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No. 68049-8-I

(Consolidated with Case No. 68048-0-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY and
BSRE POINT WELLS, LP.

Appellants

vs.

TOWN OF WOODWAY and
SAVE RICHMOND BEACH,

Respondents

APPELLANT SNOHOMISH COUNTY'S REPLY BRIEF

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I. INTRODUCTION

The parties in this case disagree about the meaning of certain state statutes regulating land use. Respondents Town of Woodway (“Woodway”) and Save Richmond Beach (“SRB”) inform the Court that this case raises “important questions” but fail to mention that the Washington Legislature answered those questions years ago. In the 1990s, the Legislature adopted a comprehensive suite of statutes governing the issues presented by this case.¹ Respondents do not like the plain meaning of these statutes because the legislative text does not authorize the relief they seek. Respondents therefore ignore basic principles of statutory construction, urge this Court to find ambiguity where none exists, and ask the Court to legislate from the bench.

Respondents’ arguments are founded on two incorrect legal premises: (i) the development regulations at issue are “void”; and (ii) the Legislature has been silent on the vesting question presented. If those premises were true, Respondents’ policy arguments and quotes from old caselaw might merit consideration. But neither premise is true. Appellant Snohomish County’s (“County”) Urban Centers development regulations are in full force and effect and have been since their enactment. All

¹ Namely, the Growth Management Act, chapter 36.70A RCW (“GMA”), the Local Project Review Act, chapter 36.70B RCW, and the Land Use Petition Act, chapter 36.70C RCW (“LUPA”)

complete land use applications submitted to the County pursuant to those development regulations have vested to those regulations. Why? Because, contrary to Respondents' contention, the Legislature has expressly so provided.

This case is controlled by the unambiguous language of the GMA. In RCW 36.70A.302(2), the Legislature clearly articulated that the Growth Management Hearings Board ("Board") may declare an ordinance invalid only when that ordinance substantially interferes with the GMA goals; a violation of the State Environmental Policy Act, chapter 43.21C RCW ("SEPA"), alone is an insufficient basis for invalidity. In this case, the Board held that the County's Urban Centers development regulations violated none of the GMA goals. Instead, the Board held the Urban Centers development regulations violated only SEPA's procedural rules. Thus, the Board did not invalidate the development regulations, and those regulations accordingly remain in place and in full force and effect.

However, even if the Board had declared the Urban Centers development regulations invalid, Respondents' "de-vesting" argument would still fail based on the plain language of the GMA. In addition to specifying the conditions under which the Board may hold an ordinance invalid, RCW 36.70A.302(2) also clearly provides that development permit applications filed prior to the Board's determination that

development regulations are invalid vest to the development regulations under which they were submitted. Thus, even if the Urban Centers development regulations had violated GMA goals and were therefore declared invalid, all permit applications submitted prior to the date of invalidation would still remain vested to the invalidated development regulations. There simply is no authority supporting Respondents' position in this case. Judge Lum's decision granting summary judgment for Woodway and SRB and enjoining the County from processing Appellant BSRE's permit application was erroneous. This Court should reverse that decision, grant summary judgment for the County and BSRE instead, and dismiss this action.

II. ARGUMENT

A. Respondents' Lawsuit is Procedurally Improper.

Woodway claims that this action was necessary "to enforce the Board's decision by precluding the processing of BSRE's development applications until SEPA compliance is achieved."² However, through the integration of SEPA and the GMA, chapter 36.70A RCW provides full administrative and judicial relief for parties aggrieved by the enactment of

² Woodway's Response Brief ("RB") at 37.

a local legislative land use provision.³ This lawsuit is therefore procedurally improper and should be dismissed. The County incorporates by reference the arguments in Sections II.A, II.B and II.C of BSRE's Reply Brief.

