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NO. 88405-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TOWN OF WOODWAY and SAVE RICHMOND BEACH,

Petitioners,

v.

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT BSRE

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I. IDENTITY OF RESPONDENT

BSRE Point Wells, LP (“BSRE”) is a Respondent with respect to Supreme Court Review. BSRE was one of the appellants at the Court of Appeals. This Supplemental Brief is submitted pursuant to RAP 13.7(e). BSRE asks this Court to affirm the decision of the Court of Appeals.

II. ISSUES PRESENTED FOR REVIEW

BSRE believes the issues presented for review may best be stated as follows:

A. Whether the Court of Appeals properly concluded that a landowner’s development permit application vests to a local jurisdiction’s land use regulations at the time a complete application is submitted, even if a Growth Board subsequently determines that the local jurisdiction did not fully comply with SEPA’s procedural requirements in its enactment of the regulations.

B. Whether the Washington Legislature gave to Growth Management Hearings Boards jurisdiction to evaluate local land use ordinances for compliance with the GMA and with SEPA, and defined the effects of a Growth Board’s determination of noncompliance.

C. Whether a major modification of the GMA and our state’s vesting rules lies within the province of the legislature.

III. BRIEF STATEMENT OF THE CASE

BSRE is the owner of waterfront property in southern Snohomish County known as Point Wells. In February and March 2011, BSRE

submitted extensive and detailed Urban Center Development and related applications for its proposed remediation and redevelopment of Point Wells. Those submittals were reviewed and expressly found by Snohomish County to be complete and in compliance with the Snohomish County application procedures. (CP 329). Woodway and Save Richmond Beach received notice of the permit filings by BSRE, and of the County's determinations that the applications were complete and vested to the County's Urban Center Code. (CP 44). Neither Woodway nor Save Richmond Beach filed a timely appeal of Snohomish County's determinations.

On April 25, 2011, many weeks after the BSRE applications were deemed complete and vested, the Central Puget Sound Growth Management Hearings Board (the "Growth Board") determined that the County had failed to comply with certain provisions of the GMA and SEPA with respect to adoption of the Urban Center ordinances.¹ (CP 4). The Board remanded the ordinances to Snohomish County to bring its Comprehensive Plan amendments and development regulations into compliance. The Board also declared the Comprehensive Plan amendment for Point Wells invalid as of April 25, 2011. The Board did not invalidate either the Urban Center Code (the development regulations)

¹ Significantly, the County's SEPA noncompliance did not involve a refusal to follow SEPA or an avoidance of SEPA review. Rather, the Growth Board merely concluded that the County's Environmental Impact Statement should have analyzed one additional alternative proposal for use of the property. Slip Op. at 16, footnote 23.

or the rezoning of Point Wells to an Urban Center. (CP 166-167). No party appealed the Growth Board's Final Decision and Order.

Many months later, Woodway and Save Richmond Beach filed a collateral attack on Snohomish County's determinations that BSRE's applications were vested to the Urban Center Code. The Complaint in King County Superior Court asked the court to nullify Snohomish County's determinations, and to enjoin the County from processing BSRE's vested applications. The County and BSRE answered, requesting dismissal of the Complaint.

All parties agreed that the issues before the trial court were legal in nature. All parties filed motions for summary judgment under CR 56. Following the hearing, the trial court granted summary judgment to Woodway and Save Richmond Beach. The order effectively overturned Snohomish County's vesting decision and prohibited the County from processing BSRE's applications until the County prepared an addendum to its prior environmental review documents to include an analysis of an additional "less dense" development alternative. (CP 487-488).

