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(Consolidated with No. 68049-8-I)

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

TOWN OF WOODWAY and SAVE RICHMOND BEACH, INC., a Washington nonprofit corporation,

Respondents,

v.

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Appellants.

REPLY BRIEF OF APPELLANT BSRE

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I. INTRODUCTION

The response briefs of Woodway and Save Richmond Beach fail to provide any meaningful legal justification for the trial court's rejection of Washington's Vested Rights Doctrine and its refusal to follow the dictates of the Washington Growth Management Act, RCW 36.70A ("GMA"). Repeating their summary judgment arguments below, Woodway and Save Richmond Beach rely on a convoluted and legally unsupported theory as to why Washington's vesting rules should be disregarded in this case.

Simply stated, Woodway and Save Richmond Beach have asked this Court to ignore the unambiguous language of RCW 36.70A.320(1) and RCW 36.70A.300(4), and to hold that when a Growth Board finds a local government's ordinance to be out of compliance with SEPA (but not invalid), all permit applications which vested under the ordinance should be "de-vested" and the local government should be precluded from even processing the formerly-vested permit application. Not surprisingly, Woodway and Save Richmond Beach cite not a single case which has ever so held.

The Respondents' argument runs counter to several provisions of the GMA, and is in direct contravention of Washington's Vested Rights Doctrine. Faced with the absence of legal authority supporting their position, Respondents have resorted to hyperbolic policy arguments suggesting a nefarious conspiracy between Snohomish County and BSRE. They refer to BSRE as a "foreign-owned entity," preying on a "compliant

county government" in an effort to "shoehorn a mega-sized project into a small isolated portion of Snohomish County." (Woodway's brief, page 1). Respondents apparently hope that this Court will be inflamed by such language, and find a way to uphold the trial court's clearly erroneous decision.

It is noteworthy that in their response briefs, Woodway and Save Richmond Beach do not deny any of the following facts, which support reversal of the trial court's decree:

- Snohomish County's Urban Centers Development Regulations were adopted and in effect at the time of BSRE's permit applications.
- BSRE's applications were submitted on February 14, 2011 and on March 4, 2011 and were in compliance with Snohomish County's local rules regarding permit completeness.
- Snohomish County made express determinations as to the completeness and vesting of BSRE's applications by Notices of Application published on February 20, 2011 and March 13, 2011.
- No party filed an appeal under the Land Use Petition Act (LUPA) of Snohomish County's determinations of completeness and vesting.
- The Growth Board's Order, finding the Urban Centers Development Regulations in partial noncompliance with SEPA, was issued many weeks after BSRE's complete applications were submitted.
- The Growth Board did not find the Urban Centers Development Regulations "invalid," but rather made the more limited determination that the regulations were "noncompliant" with SEPA's procedural requirements.
- Neither Woodway nor Save Richmond Beach appealed any aspect of the Growth Board's decision.

- This collateral lawsuit for declaratory and injunctive relief was filed by Woodway and Save Richmond Beach some seven months after Snohomish County's determinations of completeness, and approximately five months after the Growth Board's decision.

- The trial court reversed Snohomish County's determination that BSRE's applications were vested, and entered an injunction prohibiting Snohomish County from even processing BSRE's applications.

Under these undisputed facts, it is clear that the trial court's summary judgment order was in error. This Court should order that summary judgment in favor of Woodway and Save Richmond Beach be reversed, and that summary judgment be entered in favor of BSRE and Snohomish County.

II. ARGUMENT

A. The Caselaw Cited by Woodway is Outdated and Does Not Support Its "De-Vesting" Argument.

In their Response Brief, Woodway and Save Richmond Beach admit, as they must, that the GMA now regulates challenges to land use regulations enacted by local jurisdictions. The GMA provides that (a) Growth Boards have *exclusive* jurisdiction to hear challenges to local land use ordinances, whether those challenges relate to GMA noncompliance or SEPA noncompliance (RCW 36.70A.280(1)); (b) a local land use ordinance is presumed valid at the time of enactment, and a Growth Board's determination of "noncompliance" does not render it invalid (RCW 36.70A.320(1); RCW 36.70A.300(4)); and (c) even where a

Growth Board makes the determination that a land use ordinance is "invalid," invalidity applies prospectively only. (RCW 36.70A.302(2)).

