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SUPREME COURT
OF THE STATE OF WASHINGTON

CEDAR RIVER WATER AND SEWER DISTRICT and SOOS CREEK
WATER AND SEWER DISTRICT,

Appellants,

v.

KING COUNTY, *et al.*,

Respondents.

FILED

AUG 15 2012

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

WASHINGTON ASSOCIATION OF PROSECUTING
ATTORNEYS (WAPA)
AMICUS CURIAE BRIEF IN SUPPORT OF
SNOHOMISH COUNTY AND KING COUNTY

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I. INTRODUCTION

The Washington Association of Prosecuting Attorneys (WAPA) submits this amicus curiae brief in support of Snohomish and King Counties. As described in the accompanying Motion to File Amicus Curiae Brief, WAPA has an interest in the enforceability and finality of land use decisions and settlement agreements. WAPA also has an interest in ensuring counties can provide needed public services and facilities (such as wastewater treatment) to their residents, as well as an interest in ensuring the adverse impacts of such facilities are fully mitigated.

II. BACKGROUND

In 1999, King County amended its Comprehensive Sewer Plan, (the Regional Wastewater Services Plan or RWSP),¹ as required under state law.² The RWSP identified a need for additional sewer treatment facilities to serve a rapidly growing population. The RWSP expressed policies to mitigate impacts arising from the construction of a new sewage treatment plant, including policies to negotiate agreements with impacted communities through the land use permitting process.³ In negotiating such agreements, the RWSP specifically requires King County to provide

¹ Adopted by King County Ordinance 13680 (1999)

² RCW 90.48.110

³ See King County Code § 28.86.140B, EMP-1, -4 (“King County shall enter into a negotiated agreement with any community that is adversely impacted by the expansion or addition of major regional wastewater conveyance and treatment facilities. Such agreement shall be executed in conjunction with the project permit review.”)

mitigation to an impacted community in an amount equal to at least 10% of the costs associated with the new facilities.⁴

The 1999 RWSP showed King County would reach the limits of its sewer treatment capacity by 2010.⁵ To meet this demand for wastewater services, King County sought to locate a large sewer treatment facility, called “Brightwater,” within the jurisdictional boundaries of its neighbor, Snohomish County. This proposal spawned a myriad of land use administrative and judicial appeals.

King County prepared an Environmental Impact Statement (EIS), which evaluated the proposal, alternatives, impacts and proposed mitigation under the State Environmental Policy Act (SEPA).⁶ Snohomish County (and others) challenged King County’s environmental review and EIS adequacy. Correspondingly, Snohomish County adopted several land use regulations to address concerns about Brightwater, and King County challenged each of these ordinances.⁷ The Counties eventually sought

⁴ *Id.*

⁵ CP 5781

⁶ Chapter 43.21C RCW

⁷ King County brought successive challenges to the Snohomish County land use ordinances before the Central Puget Sound Growth Management Hearings Board. See *King County & City of Renton v. Snohomish County et al.*, (*King County I*) CPSGMHB 03-3-0011, Final Decision and Order (10/13/2003); *King County & City of Renton v. Snohomish County et al.*, (*King County II*) CPSGMHB 03-3-0025 Order Finding Continuing Noncompliance and Continuing Invalidity and Notice of Second Compliance Hearing (6/26/2004); *King County & City of Renton v. Snohomish County et al.*, (*King County IV*) CPSGMHB 03-3-0031, Order of Dismissal (1/23/2006).

resolution of the land use issues associated with Brightwater and, in 2005, entered into a “Settlement and Mitigation Agreement” (Settlement Agreement).⁸ The Settlement Agreement incorporated and was conditioned upon the two counties entering into a Development Agreement, which governed the terms of Brightwater’s development.⁹ The Development Agreement, in turn, was dependent upon the Settlement Agreement, it explicitly states: “This Development Agreement is an exhibit to *and a part of the Settlement Agreement* executed between Snohomish County and King County on the subject of Brightwater.”¹⁰ Approval of the Settlement Agreement was subject to public notice and hearings.¹¹ In December 2005, Snohomish County formally adopted the Development Agreement by ordinance pursuant to RCW 36.70B.170.¹²

