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SUPREME COURT
OF THE STATE OF WASHINGTON

C/A No. 68048-0-I (Consolidated with Case No. 68049-8-I)

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TOWN OF WOODWAY and SAVE RICHMOND BEACH,
Petitioners/Respondents

vs.

BSRE POINT WELLS, LP and SNOHOMISH COUNTY,
Respondents/Appellants

RESPONDENT SNOHOMISH COUNTY'S ANSWER TO
PETITIONERS TOWN OF WOODWAY'S AND SAVE RICHMOND
BEACH'S PETITIONS FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

This Answer is filed by Respondent Snohomish County (“County”), one of the Appellants before the Court of Appeals (also “Court”) in this case.

Through clear language in the Growth Management Act (“GMA”)(chapter 36.70A RCW), adopted in 1995, and amended in 1997, the Legislature has expressly authorized property owners to file land use permit applications and vest development rights even if the policies and regulations they rely upon for those development permits have been administratively appealed to the growth management hearings board (“growth board”) under the GMA. The Legislature further provided that any failure by a county or city in following the procedural requirements of the State Environmental Policy Act (“SEPA”) in enacting those policies and regulations does not affect the rights of property owners to file complete land use permit applications and vest their development rights while those underlying policies and regulations are on appeal to the growth board.

The Court in this case ruled that the statutes in question are clear and mean what they say. The Court rejected arguments raised by the Petitioners herein, Town of Woodway (“Woodway”) and Save Richmond Beach (“SRB”), that the relevant law to be followed in this case is pre-

GMA caselaw originating from the 1970s. The Court's unanimous and strongly worded Opinion correctly ruled that the authorities cited by Woodway and SRB were not applicable, and instead concluded that the Legislature had clearly articulated the answer to the vesting question at issue in this case in the GMA's invalidity provision.

Undaunted, and ignoring much of the Court's well-reasoned Opinion refuting their arguments, Woodway and SRB¹ now seek review of the Court's Opinion by the Supreme Court. However, Woodway and SRB simply rehash the same arguments they made in their briefing before the Court and which the Court considered and rejected. They make no attempt to argue, let alone prove, that the Court's rejection of their arguments was erroneous. They fail to raise any new arguments or authorities supporting their claim that the Court's Opinion was wrong.

Their petitions are wholly unpersuasive. The Court's Opinion was thorough, well-reasoned and legally correct. It painstakingly explained the legislative changes to the GMA in 1995 and 1997 to address the vested rights issue, which is the key point in this case.² The Court's Opinion was based upon a straightforward reading and analysis of relevant statutes. It is not inconsistent with any relevant decisions of the Court of Appeals or

¹ Petitioner Woodway filed a Petition for Review ("Woodway Petition"); Petitioner SRB filed a Petition for Discretionary Review ("SRB Petition").

² Slip Op. at 8-19.

the Supreme Court, nor does this case present any issue of substantial public interest. Woodway and SRB fail to meet any of the required grounds for discretionary review in RAP 13.4(b). Their petitions should be denied.

II. ISSUES PRESENTED FOR REVIEW

The County concurs with the statement of issues in the Answer of Respondent BSRE Point Wells, LP (“BSRE”).

III. STATEMENT OF THE CASE

The main issue in this case is what rights a property owner has to develop property when the county land use comprehensive plan policies and development regulations the property owner relies upon for a development permit application have been appealed to the growth board, but the growth board has not yet issued a decision. The Court ruled that, under the clear language of RCW 36.70A.302(2), the property owner may file complete development applications and vest development rights based on those land use enactments up until the time the growth board issues a determination that those enactments are invalid under that section of the GMA.

As explained in the Court's Opinion,³ BSRE owns a 61-acre site on Point Wells in the southwest corner of Snohomish County. BSRE sought to redevelop its property from its long time use as an industrial site for oil storage tanks to a mixed use of commercial and residential development. At BSRE's request, the County, through its annual GMA docketing process under RCW 36.70A.470(2), re-designated the BSRE property on its comprehensive plan map to Urban Center, adopted new comprehensive plan policies and development regulations providing for Urban Center development, and rezoned the property to take advantage of the Urban Center policies and regulations.