BSRE and Snohomish County filed appeals in Division I of the Washington Court of Appeals. Following oral argument before the Court of Appeals, Snohomish County corrected the perceived SEPA deficiency by publishing an Addendum to the prior SEIS. The Growth Board accepted the Addendum as sufficient and rescinded its invalidity order on

December 10, 2012. (CPSGMHB Case Nos. 09-3-00130 and 10-3-0011e, Order Finding Compliance, 12/10/12).²

The Court of Appeals issued a unanimous published decision on January 7, 2013, reversing the trial court and entering summary judgment in favor of Snohomish County and BSRE. The decision of the Court of Appeals was based on application of Washington's Vested Rights Doctrine and the express language of the Growth Management Act, RCW 36.70A, which provide that a landowner's development permit application vests to the local jurisdiction's land use regulations in effect at the time a complete application is filed, notwithstanding a subsequent determination by a Growth Board that the jurisdiction did not fully comply with SEPA's procedural requirements in its enactment of those regulations.

BSRE had also argued to the trial court and to the Court of Appeals that the lawsuit filed by Woodway and Save Richmond Beach was subject to dismissal because of their failure to appeal the County's determinations of completeness and vesting under the Land Use Petition Act ("LUPA"), RCW 36.70C. The Court of Appeals determined that it was not necessary for it to reach the issue of noncompliance with LUPA. (Slip Opinion, p. 22, fn.28).

Woodway and Save Richmond Beach each filed petitions for discretionary review which were consolidated. The Supreme Court

² Thus, even under Petitioners' view of the import of the Summary Judgment Order, the SEPA deficiency upon which their argument relies was cured and the Summary Judgment Order was effectively nullified.

accepted review. BSRE respectfully asks this Court to affirm the decision of the Washington Court of Appeals.

IV. ARGUMENT

A. The Relief Requested by Woodway and Save Richmond Beach Would Necessitate a Wholesale Overhaul of the GMA and Washington's Vested Rights Doctrine.

As the Washington Court of Appeals explained in its Published Opinion, “the GMA is Washington’s fundamental land use planning law.” (Opinion, p. 8). It is the product of extensive legal analysis, negotiation and balancing of competing interests relative to the appropriate regulation of land use in this state. In the years following its initial enactment in 1990, the GMA has on occasion been amended by the Washington Legislature to clarify its application in certain circumstances. But neither the original language of the GMA nor its current iteration supports the “de-vesting” argument presented by Woodway and Save Richmond Beach.

Portions of the GMA were amended in response to the Governor’s 1994 Task Force on Regulatory Reform. The Regulatory Reform effort resulted in amendments not only to the GMA, but also to the State Environmental Policy Act (SEPA) and the Shoreline Management Act (SMA). The 1995 GMA amendments simplified the GMA review process by providing Growth Boards with two distinct alternatives to address noncompliant land use ordinances. The Growth Board could either make a finding of “noncompliance” (with the GMA or SEPA) or a more serious

“determination of invalidity” where an ordinance is found to substantially interfere with the goals of the GMA. Laws of 1995, ch. 347, § 110; King County v. Central Puget Sound Management Hearings Board, 138 Wn.2d 161, 181, 979 P.2d 374 (1999).

The 1997 Legislature recodified the GMA’s invalidity provisions in a new stand-alone section, RCW 36.70A.302. The amended legislation did not, however, weaken the protection of vested rights. As the Court of Appeals correctly noted in this case, the language of 36.70A.302(2) 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. Under the statute, an ordinance can be declared “invalid” only when it “substantially interferes with the goals of the GMA.” A local government’s violation of SEPA alone is insufficient to give rise to invalidity. In recognition of the clear language of the GMA, the Washington Growth Boards have never invalidated an ordinance based solely on SEPA noncompliance. Davidson Serles & Associates v. Central Puget Sound Growth Management Hearings Board, 159 Wn. App. 148, 158, n.8, 244 P.3d 1003 (2010).

Moreover, even where a land use ordinance has been determined to be invalid, that does not affect the vesting of applications which were submitted before the determination of invalidity was made. The

determination of invalidity only applies to applications submitted after the finding is made. RCW 36.70A.302(2).

