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No. 68048-0-I (Consolidated with No. 68049-8-I)

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

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

Respondents,

v.

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Appellants.

RESPONSE BRIEF OF RESPONDENT SAVE RICHMOND
BEACH

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I. INTRODUCTION

In their opening briefs, Appellants BSRE Point Wells, L.P. (“BSRE”) and Snohomish County (also the “County”) attempt to frame this case as a head-on challenge to Washington’s longstanding vested rights doctrine. The vested rights doctrine, Appellants argue, is strong, simple and without exception: a completed development application will be considered under the statutes and ordinances in effect at the time the application is filed. From this, Appellants boldly assert that the date of submission of BSRE’s development application is the “crucial fact of this case, and is dispositive of its outcome.” In reality, however, this case is not a head-on challenge to the vested rights doctrine at all. In fact, Respondents largely agree with Petitioners’ summary of Washington’s vesting laws. Nonetheless, this case addresses the important question – apparently one of first impression – of whether a land use ordinance is legitimately “in effect” for purposes of vesting when it was *adopted* in violation of the State Environmental Policy Act (SEPA), RCW Ch. 43.21C, in the first place.

This question arises in the context of BSRE’s application to build a massive “Urban Center” development, with approximately 3,000 condominium units and over 100,000 square feet of commercial space, at

a relatively remote site in southwest Snohomish County known as Point Wells. The land use designations under which BSRE proposes to build this new Urban Center were adopted by Snohomish County at BSRE's behest, and were subsequently invalidated by the Central Puget Sound Growth Management Hearings Board (the "Board"). In addition to finding non-compliance and invalidity under the Growth Management Act (GMA), RCW Ch. 36.70A, the Board found that the ordinances in question had been adopted in violation of SEPA. Nonetheless, Snohomish County and BSRE have attempted to move forward with this massive, non-conforming project, asserting that BSRE's Urban Center development application is "vested" to the illegally-adopted ordinances because it was submitted shortly before the Board handed down its decision (though after the Board's hearing on the merits).

The issues presented by this case are of critical importance not only to the residents of Woodway and Richmond Beach who will bear the impacts of this illegally-designated Urban Center, but also to our state policies addressing environmental protection in the land use context. Snohomish County and BSRE accuse Respondents (and the trial court) of ignoring the black letter law of Washington's vested rights doctrine. But in fact, it is they who have attempted to turn the doctrine on its head by

working together to use vesting as a “sword” to allow an otherwise-illegal development, rather than as a “shield” to protect property owners from fluctuating land use policies. At its core, this case implicates the problem, recognized by the Washington State Supreme Court in *Erickson & Associates, Inc. v. McLerran*,¹ of vested rights subverting the public interest by being “too easily granted.” Snohomish County and BSRE have advanced nothing short of an approach that would allow real estate developers and complicit jurisdictions to effectively avoid SEPA altogether. Indeed, if allowing a massive, non-conforming development to vest even to ordinances *adopted* in violation of SEPA - our state’s primary environmental protection law - doesn’t “subvert the public interest” by making vested rights “too easily granted,” then it’s hard to imagine what would.

Notably, neither Snohomish County nor BSRE have disputed the fact that ruling in their favor would effectively allow them to avoid SEPA review for the land use designations and regulations in question. Instead, they argue that RCW 36.70A.302, which addresses the consequences of the Board’s finding of invalidity under the GMA *and does not even mention SEPA*, compels such a result. Petitioners’ interpretation of RCW

¹ 123 Wn.2d 864, 873-874, 872 P.2d 1090 (1994).

36.70A.302 flies in the face of the well-settled SEPA principles that actions taken in violation of SEPA are void and *ultra vires*, and that an agency may not proceed with its proposed action until an adequate environmental review has been completed. Allowing “offensive” vesting in the manner advocated by Snohomish County and BSRE would effectively negate both of these principles, rendering SEPA review meaningless in the land use planning context. Surely this is not what the Legislature intended, without saying as much, simply by giving the Growth Management Hearings Board jurisdiction to hear SEPA appeals as part of Regulatory Reform.

Contrary to Snohomish County and BSRE’s assertions, Respondents do not seek to overturn Washington’s longstanding vested rights doctrine. Rather, they seek to prevent Snohomish County and BSRE from expanding it to the point of absurdity. Where the legislature has been silent with respect to the consequences of a Hearings Board’s finding of *SEPA* noncompliance, the GMA and vested rights doctrine must be harmonized with well-established SEPA principles to ensure SEPA’s purpose is not eviscerated. Save Richmond Beach respectfully asks this Court to maintain the critical balance between vested rights and the public interest, as embodied by SEPA’s environmental protections, by affirming

the trial court's decision that BSRE's development application did not vest to the land use ordinances enacted in violation of SEPA.