The Settlement and Development Agreements resolved the land use issues and incorporated mitigation conditions for the project. The Agreements also set forth the land use permitting process, requiring King

⁸ In addition to the appeals brought by the two counties, other land use appeals challenging Brightwater were filed by citizens groups and other jurisdictions. The record shows a group called “Sno-King Environmental Alliance” brought at least nine cases against various land use decisions concerning Brightwater. CP 98-99

⁹ CP 218. Section 5 of the Settlement Agreement is entitled “Permit Process and Review Criteria.” Part of it states: “The adoption of an ordinance by Snohomish County approving the terms and conditions of the Development Agreement set forth [and incorporated] in Exhibit A is a material condition of this settlement agreement.”

¹⁰ CP 226

¹¹ CP 182-184; 186

¹² Snohomish County Amended Ordinance No. 05-127. CP 188-192

County to obtain a “binding site plan”¹³ (BSP) approval from Snohomish County. The BSP approval was granted on May 5, 2006. There were a myriad of public proceedings involving this project from 1999 to 2006. Appellants Cedar River Water and Sewer District and Soos Creek Water and Sewer District (the Districts) chose not to participate in *any* of these public proceedings. It was not until August 2008, over two years after the final land use decision was issued and almost a decade after the RWSP was adopted, that the Districts filed a judicial challenge to the payment of the mitigation fees.

III. LEGAL ARGUMENT

In addition to legal factors, there are important public policy considerations supporting the Superior Court’s dismissal of these belated challenges. The settlement and development agreements at issue here resolved several disputes, and also set forth the parameters for development. There are good reasons to use such tailored agreements to address complex land use proposals with multiple impacts, such as a large sewage treatment plant. The legislature has expressly authorized the use of such agreements, and local governments should be free to utilize them without fear of collateral attack years later.

¹³ A binding site plan approval is a land use permitting process authorized pursuant to the state subdivision statute. RCW 58.17.035

Washington courts have been unwavering in applying public policy principles supporting finality and certainty in land use decisions. The actions challenged in this case are land use decisions, which the two counties relied upon to move forward. Applying the strong public policy for finality in land use matters, this Court should find that an action brought over two years after the deadline for challenge is untimely.

A. Tailored Agreements Are Important Land Use Permitting & Mitigation Tools, Particularly When Unusual and Large Projects Are Involved.

Although many jurisdictions have detailed ordinances regarding land use, not every proposal can be foreseen and regulated by ordinance.¹⁴ Unique and complex projects such as Brightwater involve impacts that cannot be completely determined until a specific proposal is set forth. These types of projects are more amenable to the application of customized agreements to address the issues.

Brightwater is the quintessential proposal where tailored mitigation is needed. Brightwater is a large sewage treatment facility serving the Seattle metropolitan area, costing \$1.4 billion dollars, and encompassing 114 acres.¹⁵ Brightwater will receive 54 million gallons of untreated

¹⁴ See *Snohomish County Builders Ass'n v. Snohomish Health District*, 8 Wn. App. 589, 596-97, 508 P.2d 617 (1973) (Court notes it is impractical to establish comprehensive rules to foresee every possible circumstance.)

¹⁵ CP 5786

sewage per day.¹⁶ It is located in an area partially zoned for rural residential use and its outfall pipeline runs primarily through residential areas.¹⁷ Brightwater is a type of facility unwelcome in most any neighborhood, as it will generate odor, traffic and noise. In addition, legitimate concerns were raised about the seismic stability of such a facility, which includes large tanks for processing and large pipelines transmitting untreated and treated sewage.

