

SUPREME COURT
OF THE STATE OF WASHINGTON

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LOUISE LAUER and DARRELL de TEINNE,

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Petitioners,

v.

PIERCE COUNTY; and MIKE and SHIMA GARRISON,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF
PIERCE COUNTY, STATE OF WASHINGTON
Superior Court No. 08-2-06665-2

And

COURT OF APPEALS DIVISION II – 38321-7-II

SUPPLEMENTAL BRIEF OF RESPONDENTS GARRISON

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I. INTRODUCTION

The Supreme Court should affirm the Court of Appeals' decision which implicitly recognizes the well-established purpose of the Washington Vested Rights Doctrine – which is to balance the interests of private property owners with the interests of the public. *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 873-874, 872 P.2d 1090 (1994). The Garrisons submitted a building permit to Pierce County in 2004. At no time were they ever advised that their permit application was “incomplete.” Washington law clearly establishes that their application became vested in 2004.

II. STATEMENT OF THE CASE

The facts of this case are set forth in greater detail in the briefing submitted to the Court of Appeals. To aid this Court in its review, a very brief summary of significant facts is presented below.

In March 2004, Respondents (hereafter “Garrisons”) filed a building permit application to build a single family residence. CP at 35. A copy of the building permit has never been submitted into the record by Petitioners Lauer or deTienne (hereafter collectively referred to as “Lauer”). Of the entire building permit application, only one page was submitted into the record. See AR at 263. The building permit application included a site plan. AR at 263. The site plan clearly depicts a

drainage course that runs along the western portion of the property.¹ The County reviewed and approved the building permit in May 2004. RP² at 8. At no time has the County has ever questioned whether the building permit application was a complete application. AR at 35.

At the point at which the Garrisons submitted their building permit application, the County officials were very familiar with site. See, e.g. AR at 176-186.³ More importantly, the County was well aware of the drainage course's existence as the County's own biologist, Scott Sissons, had visited the site multiple times prior to the building permit application. AR at 176, 178, 180 and 184.

¹ Evidenced by the contour lines that plainly depict a narrow dip in the property leading to an obviously labeled culvert and bulkhead. AR at 263.

² Verbatim Transcript of 10/24/07 hearing before the Hearing Examiner; hereafter referred to as "Report of Proceedings" or "RP at."

³ As stated by the Court of Appeals:

Moreover, the record reflects that the County was aware of the drainage course's existence in 2004, as evidenced by the series of letters from the County to the Garrisons in 2003 regarding the Garrisons' efforts to revegetate the "drainage course." AR at 176. The County's environmental biologist, Scott Sissons, who testified at the hearing, visited the site before the Garrisons submitted the 2004 building permit application. Thus, the record shows that the County was familiar with the site and knew about the drainage course depicted on the site plan when the Garrisons submitted their 2004 building permit application. That the County then granted the permit shows that it accepted the application as complete, with the water course channel as depicted. Thus, based on the record, substantial evidence supports the hearing examiner's determination and he did not err in concluding that the Garrisons' 2004 permit application was complete and that they did not knowingly misrepresent salient features of the site and affirmatively mislead the County.

Lauer v. Pierce County, 157 Wn. App. 693, 707, 238 P.3d 539 (2010).

Three years later, on July 7, 2007, the Garrisons submitted an application for a fish and wildlife variance.⁴ AR at 50 – 71 and 233 – 234. It is the Hearing Examiner's decision on this variance application that is the subject of the underlying LUPA petition filed by Lauer.

A public hearing was held on October 24, 2007 for the purpose of determining whether the Garrisons met the criteria for a fish and wildlife variance. At that hearing a fish biologist testified on behalf of the Garrisons and provided her expert opinion as to why the proposed buffer modifications met the criteria in PCC 18E.60.050. AR at 13-16 and 38-40; RP at 12-16 and 38-40.⁵ The Hearing Examiner granted the Garrison's request for variance. AR at 28-40. Lauer claims no error in the Hearing Examiner's determination that the Garrison's proposed variance does not impact the environment as reviewed under PCC 18E.60.050. AR 26-40; and CP 1-11.⁶

⁴ A variance was required pursuant to a settlement agreement with the County as part of a LUPA petition filed in 2004 by the Garrisons because a small section of the proposed new foundation intrudes into the required 35 foot buffer. This background history (from 2004-2007) is discussed in detail in the briefing submitted to the Court of Appeals. AR at 111 and 234.