In Davidson Serles & Associates v. City of Kirkland, 159 Wn. App. 616, 626, 246 P.3d 822 (2011), this Court held that the Board has "exclusive jurisdiction" to rule on all SEPA claims arising from challenges to the adoption of comprehensive plans and development regulations.⁴ This Court dismissed an independent court challenge raising SEPA issues. Contrary to Woodway's arguments,⁵ just because it sought an injunction, relief which the Board cannot order, does not mean an independent action is allowed to obtain relief in addition to that afforded under the GMA.⁶ In light of the GMA's comprehensive statutory scheme for review, Woodway's claim, that an independent court action filed months after issuance of the Board's decision is required to "enforce" the Board's SEPA ruling, fails.

³ RCW 36.70A.300(5); Stafne v. Snohomish County, Supreme Court No. 84894-7, March 8, 2012 (Slip Op. at 8)("The legislature established in the GMA an administrative appeal process to resolve GMA noncompliance allegations, . . .").

⁴ County's Opening Brief ("OB") at 25-26.

⁵ RB at 37-39.

⁶ The relief sought in Davidson Serles was declaratory relief, which Woodway also seeks here.

B. Respondents' SEPA Caselaw is Outdated and Inapposite.

Woodway claims that several court cases from the 1970s and 1980s support its position that any governmental actions taken in violation of SEPA are void *ab initio* and *ultra vires*.⁷ However, these pre-GMA cases do not support Woodway's argument that the Urban Centers development regulations are "void." Much less do these cases stand for the proposition that an already vested project permit application such as BSRE's can be "de-vested" or otherwise "voided" during processing merely because a tribunal holds there was a procedural SEPA defect in the permitting jurisdiction's adoption of the underlying development regulations. Such a "de-vesting" rule could constitute a regulatory taking in contravention of the 5th Amendment to the U.S. Constitution.⁸

Perhaps because there is no SEPA caselaw supporting their argument, Respondents exaggerate the extent and significance of the County's violation of SEPA in this case, which was simply a procedural error. In contrast to the facts in the old cases Woodway cites, the County's error was not a willful one, and in no way demonstrated a refusal

⁷ RB, pp. 5-16, citing Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973); Lassila v Wenatchee, 89 Wn.2d 804, 817, 576 P.2d 54 (1978); Noel v. Cole, 98 Wn.2d 375, 378-80, 655 P.2d 245 (1982); Eastlake Community Council v. Roanoke Associates, 82 Wn.2d 475, 513 P.2d 36 (1973); Responsible Urban Growth Group v. City of Kent ("RUGG"), 123 Wn.2d 376, 868 P.2d 861 (1994).

⁸ See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 342, 122 S. Ct. 1465 (2002). See also County Reply Brief at 22, nn.69 and 70.

to follow SEPA or, in SRB's words, "avoid SEPA review."⁹ The County undertook full SEPA review of the BSRE comprehensive plan amendment request for Point Wells, including an analysis of a full build-out of the site at the maximum density. The County's Supplemental Environmental Impact Statement ("EIS") studied two alternatives: (1) no action, and (2) a full build-out of the Point Wells site.¹⁰ The County's deficiency, according to the Board, was not that it failed to consider SEPA or perform an EIS at all, or even that the EIS failed to evaluate the full ramifications of BSRE's intended use of the property, but merely that the County's environmental review did not analyze a less dense, alternative proposal, with fewer residential units.¹¹ Each case cited by Woodway is factually different from the instant case in this regard.

1. Respondents' SEPA Caselaw Does Not Support the Proposition that the Urban Centers Development Regulations are "Void".

In contrast to the facts here, Juanita Bay and Eastlake involved project permits issued without any consideration of SEPA. In Juanita Bay, the reviewing court voided a grading permit after it had already been granted because the local government had completely ignored SEPA in issuing the permit, erroneously believing that SEPA did not apply to its

⁹ SRB Brief at 3.

¹⁰ CP 146; Board's Corrected Final Decision and Order at 54.