Brightwater is considered an essential public facility (EPF) under the Growth Management Act (GMA).¹⁸ EPFs include facilities “that are typically difficult to site,” and include such things as airports, correctional facilities, and solid waste facilities.¹⁹ While state statute prohibits a local jurisdiction from precluding such facilities,²⁰ it does not prohibit appropriate mitigation for such facilities. The Growth Management Hearings Boards have noted that requiring mitigation for such facilities is appropriate.²¹ State regulations explicitly state that counties may consider

¹⁶ CP 5778

¹⁷ CP 5825 -5826

¹⁸ Ch. 36.70A RCW

¹⁹ RCW 36.70A.200(1)

²⁰ RCW 36.70A.200(5)

²¹ *Hapsmith et al. v. City of Auburn*, CPSGMHB No. 95-3-0075c, Finding of Non-Compliance and Notice of Second Compliance Hearing (2/13/1997) (1997 WL 461771 at *7) (Upholding the City’s requirement that an EPF project proponent must execute an agreement to mitigate the adverse financial impacts of such a facility). In this same case, the Growth Management Hearings Board instructed the City to change a criterion for siting an EPF to consider “mitigating measures to make a facility more acceptable.” See *id.*; *Hapsmith*, CPSGMHB No. 95-3-0075c, Finding of Compliance (7/24/1997).

provisions requiring amenities or incentives for neighborhoods where EPFs are sited.²² Other state laws, such as SEPA, RCW 82.02.020, and Local Project Review, provide tools to mitigate the impacts of such facilities.

The Settlement and Development Agreements were appropriately implemented as tailored agreements for Brightwater. In 1995, as part of regulatory reform, the state legislature adopted specific statutory provisions authorizing the use of “development agreements” to address certain types of land use projects.²³ Development agreements are beneficial to both the developer and to the regulatory jurisdiction.²⁴ They provide certainty to both the developer and the regulating jurisdiction by explicitly defining applicable regulations, procedures, and required mitigation. A development agreement provides both the applicant and regulator the ability to bargain for mitigation, public facilities and infrastructure, and public benefits. Moreover, the use of such agreements

²² WAC 365-196-550(6)(e) (“Counties . . . may also consider provisions for amenities or incentives for neighborhoods in which facilities are sited.”); WAC 365-196-550(4)(b)(ii) (“Agreements among jurisdictions should be sought to mitigate any disproportionate financial burden which may fall on the county . . . which becomes the site of a facility of a statewide, regional, or county-wide nature.”); *see also City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 34, 988 P.2d 27 (1999) (Cities could not preclude airport expansion because it was an EPF, but Port was required to comply with permitting and mitigation requirements imposed by the cities.)

²³ RCW 36.70B.170 - .210. Many other states have also adopted statutes specifically authorizing the use of development agreements, including Arizona (Ariz. Rev. Stat. Ann. § 9-500.05); California (Cal. Gov’t Code § 65864); Colorado (Colo. Rev. Stat. § 24-68-101); Florida (Fla. Stat. §§ 163.3220 - .3243); Hawaii (Haw. Rev. Stat. §§ 46-121); Idaho (Idaho Code § 67-6511A); Maryland (Md. Ann. Code art 66B § 13.01); Nevada (Nev. Rev. Stat. §§ 278.0201 to 278.0207); Oregon (Or. Rev. Stat. § 94.504), and others.

²⁴ *See Rathkopf’s The Law of Zoning and Planning*, § 71:2 (4th ed. 2011).

reduces costs to both the developer and regulator by avoiding administrative appeals and litigation.²⁵ Such an approach provides a comprehensive and holistic review of all aspects of a proposal, rather than piecemeal review on parts of a proposal through different applicable permits. Importantly, these types of agreements promote the strong public policy in Washington for certainty in land use decisions.

B. The Mitigation Measures Are Directly Related to Brightwater and Lawful Under Washington Law

When it adopted the RWSP in 1999, King County recognized construction of a large sewage treatment plant such as Brightwater would require extensive mitigation. King County adopted its policies years before it selected the Brightwater site in Snohomish County. The County incorporated the mitigation requirement as a planning policy, and adopted this policy into the King County code. King County's forethought, planning, and concern for its affected communities are admirable policies, and established a proper approach to providing needed, but unwanted, facilities. The Settlement and Development Agreements implement these wastewater treatment planning policies and appropriately adopt the necessary mitigation for such a facility.

²⁵ See Shelby Green, Pace Law School, Development Agreements: Bargained for Zoning that is Neither Illegal Contract or Conditional Zoning, *Bepress Legal Series*, Paper 274 (2004) at 7-8 (accessed at <http://law.bepress.com/expresso/cps/274>.)