⁵At the 2007 Hearing, the County staff also testified in support of the variance. RP at 2-5. AR at 27-40 and 42-48. Neither Lauer nor any other person submitted expert testimony that challenged or contradicted the testimony of the Garrison's expert. RP at 1-43; AR 27-41.

⁶ Lauer only challenges the findings which relate to the conclusion of the Hearing

III. ARGUMENT

The following is a summary of the legal arguments which have previously been presented in more detail by the Garrisons' in their prior briefing. As with the summary of facts provided above, the Garrisons offer this summary to the assist this Court in its review of the issues presented in this case.

A. THE HEARING EXAMINER PROPERLY FOUND THAT THE GARRISON BUILDING PERMIT APPLICATION WAS VESTED TO THE 1997 PIERCE COUNTY CODE PROVISIONS.

Vesting is one of the most fundamental concepts of land use law. It provides legal protections for property owners to ensure that subsequently enacted regulations will not impair the project that he or she has initially applied to build. Vested rights provide certainty and fairness to property owners and guide government staff in applying the laws.⁷

In furtherance of protecting individual property rights, the State of Washington has long-recognized the doctrine of vested rights.⁸ Any restrictions limiting vested rights must satisfy constitutional due process requirements.⁹ "Despite the expanding power over land use exerted by all

Examiner that the building permit application was vested.

⁷ Overstreet and Kirchheim: *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 Seattle U.L.Rev. 1043, 1043-1044 (2000).

⁸ See, e.g. *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 496, 275 P.2d 899 (1954).

⁹ *West Main Associates v. City of Bellevue*, 106 Wn.2d at 47, 52, 720 P.2d 782 (1986).

levels of government, “[t]he basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit. U.S. Const. amends. 5,14.”¹⁰ A determination that an application is vested is simply “to allow developers to determine, or ‘fix,’ the rules that will govern their land development.”¹¹ The doctrine of unclean hands has no application to the facts or law of this case or any other vesting case. Washington Courts have rejected a “good faith” requirement for vesting in favor of a bright-line rule.¹² A finding that a permit application is vested is not tantamount to guaranteeing a developer the ability to build. “A vested right merely establishes the ordinances to which a building permit and subsequent development must comply.”¹³

The Garrisons submitted their building permit application in March 2004. CP at 35. As will be discussed in more detail below, the application met the legal requirements for a complete application and was deemed complete by operation of law sometime in April 2004. RCW

¹⁰ *West Main, supra*, 106 Wn.2d at 50, citing, *Norco Constr., Inc. v. King Cy.*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982).

¹¹ *Id.* at 51.

¹² *Eastlake Community Council v. Roanoke Associates, Inc.* 82 Wn.2d 475, 481, 513 P.2d 36 (1973), citing *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958) (“We prefer not to adopt a rule which forces the court to search through the moves and countermoves of parties ...”); see also, *Allenbach v. Tukwila*, 101 Wn.2d 193, 199, 676 P.2d 473 (1984) (Under the Washington vested rights doctrine, there is no need for Courts to inquire into the “good faith” of the applicant.).

¹³ *West Main, supra*, 106 Wn.2d at 53.

36.70B.070(4). Because Lauer has failed to carry the burden of establishing error, the Hearing Examiner's decision should be affirmed.¹⁴

1) Petitioners Failed to Meet the Burden of Establishing that the Garrisons' Application Was Incomplete Under RCW 19.27.095(2) and the Pierce County Code

As discussed in more detail in prior briefing, Lauer's arguments that the Garrisons' building permit was "incomplete" are misplaced. RCW 19.27.095(2) establishes the minimum content requirements for completing a building permit application. Lauer failed to offer a full copy of the Garrisons' building permit application, other than a one page site plan into the record. AR at 1-338. The Hearing Examiner could only base his decision on the evidence presented to him at the hearing.¹⁵ There is insufficient evidence to conclude that the Hearing Examiner's decision was "clearly erroneous" when Lauer failed to provide a complete copy of the document that would have been necessary for such a decision.