Woodway and SRB opposed BSRE's development plans and appealed the County's Urban Center policies and regulations to the growth board. While that administrative appeal was pending, and prior to the growth board ruling on it, BSRE filed complete applications for several permits in connection with its proposed Urban Center development on Point Wells (hereinafter "Urban Center applications").⁴ The growth board subsequently ruled in favor of Woodway and SRB in part, finding that the County's re-designation of BSRE's property to Urban Center was out of compliance with the GMA and invalid under RCW 36.70A.302. The growth board also ruled that the County's Urban Center policies and

³ Slip Op. at 2-5.

⁴ Slip Op. at 3.

regulations were adopted in violation of the procedural requirements of SEPA because the County had failed to consider an alternative action that included an intermediate density between the "no action" alternative and the 3,500 dwelling unit density that had been analyzed in the environmental impact statement. Notwithstanding the growth board's decision, the County continued processing BSRE's Urban Center applications because they were vested under the provisions of RCW 36.70A.302(2).

Dissatisfied that BSRE was proceeding with its development plans despite the growth board ruling, Woodway and SRB sought to stop the County's processing of BSRE's Urban Center applications. Five months after the growth board issued its decision, Woodway and SRB filed this action for declaratory and injunctive relief, arguing that because the growth board had found the County's Urban Center policies and regulations had been adopted in violation of SEPA's procedural requirements, those policies and regulations were void, and BSRE's Urban Center applications were therefore not vested. King County Superior Court Judge Dean Lum agreed with Woodway and SRB, granted summary judgment in their favor, declared BSRE's Urban Center applications "not vested," and enjoined the County from processing them. He also denied

the County's and SRB's motions for summary judgment dismissing the action. The County and BSRE appealed.

The Court of Appeals reversed the trial court's decision, ruling that the action was controlled by the clear language of the GMA, adopted in 1995, and as amended in 1997. After discussing the evolution of the State's vested rights doctrine⁵ and the development of the GMA⁶, the Court discussed the 1995⁷ and 1997⁸ amendments to the GMA. The Court focused on language in RCW 36.70A.302(2), adopted by the Legislature in 1997, which provides:

A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.⁹

The Court found that this clear statutory language meant that when BSRE filed its Urban Center applications prior to the growth board issuing its decision, it vested its right to develop its property under those challenged policies and regulations. The Court stated:

⁵ Slip Op. at 6-7.

⁶ Slip Op. at 7-9.

⁷ Slip Op. at 9-11.

⁸ Slip Op. at 11-15.

⁹ Slip Op. at 14.

We conclude that RCW 36.70A.302(2)'s invalidity provision controls the present dispute. It unambiguously describes what happens to development permit applications that are filed with counties and municipalities relying on recently adopted GMA enactments – comprehensive plan provisions and development regulations – that are challenged in a Growth Board administrative appeal. As quoted above, RCW 36.70A.302(2) states that those complete and filed applications vest to those challenged plan provisions and regulations, regardless of the Growth Board's subsequent ruling in the administrative appeal.¹⁰

The Court reversed the trial court's ruling and remanded the matter with instructions for the trial court to grant the County's and BSRE's summary judgment motions and dismiss the action. Woodway and SRB have filed petitions requesting that the Supreme Court review the Court's Opinion.

IV. ARGUMENT

A. Grounds for Accepting Discretionary Review.

Woodway and SRB have failed to meet the criteria for the Supreme Court to accept review of this case. RAP 13.4(b) provides that a petition for review will only be accepted by the Supreme Court if one of four grounds is met:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

¹⁰ Slip Op. at 15 (footnotes omitted).

- (3) If a significant questions of law under the Constitution of the State of Washington or of the United States is involved;
or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Here, Woodway and SRB assert that discretionary review is warranted under grounds (1), (2) and (4). They have failed to meet any of these grounds.