The Settlement and Development Agreements incorporate appropriate mitigation under SEPA. SEPA is based upon a broad policy “that each person has a fundamental and inalienable right to a healthful environment....”²⁶ Public agencies are required to use “all practicable means” to achieve the following SEPA goals:

- (a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (b) Assure for all people of Washington safe, healthful, productive and aesthetically and culturally pleasing surroundings;
- (c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences[.]²⁷

These goals are broad enough to include the mitigation measures that King County committed to, both in its RWSP and the agreements with Snohomish County. The Agreements work to assure a “safe, healthful, productive and aesthetically and culturally pleasing” environment for those who are accommodating a large sewage treatment plant in their neighborhood. These types of SEPA mitigation agreements are appropriately used for large, complex projects with multiple impacts.²⁸

²⁶ RCW 43.21C.020(3)

²⁷ RCW 43.21C.020(2)(a)-(c)

²⁸ See *Org. to Preserve Agricultural Lands (OPAL) v. Adams County*, 128 Wn.2d 869, 875, 913 P.2d 793 (1996) (Mitigation agreement used to address impacts of a large regional solid waste landfill.)

SEPA overlays and supplements all other state laws.²⁹ When reviewing a project of this magnitude and with such enormous impact, the reviewing jurisdiction has a duty to look at all impacts:

[SEPA] recognizes “the necessary harmony between humans and the environment in order to prevent and eliminate damage to the environment and biosphere, as well as to promote the welfare of humans and the understanding of our ecological systems.”³⁰

SEPA requires consideration of impacts to *all* aspects of the environment, including the built environment. The first step in a SEPA analysis is the completion of a “SEPA checklist,”³¹ which includes questions about impacts to the traditional concepts of “environment,” including earth, air, water, plants and animals. But the checklist also includes an evaluation of the built environment and the human community, i.e., environmental health, noise, housing, aesthetics, recreation, public services and utilities. The Districts argue that the agreed-upon mitigation measures are not appropriate SEPA mitigation. They also argue that the mitigation measures are “illegal exactions” under RCW 82.02.020.³²

Neither argument is correct. The record shows extensive evidence of the

²⁹ *Donwood, Inc. v. Spokane County*, 90 Wn. App. 389, 398, 957 P.2d 775 (1998); *see also Dep't of Natural Res. v. Thurston County*, 92 Wn.2d 656, 664, 601 P.2d 494 (1979).

³⁰ *Anderson v. Pierce County*, 86 Wn. App. 290, 300, 936 P.2d 432 (1997) (quoting *Stempel v. Dep't of Water Resources*, 82 Wn.2d 109, 117, 508 P.2d 166 (1973)).

³¹ *See* WAC 197-11-315; WAC 197-11-444 lists the “elements of the environment,” which include both the natural and built environment. “Impact” is defined as “effects upon the elements of the environment listed in WAC 197-11-444.” WAC 197-11-752

³² RCW 82.02.020 permits voluntary agreements between developers and local governments to develop mitigation measures to mitigate direct impacts of development.

nexus between each mitigation project and the source of funds, in compliance with SEPA and RCW 82.02.020.³³

The Settlement and Development Agreements together constitute a land use development agreement, authorized under state law. Contrary to the Districts' allegations, these mitigation payments are not "bribes or extortion." Rather, the use of tailored land use agreements to implement mitigation measures is quite fitting for this type of large, unpopular but necessary, facility with a myriad of impacts.³⁴ Washington has authorized the use of development agreements, and this Court should uphold its use and provisions here.

C. Washington Has Strong Policies Supporting Certainty & Finality in Land Use Decisions.

Washington Appellate Courts and the State Legislature have embraced a strong public policy supporting finality and certainty in land use decisions. Washington court decisions are replete with iterations of

³³ See CP 2679 - 6725.