Nor do Respondents dispute that the Washington courts have upheld and affirmed the exclusive jurisdiction of the Growth Board and the prospective nature of determinations of invalidity. Davidson Serles & Associates v. City of Kirkland, 159 Wn. App. 616, 626, 246 P.3d 822 (2011); Hale v. Island County, 88 Wn. App. 764, 772, 94 P.2d 1192 (1997).

Woodway nonetheless attempts to carve out a fictitious exception to the GMA statute and Washington's Vested Rights Doctrine, relying on cases which are 30 to 40 years old and which do not even address the vesting of permit applications to regulations which are later determined to be violative of SEPA. Indeed, most of the cases relied upon by Woodway do not even involve the issue of vesting, much less the imagined statutory exception which Woodway asks this Court to create.

The primary case relied upon by Woodway is Responsible Urban Growth Group v. City of Kent, ("RUGG"), 123 Wn.2d 376, 868 P.2d 861 (1994). It should first be noted that, like all of the other principal cases relied upon by Woodway, RUGG predates the enactment of the GMA, LUPA and other aspects of Washington's regulatory reform legislation. Moreover, RUGG did not involve a failure of a local jurisdiction to comply with SEPA in enactment of a land use ordinance. Rather, the RUGG court held that a rezone should be set aside because the city had

violated the due process rights of citizens by (a) failing to provide notice of a quasi-judicial hearing and decision; and by (b) violating the State's "Appearance of Fairness Doctrine." Id. at 381. No similar facts are present here. The trial court's decision in this case (that BSRE's application should be de-vested) was based entirely on the Growth Board's limited determination that Snohomish County's Urban Center Regulations had not fully complied with SEPA's procedural guidelines. The decision in RUGG provides no support for the trial court's decision.

The other cases relied upon by Woodway in support of its "de-vesting" argument provide even less guidance to this Court. For example, Eastlake Community Council v. Roanoke Associates, 82 Wn.2d 475, 513 P.2d 36 (1973) predates GMA and LUPA by several decades. Moreover, the court in that case was striking down a *permit* issued in violation of SEPA. There was no issue of vesting to an ordinance that did not comply with SEPA. Further, the decision in Eastlake makes no mention of "voidness."

Similarly, in Lassila v. Wenatchee, 89 Wn.2d 804, 576 P.2d 54 (1978) there was no issue of vesting, and there is no mention of the terms "void," or "ultra vires" in the context of the Court's SEPA analysis. In Noel v. Cole, 98 Wn.2d 375, 378-80, 655 P.2d 245 (1982), the court does make reference to the *ultra vires* doctrine, but only in the context of an unauthorized government contract. The Noel case has nothing to do with the vesting of a land use permit application.

In short, to support its novel argument regarding de-vesting of a land owner's permit application based on SEPA noncompliance, Woodway must rely on cases which are decades out of date and which do not even address the legal theory which Woodway has asked this court to adopt. The trial court erred in accepting Respondents' unsupported legal arguments.

B. Woodway's Statutory Argument is Legally Unsupportable and Logically Unsound.

The most fundamental reason why the superior court should have dismissed Respondents' lawsuit is that the Court had no jurisdiction to attack or set aside the Growth Board's determinations. The legislature granted the Board exclusive jurisdiction regarding SEPA compliance in the context of GMA enactments. It also granted to the Growth Board continuing jurisdiction during the period of remand to monitor and eventually evaluate the local jurisdiction's compliance efforts. The legislature did not grant any authority to a trial court to intervene or substitute its judgment for that of the Growth Board, absent the filing of a timely appeal of the Growth Board's decision.