In view of the unambiguous language of the GMA, the clear legislative history and Washington's well established Vested Rights Doctrine, the Court of Appeals properly rejected the argument of Woodway and Save Richmond Beach that a mere determination of procedural noncompliance with SEPA by Snohomish County could result in a "de-vesting" of BSRE's permit applications filed under the County's Urban Center Code. Indeed, the result reached by the Court of Appeals was the only logical conclusion from the undisputed facts and unambiguous statutory law.

Granting of the relief sought by Woodway and Save Richmond Beach would necessitate a wholesale rewriting of the GMA by the Washington Legislature. If Petitioners believe that the GMA needs to be modified, their path lies through the legislative process. Absent major revisions to the GMA's provisions as to (a) the jurisdiction of Growth Boards, (b) findings of noncompliance and (c) vesting, the position asserted by Petitioners herein is unsupportable.

Indeed, in view of the Legislature's grant of exclusive jurisdiction to Growth Boards for review of land use ordinances and SEPA compliance, the trial court was without jurisdiction to overturn the Central Board's determination and to order the "de-vesting" of BSRE's permit applications. The absence of superior court jurisdiction in this context was

made clear by the Court of Appeals in Davison Serles & Associates v. City of Kirkland, 159 Wn. App. 616, 246 P.3d 822 (2011):

The Board properly had jurisdiction over Davidson's SEPA challenge to the city Comprehensive Plan and Zoning Code Amendments. The Board's jurisdiction over these challenges is exclusive. RCW 36.70A.280(1). Thus, the superior court does not have jurisdiction over such SEPA challenges.

159 Wn. App. at 626. The same principles apply in this case. The superior court had no authority to usurp the statutorily granted jurisdiction of the Growth Board. The Court of Appeals' unanimous decision overturning the trial court's order was correct, and should be affirmed by this Court.

B. Petitioners' Policy Argument is Not Even Applicable Under the Facts of This Case.

Petitioners Woodway and Save Richmond Beach argue in effect that the language of the GMA should be overridden by public policy considerations. In making this argument, they rely on Responsible Urban Growth Group v. City of Kent, 123 Wn.2d 376, 868 P.2d 861 (1994) ("*RUGG*") which held that a developer's permit was void, where it was issued under a void ordinance. They point to the *RUGG* court's finding that the "balancing of the equities" doctrine could not be utilized by a developer against challenges to an illegal ordinance. *Id.* at 389. But the *RUGG* decision is entirely inapposite, and the Petitioners' policy argument has no application to this case. Indeed, there are multiple flaws in Petitioners' argument.

First, the facts of this case are entirely dissimilar from the facts in *RUGG*. As the Court of Appeals in this case properly noted, *RUGG* arose prior to enactment of the GMA, prior to the Land Use Petition Act and prior to other aspects of Washington's regulatory reform legislation. Moreover, *RUGG* involved a zoning ordinance which was adopted without proper public notice and in violation of the Appearance of Fairness Doctrine. *Id.* at 381. (See, Slip Opinion herein, p. 19, fn.26). There are no comparable facts present here. Snohomish County's Urban Center Code was adopted with proper notice to Woodway, Save Richmond Beach and other interested citizens. Petitioners were not only afforded an opportunity to comment on the legislation, they exercised their statutory right to challenge Snohomish County's ordinances before the Growth Management Hearings Board. Further, they were afforded an opportunity to appeal the Growth Board's Final Decision and Order, but elected not to do so. In short, the "due process" argument which was central to the *RUGG* decision is entirely absent here.

Moreover, since the enactment of the GMA, the Washington Legislature and the courts have rejected requests that the GMA be amended to restrict vested rights. As the Court of Appeals noted, the Legislature has declined to make changes in the GMA which would abrogate or restrict the vesting of applications to ordinances later found to be noncompliant or invalid. And the courts have properly declined to ignore or invalidate the clear language of the GMA relative to vesting,

even as to ordinances which are later found to be “invalid.” Hale v. Island County, 88 Wn. App. 764, 772, 94 P.2d 1192 (1997). Because *RUGG* arose prior to enactment of the GMA’s vesting rules, and involved a violation of the plaintiffs’ due process rights, it is not relevant to the current dispute.