³⁴ In *Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors*, 84 Cal. App.4th 221 (2000), a challenge that the county contracted away its police powers through a development agreement was rejected. The California Court of Appeals noted that a legislative purpose for such agreements includes "encourag[ing] the creation of rights and obligations early in the project in order to promote public and private participation during planning, especially when the scope of a project requires a lengthy process of obtaining regulatory approvals." *Id.* at 228.

this public policy ensuring certainty and finality in land use decisions.³⁵

Washington has a strong “vested rights” policy protecting land use permit

³⁵ *Thurston County v. Western Wash. Growth Management Hearings Board*, 163 Wn.2d 329, 190 P.3d 38 (2008) (“Finality [in land use] is important because ‘[i]f there were not finality, no owner of land would ever be safe in proceeding with development of his property.’” (quoting *Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974), overruled in part by *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 991 P.2d 1161 (2000)); *Twin Bridge Marine Park, LLC v. State Dept. of Ecology*, 162 Wn.2d 825, 829, 175 P.3d 1050 (2008) (“Where Ecology has reasonable notice of a final land use decision by the local permitting authority, it must pursue collateral attack of that decision through [LUPA].”); *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 180, 149 P.3d 616 (2006) (In rejecting referendum authority for GMA actions, Court noted: “This would be inconsistent with the general legislative policy recognized by this court that land use decisions should reach finality quickly.”); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005) (“[E]ven illegal decisions must be challenged in a timely, appropriate manner.”); *James v. Kitsap County*, 154 Wn.2d 574, 589, 115 P.3d 286 (2005) (County’s imposition of impact fees was a land use action subject to LUPA; LUPA supports “administrative finality in land use decisions.”); *Samuel’s Furniture, Inc. v. State Dept. of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2003) (Requiring Ecology to file LUPA action to challenge city’s issuance of a permit, and rejecting Ecology’s “belated enforcement action” as undermining policy for finality); *Chelan County v. Nykreim*, 142 Wn.2d 904, 52 P.3d 1 (2002) (LUPA deadline applies to ministerial decisions not subject to notice requirements and is supported by strong public policy supporting finality in land use decisions); *Skamania County v. Columbia River Gorge Comm’n*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001) (“If there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property.”); *Stientjes Family Trust v. Thurston County*, 152 Wn. App. 616, 622, 217 P.3d 379 (2009) (“Indeed, courts have ‘long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions’ before courts of law review administrative decisions of local jurisdictions.”)(quoting *James*, 154 Wn.2d at 589); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 382, 223 P.3d 1172 (2009) (Challenge to land use decision untimely even where no notice provided; furthers policy of uniform and prompt judicial review of land use decisions); *Summit-Waller Citizens Ass’n v. Pierce County*, 77 Wn. App. 384, 393, 895 P.2d 405 (1995) (Pre-LUPA decision finding writ of certiorari untimely given the policy for expeditious review and finality of land use decisions); *Concerned Organized Women and People Opposed to Offensive Proposals, Inc. v. City of Arlington*, 69 Wn. App. 209, 219, 847 P.2d 963 (1993) (Establishing a 30-day appeal period for a writ of certiorari challenging a land use decision, Court noted: “We agree with the policy goals expressed in *Deschenes v. King County* and *DiGiovanni*: to promote certainty and finality in land use decisions while giving the opponents a reasonable time to take their concerns to the courts.”).

applicants from changes in regulations³⁶ and has always adhered to relatively short appeal periods for land use decisions.³⁷

In 1995, the state legislature adopted significant legislation incorporating these strong public policies in the form of “regulatory reform.” One part of regulatory reform, Chapter 36.70B RCW, Local Project Review, provides certainty in land use permit processing procedures, public notice requirements, administrative appeals, and also provides flexibility through the negotiation of development agreements.³⁸ These requirements protect both the applicant and the public, specifying a public process with specific notice and timelines requirements. Another part of “regulatory reform,” the Land Use Petition Act (LUPA),³⁹ replaced the writ of certiorari as a means for obtaining judicial review of land use decisions. LUPA “establish[es] uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.”⁴⁰ The legislature

³⁶ *Erickson & Associates v. McLerran*, 123 Wn.2d 864, 867-68, 872 P.2d 1090 (1994).