II. RE-STATEMENT OF THE ISSUES

The issues in this appeal are properly re-stated as follows:

- A. Whether the trial court properly determined that failure to comply with SEPA results in an action being void and ultra-vires, such that an ordinance is not "in effect" for vesting purposes when it has been adopted in violation of SEPA?
- B. Whether the trial court properly determined that BSRE's development application could not vest to ordinances found to be enacted in violation of SEPA, where the development application was filed subsequent to the hearing before the Board but prior to issuance of the Board's Final Decision and Order?
- C. Whether the trial court properly determined that Save Richmond Beach and Woodway's declaratory judgment action was not precluded by LUPA where the action did not involve a challenge to a "final land use decision"?
- D. Whether the trial court properly determined that an injunction was the appropriate remedy where Snohomish County

attempted to continue processing BSRE's development action in reliance on actions taken in violation of SEPA?

III. RE-STATEMENT OF THE CASE

A. The Point Wells Property

This controversy arises from the proposed re-development of Point Wells, a relatively remote site on the shores of Puget Sound in the far southwest corner of Snohomish County, just across the boundary from King County. This 61-acre parcel, which is within unincorporated Snohomish County, is bordered on three sides by the Town of Woodway with Puget Sound serving as a boundary to the west. CP 100. The site is immediately north of the Richmond Beach neighborhood in the City of Shoreline. An aerial map showing the location of the Point Wells site is included herewith in Appendix A. *See*, CP 176.

Point Wells has been used for petroleum product storage, processing, and distribution under Snohomish County's "Urban Industrial" land use designation for many years. CP 101. However, the surrounding area is primarily developed with single family residential neighborhoods. CP 306. Despite this seemingly incompatible mix of land uses (i.e., industrial and single family residential), Point Wells' relative isolation has allowed it to function as an industrial site with relatively few conflicts or

complaints from the surrounding neighborhood. *Id.* Presumably this is because Point Wells is tucked away at the end of a winding two-lane, local road with *no* passersby and very little traffic in general. *Id.* The only land-based access to the site is via Richmond Beach Drive, which runs to the south across the King County line, making it impossible to access Point Wells by car without passing through Woodway and Richmond Beach (Shoreline). CP 101. In its Final Decision and Order dated April 25, 2011, the Central Puget Sound Growth Management Hearings Board (the “Board”) aptly described the traffic limitations of the Point Wells Site:

A major obstacle [to redevelopment] is limited access. Point Wells lacks highway access. Due to the steep bluffs upland, the only way to access the property by land is through the City of Shoreline from the south via Richmond Beach Drive, a two-lane street that dead-ends at Point Wells. The nearest major highway is State Route 99, approximately 2.5 miles east, via Richmond Beach Drive and N. 185th Street in Shoreline.... The [environmental impact statement] points out the bluff to the east and northeast limits the potential for additional access roads.

Point Wells also lacks transit service. Express transit service, whether offered by King County Metro or Community Transit, is 2.5 miles away, on State Route 99, and Sound Transit’s proposed light rail line is beyond — on Interstate 5. While the rail line through Point Wells provides commuter service between Seattle and Everett, Sound Transit, which operates commuter rail, has no present plan to provide a Point Wells station. Even if the King County Metro bus line which now terminates half a mile from Point Wells were extended to Point Wells in the future to serve the

anticipated population, this would not be express or high-capacity service.
CP 102-3.

The Point Wells property is owned by Appellant BSRE Point Wells, LP (“BSRE”). BSRE is a subsidiary of Alon Group, an international corporation with holdings in the real estate, energy, and retail sectors. CP 178-9.

B. Snohomish County’s Redesignation and Zoning of Point Wells

In 2006, BSRE² applied to Snohomish County to re-designate Point Wells from an “Urban Industrial” land use designation to an “Urban Center” designation. CP 181-186. “Urban Center” is Snohomish County’s most intensive, high density land use classification for mixed-use developments. CP 197-8. It contains no maximum residential density – only a minimum. In short, “Urban Center” means what it says: a downtown-style, high rise development where the County has seen fit to concentrate a population “center.” As one might expect for this type of development, Urban Centers are supposed to be “located along an existing or planned high capacity transit route.” CP 214. Despite strong objections from Woodway, the City of Shoreline, and Save Richmond Beach,³ the

² Then known as Paramount of Washington, LLC.

³ Save Richmond Beach is a community organization composed of individual residents in Woodway and the Richmond Beach area of Shoreline, located just south of the King County border adjacent to Woodway. CP 305. Its mission is to preserve and enhance quality of life in Richmond Beach and surrounding neighborhoods through responsible, sustainable planning. The members of Save Richmond Beach use the public amenities in the communities adjacent to Point Wells on a daily basis, including streets, schools,

Snohomish County Council granted BSRE's request to re-designate Point Wells as an "Urban Center" on August 12, 2009.⁴ CP 94-5. Point Wells thus became one of only seven designated Urban Centers within Snohomish County.