¹¹ CP 148-151; Board's Corrected Final Decision and Order at 56-59.

actions.¹² In Eastlake, a developer acquired a building permit from the City of Seattle to construct a 120-unit, five-story condominium on the shores of Lake Union two years before SEPA became law.¹³ The developer renewed the permit three times. The Eastlake court found that the third renewal was invalid because it occurred after SEPA became effective but the City performed no environmental review whatsoever under SEPA.¹⁴

The instant case is completely different. First, the SEPA deficiency here does not involve the issuance of a project permit application, but rather a legislative action adopting new development regulations.¹⁵ Also, as explained above, the County here did engage in a non-project SEPA analysis, including preparation of an EIS that fully analyzed any impacts resulting from a future project application.¹⁶ Thus, none of the caselaw discussed above is on point.

Noel v. Cole¹⁷ likewise does not support the Respondents' position. Noel involved not a municipal ordinance regulating development, but a

¹² Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wn.App. at 73-74.

¹³ Eastlake Community Council v. Roanoke Associates, 82 Wn.2d at 477-79.

¹⁴ Id. at 480, 486-87.

¹⁵ It is uncontested that project-level SEPA review still needs to be done in connection with processing BSRE's Urban Centers application which, as the Board noted, is yet to come. CP 150-51; Board's Corrected Final Decision and Order at 58-59.

¹⁶ CP 146-48; Board's Corrected Final Decision and Order at 54-56.

¹⁷ Noel v. Cole, 98 Wn.2d 375, 655 P.2d 245 (1982).

government timber contract. As the County noted previously,¹⁸ Noel merely held that a public contract for the sale of timber is *ultra vires* if the government fails to consider SEPA or prepare a required EIS.¹⁹ Unlike the government's utter failure in Noel to consider SEPA or prepare an EIS, the County in this case prepared a full-scale non-project level environmental EIS, which was procedurally defective only because it failed to consider an alternative having less intense environmental impacts.

Woodway attempts to bolster its misguided reliance on Noel by citing the more recent case of South Tacoma Way, LLC v. State of Washington.²⁰ However, South Tacoma Way supports the County's position. There, the State sold an alley without giving required statutory notice to all adjoining property owners. In upholding the sale, the Supreme Court noted the difference between *ultra vires* acts (acts "performed with no legal authority"²¹) and acts taken pursuant to statute but which simply failed to follow all procedural requirements. The Court there rejected the losing party's argument that the holding in Noel should apply in South Tacoma Way. The Court noted the difference between a

¹⁸ OB at 29.

¹⁹ Noel v. Cole, 98 Wn.2d at 379, 381.

²⁰ South Tacoma Way, LLC v. State of Washington, 169 Wn.2d 118, 126, 233 P.3d 871 (2010).

²¹ Id. at 123.

procedural error in failing to follow notice provisions in that case and the abject failure to comply with SEPA at all in Noel, thereby thwarting the Legislature's will.²² The facts of this case are far more analogous to those in South Tacoma Way than Noel; here the County complied with the SEPA requirement to prepare an EIS, but did so in a procedurally defective manner because it failed to evaluate a less dense alternative.

Woodway's reliance on Lassila v. Wenatchee²³ is similarly misplaced.²⁴ In Lassila, the City of Wenatchee amended its comprehensive plan without preparing any EIS or even considering environmental factors.²⁵ The Court vacated the comprehensive plan amendment on SEPA grounds, but left intact a simultaneous rezone of the subject property.²⁶ Contrary to Woodway's contention, Lassila does not stand for the proposition that a land use application that relies on another land use provision that was enacted in violation of SEPA is itself invalid. Similar to Lassila, although the Board in this case invalidated the County's comprehensive plan amendment under the GMA, it left intact the County's development regulations even though they were adopted without fully complying with SEPA.

²² South Tacoma Way LLC v. State of Washington, 169 Wn.2d at 126.

²³ Lassila v. Wenatchee, 89 Wn.2d 804, 576 P.2d 54 (1978).

²⁴ RB at 5-6, 14-15.

²⁵ Lassila v. Wenatchee, 89 Wn.2d at 816-17.

²⁶ Id. at 817-18.