³⁷ See e.g., *Brutsche v. City of Kent*, 78 Wn. App. 370, 377, 898 P.2d 319 (1995) (30-day statute of limitations applicable in pre-LUPA declaratory judgment action regarding land use ordinance; “Uniformity and clarity as to the time for appeal is in the interest of all participants in governmental land use decisions.”); see also *City of Federal Way v. King County*, 62 Wn. App. 530, 539, 815 P.2d 790 (1991) (A pre-LUPA case where the court noted: “The consistent policy in this state is to review decisions affecting use of land expeditiously so that legal uncertainties can be promptly resolved and land development not unnecessarily slowed or defeated by litigation-based delays.”.)

³⁸ RCW 36.70B.170 - .210.

³⁹ Ch. 36.70C RCW.

⁴⁰ RCW 36.70C.010.

declared the judicial process set forth in LUPA to be “the exclusive means of judicial review of land use decisions[.]”⁴¹ A LUPA action must be filed within twenty-one days of the issuance of the disputed land use decision.⁴² If not filed within this time limit, a challenge is barred, final, and not subject to judicial review.⁴³

The disputed mitigation requirements here were adopted through the Settlement Agreement and implemented through the Development Agreement. These two agreements are interdependent upon each other and inextricably intertwined, constituting a single contract. This contract constitutes a “land use decision” as defined under LUPA, because (1) the agreements resolved land use disputes through a final determination by the local body’s officer with the highest level of authority to make that determination, and/or (2) they were interpretative or declaratory decisions regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development,

⁴¹ RCW 36.70C.030; *see also Twin Bridge Marina Park LLC v. Wash. Dept. of Ecology*, 162 Wn.2d 825, 844, 175 P.3d 1050 (2008); *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002); *Skamania County v. Columbia River Gorge Comm’n*, 144 Wn.2d 30, 26 P.3d 241 (2001); *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000).

⁴² RCW 36.70C.040(3). Where a land use decision is made by ordinance, the decision is “issued” on the date the body passes such ordinance. RCW 36.70C.040(4)(b)

⁴³ *Habitat Watch*, 155 Wn.2d 397; *James*, 154 Wn.2d 574; *Nykreim*, 142 Wn.2d 904, *Wenatchee Sportsmen*, 141 Wn.2d 169.

modification, maintenance of use of real property.⁴⁴ Because the Settlement and Development Agreements are land use decisions, LUPA is the exclusive means to challenge such mitigation.⁴⁵

Failure to bring an action under LUPA, and within the LUPA appeal timelines, bars a challenge at some later date. It does not matter that the challenge claims the agreement was illegal, those claims are barred if not brought pursuant to the proper statute or within the prescribed time limitations.⁴⁶ This strict limitation promotes the public policy of certainty and finality in land use decisions.

In rejecting an argument that a different statute of limitations should apply to impact fee challenges, the Washington Supreme Court stated:

As we stated in *Nykreim*, this court has long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions. The purpose and policy of the law in establishing definite time limits is to allow property owners to proceed with assurance in developing their property. Additionally, and particularly with respect to impact fees, the purpose and policy of chapter 82.02 RCW in correlation with the procedural requirements of LUPA ensure that local jurisdictions have timely notice of potential impact fee challenges. *Without*

⁴⁴ RCW 36.70C.020(2)(b) -The Settlement Agreement lists the various land use litigations that were resolved, including Growth Hearings Board appeals, SEPA appeals and LUPA appeals. Moreover, the Settlement Agreement specifically defines the future land use permit process and review criteria and incorporates the development agreement by reference. CP 217-218. The Development agreement in turn specifically references RCW 36.70B.170 – .210 and sets forth a land use process. The agreements were executed by the highest bodies with land use authority for each jurisdiction. They are land use decisions under LUPA's definition.

⁴⁵ RCW 36.70C.030(1); RCW 36.70B.200.

⁴⁶ *James*, 154 Wn.2d 574; *Habitat Watch*, 155 Wn.2d 397.