In this case, the Growth Board ruled that the SEPA aspects of the County's development regulations were not invalid. Furthermore, the Board expressly retained jurisdiction - as contemplated by the legislature - to monitor Snohomish County's efforts to bring its development regulations into full compliance with SEPA. Because neither Woodway

nor Save Richmond Beach appealed any aspect of the Growth Board's decision, these aspects of the FDO became final, and were not subject to collateral attack.

By declining to dismiss Respondents' collateral attack, the trial court undermined the Board's jurisdiction and thereby violated the GMA. The trial court's summary judgment order substituted the court's judgment for that of the Growth Board and interfered with the compliance process ordered by the Board. The trial court's decision was erroneous as a matter of law.

Faced with the unambiguous language of the GMA regarding Growth Board jurisdiction and the vesting of permit applications, and finding no applicable Washington caselaw supporting its argument that SEPA noncompliance trumps the Vested Rights Doctrine, Woodway falls back on the same strained argument that it made at the trial court level and which the court unfortunately adopted. Woodway argues that notwithstanding the express language of the GMA that ordinances are presumed valid until determined otherwise by a Growth Board, and despite unambiguous statutory language that invalidity applies prospectively only, a trial court nonetheless may – in a collateral lawsuit - reverse a vesting determination and overrule a Growth Board's refusal to find a local ordinance invalid.

Woodway argues that the statutory language of the GMA regarding invalidity and vesting should not be construed according to its

actual terms, but rather should be interpreted to be inapplicable whenever SEPA noncompliance is involved, or at least when an ordinance is found to be out of compliance with SEPA, but not subject to invalidation. Woodway makes the puzzling argument that while a party may vest to an ordinance later found to be *invalid* based on environmental considerations, somehow the vesting rule should not apply when the Growth Board has made the more limited determination that a regulation is non-compliant, but not invalid. The argument is supported by no authority and is illogical on its face. Woodway does not explain why the Legislature would have allowed the vesting of permit applications to regulations which had been found to be wholly invalid, while depriving a permit applicant of vesting protection where regulations were found to be less problematic, i.e., out of compliance, but not invalid.

Part of the confusion with Woodway's argument is its attempt to suggest that the pre-GMA term "void" means something entirely different than the term "invalid," as it is used in the GMA. Woodway suggests that a wholly different standard applies to SEPA violations, which the Legislature failed to consider or address in the GMA. But the distinction drawn by Woodway is unsupportable. Black's Law Dictionary defines *void* as "of no legal effect." Similarly, Black's defines *invalid* as "not legally binding." (Black's Law Dictionary, 8th ed., 2004). In other words, in this context the terms are virtually interchangeable.

When it crafted the GMA, the Washington Legislature employed the term "invalidity" for ordinances which were to be treated as not legally binding (or of no effect). But it expressly provided that determinations of invalidity would be applied prospectively only, and would not affect vested applications. There is not a shred of evidence that the Legislature intended to carve out a statutory exception for ordinances which did not comply with SEPA's procedural requirements. Woodway's suggestion that the Urban Centers Development Regulations should be viewed as "valid, but void" is nonsensical. The GMA now provides the exclusive measure of when a local ordinance may be "of no legal effect," i.e., invalid, and provides unambiguously that determinations of invalidity apply prospectively only.

Woodway provides no caselaw supporting its argument that SEPA noncompliance (absent invalidity) should be outside the GMA's express language. Indeed, the two principal cases cited by Woodway with respect to statutory construction of the GMA are entirely inapposite. In Davidson Serles & Associates v. Central Puget Sound Growth Board, 159 Wn. App. 148 (2010) (Davidson Serles I), the Court of Appeals did not hold that noncompliance with SEPA creates an exception to the GMA rules regarding invalidity and vesting. To the contrary, the Serles court held that the Growth Board had acted within its authority in *declining* to invalidate an ordinance even where SEPA noncompliance was present. 159 Wn. App. at 160. Thus, Serles supports the determination by the

Growth Board in this case that even though there were technical areas of noncompliance with Snohomish County's SEPA procedures, there was no reason to invalidate (i.e., render void) the development regulations for Snohomish County's Urban Centers. The Serles case did not recognize any exception to Washington's vesting rules.