Unlike the other "Urban Centers," which are all located near major highways and intersections, Point Wells is, by virtue of its unique topography and geography, relatively isolated. To the west and northwest, it is bounded by approximately 3,500 feet of Puget Sound shoreline; to the east and northeast, it is sheltered by a steep, environmentally-sensitive slope ascending approximately 150 to 200 feet high. CP 100. The transportation impacts of designating Point Wells as an urban center were the subject of many of the public comments by Woodway, Shoreline, and Save Richmond Beach, and ultimately became one of the primary bases for these parties' appeal to the Growth Management Hearings Board.

Meanwhile, Snohomish County undertook to adopt permanent development regulations for all Urban Centers within its boundaries,

parks, libraries, and other City- or County- services. CP 305. Several members of Save Richmond Beach live immediately adjacent to the Point Wells site or on the bluff above the site, with views overlooking the property. In sum, the proposed redevelopment of Point Wells as an "Urban Center" poses a very real threat to the property interests, safety, environment and overall quality of life of Save Richmond Beach's members. CP 306.

⁴ On August 12, 2009, the County Council adopted Amended Ordinances 09-038 and 09-051, which amended the Future Land Use Map ("FLUM") of the Snohomish County Growth Management Act Comprehensive Plan ("GMACP") and the area wide zoning map to redesignate Point Wells as an Urban Center and to re-zone the property as Planned Community Business. CP 93-4. In addition, Ordinance 09-051 amended the Land Use ("LU") chapter of the GMACP – General Policy Plan ("GPP") for Urban Centers. The County's adoption of these ordinances formed the basis of the Petitioners' "*Shoreline III*" appeal to the Growth Management Hearings Board. *Id.*

including Point Wells. CP 215-6. The County ultimately adopted two ordinances as a result of this effort—one to adopt a new Chapter 30.34A of the Snohomish County Code adding a new “Urban Center” zoning classification and new regulations governing urban center development (later designated Ordinance No. 09-079); and another to adopt area wide rezones to implement the new “Urban Center” zone (later designated Ordinance No. 09-080). CP 95.

Once again, despite Woodway’s, Save Richmond Beach’s, and Shoreline’s repeated assertions that more stringent development regulations should be adopted for the newly-designated Point Wells Urban Center because of its access limitations, the County Council adopted and applied the same intensive, high-density development regulations to Point Wells that it did to all of the other urban centers within the County. CP 95. The application of these development regulations to Point Wells thus became the basis of petitioners “*Shoreline IV*” appeal to the Growth Management Hearings Board.

C. SEPA Process

In response to BSRE’s application to redesignate and rezone the Point Wells site, Snohomish County issued a Determination of Significance stating that an Environmental Impact Statement was required for the Comprehensive Plan amendments changing the designation of Point Wells to “Urban Center” and the zoning to “Planned Community Business.” CP 217-220. But rather than developing a new EIS, the

County relied on an existing EIS developed for previously-considered Comprehensive Plan updates, and on February 6, 2009, issued a Draft Supplemental EIS (DSEIS). CP 95. In response to the DSEIS, the County received detailed comments from interested parties such as the City of Shoreline, the Shoreline Police Department, the Shoreline Fire Department, Woodway, and various transit agencies pointing out significant, unmitigated, adverse environmental impacts including transportation issues, roadway concerns, and adequacy of emergency and public services. CP 136-139, 221-236.

The DSEIS was followed in June 2009 by a Final Supplemental EIS (FSEIS), which responded to comments but deferred some analysis of impacts and mitigation to the permitting stage. CP 146. The FSEIS considered only two alternatives: (1) the “Proposed Action” requested by BSRE, as outlined above; and (2) the “No Action Alternative” to retain the existing comprehensive plan and zoning designations at Point Wells. In other words, the EIS considered only the existing land use designation for the site and the most intensive land use designation available – “Urban Center.” CP 147. No other alternatives were analyzed. Nor did the EIS consider an alternative location for an Urban Center in southwest unincorporated Snohomish County. *Id.* Once again, interested parties provided comments challenging the sufficiency of the EIS. CP 237-247. At no point did the County order a new EIS to determine the impacts of

the ordinances, but instead relied upon the DSEIS and FSEIS previously issued.