2. Respondents' SEPA Caselaw Does Not Support the Proposition that BSRE's Permit Applications Were "De-Vested".

Woodway relies on RUGG²⁷ to support its position that "vested rights may not be obtained in a void regulation."²⁸ The County hereby incorporates BSRE's analysis of RUGG in its Reply Brief.²⁹

Woodway also cites the more recent case of Clark County v. Western Washington Growth Management Hearings Board³⁰ for the proposition that "vested rights cannot be acquired until after the Board's decision has been rendered."³¹ However, Clark County is factually and legally distinguishable from this case, and in no way stands for that proposition. In Clark County, a city annexed land in its urban growth area (UGA) before a Board could rule on a then-pending appeal of the county's action to include that land in the city's UGA.³² Division II of the Court of Appeals held that the city's purported annexation of the disputed land did not deprive the Board of jurisdiction to consider the pending appeal before it.³³ There was no issue of vested rights relating to any permit

²⁷ RUGG v. City of Kent, 123 Wn.2d 376, 868 P.2d 861 (1994).

²⁸ RB at 9, 11-14.

²⁹ BSRE's Reply Brief at 4-5.

³⁰ Clark County v. WWGMHB, 161 Wn. App. 204, 254 P.2d 862 (2011).

³¹ RB at 34-36.

³² Clark County v. WWGMHB, 161 Wn. App. at 225-26.

³³ Id.

application.³⁴ Another major difference between the Clark County decision and this case is that the GMA is silent on the issue presented in the Clark County case, which is whether a city's annexation of land moots out a Board appeal of the underlying County action which put the annexed land into the city's UGA. In contrast, RCW 36.70A.302(2) is crystal clear that a development permit application can vest while an underlying legislative enactment is on appeal to the Board.

C. Respondents' Interpretation of the GMA Conflicts with Basic Principles of Statutory Interpretation.

1. Principles of Statutory Interpretation.

When interpreting a statute, a court's primary objective is "to discern and implement the intent of the legislature."³⁵ "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."³⁶ Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole, including related statutes.³⁷ "If the plain

³⁴ In addition, the Washington Supreme Court has granted review of Division II's decision. Clark County v. WWGMHB, *review granted*, 172 Wn.2d 1006, 259 P.3d 1108 (Sept. 6, 2011). Thus, regardless of whatever reading Woodway wishes to ascribe to that case, the continued viability of Clark County might well be short-lived.

³⁵ Five Corners Family Farmers v. State, 173 Wn.2d 296, 305, 268 P.3d 892 (2011) (citation omitted).

³⁶ In re Pierce, 173 Wn.2d 372, 378, 268 P.3d 907 (2011) (citation omitted).

³⁷ Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007); State, Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002).

language is subject to only one interpretation, [the court's] inquiry ends because plain language does not require construction.”³⁸ “Where the plain language of the statute is subject to more than one reasonable interpretation, it is ambiguous.”³⁹ When a statute is ambiguous, a court may “resort to principles of statutory construction, legislative history, and relevant caselaw to assist [the court] in discerning legislative intent.”⁴⁰ Courts “will not construe a statute in a manner that creates an absurd result.”⁴¹

2. Respondents’ Reading of the GMA Conflicts with the Plain Meaning of the Statute.

The statutory provisions at issue in this case are plain on their face. “When the words in a statute are clear and unequivocal, this court is required to assume the Legislature meant exactly what it said and apply the statute as written.”⁴² Woodway claims that because there is no case stating specifically whether a SEPA procedural violation in the adoption of a comprehensive plan provision or development regulation precludes the filing and vesting of any permit applications relying on those

³⁸ HomeStreet, Inc. v. State, Dept. of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citations omitted); see also In re Schneider, 173 Wn.2d 353, 363, 268 P.3d 215 (2011) (“[i]n the absence of ambiguity, we will give effect to the plain meaning of the statutory language”) (citation omitted).

³⁹ State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citation omitted).

⁴⁰ Cockle v. Department of Labor and Industries, 142 Wn.2d 801, 808, 16 P.3d 583 (2001) (citation omitted).