The other case cited by Woodway in support of its "SEPA exception" argument is Clark County v. Western Washington Growth Board, 161 Wn. App. 204, 254 P.3d 862 (2011). But once again, the opinion in the Clark County case does not support Woodway's argument. Clark County did not involve the vesting of a private development application to local regulations. Rather, it dealt with restraints that are placed on *cities* that attempt to pass *legislative* annexation ordinances while a County's comprehensive plan is on review before a Growth Board. 161 Wn. App. at 223. Nothing in the Clark County decision addresses the issue of vesting of private land use permit applications, much less an exception to the vesting rule based on SEPA noncompliance.

In evaluating the reasonableness of Woodway's current argument, it is instructive to recall the nature of the relief that Woodway and Save Richmond Beach sought from the Growth Board. Along with the City of Shoreline, Respondents urged the Board to find that Snohomish County's Urban Centers Development Regulations were *invalid.* (CP 166-167). Clearly, they understood that absent a determination of invalidity, the Urban Centers Regulations would remain on the books allowing the

vesting of future permit applications to those regulations. It was only when the Board declined to grant their request for invalidity that Woodway and Save Richmond Beach reversed field, and argued to the trial court in their collateral action that it was precisely the Board's *refusal* to find invalidity that should somehow justify de-vesting BSRE's permit application! The incongruity of Respondents' shifting positions is striking.

Woodway's argument that a party cannot vest to current regulations when those regulations are later found to be in partial noncompliance with SEPA is supported by no authority whatsoever, and should be reversed by this Court. When the legislature granted exclusive authority to Growth Boards to determine not only GMA challenges to local jurisdictions but also SEPA challenges, it did not create any exception to the statutory rules governing noncompliance, invalidity and prospective application. Absent any such statutory exception, the ruling of the trial court was incorrect as a legal matter, and should be reversed.

C. Woodway's Public Policy Argument is Contrary to Washington Statutes and Caselaw.

Apparently recognizing that there is no legal basis to challenge Snohomish County's vesting decision on substantive grounds, Woodway has fashioned a public policy argument in Section D.5 of its Brief. Woodway argues that BSRE should not be allowed to take advantage of Washington's Vested Rights Doctrine because there was an element of

"strategy" in BSRE's decision to apply for permits while the Urban Centers Ordinances and Development Regulations were under appeal. In essence, Woodway argues that if a landowner is concerned about a potential change in or challenge to existing development regulations, the landowner should be prohibited from filing permit applications and relying on Washington's Vested Rights Doctrine. Simply stated, Woodway's argument finds no support in Washington law.

Where a developer submits an application for a subdivision, a building permit or a planned development, he has the right to have all of the uses disclosed in the application considered under the laws in effect at that time. Noble Manor v. Pierce County, 133 Wn.2d 269, 287, 943 P.2d 1378 (1997). In applying the Vested Rights Doctrine, the courts do not inquire as to whether a landowner was confident that the existing regulations would remain in effect indefinitely, or whether he was concerned about a possible change in the law. In either circumstance, the applicable regulations are fixed at the time of submittal of the complete application. The mental processes of the applicant are irrelevant to determinations of vesting. The Washington courts have expressly rejected the "reliance-based" rule for vesting, instead embracing a "date certain vesting point" with its emphasis on certainty. Erickson & Associates, Inc. v. McLarron, 123 Wn.2d 864, 868, 872 P.2d 1090 (1994); West Main Associates v. Bellevue, 106 Wn.2d 47, 51, 720 P.2d 782 (1986).

In this case, even if BSRE had waited until after the Growth Board's decision, it would still have been allowed to vest to the Urban Centers Development Regulations, as those regulations were **not** invalidated by the Board. But whether or not BSRE had concerns as to what decision the Growth Board would make, that would not alter the vested rights which BSRE obtained. There is no case support for Woodway's argument that vesting should not apply where an ordinance is repealed or found to be invalid shortly after the landowner's application was filed. To the contrary, the vesting rule has been applied even where the subject regulations were changed a few days or weeks after the landowner's application was filed, and even where the owner had not begun construction at the time of repeal or invalidity. See, e.g., Rural Residents v. Kitsap County, 141 Wn.2d 185, 192, 4 P.3d 115 (2000); Hale v. Island County, supra, 88 Wn. App. at 767.