D. Appeal to the Growth Management Hearings Board

The Town of Woodway and Save Richmond Beach, along with the City of Shoreline, filed appeals with the Board, challenging the County's comprehensive plan and zoning ordinances as well as the SEPA process utilized by the County. CP 95-96. BSRE was granted permission to intervene. *Id.*

On April 26, 2011, the Board issued its Final Decision and Order ("FDO") addressing the Point Wells-related ordinances. CP 92-174. The Board found the County's adoption of Ordinance Nos. 09-038 and 09-051 and the designation of Point Wells as an Urban Center to be clearly erroneous in three respects. CP 93. First, the designation was internally inconsistent with the County's comprehensive plan provisions concerning Urban Centers, in violation of RCW 36.70A.070. CP 114. Second, the action was also inconsistent with the City of Shoreline's GMA requirements for capital facilities and transportation planning. CP 129. Third, the Board found that the action was not guided by GMA planning goals. CP 143. As a result, the FDO provided, in part, that the County's designation of Point Wells as Urban Center violated the Growth Management Act ("GMA") and was declared invalid.

The Board also found that the County failed to comply with SEPA with respect to the Comprehensive Plan amendments as well as the

amendments to the development regulations. Specifically, the County's FSEIS failed to identify and analyze a reasonable range of alternatives, in violation of SEPA. Additionally, the DNS for Ordinance Nos. 09-079 and 09-080 was found to be legally inadequate and based on an inadequate EIS. CP 156. Under SEPA, this means the development regulations are void. The Board ordered that the County comply with both GMA and SEPA. No appeal was made of this FDO.

E. BSRE's Urban Center Development Application

On or about March 4, 2011, subsequent to the hearing on the Growth Manage Hearings Board appeal but prior to the Board's Final Decision and Order, BSRE filed applications to subdivide the Point Wells property and develop it as an Urban Center with approximately 3,000 residential units and 100,000 square feet of retail space (collectively, the "BSRE Permit Application"). CP 248-262. On or about March 13, 2011, the Snohomish County Herald published a Notice of Application with the "Date of Application/ Completeness Date" listed as March 4, 2011. CP 428. Thus, according to Snohomish County BSRE's application was deemed complete upon acceptance.

The completeness of a development application is not appealable under the County's development regulations or other administrative remedies available to Petitioners. Petitioners' only available recourse was to provide public comment on the BSRE Permit Application, which Save Richmond Beach did via a letter dated April 11, 2011. CP 263-274.

Among other things, the Save Richmond Beach letter asserted that the BSRE Permit Application should not be considered vested to the urban center development regulations or land use designation for Point Wells because those ordinances had been adopted in violation of SEPA and were void. *Id.* Nonetheless, both the County and BSRE considered the BSRE Permit Application complete and vested to the ordinances that were found invalid under GMA and void under SEPA. The County continued to process the BSRE Permit Application under the invalid and/or void ordinances over Save Richmond and Woodway's objections, leading to the present lawsuit.

F. The Superior Court Decision

Woodway and Save Richmond Beach filed a declaratory judgment action on September 12, 2011, seeking an order declaring that BSRE had not vested to the County's Urban Center designation and development regulations adopted in violation of SEPA. CP 1-8. In addition, Woodway and Save Richmond Beach sought an order enjoining the County from processing the development application under the existing regulations until compliance with SEPA was achieved. The parties subsequently filed cross-motions for summary judgment. Following oral argument on November 23, 2011, King County Superior Court Judge Dean S. Lum granted Woodway and Save Richmond Beach's summary judgment

motion, and denied the County and BSRE's cross-motions. CP 487-490. Judge Lum's Order stated that BSRE was not vested to the Urban Center ordinances, which had been adopted in violation of SEPA, and enjoined the County from further processing BSRE's application until the County has complied with SEPA. *Id.*

IV. ARGUMENT

A. SEPA and Vesting

Save Richmond Beach hereby adopts and incorporates by reference the SEPA and vesting arguments presented by Co-Respondent Woodway in sections D.1. through D.5. of Woodway's Response Brief.

B. Respondents' Claims are not Barred by the Land Use Petition Act

In its opening brief, BSRE claims that the trial court erred in allowing Woodway and Save Richmond Beach to ignore the "exclusive remedy" provisions of the Land Use Petition Act, RCW Ch. 36.70C (LUPA).⁵ BSRE overlooks the fact that Woodway and Save Richmond Beach did not appeal a "land use decision" subject to LUPA, but invoked the original jurisdiction of the Superior Court pursuant to the Uniform Declaratory Judgments Act, RCW Ch. 7.24, to determine as a matter of law whether a development application can vest to an ordinance adopted

⁵ Snohomish County made a similar LUPA argument before the trial court, but has abandoned this argument on appeal.

in violation of SEPA. There has been no “land use decision” to appeal – LUPA does not apply to interim decisions made in the process of reaching a “final determination.” Woodway and Save Richmond Beach properly brought their challenge to the vested status of BSRE’s application before the Superior Court in this declaratory judgment action.