⁴¹ In re Pierce, 173 Wn.2d 372, 378, 268 P.3d 907 (2011) (citation omitted).

⁴² Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997) (citation omitted).

legislative enactments, the issue it raises in this case is one of “first impression in this state.”⁴³ However, the reason there is no such case is because the language of RCW 36.70A.302(2) is so clear that no published decision has had to address the argument that Woodway makes here. The language of the statute itself resolves the issue; there is no need for courts to construe a statute that is plain on its face. Instead, courts must simply apply the statute as written.

Under the GMA, the Legislature has crafted a thorough and clear system of appeals and remedies to afford relief for persons aggrieved by county or city legislative enactments that may have been adopted in violation of provisions of SEPA or the GMA. Woodway complains that allowing a property owner to file a development application and vest to local development regulations later found to have been adopted in violation of SEPA will “eviscerate meaningful review of compliance with SEPA procedures.”⁴⁴ However, as the County pointed out, this result was the considered intent of the Legislature.⁴⁵ The Legislature clearly established how and under what circumstances permit applications would vest when the legislative enactments they rely upon are under appeal to the Board. Woodway’s disenchantment with the Legislature’s choice in that

⁴³ RB at 3.

⁴⁴ RB at 41, 45-47.

⁴⁵ OB at 12-22.

regard does not permit it to rewrite the GMA in a manner that better suits its policy preferences.

The fact that development applications are allowed to vest also does not mean that the GMA denies “meaningful review of SEPA compliance,” as Woodway charges.⁴⁶ Counties and cities that adopt plan amendments or development regulations in violation of SEPA and are found noncompliant by the Board are required to take actions to bring themselves into compliance with SEPA.⁴⁷ If they don’t, the Board can recommend that the governor impose sanctions.⁴⁸ The Legislature has chosen how to give SEPA teeth under the GMA. Just because that remedy is not the one Woodway and SRB want does not mean the GMA does not provide for “meaningful review of SEPA compliance.”

3. Respondents’ Reading of the GMA Conflicts with Legislative History.

As noted in subsection II.C.1 above, if this Court finds the pertinent statutory provisions to be ambiguous, the Court may use legislative history to determine the Legislature’s intended meaning. Respondents’ reading of the statutes is not supported by legislative history. The County’s OB explained that, in 1995, and in response to the Report from the Governor’s Task Force on Regulatory Reform, the Legislature rewrote the State’s land

⁴⁶ RB at 45.

⁴⁷ RCW 36.70A.300(1), (3)(b).

⁴⁸ RCW 36.70A.330(3), 340.

use statutes,⁴⁹ including the appeals provisions for the GMA and SEPA. Section 1 of Chapter 347 of the Laws of 1995 states the overarching purpose of this regulatory reform:

The legislature recognizes by this act that the growth management act is a fundamental building block of regulatory reform. The state and local governments have invested considerable resources in an act that should serve as the integrating framework for all other land-use related laws. The growth management act provides the means to effectively combine certainty for development decisions, reasonable environmental protection, long-range planning for cost-effective infrastructure, and orderly growth and development. (Emphasis added)

While recognizing that SEPA is an important provision in our land use regulatory structure, the Legislature did not consider it more important than any other provision of law. Rather, the Legislature sought to integrate the GMA concepts of “orderly growth and development” with “reasonable” (not “absolute” or “unqualified”) environmental protection, while preserving Washington’s vested rights doctrine⁵⁰ by assuring “certainty for development decisions.”

Respondents’ position is that if a jurisdiction makes a procedural error under SEPA when it adopts development regulations, that procedural error trumps everything else, and prevents any property owner from

⁴⁹ OB at 12-18.

⁵⁰ OB at 9-11.

submitting a development application under those regulations.⁵¹ The Legislature intended no such thing. In adopting the GMA's invalidity provisions, the Legislature balanced the protection of vested development rights with SEPA and the GMA. The Legislature chose to prohibit the Board from entering a determination of invalidity simply because local legislative enactments were adopted in violation of SEPA. Further, the Legislature provided that even when development regulations are invalidated by the Board, any development permit applications that have already been filed remain vested under the newly invalidated regulations. Woodway's goal that the County not process BSRE's application because it relies on "void development regulations"⁵² has led it to seek a judicial ruling contrary to the express provisions of the GMA.⁵³

⁵¹ RB at 15-16, 45-46.

