark and Shima Garrison</u></p> <p>Jennifer A. Forbes MCGAVICK GRAVES 1102 Broadway, Suite 500 Tacoma, WA 98402-3534 jaf@mcgavick.com</p> | <p><u>Attorneys for Pierce County</u></p> <p>Jill Guernsey PIERCE COUNTY PROSECUTOR'S OFFICE CIVIL DIVISION 955 Tacoma Ave. South, Suite 301 Tacoma, WA 98402-2160 jguerns@co.pierce.wa.us</p> |
|--|--|

Dated this 2nd day of November, 2009, at Tacoma, Washington.



Cheryl M. Koubik
Legal Assistant to Margaret Y. Archer

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DIVISION II

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STATE OF WASHINGTON
BY JW
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LOUISE LAUER and DARRELL de
TIENNE,

Respondents,

NO. 38321-7-II

vs.

PIERCE COUNTY; and MIKE and SHIMA
GARRISON,

BRIEF OF PIERCE COUNTY

Appellants..

COMES NOW Respondent Pierce County, by and through its attorneys, Mark Lindquist, Pierce County Prosecuting Attorney, by Jill Guernsey, Deputy Prosecuting Attorney, and files this brief in support of the arguments raised in the brief of Respondents Lauer and deTienne on the mootness issue. Although the County previously indicated to the Court that it would not be filing a brief in this case, in light of the arguments in Appellants' Brief regarding the mootness issue, and the Court of Appeals decision in *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board*, ___ P.3d ___, 2009 WL 287793 (Div. II, Sept. 9, 2009), the County believes it is necessary to advise

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the Court that the County supports Respondents' arguments on this issue.

DATED this 2nd day of November, 2009.

MARK LINDQUIST
Prosecuting Attorney

By: Jill Guernsey
JILL GUERNSEY, WSBA #9443
Deputy Prosecuting Attorney
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Attorneys for Pierce County

DECLARATION OF SERVICE

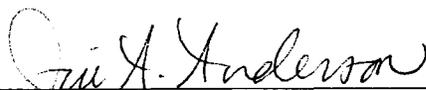
I, Jill A. Anderson, declare that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. As a legal assistant in the Office of the Pierce County Prosecuting Attorney, I sent a true and correct copy of the foregoing Brief of Pierce County today by FAX and giving a copy to ABC Legal Services with instruction for delivery by November 3rd, 2009, to:

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STATE OF WASHINGTON
BY _____
DEPUTY

I certify under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct. Dated at Tacoma, Pierce County, Washington, this 2nd day of November, 2009.



JILL A. ANDERSON