Woodway makes the dramatic assertion that adhering to Washington's Vested Rights Doctrine means that citizens will not have "the means to protect their fundamental and inalienable rights to a healthful environment," Woodway's Response, p. 49. According to Woodway, enforcing the express language of the GMA regarding vesting will destroy all incentive for citizens to challenge local land use ordinances as violative of the GMA or SEPA. The argument is groundless. Washington's Vested Rights Doctrine simply allows a landowner who has already filed a complete application under a given

regulation to be vested to that regulation. It does not mean that *future* applications will be vested to regulations which the Growth Board may invalidate. Presumably, citizens will remain motivated to challenge regulations they do not like, because a finding of invalidity by a Growth Board will indeed prevent the vesting of *future* applications to the invalidated regulations.

Woodway's policy argument proceeds from the assumption that cities and counties are deliberately enacting land use ordinances that they know to be invalid, and that property owners are lying in wait to submit applications as soon as any potentially unlawful ordinance is enacted into law. The reality is much different. Needless to say, local jurisdictions take no pleasure in having their legislative enactments found to be noncompliant or invalid. The suggestion that counties and cities set out to enact legislation that they know to be illegal is a fantasy.

Likewise, a developer of a complex project such as the one proposed by BSRE begins the planning process months and frequently years before an application is submitted. BSRE's applications in this case consisted of hundreds of pages of reports, drawings, data and other materials. The suggestion that such applications are slapped together at the last moment in order to vest to a deficient ordinance is equally fantastic.

In any event, in a case such as this, where the Growth Board found that the County's procedural noncompliance with SEPA was not even

serious enough to warrant invalidity, Woodway's public policy argument is unpersuasive. The trial court's decision overturning Snohomish County's vesting determination was legally erroneous, and should be reversed.

D. Respondents' Failure to Comply With LUPA Provides a Further Basis for Reversal.

The trial court's summary judgment order was not only erroneous on substantive grounds (i.e., inconsistent with the Vested Rights Doctrine and the language of the GMA). It was also inappropriate insofar as it allowed Woodway and Save Richmond Beach to challenge and overturn Snohomish County's vesting determination through the filing of an untimely collateral action for declaratory and injunctive relief. If there was any legal basis to challenge Snohomish County's vesting determination, LUPA was the exclusive avenue for pursuing such a challenge.

1. The Range of Decisions Subject to LUPA is Broad, and Includes Interpretive Decisions.

Save Richmond Beach bases its LUPA argument on its contention that the range of governmental actions subject to the "exclusive remedy" provisions of LUPA must be narrowly defined. According to Save Richmond Beach, LUPA applies only to the final, quasi-judicial decision by a local government on a project; all other challenges may be brought via a collateral attack at any time, using the declaratory judgment statute. Yet its argument ignores the broad definition of "land use decision" under

RCW 36.70C.020, which includes not only final decisions on project permits, but also interpretive decisions by local governments as to the applicability of zoning or other land use regulations to a particular permit:

> (2) "Land Use decision" means a final determination . . . on:
>
> * * *
>
> (b) An interpretive or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance or use of real property; . . . .

RCW 36.70C.020.

There is no other way to characterize Snohomish County's determination of completeness and vesting except as an interpretive decision regarding the application of land use regulations to BSRE's property. A "vested right" is by definition a right that is unconditional and cannot be taken away. (Black's Law Dictionary, 8th ed., 2004). In making the vesting determinations, Snohomish County made a final decision that the County's Urban Centers Development Regulations would govern BSRE's application going forward. This was not an "interim" decision for the County which would be revisited at some point in the future. Rather, it was an unambiguous declaration of the "ground rules" (i.e., development regulations) that would apply to BSRE's application as it moved through the lengthy and complex permitting and approval process.