B. Petitioners Have Not Met Any of the Grounds in RAP 13.4(b) Warranting Acceptance of Discretionary Review.

1. RAP 13.4(b)(1) and (2).¹¹

Woodway¹² and SRB¹³ claim that the Court's Opinion is in conflict with Court of Appeals and Supreme Court decisions. However, their position defies logic. The legal authorities they rely upon are appellate court decisions that pre-date the GMA while the Court's Opinion was based on the GMA. The Court's Opinion cannot "conflict" with decisions issued before the adoption of the statute upon which the Court's Opinion was based. The Petitioners' pre-GMA court decisions fail to address the changes to the GMA relating to vested rights made by the 1995 Legislature, which is the key to the Court's holding. The old, pre-GMA decisions are irrelevant to the issues presented in this case because the

¹¹ The County will address grounds (1) and (2) jointly.

¹² Woodway Petition at 3-10.

¹³ SRB Petition at 20, relying on Woodway's arguments.

current statutory scheme under the GMA is different from what it was when the cases relied upon by Petitioners were decided. The Court correctly ruled that the old decisions were not applicable to the facts of this case in light of the language in RCW 36.70A.302(2) (allowing property owners to vest development rights) that was adopted into the GMA in 1995 and 1997.

Ironically, Woodway leads off its argument¹⁴ by citing to Sec. 20.09 of Professor Richard Settle's treatise on SEPA, *The Washington State Environmental Policy Act*,¹⁵ claiming that its old cases prove that it should win. The County pointed out to the Court that Woodway's interpretation of Professor Settle's SEPA treatise was incorrect because it ignored a more relevant passage in the treatise that concluded that the Legislature's 1995 amendments to the GMA on vesting changed the law and made Woodway's old cases inapplicable.¹⁶ The Court rejected Woodway's position and adopted the County's view, quoting verbatim the relevant passage from Professor Settle's treatise cited by the County.¹⁷

Woodway's blind reliance on language in Professor Settle's treatise that was taken out of context, and its refusal to acknowledge the

¹⁴ Woodway Petition at 3-4.

¹⁵ "The Washington State Environmental Policy Act – A Legal and Policy Analysis" (Release No. 22, December 2010).

¹⁶ Snohomish County's Opening Brief at 31-32, quoting Sec. 19.01[10] of Professor Settle's treatise.

¹⁷ Slip. Op. at 17-19.

relevant language from a different chapter of the treatise cited by the County and later the Court, is disturbing. Woodway's failure to address the relevant language from the Settle treatise in its Petition tellingly demonstrates the weakness of its argument.

Woodway and SRB devote 13 pages of their briefing before the Court to arguing the applicability of pre-GMA cases from the 1970s through 1994.¹⁸ The County explained to the Court that the Petitioners' pre-GMA cases were not on point.¹⁹ The Court rejected the Petitioners' arguments in a mere footnote in its Opinion,²⁰ noting that none of the Petitioners' old cases address the key issue of vested rights. The Court's dismissive rejection of Woodway's and SRB's authorities without mentioning them in the body of the Opinion reflects that they are not relevant.

Despite this fact, Woodway spends over half of its Petition reprising those arguments.²¹ Woodway's repetition of those discredited arguments is unavailing. Woodway fails to show that its pre-GMA, non-vested rights cases are relevant, or that the Court's decision is in conflict with them. Woodway and SRB have failed to point to a single case from the Court of Appeals or the Supreme Court decided within the GMA

¹⁸ Woodway Response Brief at 5-16; SRB Response Brief at 19.

¹⁹ County Opening Brief at 27-30; County Reply Brief at 5-11.

²⁰ See Slip Op. at 18, footnote 26.

²¹ Woodway Petition at 3-13.

context that is in conflict with the Court's decision.²² As articulated in the Court's Opinion, recent legal authorities support the County's position.²³

The Petitioners' arguments that the Court's Opinion is in conflict with Court of Appeals and Supreme Court decisions is further belied by their claim that this is a "case of first impression."²⁴ If this is a "case of first impression," it is difficult to conceive of how the Court's Opinion could be in conflict with any decisions of the Court of Appeals or Supreme Court and thus qualify for review under the standards in RAP 13.4(b)(1) or (2). In fact, the Court's Opinion is not in conflict with any earlier decisions because the decisions Woodway and SRB rely upon were neither GMA cases nor vested rights cases.²⁵ The key provision of law controlling this case is a GMA provision governing vested rights.