⁵² RB at 15.

⁵³ In the County's OB at pages 31-32, it pointed out that although Woodway cited Professor Settle's SEPA treatise before the trial court as supporting Woodway's position, in fact, Professor Settle actually agreed with the County's position. In its RB at page 22 and footnote 18, Woodway incorrectly claims that "Professor Settle did not cite any authority for his statements." The legal "authority" Professor Settle relied on was the 1995 GMA amendments, which ironically Woodway had just quoted Professor Settle as mentioning. Woodway's attempt now to discredit Professor Settle's analysis when it had initially praised it is, at best, disingenuous.

4. Respondents' Reading of the GMA is Contrary to Canons of Statutory Construction.

If provisions of the GMA are ambiguous, this Court may also apply canons of statutory construction to determine the proper interpretation of the statute. Two such canons are helpful in this case: (a) the principle of legislative acquiescence, and (b) the canon of *expressio unius est exclusio alterius*.

a. Legislative Acquiescence

Washington courts routinely interpret the Legislature's inaction or silence as indicative of legislative intent, i.e., that the existing statute reflects the Legislature's will.⁵⁴ This is referred to as the canon of "legislative acquiescence."⁵⁵ The court presumes that the Legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.⁵⁶

Since the Legislature's adoption of the regulatory reform amendments in 1995, the courts have consistently held that the superior court has no jurisdiction to rule in an original action (as opposed to an appeal of a Board decision under the APA) on any SEPA challenges to a

⁵⁴ CLEAN v. State of Washington, 130 Wn.2d 782, 819 (n.20), 928 P.2d 1054 (1996) (citing State v. Clark, 129 Wn.2d 805, 812-13, 920 P.2d 187 (1996)).

⁵⁵ Five Corners Family Farmers v. State, 173 Wn.2d 296, 268 P.3d 892 (2011).

⁵⁶ City of Seattle v. McKenna, 172 Wn.2d 551, 562, 259 P.3d 1087 (2011).

local jurisdiction's adoption of comprehensive plan and development regulation amendments.⁵⁷ Any SEPA challenges must go to the Board, and are exclusively within the Board's jurisdiction under RCW 36.70A.280(1).

As the County noted in its OB, legislative amendments to the vesting rule in RCW 36.70A.302(2) have been proposed in recent years, yet none have been enacted.⁵⁸ The failure of the Legislature to amend the GMA vesting provisions despite the efforts of some ardent proponents demonstrates that the Legislature is not only aware of the status of the law on this issue, but that the Legislature intended the vesting provisions in RCW 36.70A.302(2) to remain in effect. In its response, Woodway cites two cases opposing the County's position.⁵⁹ However, one authority is a dissenting opinion, and the other involved a situation where there had been no judicial decisions which would have triggered the Legislature taking another look at the applicable statute. Woodway's cases are distinguishable and not persuasive in light of Davidson Serles.⁶⁰

⁵⁷ Davidson Serles & Associates v. City of Kirkland, 159 Wn. App. 616, 626, 246 P.3d 822 (2011)(citing Woods v. Kittitas County, 162 Wn.2d 597, 614-15, 174 P.3d 25 (2007), and Somers v. Snohomish County, 105 Wn. App. 937, 942-43, 945, 21 P.3d 1165 (2001)).

⁵⁸ OB 22-23.

⁵⁹ RB at 31-32.

⁶⁰ See County Reply Brief at 18, n.57.