- 1) **Woodway and Save Richmond Beach filed an action to determine the vesting status of BSRE’s Urban Center development applications, not an appeal of Snohomish County’s “determination” of completeness.**

Woodway and Save Richmond Beach properly brought a declaratory judgment action and request for injunctive relief before the Superior Court to determine the status of any vested rights associated with BSRE’s Urban Center development application. Respondents did not challenge the completeness of BSRE’s development application through this action; nor did they appeal any decision by the County on the merits of the application. Any such challenges would be made as part of the County’s hearing examiner process, and then appealed at the appropriate time in accordance with LUPA.

The Superior Court had jurisdiction to hear this controversy under the Uniform Declaratory Judgments Act and its equitable powers to issue an injunction, as codified in RCW Ch. 7.40. Because LUPA does not provide a remedy, there is no bar to Respondents’ declaratory judgment action. *See Berst v. Snohomish County*, 114 Wn. App. 245, 254, 57 P.3d 273 (Div.1, 2002). Respondents’ position does not contradict the

exclusive remedy provisions of LUPA. Again, LUPA is the exclusive remedy for an *appeal* of a final land use or permit decision. Respondents' Petition to the Superior Court was not an appeal of any decision. Rather, Woodway and Save Richmond Beach properly invoked the original jurisdiction of the Superior Court to issue a declaratory judgment regarding the application of the vested rights doctrine, and to grant declaratory and injunctive relief regarding the underlying ordinances' failure to comply with SEPA. The superior courts have original jurisdiction under the Uniform Declaratory Judgment Act, and LUPA applies only when a party asks the court to exercise *appellate* jurisdiction – not when a party invokes the court's *original* jurisdiction. *See Chaney v. Fetterly*, 100 Wn. App. 140, 151, 995 P.2d 1284 (Div. 2, 2000) (plaintiffs' original action for injunction and damages in boundary line dispute was not subject to LUPA because it was not seeking review of the county's approval or failure to act).

- 2) **There has been no “land use decision” for purposes of LUPA – Washington courts have held that LUPA does not apply to interim decisions made in the process of reaching a “final determination.”**

Even if Woodway and Save Richmond Beach sought to appeal the determination of completeness concerning BSRE's application, they would not have brought a LUPA action at this time because no *final* “land use decision” had been made. BSRE's argument to the contrary lacks merit. To be clear, BSRE is arguing that the County's “decision” to

simply *accept* BSRE's permit application was a *final* decision triggering LUPA review. As Judge Lum correctly pointed out at oral argument, this means there could be a dozen such "final" decisions before the application is actually approved or denied, each of which would trigger its own LUPA appeal deadline. Clearly this is not the law.

Perhaps this is why BSRE's brief places considerable emphasis on LUPA's exclusivity provisions and the timing of the determination of completeness, but quickly glosses over whether the County's "determination of completeness" is a *final* decision subject to LUPA. BSRE cannot take a preliminary, administrative step in the permit review process and ratchet it up into a final "land use decision" purely by its own assertion. Nor can it bring the vesting status of project application within LUPA's exclusive remedy provision simply by calling it a "vesting decision." This would undermine the very purpose of LUPA by allowing parties to manipulate the statute and create extraneous opportunities for judicial review at any step of the permitting process.

LUPA was enacted to establish "uniform, expedited appeal procedures and uniform criteria for reviewing [land use] decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. A "land use decision" requires "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals." RCW 36.70C.020(1). A "final determination" for LUPA review is "[o]ne

which leaves nothing open to further dispute and which sets at rest the cause of action between parties.” *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002) (receipt of grading, fill and building permits were “final decisions”). A letter or notice does not meet this definition “unless it clearly asserts a legal relationship and makes clear that it is the final point of the administrative process.” *Harrington v. Spokane Cty*, 128 Wn.App. 202, 212, 114 P.3d 1233 (Div. 3, 2005) (letter regarding compliance of proposed septic system was not a “final decision”). Such decision must be clearly cognizable as a final determination of rights, and any doubts regarding a decision’s finality will be resolved against the agency. *Id.*

BSRE argues that LUPA applies to a determination of completeness but fails to establish an essential element of LUPA review: the decision’s finality. BSRE argues only that a determination of “completeness” is an “interpretive decision” under RCW 36.70C.020, but cites no authority in support of this contention. BSRE’s only authority on this point, *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (Div. 2, 2006), *review denied*, 159 Wn.2d 1005 (2006), simply held that LUPA applies to challenges to a permit’s validity and to interpretations of zoning ordinances.⁶ LUPA does not apply to interim decisions, regardless of

⁶ The petitioners in *Asche* did not even contend that the building permit was not a final decision, so the court only considered whether the petition fell under the scope of RCW 36.79.030(b). *Id.* at Note 3.

whether they are related to permit applications or fall under the definition of “interpretive decisions.”

