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NO. 88405-6

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SUPREME COURT OF THE STATE OF WASHINGTON

TOWN OF WOODWAY and SAVE RICHMOND BEACH,

Petitioners

v.

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Respondents

AMENDED AMICUS CURIAE BRIEF OF
THE SHORELINE COALITION FOR OPEN GOVERNMENT

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I. IDENTITY AND INTEREST OF AMICUS

Amicus curiae is The Shoreline Coalition for Open Government (“Coalition”). The identity of Amicus is further described in the accompanying Motion to File Amicus Curiae Brief. This case deals with whether or not the public may permissibly challenge actions of a County in violation of state law and threatens the public’s ability to hold government agencies and officials accountable. This Court’s decision will directly impact the Amicus and the public whose interests in open and accountable government it represents. Amicus have a legitimate interest in assuring the Court is adequately informed about the issues and impact its decision will have on the public and future parties, not only this developer, this town, and this one neighborhood organization.

II. STATEMENT OF RELEVANT FACTS

The Coalition adopts the factual statements of Woodway and Save Richmond Beach (“SRB”) in their Briefs of Respondents before the Division One Court of Appeals and their Petition for Review and Supplemental Briefs before this Court.

III. ARGUMENT AND AUTHORITY

For the reasons set forth below, this Court should reverse the Division One Court of Appeals holding finding the developer’s rights

vested despite failure to comply with SEPA and reinstate the opinion of the trial court.

A. The Facts of this Case Illustrate the Threat to Open Government if the County and Developer's Positions are Accepted.

The facts of this matter are frankly not in dispute. The parties argue about the legal implication of those facts but do not dispute them. But the factual background illustrate why the arguments of the County and developer must be rejected and why open government doctrines would be harmed if even one of those arguments were accepted. The issue cannot be decided in a vacuum, and this Court should remind itself of the facts here.

Point Wells is a 61 acre parcel in an unincorporated area of the southwestern most corner of Snohomish County. For 100 years it has been the site of petroleum-based industrial use. "An oil refinery, tank farm, and asphalt plant have left a legacy of heavy contamination." Growth Management Hearing Board decision at p. 9 of 81, lines 4-5. "Natural streams have been buried or diverted, marshes drained or filled, and the land paved over." Id. at lines 8-9. For many decades Point Wells was zoned as "Urban Industrial" by Snohomish County. It is bordered entirely on its west side by the Puget Sound. It is bordered on its north and eastern sides by the small suburban town of Woodway. And it is

bordered on its eastern and southern sides by neighborhood of Richmond Beach in the City of Shoreline located in King County.

The only access to the property is a narrow two lane residential road largely without sidewalks located in the neighborhood of Richmond Beach. There is little to no public transportation remotely near the site, limited to public bus service with limited bus stops several blocks away. The nearest freeway is I-5 several miles to the east, and the nearest major arterial is Aurora Avenue/Highway 99 also several miles to the east. To exit from the Point Wells property, one must travel through Richmond Beach along narrow one and two lane residential roads, most without sidewalks, and briefly on a narrow thoroughfare that reaches four narrow lanes at some points before reaching Aurora Avenue/Highway 99. To reach Point Wells one must travel these same narrow residential streets back to the narrow two lane entrance point of Richmond Beach Drive. The developer acknowledges that the Point Wells development will result in approximately 11,500 car trips a day into and out of the Point Wells development through the single two lane access point and through the neighborhood of Richmond Beach.

Richmond Beach is a community of predominantly single family homes and is home to families with young children and a growing population of the elderly and disabled. It has a population of just 5,400

residents. It houses along the access route to Point Wells a few small preschools and day care centers, a rehabilitation center, a scattering of small private senior care homes, and a small public elementary and middle school. It has few traffic lights or stop signs and little buffer between the single family residences and the street. Its speed limits range from 20 to 25 miles per hour for most of its streets to up to 30 to 35 miles per hour on its one narrow arterial street of Richmond Beach Road which at its widest is but four lanes for a few blocks.

Point Wells, as a part of unincorporated Snohomish County, is under the control of the Snohomish County Council which resides in Everett, Washington, 21 miles away from the property.