As this Court has previously noted, no Board decision has invalidated an ordinance based solely on SEPA noncompliance.⁶¹ The Legislature is well aware of the language in RCW 36.70A.302, the Land Use Study Commission's Annual Report in 1996, and the more recent failed efforts by State Senator Kline to amend the provision during the 2007, 2008 and 2009 legislative sessions. Thus, in light of the above, the Legislature's failure to amend the GMA's vesting provisions in RCW 36.70A.302 is evidence of legislative acquiescence in the current, and consistent, interpretation of the provision by the Board and this Court.

b. *Expressio Unius Est Exclusio Alterius.*

Even assuming, *arguendo*, that the Legislature was silent on the legal effect of violating SEPA, the statutory canon *expressio unius est exclusio alterius* would control. "Under the statutory canon *expressio unius est exclusio alterius*, the express inclusion in a statute of situations in which it applies implies that other situations are intentionally omitted."⁶²

Within the GMA the Legislature included very specific language on the Board's jurisdiction and authority. The Legislature granted the

⁶¹ Davidson Serles & Associates v. Central Puget Sound Growth Management Hearing Board, 159 Wn. App. 148, 158 (n.8), 244 P.3d 1003 (2010) (In footnote 8, the Court cites to the Board's order on motions, which provides that no Board has invalidated an ordinance based solely on SEPA noncompliance) (internal citations omitted).

⁶² In re Det. of Strand, 167 Wn.2d 180, 190, 217 P.3d 1159 (2009).

Board authority to rule on violations of SEPA and the GMA, and outlined very specific requirements for making determinations of invalidity. The Legislature restricted the Board's authority to issue a determination of invalidity to only those instances where the challenged enactment would "substantially interfere with the fulfillment of the goals of [the GMA]."⁶³ Woodway advocates for this Court to read language into the statute that the Legislature elected not to include.

D. The Legislature Has Already "Harmonized" GMA and SEPA.

Neither SEPA nor GMA existed at common-law. Both are creations of the Legislature. The enactment of the GMA represented the dawn of a new day; pre-GMA caselaw regarding SEPA is no longer controlling.⁶⁴

Woodway and SRB claim that they are not asking the Court to overrule the will of the Legislature in enacting RCW 36.70A.302(2), but simply to "harmonize" the GMA consistent with the policies of SEPA.⁶⁵ However, they ignore the fact that the Legislature already "harmonized" the GMA and SEPA in 1995 when it adopted the regulatory reform legislation that integrated those statutes.⁶⁶ Former RCW 36.70A.300(2) and (3), adopted that session, and current RCW 36.70A.302(2), adopted in

⁶³ RCW 36.70A.302(1)(b).

⁶⁴ The County addressed Woodway's arguments that the law does not favor overturning long-established legal principles by implication (RB at 26-27) in its OB (at 33-35).

⁶⁵ RB at 17-18, 27-28; SRB Response Brief at 4.

⁶⁶ See discussion of Chapter 347, Laws of 1995, Sec. 1, *supra* at 14-15.

1997, clearly explain that vested development applications are not affected by any violation of SEPA in the adoption of the underlying legislative enactments.⁶⁷ Woodway's request that this Court "harmonize" the GMA and SEPA is merely a cloaked attempt to have this Court rewrite the GMA in a way that allows SEPA to abrogate vested rights.

E. Respondents' Interpretation of the GMA and Vested Rights Doctrine Leads to Practical Difficulties and Absurd Results.

The interpretation of RCW 36.70A.302 that Woodway and SRB request would lead to practical difficulties and absurd results. In construing a statute, the Court avoids a reading that produces absurd results.⁶⁸

First, Respondents' approach ignores the practical difficulties that would result from automatically "voiding" development regulations and "de-vesting" development applications. Would the "voiding" of development regulations cause the automatic revival of prior versions of a jurisdiction's development regulations? Or would it instead result in a moratorium on development until all litigation is over and the SEPA violation has been cured? What would happen if an appellate court were to reverse the Growth Board's holding regarding the development regulations and declare them compliant with SEPA? What will happen to

⁶⁷ OB at 15-22.