It would be unfair and unreasonable to allow Save Richmond Beach to neglect to file a timely appeal of the County's final vesting determination, and then wait for many months (or years) before collaterally challenging the fundamental rules under which the application would be evaluated. Save Richmond Beach's argument would mean that no landowner could ever be confident about the development regulations which would be applicable to its project. It was this evil which LUPA was designed to avoid:

> The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing *uniform, expedited appeal procedures* and uniform criteria for reviewing such decisions, in order to provide consistent, *predictable* and *timely* judicial review.

RCW 36.70C.010. (Emphasis added).

The Washington Court of Appeals has specifically held that a county's interpretation regarding the application of an ordinance to a building permit application must be timely challenged under LUPA, or the interpretation will be deemed valid. Asche v. Bloomquist, 132 Wn. App. 784, 791, 133 P.3d 475 (2006), rev. denied, 159 Wn.2d at 1005.

The Washington Supreme Court has rejected the notion that the exclusivity provisions of LUPA should be construed narrowly to apply only to the final issuance of project approval. Thus, in Chelan County v. Nykreim, 146 Wn.2d 904, 53 P.2d 7 (2002) it was held that a collateral attack by means of declaratory judgment was barred by LUPA, even

though the challenged decision was merely an over-the-counter boundary line adjustment which was issued before the landowner had even applied for his building permit:

> While LUPA states that it replaces the writ of certiorari, it does not limit judicial review to quasi-judicial land use decisions. In fact it expressly states that LUPA "shall be the *exclusive* means of judicial review of land use decisions."

146 Wn.2d at 930. The Nykreim court held that all manner of land use decisions are subject to LUPA, unless specifically excluded under RCW 36.70C.030.

2. The Cases Cited by Save Richmond Beach are Inapposite.

In its response brief, Save Richmond Beach cites several cases to support its argument that LUPA's exclusivity provision should be narrowly construed. But the cases do not support its position. For example, in Berst v. Snohomish County, 114 Wn. App. 245, 253-54, 57 P.3d 273 (2002), the court held that an area-wide building moratorium was not a "land use decision" under LUPA, because it did not relate to a specific project permit application, but rather affected a wide area in the County. In contrast, BSRE's applications were site specific, and the Snohomish County's vesting determination related specifically to BSRE's project.

Save Richmond Beach's reliance on Chaney v. Fetterly, 100 Wn. App. 140, 995 P.2d 1284 (2000) is certainly misplaced. First, in holding that the plaintiff did not have to exhaust administrative remedies before

enjoining construction, the Fetterly court made no reference whatsoever to LUPA. Furthermore, it should be noted that the Court of Appeals in the Nykreim case had relied on Fetterly to justify a declaratory challenge to the boundary line adjustment. Chelan County v. Nykreim, 105 Wn. App. 339, 359-60, 20 P.3d 416 (2001). But the Supreme Court *reversed* the Court of Appeals' decision in the Nykreim case which, in effect, was an overruling of the Fetterly decision *sub silentio* on this point.

The Fetterly decision predated not only the Supreme Court's ruling in Nykreim, but also several other Supreme Court decisions barring collateral challenges to land use decisions. See, e.g., Habitat Watch v. Skagit County, 155 Wn.2d 397, 408, 120 P.3d 56 (2005); Department of Ecology v. Samuel's Furniture, 147 Wn.2d 440, 447, 459, 54 P.3d 1194 (2002) (city's interpretive determination that a landowner's proposed construction project was not within the shoreline jurisdiction of the Shoreline Management Act had to be timely appealed under LUPA).

Save Richmond Beach's reliance on Harrington v. Spokane County, 128 Wn. App. 202, 114 P.3d 1233 (2005), is also misplaced. The Harrington court held that a letter from the county containing "interim negative comments" was not a final decision because it was subject to later change by the county. Id. at 212-13. In contrast, Snohomish County's determination of completeness and vesting of BSRE's applications was final, and not subject to later change.