*notice of these challenges, local jurisdictions would be less able to plan and fund construction of necessary public facilities.*⁴⁷

As in *James*, the mitigation fees here are properly characterized as land use decisions, subject to challenge only through LUPA.⁴⁸ LUPA provides certainty and finality to the developer (King County), as well as to the regulator (Snohomish County). The fact that the developer is a county does not remove it from the LUPA process.

The Districts had many opportunities over the years to question the approach King County took on mitigation. The issues concerning Brightwater were widely publicized through a variety of processes. Since at least 1999, King County was on record (through an adopted public policy) that it would provide community mitigation for new sewage treatment plants. Thereafter, there was public notice of the proposed community mitigation through the SEPA process, through public meetings and public hearings on the Settlement and Development Agreement, as well as open record land use hearings on the binding site plan. Apparently, the Districts took no part in any of these processes.

⁴⁷ *James*, 154 Wn.2d at 589 (emphasis added).

⁴⁸ Challenges to RCW 82.02.020 fees and SEPA challenges are both required to be brought under LUPA. See e.g., *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 252 P.3d 382 (2011); *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn.2d 421, 256 P.3d 295 (2011).

In 1999, King County adopted a policy committing up to 10% of the cost of a new sewage treatment plant to community mitigation in the RWSP and King County code. County legislative actions (i.e., code adoptions) are subject to public notice and hearing processes.⁴⁹ The RWSP was also subject to a state approval process, and appealable to the Pollution Control Hearings Board (PCHB).⁵⁰ But there were no appeals or challenges to the RWSP or the code provision concerning mitigation.

After the Brightwater proposal became more specific, King County was required under SEPA to prepare various public notices concerning environmental review. King County utilized a SEPA checklist to determine that it should issue a determination of significance (DS). Copies of that DS were circulated to agencies with jurisdiction and expertise, affected tribes and to the public.⁵¹ King County held a number of public meetings concerning Brightwater, far more than required under SEPA.⁵² The draft EIS was circulated for public review and comment.⁵³

⁴⁹ See King County Charter § 230.10 (Prior to the adoption of an ordinance, “the county council shall hold a public hearing after due notice to consider the proposed ordinance.”).

⁵⁰ See *Watershed Defense Fund v. Riveland*, 91 Wn. App. 454, 460, 959 P.2d 130 (1998), (Challenge to an amendment to Whatcom County’s water and sewer plan was barred because challenger did not exhaust administrative remedies. In this case, the court recognized that even if the PCHB is not able to provide complete relief to a challenge, its review is important “to clarify and elucidate issues that are necessarily within its expertise, particularly where the case involves matters that are not within the conventional knowledge of the courts.”.)

⁵¹ CP 5466 ; WAC 197-11-360(3)

⁵² CP 5466

⁵³ CP 5466; WAC 197-11-455

By law, the distribution list for a draft EIS must include “each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal.”⁵⁴ A final EIS was issued after this process, taking into consideration public comment.⁵⁵ The Brightwater final EIS was huge, consisting of 16 volumes of information. An entire volume was devoted to responses to comments from “Cities and Towns, Sewer and Water Districts, Other Governmental Entities.”⁵⁶ Although they were on the distribution list, there is no indication that the Districts filed *any* comments on the SEPA documents.⁵⁷

Snohomish County also provided opportunities for comment on the Settlement Agreement, the Development Agreement, and the land use permitting process. The Settlement Agreement, which included the Development Agreement, was approved in a public meeting. Subsequently, the Development Agreement was approved by ordinance, after notice and a public hearing.⁵⁸ There were also public hearings and appeal opportunities on the binding site plan process. Finally, in addition to all of the public process, and as the Districts fully acknowledge,⁵⁹ there

⁵⁴ WAC 197-11-455(1)(c). The record shows the Districts were on the distribution list and received a copy of the draft and final EIS. CP 5466

⁵⁵ WAC 197-11-560

⁵⁶ CP 5466 (FEIS Vol. 12)

⁵⁷ CP 5466. Under the SEPA rules, a consulted agency that does not comment is barred from alleging any defects in the EIS or its process. WAC 197-11-545(1)

⁵⁸ CP 182-184

⁵⁹ CP 558

was a great amount of media coverage on the issues between Snohomish and King Counties concerning Brightwater.