SRB’s policy argument is based on its assertion that BSRE knew that Snohomish County’s Urban Center Code had been appealed and therefore should have known that the Code could be invalidated by the Growth Board. But even if this assertion is correct, it is irrelevant. Washington recognizes a “date certain” standard for vesting. Abbey Road Group, LLC v. City of Bonney Lake, 167 Wn.2d 242, 251, 218 P.3d 180 (2009). Whether a landowner is supremely confident, or genuinely concerned, as to whether a regulation will remain in effect indefinitely is immaterial to the determination of vesting.

Moreover, this is not a case in which the landowner gained an advantage by filing its applications before the Growth Board had decided the legality of Snohomish County’s Urban Center Code, because the Board did *not* invalidate the Urban Center Code. Thus, even if one were to entertain a policy argument that a party should not be allowed to vest to an ordinance later found to be “void” or “invalid,” the argument would be inapplicable in the instant case, because Snohomish County’s Urban Center Development Regulations were *not* found by the Growth Board to

be invalid or void, and the Urban Center Code remained in place after the Growth Board's decision.³

In short, Petitioners' argument that BSRE should not have been allowed to take advantage of a potentially flawed ordinance bears no relationship to the facts or the law. Even if BSRE had waited to ascertain what the Growth Board's decision would be before filing its development applications, the result under the GMA would have been the same. Because the Urban Center Development Regulations were *not* determined to be invalid, those regulations remained in place, and BSRE could have lawfully and properly filed its Urban Center permit applications even after the Growth Board's Final Decision and Order, and those applications would still have vested to the Urban Center Regulations. RCW 36.70A.302.

This is yet another reason why the *RUGG* decision is inapplicable. Here, BSRE has not asked the Court to apply a "balancing of the equities." It has only asked that the unambiguous language of the GMA and Washington's Vested Rights Doctrine be followed, as the Court of Appeals has done.

Save Richmond Beach's characterization of the instant case as one of an ominous "international" developer manipulating a "compliant" local

³ It is the content of the development regulations, and not the comprehensive plan, which is relevant to vesting. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 126, 947 P.2d 322 (2005) ("Neither the GMA nor the comprehensive plans adopted pursuant thereto directly regulate cite specific land use activities [citations omitted]. Instead, it is

jurisdiction has no support factually or legally. It is worth noting that the landowner's interpretation of the GMA and Washington's Vested Rights Doctrine in this case is entirely consistent with that of the local jurisdiction, and that interpretation is in conformance with Washington statutes and caselaw, as the Court of Appeals has confirmed. Far from the sinister picture portrayed by Petitioners, the facts of this case reflect an appropriate arms-length and professional interaction between a landowner and a governmental permitting agency.

The permit applications submitted by BSRE were not simple or hastily assembled applications. The applications consisted of hundreds of pages of plans, specifications and details regarding the proposed project. (CP 44). It was only after BSRE had satisfied the strict Snohomish County requirements for a completed Urban Center application that the County made the appropriate determination of completeness and vesting to the Urban Center Regulations.

Neither Woodway nor Save Richmond Beach appealed Snohomish County's determinations of completeness and vesting. Instead, they waited many months and then pursued a collateral attack outside of the statutory procedures of the GMA and outside of the requirements of the Land Use Petition Act. The trial court erroneously granted the relief sought in the collateral attack. The Court of Appeals' unanimous decision

local development regulations, including zoning regulations enacted pursuant to a comprehensive plan, which act as a constraint on individual landowners").

properly overturned the trial court's decision, allowing BSRE's vested permit applications to be processed by Snohomish County. This Court should place its seal of approval on the Court of Appeals' analysis.

V. CONCLUSION

The Court of Appeals' unanimous, well-reasoned opinion should be affirmed by this Court.

DATED this 3rd day of July, 2013.

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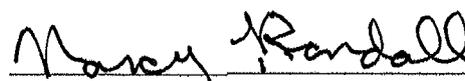
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