⁶⁸ See State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citation omitted).

permits that have already been issued under the “void” regulations? May the local jurisdiction retain the permit fees paid by such applicants, or must refunds be issued? Do the “de-vested” permits sit around in limbo pending the outcome of any appeals? Who is required to compensate permit applicants for any damages resulting from the inability to complete their development projects?

Next, Respondents’ ignore the unconstitutional interference with property rights that would occur if development regulations are “voided” and applications are “de-vested.” The right to use and develop one’s land is a valuable property right and vesting ensures that right.⁶⁹ The vested rights doctrine is based on constitutional principles of fairness and due process.⁷⁰ “Voiding” development regulations so that no one can submit development applications, and “de-vesting” permit applications that have already been submitted will prevent property owners from using and developing their land. Respondents argue property owners who choose to submit permit applications based on newly adopted development regulations should bear the risk that their applications will be “voided”

⁶⁹ West Main Associates v. City of Bellevue, 106 Wn.2d 47, 50-51, 720 P.2d 782 (1986).

⁷⁰ Weyerhaeuser v. Pierce County, 95 Wn. App. 883, 891, 976 P.2d 1279 (1999)(citing Friends of the Law v. King County, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994)). See also Frederick D. Huebner, Washington’s Zoning Vested Rights Doctrine, 57 Wash. L. Rev. 139 (n.11) (1981)(characterizing certain rights as “vested” signifies a conclusory description of a right or interest that is sufficiently secure or fixed such that divestment of that right is unfair or violates due process).

and “de-vested” if the development regulations are later determined to suffer from a procedural SEPA flaw. But this argument ignores the frequency with which local jurisdictions amend portions of their development regulations. It also assumes that the only individuals who ever submit land use permit applications are large, sophisticated, development companies. This assumption is false. The ability to use and develop one’s land is just as important to ordinary citizens as it is to professional development companies.

Third, the Legislature restricted the Board’s authority to issue a determination of invalidity to only those instances where the challenged enactment would “substantially interfere with the fulfillment of the goals of [the GMA].”⁷¹ Thus, even in instances where the Board found an egregious violation of the GMA that substantially interfered with the fulfillment of a GMA goal, the Legislature limited the Board’s determination of invalidity to being “prospective in effect and [not extinguishing] rights that vested under state or local law before receipt of the [FDO].”⁷² However under Woodway’s interpretation, even a minor procedural violation of SEPA would result in the drastic “de-vesting” of any and all permit applications that had been submitted in reliance on the

⁷¹ RCW 36.70A.302(1)(b).

⁷² RCW 36.70A.302(2).

challenged plan or regulation – a proposal that the Legislature considered and rejected in 1995.

III. CONCLUSION

In this case, after availing themselves of the administrative remedies provided by the GMA, and prevailing before the Board, Respondents decided that the GMA and the Board did not and could not afford them the relief they really wanted. So, relying on the Board's FDO, they filed an independent lawsuit seeking declaratory and injunctive relief to enjoin the County from processing BSRE's vested development application. The law authorizes neither the independent lawsuit nor the remedy requested by Respondents. Rather than being a case of "first impression in this state,"⁷³ as Woodway contends, the issue presented in this matter is answered by the clear language of RCW 36.70A.302(2). Under that statute, vested permit applications are insulated from any later Board determination that a county or city violated SEPA in enacting the legislative provisions upon which those permit applications rely.

The GMA provides the only remedies allowed by law for failing to follow SEPA in the adoption of local legislative enactments under the GMA. Those remedies expressly allow permit applications to vest that rely on development regulations then on appeal before the Board. The

⁷³ RB at 3.

GMA contains no provisions that provide for the “de-vesting” of those applications upon a subsequent Board finding that the underlying legislative enactments were adopted in violation of SEPA. The trial court had no authority to rewrite the GMA to please Woodway and SRB. This Court should reverse the trial court and dismiss this action.

Respectfully submitted this 21st day of March, 2012.

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DECLARATION OF SERVICE

I, Regina McManus, hereby declare that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on this 21st day of March, 2012, Snohomish County's Reply Brief was served upon persons listed and by the method(s) indicated:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 21st day of March, 2012.


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