Washington courts have found nothing “final” about an agency’s determination of an action’s completeness. In *WCHS v. City of Lynnwood*, this Court found that LUPA did not apply to a city’s decision on whether a permit application was complete, because a decision regarding completeness was “an interim decision made in the process of, but prior to, reaching a final decision on a permit.” 120 Wn. App. 668, 679-680, 86 P.3d 1169 (Div. 1, 2004). The *WCHS* case, which is directly on point, is dispositive of BSRE’s argument that Respondents have missed a deadline to appeal under LUPA.

Furthermore, LUPA was specifically enacted to discourage “judicial review on a piecemeal basis.” *Stientjes Family Trust v. Thurston County*, 152 Wn.App. 616, 623, 217 P.3d 379 (2009) (board decision to remand to hearing examiner was not final). RCW 36.70C.060(2)(d) “prevents a party from needlessly turning to a court for judicial relief when a local authority may still provide the requested relief.” *Id.* at 623. To apply the LUPA requirements to interim decisions such as this would contravene the statute’s express purpose. The County has yet to even approve or deny BSRE’s permit application, let alone reach the extent of the administrative permit processes set forth by the County. Appellants’ LUPA argument fails as a matter of law, because any decision on the

completeness of an application, and its appurtenant vested status, is clearly an interim decision. *WCHS*, 120 Wn.App. at 679-680.

BSRE also argues that “the determination that BSRE’s development applications were vested” is a “land use decision” under LUPA, because it is an “interpretive or declaratory decision regarding the application of ordinances to a specific property.” BSRE cites the broad definition of “land use decision” in RCW 36.70C.020 (along with case law construing LUPA’s exclusive remedy provision) in support of its position, but cannot escape the fact that any “interpretive or declaratory decision” made by the County in this case was not a final decision on BSRE’s application.

Washington courts have not specifically addressed the question of whether an application’s vesting status can be addressed as part of a LUPA action. However, this Court, in dicta, has suggested that for a court to review the vested status of an application pursuant to a LUPA petition, there would have to be a “final determination by a local jurisdiction’s body or officer” regarding the application’s status. *See King County v. CPSBMHB*, 91 Wn. App.1, 30, n.66, 951 P.2d 1151 (Div. 1, 1998), *affirmed in part and reversed in part on other grounds by* 138 Wn.2d 161, 979 P.2d 374 (1999). In the present case, neither the determination of completeness nor any claims of the applications’ vested status are “final determination[s] by a local jurisdiction’s body or officer” under LUPA’s definition of “land use decision.”

- 3) **BSRE cannot claim that Respondents failed to comply with LUPA's "mandatory appeal requirements" after Snohomish County repeatedly represented that no appeal was available.**

Following BSRE's permit applications, Snohomish County published three separate Notices of Application, each indicating that "[t]here is no appeal opportunity for this application at this point in the process. Additional notice will be provided of any future appeal opportunities." CP 423-432. No further notice was given of any future appeal opportunities. The County failed to give any indication that an appeal process was available, let alone a specified deadline, procedure, or forum for appeals. Any appeal rights are required to be included in the Notice of Application under RCW 36.70B.110(2)(e). This statutory provision requires an agency to specify the availability of an appeal at the application stage, in an attempt to avoid this type of dispute.

BSRE has no basis for its claim that Respondents failed to comply with mandatory appeal requirements, because the Notice of Application specifically stated that no appeal opportunities were available to them at this time.⁷ The County also corresponded with Save Richmond Beach via email and explained that it would continue to accept public comments after the stated period had expired. CP 430-432. At no point did the

⁷ Appellants may argue that the "no appeal" language in the Notices of Application triggers the application of LUPA, because the administrative review process has ended. This argument fails because the completeness of an application is not a final decision on a permit. See Section IV.B.2), *supra*

County mention that any appeal was available. BSRE now claims that Respondents' window to appeal under LUPA closed 21 days after each "determination of completeness" (on March 4th and March 25th, 2011). Yet these dates were apparently within the public comment periods for the Notices of Application. Furthermore, the 2nd Notice of Application was issued many months after the "deadline" that BSRE claims Woodway and Save Richmond Beach missed. CP 433. The public comment period for the applications did not close until August 3, 2011. *Id.* It defies common sense to claim that Respondents should have brought an appeal regarding the application's status when the public comment period on that very issue was still open, and when the County sent a Notice of Application several months later indicating (once again) that no appeal was available.

Had Respondents attempted to bring a LUPA action, BSRE and Snohomish County almost certainly would have argued that such an action was barred by the Notice of Application, or premature because of the applications' very preliminary stage of review. BSRE cannot have it both ways - there is no question that the Notices of Application stated that no appeal was available. BSRE cannot claim that Respondents failed to timely file a LUPA appeal in order to prevent the Court from reaching the merits of Respondents' action.

BSRE now takes the position that the "no appeal" language applied only to administrative appeals, and served as a trigger for the application of LUPA, indicating that the administrative review process has ended.