In 2009, the developer in this case, BSRE, lobbied the Snohomish County Council to re-zone the Point Wells property from the urban industrial designation it had held for decades to that of an Urban Center. Snohomish County at that time had only six other properties zoned as an Urban Center, all of them near major freeways and significant sources of public transportation. An Urban Center is the highest density zoning for Snohomish County with no maximum residential units only minimums. It allows for buildings up to 180 feet in height. It allows for significant commercial and retail space intermixed with high-density hi-rise style apartments and condominiums. Urban Centers are to be located in major

population centers near adequate public transportation hubs and with easy access to freeways and highways. They are not suited, nor appropriate, in small quiet single family home communities with narrow roads, limited public transportation, and a bottle-necked entrance and exit points to the Center.

Nonetheless, with little notice to affected residents and out-of-county governments, Snohomish County gave in to the developer's lobbying and agreed to re-zone the Point Wells development from Urban Industrial to an Urban Center. In 2010, the County adopted ordinances urged by the developer amending the County's development regulations for Urban Centers to accommodate the Point Wells designation. The County did not comply with SEPA in approving the re-zone or ordinances. It relied on old and outdated draft environmental impact statements, failed to consider any other alternatives other than a "do nothing" approach or the Urban Center as an appropriate use for the property. It failed to consider whether or not an Urban Center was more appropriate in some other part of Snohomish County. And it relied on false and inaccurate information that a public transportation facility would be located by mass transit at or near the site, when there was no reason to believe this was true, and in fact evidence this would not occur. Since Point Wells was located in Snohomish County, but its only access point was in the

Richmond Beach neighborhood of King County, there was also a lack of consideration of how emergency services, presumably required to be provided by Snohomish County, could be provided to the location since fire trucks, ambulances, and law enforcement would all have to travel through Woodway or Richmond Beach greatly increasing safety concerns and response times, or the towns of Woodway and Shoreline would be obliged to provide services from its own limited services without any compensation from Snohomish County for the burden.

The Town of Woodway, City of Shoreline, and an organization of Richmond Beach residents called Save Richmond Beach (“SRB”) among others promptly filed challenges to the Growth Management Hearing Board to fight the re-zone and ordinance changes. The challenges were consolidated in 2010, and a hearing was finally held on March 2, 2011. The challenges and hearing focused on the County’s violations of SEPA in approving the re-zone and ordinances as well as the fact that the re-zone and ordinances prevented Shoreline from itself complying with the Growth Management Act and its policies. In short, the communities bordering the site and their residents were able to show Snohomish County approved the re-zone and ordinances based on faulty and inadequate information and without compliance with state SEPA laws.

The developer participated in the hearing and was on notice of all of the flaws with the re-zone and the County's actions.

Although the developer had taken no official steps toward obtaining permits prior to the hearing, on March 4, 2011, two days after the hearing, the developer submitted its first permit application to Snohomish County. CP 248. The developer, and County, were aware that SRB, Woodway and Shoreline all contended SEPA had been violated in approving the re-zone and ordinances. The application sought to build 3000 condominiums and more than 100,000 square feet of retail space with buildings up to 180 feet in height on the contaminated formerly industrial parcel with the single two lane sole access point in the Richmond Beach neighborhood. According to a Snohomish County rules if the County took no action on a permit for 28 days it was deemed complete and accepted for consideration. The County took no action on any the BSRE permits. In April 2011, the Growth Management Hearing Board issued its decision declaring the re-zone and ordinances invalid and remanding for a proper SEPA evaluation.

It is under this framework this case comes to this Court, and on this framework that the Shoreline Coalition for Open Government is compelled to weigh in.

The developer and Snohomish County argue that a property owner's rights in a permit application vest when the application is filed. The developer argues Snohomish County had to approve the permit quickly or face legal liability for failing to do so. The permit was not deemed approved until 28 days after the application by virtue of the County's lack of any response. Construction was not begun between the March 2, 2011, permit filing and the April 2011 decision of the GMHB. Rather, the developer and County argue the permit rights must be deemed to have vested and not be allowed to be disturbed simply upon application for a permit. They argue this is true even if the GMHB, or a court, later finds the re-zone upon which the permit was based was obtained in violation of state law, such as SEPA, or was obtained fraudulently, illegally, or by any other improper means. In short, the developer and County argue that a developer who asks for a zoning change and regulation change, gets it, does not begin construction but submits an application after a GMHB hearing but before the GMHB can rule and throw out and invalidate its re-zone, can never have its rights to the re-zoning disturbed.