Family Trust v. Thurston County, 152 Wn. App. 616, 217 P.3d 379 (2009) is another cited case that does not support Save Richmond Beach's LUPA argument. In that case, the court held that a decision remanding a permit to a Hearing Examiner for further proceedings was not a final decision, but rather was "akin to a court order denying a dispositive pre-trial motion." Id. at 623. Snohomish County's determinations of completeness and vesting, by contrast, were not subject to further hearings or modification.

Finally, Save Richmond Beach's reliance on WCHS v. City of Lynnwood, 120 Wn. App. 668, 83 P.3d 1169 (2004) is misguided. In that case, the Court of Appeals held that there was no "land use decision" because the city *refused* to make a determination of completeness on the application, in an attempt to preclude the applicant's project from vesting. Id. at 679-80. In contrast in this case Snohomish County's determination of completeness and vesting was unambiguous and final. Therefore, any challenge to that decision could only have been brought by a timely LUPA petition.

In short, none of the cases relied upon by Save Richmond Beach support its argument that it could neglect to file a LUPA challenge to the County's vesting decisions, and then wait many months and file a collateral attack by means of declaratory judgment action.

3. The County's Statement of No Further Administrative Appeals Was a Trigger for a LUPA Challenge.

Save Richmond Beach argues that, even if the County's vesting determinations were final, Respondents were not required to file an appeal under LUPA because the County's Notices of Application stated that there was no appeal opportunity from that determination. But the language of the notices obviously refers to administrative appeals to Snohomish County. The County of course could not foreclose Save Richmond Beach or the City of Woodway from pursuing legal remedies under LUPA. Indeed, the quoted language from the Notices of Application was a trigger for the application of LUPA, because it advised interested parties that the administrative review process relative to completeness and vesting had ended.

Respondents argued at the trial court level that Snohomish County should be estopped from raising LUPA as a defense, based on the language of the Notices of Application. Save Richmond Beach apparently has abandoned the estoppel argument, both because the Notices of Application related to administrative appeals, but also because *BSRE* could not be estopped by a Notice published by Snohomish County. BSRE was entitled to have the "exclusive remedy" provisions of LUPA applied to the County's vesting determination, and cannot be precluded from asserting that defense by an estoppel argument directed at Snohomish County.

4. If the County's Vesting Determination Was Not Ripe for LUPA Appeal, It Was Certainly Not Ripe for an Untimely Collateral Attack.

In its Response Brief, Save Richmond Beach goes to great length to argue that the Snohomish County vesting determinations should not be considered final decisions subject to LUPA review, because LUPA was enacted to discourage "judicial review on a piecemeal basis." (Save Richmond Beach Brief, p. 20). But Save Richmond Beach conveniently ignores the fact that Respondents *did* resort to the courts, and did so in an untimely manner and without utilizing the exclusive procedures mandated by LUPA.

Simply stated, if Snohomish County's vesting determination was not a final decision subject to LUPA review, it most certainly was not ripe for a collateral attack seeking declaratory and injunctive relief, filed many months after the County's decision. The trial court clearly erred in ignoring the exclusive remedy provisions of LUPA, when it set aside the County's vesting decision in the context of an untimely collateral attack.

III. CONCLUSION

Based on all of the above arguments, Appellant BSRE respectfully asks the Court to reverse the summary judgment entered in favor of Woodway and Save Richmond Beach, and to order entry of summary judgment in favor of Snohomish County and BSRE.

DATED this 21st day of March, 2012.

KARR TUTTLE CAMPBELL

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DECLARATION OF SERVICE

Angela Seybold declares as follows:

I am a resident of the State of Washington, employed at Karr Tuttle Campbell, 1201 Third Avenue, Suite 2900, Seattle, WA 98101. I am over the age of 18 years and am not a party to this action. I certify under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the Opening Brief of Appellant BSRE was served to the following via electronic mail and first class mail, postage prepaid:

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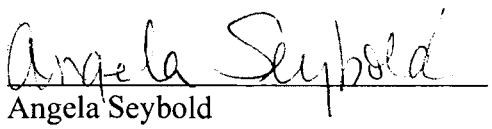

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