But the Notice of *Application* could not have been the end of the administrative appeals process and the trigger for LUPA, because no decision had been made on the merits of the application. The Notice of Application simply indicated that the application was complete, and the completeness of a permit application is not a final decision under LUPA. *WCHS*, 120 Wn.App. at 679-680. It is irrelevant whether the County makes any further review of an application's completeness; it has yet to make any kind of decision regarding the merits of the application or the issuance of any permits. Requiring Respondents to file a LUPA appeal before a final decision on an application's merits would contravene LUPA's express purpose, and force Respondents to bring a LUPA appeal at each interim step of the process.

Furthermore, BSRE's position is belied by the very language of the Notice of Application, which states "[a]dditional notice will be provided of any future appeal opportunities." If the administrative appeals process had in fact ended, and LUPA was the only available remedy, then the Notice of Application would have indicated that there were no future administrative appeal opportunities available, as required by the GMA and the Snohomish County Code.

4) Snohomish County's own Development Code establishes that a LUPA appeal was not available to Woodway and Save Richmond Beach.

BSRE's argument that Respondents missed a deadline to appeal is not only counter to the Notice of Application itself and well-established

law under LUPA, but also Snohomish County's own Development Code. RCW 36.70B.130 and the Snohomish County Code lay out procedures establishing which permitting decisions are subject to LUPA review. The County's own permitting procedures indicate that a number of steps are required before a "final decision" on an application is reached. These steps include, among other things, an initial decision by the planning department or the hearing examiner, and an appeal to either the hearing examiner or the County Council. *See* SCC 30.71.030, SCC 30.72.025. The Snohomish County Code itself specifies at what point in the permitting process a LUPA petition would be appropriate for the permit applications at issue: after a final decision has been made on an appeal to the hearing examiner or the county council. None of the BSRE permit applications in question have even been initially approved, let alone administratively appealed.

The various individual permits requested by BSRE as part of its "Urban Center" development application call for either a "Type 1" or "Type 2" permitting process under the Snohomish County Code. *See* SCC Chapters 30.71, 30.72, 30.34A.⁸ Under SCC 30.71.030, Type 1 permits and decisions, including decisions on permits for land disturbing activity

⁸ BSRE filed a Master Permit Application for preliminary approval of a preliminary short plat, as well as a permit for Land Disturbing Activity. Both are Type 1 permits under SCC 30.71.020. BSRE also submitted a Master Permit Application for a Shoreline Management Substantial Development Permit, an Urban Center Development Permit, a Site (Development) Plan, a Land Disturbing Activity Permit, and a Commercial Building Permit. These include both Type 1 and Type 2 permits, and processes under SCC 30.71.020, SCC 30.72.020, and SCC 30.34A180.

subject to SEPA, are “administratively made by the department.” The code provides that once a completed application is filed, the department (*i.e.*, the Snohomish County Department of Planning and Development Services) provides notice of application, accepts written comments, and then issues a decision approving, approving with modifications or conditions, or denying the applications. SCC 30.71.030. The department’s decision is appealable to the hearing examiner, and “[t]he hearing examiner’s decision on appeal of a Type 1 application is the *final county decision*.” *Id.* (emphasis added). Further appeal of the hearing examiner’s decision “may be taken pursuant to a land use petition filed in superior court.” *Id.*

Similarly, SCC 30.72.025 establishes that Type 2 decisions are made by the hearing examiner based on a report from the department and information received at an open hearing. “The hearing examiner’s decision on a Type 2 application is a final decision subject to appeal to the county council...” *Id.* This is not a final decision for the purposes of LUPA, however. The county council’s decision on a Type 2 appeal is the “final decision,” except where the matter has been remanded to the hearing examiner. SCC 30.72.130. A “*final council decision* may be appealed to superior court within 21 days of issuance of the decision in accordance with chapter 36.70C RCW.” *Id.* (emphasis added).

Urban Center development applications have their own review process under SCC 30.34A.180. After an application is completed, the applicant must initiate negotiations in an attempt to reach a development agreement. SCC 30.34A.180(1)(a). A development agreement under SCC 30.34A.180 shall be subject to appeal in superior court in accordance with the provisions of the Land Use Petition Act, Chapter 36.70C RCW. SCC 30.75.300(1). If no agreement is reached, the design review board must hold a public meeting and provide written recommendations, and the Urban Center development application is then processed as a Type 2 decision under chapter SCC 30.72. SCC 30.34A.180(2).

Thus, BSRE's argument that Respondents have missed a deadline to bring a LUPA action goes against the land use permitting and review processes set forth in Snohomish County's own codes. A LUPA petition to the Superior Court would only be appropriate, if at all, after the corresponding administrative appeal has been made and decided. Pursuant to LUPA case law, the Notice of Application itself, and Snohomish County's own Development Code, Woodway and Save Richmond Beach have no available remedy under LUPA at this point in the permitting process. Accordingly, LUPA does not bar this action for declaratory and injunctive relief.