Woodway erroneously argues that the Court's Opinion interprets RCW 36.70A.302(2) in a manner that creates vested rights rather than protects them, claiming that BSRE's applications never vested because

²² The Court rejected the one GMA case cited by Woodway, Clark County v. Western Washington Growth Management Hearings Board, 161 Wn. App. 204, 254 P.3d 862 (2011), as not being on point because it did not involve vested rights. Slip Op. at 18, footnote 26. Woodway fails to cite Clark County in its Petition.

²³ Slip Op. at 15-16, 19-21.

²⁴ Woodway Petition at 1, SRB Petition at 1 and 13.

²⁵ Woodway fails to cite a single GMA case in its entire Petition. SRB cites only one, Davidson Serles & Associates v. Central Puget Sound Growth Management Hearings Board, 159 Wn. App. 148, 244 P.3d 1003 (2010), on page 16 of its Petition, but that is for an uncontested point.

they relied on regulations that had been adopted in violation of SEPA.²⁶ Woodway's reliance on its old cases for that claim is unpersuasive. First, they are not vesting cases. The issue of "vesting" was never discussed in those decisions. Rather, the cases stand for the proposition that a court may set aside a project permit where the application was processed and approved without complying with SEPA's procedural requirements.

That is a different situation from that which exists here. In this case, the SEPA procedural violation occurred during the processing of the County's amendments to its comprehensive plan and development regulations that a later permit application relied upon – not during the processing of a permit application itself. Here, BSRE has not even had the opportunity to comply with SEPA's requirements at the project level on its applications because Judge Lum's order stopped the County from processing its Urban Center applications. BSRE's applications have not even been processed, let alone approved. It is uncontested that BSRE filed complete applications.²⁷ Its applications were then vested. RCW 36.70A.302(2) does not create vested rights. It acknowledges and protects development rights that vested when a developer filed a permit application relying on those GMA enactments while they were on appeal to the growth board, as BSRE did here.

²⁶ Woodway Petition at 11-12.

²⁷ Slip Op. at 7, footnote 11.

Second, the entire statutory landscape changed with the adoption of GMA's vesting provisions in RCW 36.70A.300 in 1995, recodified as RCW 36.70A.302(2) in 1997. Woodway's position ignores the line of cases cited by the Court that BSRE's complete permit application vested upon filing, and did so here prior to the issuance of the growth board decision.²⁸ If Woodway's position (that no rights vested when the growth board later found a SEPA violation in the adoption of the underlying enactments) were correct, there would not have been the repeated movement in the State Legislature for amendments to the GMA to prevent vesting until challenged GMA enactments are upheld on appeal.²⁹

Woodway's position is also completely unworkable in practice in view of its inconsistency with the language of RCW 36.70A.302(2). Under that statute, counties are required to accept complete development permit applications as vested when filed. If a growth board later found the underlying county enactments upon which the permit applications rely were adopted in violation of SEPA, the applications would be "not vested," as Judge Lum declared BSRE's applications were here. In the meantime, the applicant would have spent thousands of dollars, if not hundreds of thousands of dollars, on permit-related activities and studies.

²⁸ Slip Op. at 6-7, 14-16.

²⁹ See County Opening Brief at 22-23.

Washington's vested rights rule was meant to promote predictability.³⁰ The result sought by Woodway would instead promote uncertainty, with the possibility of previously-vested applications being declared by a court to be "not vested" months after filing, as happened here.³¹ Such an outcome would be antithetical to the purpose behind the state's vested rights doctrine.

Finally, Woodway insists that the cases it relies upon are still good law because they have never been expressly overruled.³² The Court rejected this argument, at least in the GMA context.³³ There is no requirement that there be a new appellate judicial decision expressly overruling old cases before the law is changed. The Legislature can change the law by legislative action. In this case, the Legislature's language in RCW 36.70A.302(2) did that. It could not be clearer. Whatever the law may have been before, it was changed by the Legislature with the GMA amendments in 1995. The development rights of property owners filing permit applications while the underlying county enactments upon which they rely are on appeal to the growth board are vested.

³⁰ Slip Op. at 6-7.

³¹ For further analysis on this point, see County's Opening Brief at 35-37.

³² Woodway Petition at 14-16.

³³ Slip Op. at 19-21.