The developer acknowledges that it plans to build 3000 condominiums, up to 180 feet in height, and more than 100,000 square feet of retail space at Point Wells. The developer acknowledges that the

sole entrance and exit point to Point Wells is on a narrow winding two lane residential road of single family homes in the Richmond Beach neighborhood of Shoreline, Washington in King County. . The developer acknowledges that the development as planned will add more than 11,500 cars a day to this two lane road and for several miles on the surrounding narrow, residential streets through Richmond Beach to reach either Aurora Avenue/Highway 99 or I-5.

It cannot be disputed that the governmental body to whom the developer lobbied for the re-zone and regulation change sits in Everett, Washington, to the far north of Snohomish County, more than 21 miles away from the development, and that the residents of Richmond Beach and Shoreline have no right to vote for the council members on the Snohomish County Council who made the decision that will so drastically impact and devalue their homes and threaten their way of life. The more than 11,500 cars that will enter and exit the two lane road will convert the narrow residential streets into a virtual freeway, although without any of the safety protections normally afforded for such high traffic passages. Drivers looking for alternate routes will cut through the town of Woodway heading north. The property values of the homeowners in Richmond Beach and Woodway will decrease significantly as thousands of cars cut through their neighborhood to reach the Point Wells “Urban Center”.

Fire, police, and other services will have to pass through Richmond Beach and Woodway to serve the residents and customers of Snohomish County Point Wells. And yet the Richmond Beach residents had no vote in the decision that will destroy their neighborhood and they had no vote in placing or unseating the council members who made the decision to do so sitting in council chambers in Everett, Washington in a neighboring county.

It is against this backdrop that this Court must view all of the facts and arguments being made by the parties in this appeal.

The Shoreline Coalition for Open Government is devoted to aiding the public in keeping its government accountable and accessible. The actions taken in this case, and the arguments being made by the developer and Snohomish County, threaten the essence of accountable and open government.

B. LUPA Does Not Bar the Appeal Here.

The developer argues that its permit application, and the failure to act by the County which makes the permit allegedly deemed approved upon application, is a land use decision that must be appealed via the Land Use Petition Act or LUPA within 21 days. The developer argues that the permit is deemed approved on the date of application, and thus vested, but the permit's approved status cannot really be known until 28 days later to

see if the agency acts or does nothing. Snohomish County was required to state the appeal rights in its notice of the permit application, and did not do so here. See RCW 36.70B.110(2)(e). Snohomish County indicated it was accepting public comment on the applications and never mentioned an appeal process. CP 430-33. The developer argues that the public would nonetheless need to file its LUPA appeal within 21 of an application, even though its approval status would not be known for another 7 days. Thus there would never be a way for an affected person to file a LUPA challenge in a case such as this if the developer's argument was accepted. The developer's LUPA argument must be rejected. A permit application is not a land use decision. The public's right to challenge a permit cannot be cut off, as the developer and County would have done, by requiring members of the public to challenge every permit application as a LUPA land use decision within 21 days of an application having been filed even though the permit is not approved at that stage and is still subject to the public comment period.

Here Woodway and SRB properly brought their challenges before the Superior Court pursuant to the Uniform Declaratory Judgments Act, RCW Ch. 7.24. The developer and County would have this Court strip the judiciary of the power to review such a case— again something the law does not require this Court to do nor allow this Court to do. The public

needs courts to be empowered to hold agencies and applicants accountable, as the facts of this case so clearly demonstrate. The residents of Richmond Beach and Shoreline and the Town of Woodway could not count on the Snohomish County Council to protect their interests. Courts must be empowered to hear disputes such as this one.