C. The Trial Court Properly Enjoined Snohomish County from Further Action in Violation of SEPA.

It is undisputed that Snohomish County failed to comply with SEPA in the process of adopting the ordinances at issue in this case. CP 145-151, 156-161. Nonetheless, the County was continuing to process BSRE's permit applications under those ordinances, without having cured the SEPA violations. The trial court agreed with Save Richmond Beach and Woodway that an injunction is the appropriate remedy for the County's continued failure to comply with SEPA, and issued an injunction preventing Snohomish County from further processing the BSRE permit applications until it had come into compliance. CP 487-490. The decision to grant or withhold an injunction falls within the sound discretion of the trial court. *Alderwood Assocs. v. Wash. Environmental Council*, 96 Wn.2d 230, 233, 635 P.2d 108 (1981). A trial court's decision to grant or deny injunctive relief will be reviewed only for abuse of discretion, which is limited to circumstances where the decision is based on untenable grounds, is manifestly unreasonable, or is arbitrary. *Wash. Fed. of State Employees v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983).

In order to obtain injunctive relief, a plaintiff must establish (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right by the one against whom the injunction is sought, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury. *See Wash. Fed. of State Employees v. State*,

99 Wn.2d 878, 665 P.2d 1337 (1983). The County's ongoing violation of SEPA with regard to the ordinances in question and BSRE's (allegedly "vested") permit applications indisputably constitutes an invasion of a clear legal right or obligation. See *Boundary Rev. Bd.*, *supra*, 122 Wn.2d at 666-7. Furthermore, the Growth Board decision conclusively establishes that Woodway and Save Richmond Beach stand to suffer actual and substantial injury if the County is allowed to proceed, due to the proposed development's impacts on traffic, safety, public services, and facilities. As the Board recognized, these impacts include the potential for "12,860 vehicle trips per day," and "[p]olice, fire, emergency, trash collection and other service vehicles all fac[ing] the limitations of the single access road." CP 150, 143.

Snohomish County and BSRE's argument that the injunction was improperly granted appears to be based solely on their interpretation of the merits of this case. In essence, they make the circular argument that because *their* legal position is correct, Save Richmond Beach and Woodway cannot prevail on the merits, and thus don't meet the requirements for an injunction. But whether or not BSRE's permit applications are ultimately considered "vested" to the ordinances in question, the County's attempt to proceed without adequate SEPA review violates not only SEPA itself (see WAC 197-11-070), but also the County's own development regulations that incorporate all of WAC Ch. 197-11. SCC 30.61.020. SEPA imposes important procedural

requirements designed to help jurisdictions carefully consider the environmental consequences of their actions. Washington courts have confirmed that an injunction is the appropriate remedy when a jurisdiction attempts to disregard SEPA review and move forward without it. *See Boundary Rev. Bd., supra*, 122 Wn.2d at 667. Because Woodway and Save Richmond Beach have met the requirements for injunctive relief, the trial court did not abuse its discretion in enjoining Snohomish County from further action in violation of SEPA. The trial court's decision to issue the injunction should be upheld.

V. CONCLUSION

This case presents the important question of whether a land use ordinance is legitimately "in effect" for purposes of vesting when it has been adopted in violation of SEPA. Much as they did during the proceedings before the Board and the trial court, Snohomish County and BSRE invite the Court to decide this case in a vacuum—without any consideration of the real-world consequences or policy ramifications of their proposed actions. The issues presented here are of critical importance not only for the residents of Save Richmond Beach and Woodway, but also for our state policies addressing environmental protection in the land use context. Save Richmond Beach respectfully asks this Court to reject Appellants' invitation to effectively eliminate

SEPA review in the land use planning context. Instead, the Court should preserve the delicate balance between the vested rights doctrine and the public interest by holding, as the trial court did, that the Regulatory Reform amendments to the GMA did not repeal longstanding SEPA protections. For the reasons set forth above, as well as those set forth in the Response Brief of Woodway, Save Richmond Beach respectfully requests that the trial court's order in this case be affirmed.

Respectfully submitted this 21st day of February, 2012.

GRAHAM & DUNN PC

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DECLARATION OF SERVICE

Karrie Fielder declares as follows:

I am a resident of the State of Washington, employed at Graham & Dunn, 2801 Alaskan Way, Suite 300, Seattle, WA 98121. I am over the age of 18 years and am not a party to this action. I certify under penalty of perjury under the laws of the State of Washington that on the below date, a true and correct copy of the Response Brief of Save Richmond Brief was served to the following via electronic mail and first class mail, postage prepaid:

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APPENDIX A
ARIEL MAP