Woodway's and SRB's arguments basically boil down to: The County is wrong; Professor Settle is wrong; the Court is wrong; the GMA doesn't mean what it says; the Legislature can't overrule old caselaw; we should win because of these 40-year old cases. The Court expressly rejected all of Woodway's and SRB's arguments. The Petitioners' position is unpersuasive and fails to demonstrate that review by the Supreme Court is merited under RAP 13.4(b)(1) or (2).

2. RAP 13.4(b)(4).

The Petitioners' claim that the petitions present an issue of substantial public interest justifying Supreme Court review under RAP 13.4(b)(4) is incorrect. The Court's Opinion was based on a straightforward reading of a clear statute. Although the County agrees that the vested rights doctrine is an important principle of law, the facts of this case do not present an issue of substantial public interest.

In its effort to convince the Supreme Court to accept review, Woodway asserts that the Court's Opinion creates a "dichotomy in the administration and enforcement of SEPA."³⁴ Woodway then posits a hypothetical situation intended to prove its point.³⁵ Woodway suggests that if an ordinance upon which an applicant bases an application is appealed to another administrative body, such as the shorelines hearings

³⁴ Woodway Petition at 16.

³⁵ Id. at 16-17.

board, that body could find a SEPA violation and void the ordinance. Woodway's hypothetical confuses an "ordinance" adopting plan policies or regulations with an "ordinance" approving a project.³⁶ Woodway's erroneous hypothetical is illustrative of its continued failure to distinguish between a county's legislative enactment and a "project action," such as approval or denial of a permit application. It also incorrectly asserts that the shorelines hearings board can hear and rule on challenges to legislative enactments such as comprehensive plan policies and development regulations.

Only the growth board reviews ordinances adopting land use comprehensive plan policies and development regulations, and amendments thereto, including alleged violations of SEPA in their adoption.³⁷ Policies and regulations adopted under the authority of the Shoreline Management Act (chapter 90.58 RCW) are also appealable exclusively to the growth board.³⁸ On the other hand, as provided in RCW 90.58.170(1), the shorelines hearings board has jurisdiction to review only appeals of project permit approvals or denials. It has no jurisdiction to

³⁶ *Id.* at 16, footnote 7. The County disputes that most projects are approved by "ordinance."

³⁷ RCW 36.70A.280(1)(a).

³⁸ RCW 90.58.190(2)(a)(an appeal of a Department of Ecology approval of a county or city shoreline master program amendment goes to the growth board); RCW 36.70A.280(1)(a)(the growth board has jurisdiction to review "adoption of shoreline master programs or amendments thereto").

hear appeals of ordinances adopting policies or development regulations, or any alleged violation of SEPA in connection therewith; those enactments are within the exclusive jurisdiction of the growth board under RCW 36.70A.280(1)(a).

SRB suggests that this case presents an issue of substantial public interest by giving the Supreme Court a chance to make a policy choice on whether SEPA will continue to have teeth. After decrying the fact that the County adopted the Urban Center policies and regulations with SEPA deficiencies the developer allegedly was aware of, SRB says, “Allowing the developer’s application to vest under these circumstances would serve none of the legitimate policies behind Washington’s vested rights doctrine.”³⁹ However, it is not for the Supreme Court to make a “policy choice” on whether to “allow” an application to vest. That policy decision was already made by the body that makes policy decisions: the State Legislature. It made that decision when, in 1997, after much study and consideration,⁴⁰ it adopted RCW 36.70A.302(2), a statute which exists unchanged today. It is that statute that not only “allows” but requires that complete permit applications vest to adopted policies and regulations even if those underlying policies and regulations upon which they rely are on appeal to the growth board. It is for the courts to enforce the Legislature’s

³⁹ SRB Petition at 13-14.

⁴⁰ Slip Op. at 9-14.

will, not question it. As stated in State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999):

[A] court should resist the temptation to rewrite an unambiguous statute to suit [its] notions of what is good public policy, recognizing the principle that “the drafting of a statute is a legislative, not a judicial, function.” State v. Enloe, 47 Wn. App. 165, 170, 734 P.2d 520 (1987).

Similarly, SRB laments the Court’s “interpretation of the GMA.”⁴¹ The Court did not “interpret” the GMA – it merely applied it as it is written. The Supreme Court should reject SRB’s invitation to second guess the Legislature’s adoption of RCW 36.70A.302(2).