C. The Developer's Rights Did Not Vest based on an Invalid Re-Zone and Ordinance

As this Court has said:

Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

Erickson & Associates, Inc. v. McLerran 123, Wn.2d. 864, 873-74; 872 P.2d 1090 (1994). RCW 43.21C.020 provides: "The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." SEPA's primary means of promoting its policies are procedural requirements designed to ensure integration of environmental values and consequences in the decision-making of all agencies of state and local government. Settle, State Environmental Policy Act § 3.01. The affected

municipalities and their residents did what the law allows them to do, and filed a challenge before the Growth Management Hearing Board to an improper re-zone and ordinance. The GMHB threw out the re-zone and ordinance and mandated the County comply with SEPA. The developer took no steps to develop the property before the hearing, and only applied for the permits after the hearing but before the Board could rule. Such strategic vesting is not allowed by the provisions the developer and County cite. Vesting only occurs when rights are acquired lawfully via another state law. Here rights were not lawfully acquired. The County violated state law in approving a re-zone and ordinance. The developer did not rely on an ordinance which was later taken away. Rather, here the developer lobbied for an improper zoning change and improper use of industrial property, obtained the re-zone and ordinance changes based on improper and incomplete information and without compliance with SEPA, and then only sought a permit after a hearing that was destined to invalidate the re-zone and ordinance it had improperly obtained.

It is clear from the facts of this case that Snohomish County was acting cooperatively with the developer and was not considering the interests of the residents of a neighboring county. The impacts would not be felt by the constituents of the Snohomish County council members. Rather, Snohomish County stood to benefit from increased tax and permit

revenues receiving all of the benefits and none of the costs. The costs would be borne primarily by residents of neighboring King County, people whose tax dollars do not go to Snohomish County, whose decreased property values would not impact Snohomish County's coffers, and whose votes Snohomish County council members did not need to earn to retain their seats in office. Snohomish County did not feel the need to listen to the City of Shoreline in a different county whose fire and police and ambulance services might be compelled to serve the needs of the residents and customers of Point Wells although receiving none of the tax revenue to fund this additional burden. Snohomish County did not feel the need to consider where the children of the development would be educated and whether Shoreline or Woodway had capacity in their school systems to accommodate the potentially large influx of students from such a large development.

The Growth Management Act and SEPA exist to help communities manage their growth and protect the environment and to ensure the quality of life of one community is not impermissibly sacrificed for the benefit of another. The Shoreline Coalition for Open Government respects individual freedoms and is not anti-development. It is also not anti-government, only anti-irresponsible and unresponsive or unaccountable government. Here, Snohomish County passed an improper re-zone and

ordinance, was property and timely challenged, and the developer is trying to retain that improper relief though it suffered no loss, had no justifiable reliance on the illegal acts, and sought to strategically vest to use its vesting claim as a sword to defeat SEPA claims rather as a shield against improper agency reversals as the vesting doctrine was intended to be used. If a developer can vest its rights in an illegally obtained re-zone and ordinance under the facts presented in this case, then the public and other affected governmental agencies will never be able to hold a government accountable and laws such as SEPA will have no meaning. The same result would be required if a developer was found to have bribed an official to obtain the illegal re-zone and ordinance or if an agency was found to have passed the challenged actions in secret and illegal meetings that violated the Open Public Meetings Act, RCW 42.30. The result the developer and County seek is not supported by the law, and such a holding would do significant damage to the concepts of open and accountable government and must be rejected.

D. More is at Stake Here than Just the Impact on this Developer, Town and Neighborhood Group.

This appeal will no doubt have an important impact on whether or not this developer will be able to build its 3000 condominiums and 100,000 square feet of retail space and add 11,500 cars daily to a two lane

residential road in and out of Richmond Beach. It will have a life-altering impact on residents of the Town of Woodway and Richmond Beach and generations to come. These issues are significant and will have a far-reaching impact to the residents of the City of Shoreline and Woodway, their home values, safety, and way of life for the conceivable future. But this appeal will also decide whether or not developers like the Respondent here and distant and unconnected governments like the County here can alter its zoning procedures, violate state environmental requirements, and slip through such significant changes free of all of the safeguards our open government laws afford and leave those affected without a voice and without recourse to challenge the actions. This Court's decision will determine whether in future entities such as the Snohomish County Council can be held accountable to the public for violating state law, ignoring SEPA requirements, and making not only imprudent but illegal decisions. The vitality of SEPA, as well as any state law, will be impacted by the decision this Court reaches. And the reach of the decision will not be limited to a vesting argument about a permit application and a SEPA violation. It will immunize and prevent challenges just as easily to illegal, fraudulent, and corrupt agreements and those reached behind closed doors in secret and in violation of state open government laws.