Any or all of these public processes, conducted over a period of six years, provided the Districts abundant opportunities to raise concerns about the mitigation package. They chose not to do so until years later. The Districts chose not to comment on the SEPA documents. They chose not to comment on the legislative actions. They chose not to exercise appeal rights on the RWSP, the Development Agreement or the binding site plan, all of which include administrative appeal processes. Instead, years later, in an economy where all local governments are suffering, the Districts collaterally challenge the mitigation package ostensibly based upon other legal theories.

To allow this challenge under the guise that these are not “land use” decisions would defeat the strong public policy for certainty and finality in land use decisions. It would allow challengers to semantically repackage any challenge to a land use decision to avoid a defense that it is untimely. It would create considerable uncertainty for local governments, for project proponents and for other interested parties. Furthermore, it would be unfair to those people and entities who *did* comply with the required timelines.⁶⁰

Allowing this challenge to go forward would essentially “undo” all of the

⁶⁰ For example, here, the record shows that the City of Woodinville’s challenge to the Development agreement was time-barred. CP 193 – 210

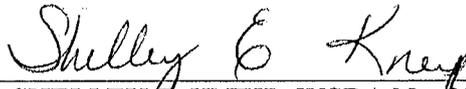
regulatory reform that was enacted to implement this strong public policy. The Superior Court ruled correctly in this case, and that ruling should be upheld.

IV. CONCLUSION

The Superior Court properly applied the law and public policy considerations to these challenges and correctly dismissed the action. If the action is not considered time-barred under LUPA, it will undermine well-settled policies concerning finality in land use decisions. This Court should uphold the Superior Court's dismissal in this case.

Respectfully submitted this 30 day of July, 2012.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney



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7 SUPREME COURT
8 OF THE STATE OF WASHINGTON
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10 CEDAR RIVER WATER AND SEWER
11 DISTRICT and SOOS CREEK WATER AND
12 SEWER DISTRICT,

13 Appellants,

14 -vs-

15 KING COUNTY, *et al.*,

16 Respondents.
17

NO. 86293-I

CERTIFICATE OF SERVICE

18 The undersigned certifies under penalty of perjury under the laws of the State of
19 Washington that I am now and at all times herein mentioned, a resident of the state of
20 Washington, over the age of eighteen years, not a party to or interested in the above-entitled
21 action, and competent to be a witness herein.

22 On the date given below I caused to be served in the manner noted copies of the
23 following upon designated counsel:

24 Washington Association of Prosecuting Attorneys Motion for Leave to File Amicus
25 Curiae Brief

26 Washington Association of Prosecuting Attorneys (WAPA) Amicus Curiae Brief in
27 Support of Snohomish County and King County
28

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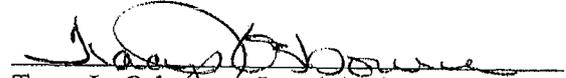
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1 Respectfully submitted this 30th day of July, 2012.

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CERTIFICATE OF SERVICE -- 5

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OFFICE RECEPTIONIST, CLERK

To: Tracy L. Osbourne
Cc: Shelley E. Kneip
Subject: RE: Case No. 86293-1, Cedar River Water & Soos Creek Water v. King County, et al. - WAPA Motion & Amicus Brief

Rec. 7-30-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Tracy L. Osbourne [<mailto:TOSbourn@co.kitsap.wa.us>]
Sent: Monday, July 30, 2012 4:18 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Shelley E. Kneip
Subject: Case No. 86293-1, Cedar River Water & Soos Creek Water v. King County, et al. - WAPA Motion & Amicus Brief

Dear Clerk,

Attached for filing please find the following:

- Washington Assoc of Prosecuting Attorneys Motion for Leave to File Amicus Curiae Brief (this document consists of 5 pages)
- Washington Assoc of Prosecuting Attorneys Amicus Curiae Brief (this document consists of 20 pages)
- Certificate of Service (this document consists of 5 pages)

These documents are being filed by:

Shelley E. Kneip
Senior Deputy Prosecuting Attorney
WSBA No. 22711

Thank you for your assistance.

Sincerely,

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