SRB additionally complains that the Court’s Opinion “is in conflict” with SEPA.⁴² However, SRB fails to explain how the Court’s Opinion was wrong, or how this “conflict” meets the criteria of RAP 13.4(b)(4), justifying review by the Supreme Court. SRB overstates the importance of SEPA, which directs no substantive outcome,⁴³ but only imposes procedural requirements.⁴⁴ As Professor Settle explains,

Extensive legislative findings [in the 1995 Regulatory Reform statutes] explain the legislative intent of provisions for the integration of SEPA and GMA processes and the substantive subordination of SEPA to policy choices in local GMA comprehensive plans and development regulations.⁴⁵

⁴¹ Id. at 15.

⁴² Id. at 16-20.

⁴³ Moss v. City of Bellingham, 109 Wn. App. 6, 14, 31 P.3d 703 (2001).

⁴⁴ SORE v. Snohomish County, 99 Wn.2d 363, 371, 662 P.2d 816 (1983).

⁴⁵ “The Washington State Environmental Policy Act: A Legal and Policy Analysis” (Release No. 23, December 2011), App. E-21.

SRB asserts that the GMA vesting provision in RCW 36.70A.302(2) is subject to “SEPA’s supplemental requirements,”⁴⁶ but fails to explain what is meant by that or how that fact, even if true, means the Court’s plain reading of that statute was wrong.

Woodway’s and SRB’s decades-old cases may still be good law in the appropriate context. Project permit applications still must comply with SEPA procedural requirements, and such applications can be denied if they do not. If Woodway and SRB have objections to BSRE’s Urban Center applications on SEPA (or any other) grounds, they may still air them during the local project permitting phase. However, at this point, BSRE has not even had the opportunity to comply with SEPA at the project level.

The Court found that those old cases were not relevant because they deal neither with vesting nor the GMA. The Court correctly rejected Woodway’s and SRB’s efforts to graft them into the GMA framework because the express language in RCW 36.70A.302(2) controls the outcome of this case. Woodway’s and SRB’s disagreement with the Court’s Opinion is not grounds for the Supreme Court to accept review of

⁴⁶ SRB Petition at 19.

this case, nor does it show that they have met the requirements of RAP 13.4(b).

V. CONCLUSION

Woodway and SRB have failed to meet the mandatory requirements for acceptance of review under RAP 13.4(b). The Court's Opinion is not in conflict with any decision of the Court of Appeals or Supreme Court, nor does it present an issue of substantial public importance. The Court's Opinion was based on a straightforward reading of a clear statutory provision in RCW 36.70A.302(2). Woodway and SRB have presented nothing new in their Petitions that was not considered and rejected by the Court. The fact that the law does not provide them with the relief they want is not grounds for Supreme Court review. The Court's Opinion was correct. The Supreme Court should deny review.

Respectfully submitted this 5th day of March, 2013.

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DECLARATION OF SERVICE

I, Regina McManus, hereby declare that on this 5th day of March, 2013, I filed and served Snohomish County's Answer to Town of Woodway's and Save Richmond Beach's Petitions for Discretionary Review upon persons listed and by the method(s) indicated:

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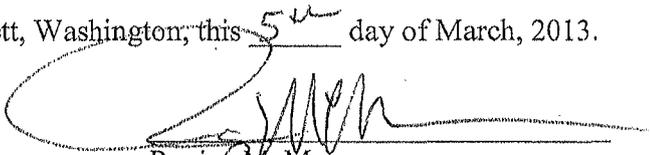
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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Everett, Washington, this 5th day of March, 2013.


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Subject: RE: E-Filing - Woodway, et al. v. BSRE Point Wells, LP, et al. - Supreme Court No. 88405-6

Rec'd 3-5-13

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Subject: E-Filing - Woodway, et al. v. BSRE Point Wells, LP, et al. - Supreme Court No. 88405-6

Attached for filing in Woodway, et al. v. BSRE Point Wells, LP, et al. (Supreme Court No. 88405-6) is Respondent Snohomish County's Answer to Petitioners Town of Woodway's and Save Richmond Beach's Petitions for Discretionary Review. Please let me know if you have any trouble opening the document.

Filed on behalf of:

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