This Court will send a message to the people of Washington whether it wants to or not whether this Court supports the mandate of open and accountable government found in our many laws, including the Public Records Act (“PRA”), and Open Public Meetings Act (OPMA”), RCW 42.30 et seq.:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030. This Court cannot rule for the developer and County declaring the permit rights to have vested without damaging this important doctrine,.

IV. CONCLUSION

For the above reasons, Amicus Curiae Shoreline Coalition for Open Government urge this Court to reverse the Division One Court of Appeals decision and reinstate the opinion of the trial court.

This issue should proceed in the light of day, affording all those impacted with their statutorily required notice and opportunity to respond, and the benefit of a complete and adequate SEPA evaluation before a massive re-zoning variance can proceed and the massive scale

development at issue here be placed on property in Snohomish County on the edge of this small bedroom community in King County with its only entrance and exist point at this narrow two lane road cutting across the neighborhoods of Richmond Beach and the Town of Woodway.

Respectfully submitted this 24th day of September, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 25, 2013, I delivered a copy of the foregoing Amended Amicus Curiae Brief of Shoreline Coalition For Open Government via email with backup by U.S. Mail pursuant to agreement to:

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Filed by attorney Michele Earl-Hubbard, WSBA # 26454, attorney for Amicus Curiae Shoreline Coalition for Open Government.

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Sent: Tuesday, September 24, 2013 4:07 PM

To: Michele Earl-Hubbard; 'Sarah Skaggs'; 'wtanaka@omwlaw.com'; 'keick@omwlaw.com'; 'adecker@grahamdunn.com'; 'zach.hiatt@weyerhaeuser.com'; 'jmoffat@co.snohomish.wa.us'; 'Martin.Rollins@co.snohomish.wa.us'; 'motten@snoco.org'; 'Martin.Rollins@co.snohomish.wa.us'; 'juliesund@comcast.net'; OFFICE RECEPTIONIST, CLERK; 'Keith Scully'; 'mjohansen@karrtuttle.com'; 'dluetjen@karrtuttle.com'; 'ghuff@karrtuttle.com'

Subject: RE: Case No. 88405-6, Town of Woodway et al. v. Snohomish County et al.

Attached for filing is an Amended Amicus Curiae Brief of Shoreline Coalition for Open Government and Motion to file same. (Cause number was incorrect on the earlier submission.)

Being filed by Attorney Michele Earl-Hubbard, WSBA #26454, attorney for amicus curiae Shoreline Coalition for Open Government.

Michele Earl-Hubbard



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From: Michele Earl-Hubbard

Sent: Tuesday, September 24, 2013 4:01 PM

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Subject: RE: Case No. 88405-6, Town of Woodway et al. v. Snohomish County et al.

Attached please find for filing the following documents:

Motion to File Amicus Curiae Brief of the Shoreline Coalition for Open Government and Amicus Curiae Brief of Shoreline Coalition for Open Government.

The certificate of service for each document is contained at the end of each filing.

Being filed by Attorney Michele Earl-Hubbard, WSBA #26454, attorney for amicus curiae Shoreline Coalition for Open Government.

(The parties who have agreed to email service are being served herewith with this emailed copy with hardcopy to follow by U.S. Mail. BSRE, who declined to answer my request regarding email service, is being provided with a copy by legal messenger.)

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From: Sarah Skaggs [<mailto:sarah@newmanlaw.com>]

Sent: Tuesday, September 24, 2013 1:38 PM

To: watanaka@omwlaw.com; keick@omwlaw.com; adecker@grahamdunn.com; zach.hiatt@weyerhaeuser.com; jmoffat@co.snohomish.wa.us; Martin.Rollins@co.snohomish.wa.us; motten@snoco.org; Martin.Rollins@co.snohomish.wa.us; juliesund@comcast.net; Michele Earl-Hubbard

Cc: Keith Scully

Subject: Case No. 88405-6, Town of Woodway et al. v. Snohomish County et al.

Good afternoon,

Attached please find

- **MOTION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF OF FUTUREWISE AND MEMORANDUM IN SUPPORT**
- **AMICUS BRIEF OF FUTUREWISE**
- **CERTIFICATE OF SERVICE**

Filed by Futurewise today. Hard copies will follow by U.S. Mail.

Very truly yours,

Sarah Skaggs

Paralegal

Newman Du Wors LLP

(206) 274-2800