In their prior briefing Lauer has argued that the failure to submit a variance application along with the building permit renders the application incomplete and further argues that a project proposed in an application

¹⁴ Under RCW 36.70C.130, Lauer bears the burden of establishing that the Hearing Examiner's decision was "clearly erroneous." The "clearly erroneous" test requires the Court to affirm the decision unless the "court is left with the definite and firm conviction that a mistake has been made." *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999).

¹⁵ Compare *Davidson v. State*, 33 Wn. App. 783, 657 P.2d 810, *rev den.* 99 Wn.2d 1011 (1983) (When acting in judicial capacity, administrative board cannot base its finding and conclusions upon undisclosed documentary evidence).

cannot vest unless it is *permitted outright*. Only the simplest projects would vest under Lauer's novel theory of the law. Case law firmly establishes that a project does not have to be "outright permitted" to be vested.¹⁶

Throughout their arguments, Lauer has employed an overly strict reading of the requirements for a complete application. It is well recognized a building permit application may be complete, even if additional information is needed to continue processing it.¹⁷ In *Ogden*, this Court found an application was vested even though it did not contain all of the information required by the City Code.¹⁸ Furthermore, in *West Main*, this Court found that the Meydenbauer Place project was vested, despite the fact that the developers had "continued to revise and refine its design plans."¹⁹ Importantly, in *West Main*, the City of Bellevue adopted an ordinance which defined the elements for a complete building permit application to require the applicant to obtain conditional use permits, get

¹⁶ See, e.g., *Weyerhaeuser v. Pierce County*, 95 Wn. App 883, 976 P.2d 1279 (1999) (conditional use permit); *Beach v. Board of Adjustment of Snohomish Cy.*, 73 Wn.2d 343, 347, 438 P.2d 617 (1968) (conditional use permit); *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 207, 884 P.2d 910, 917 (1994) (variance); and *Talbot v. Gray*, 11 Wn. App. 807, 811, 525 P.2d 801 (1974), *review denied*, 85 Wn.2d 1001 (1975) (substantial development permit).

¹⁷ RCW 19.27.095(5); RCW 36.70B.070(2) ("A project permit application is complete for purposes of this section when it meets the procedural submission requirements of the local government and is sufficient to continue processing even though additional information may be required or project modifications may be undertaken subsequently.").

¹⁸ *Ogden*, *supra*, 45 Wn.2d at 493-496.

¹⁹ *West Main*, *supra*, 106 Wn.2d at 48.

site plan approval, and a series of other actions before it could vest its rights by filing a building permit application. The court invalidated the ordinance because it improperly established several hurdles for *West Main* to clear before it could vest its rights.²⁰

Lauer's unusual legal theory is an inadequate basis for reversing the Hearing Examiner's decision. The Court of Appeals properly affirmed the Hearing Examiner's decision.

2) *The Garrisons' Application Was Deemed Complete by Operation of Law.*

Even if the Garrison application was "incomplete" the application vested 28 days after it was submitted by operation of law. In 1995, the Legislature adopted Chapter 36.70B RCW, Local Project Review, which establishes the minimum requirements for processing permit applications by Counties and Cities.²¹ The language of Chapter 36.70B RCW is plain and unambiguous.²² In enacting Chapter 36.70B RCW, the Legislature

²⁰ *West Main, supra*, 106 Wn.2d at 52-53. If Lauer's reasoning was followed to its natural conclusion, then every government entity could prevent vesting by simply making all of its permits "conditional." Such a result would completely undermine the recognized vested rights established under Washington law. Any such ordinance or application procedure would be unduly oppressive upon individuals.

²¹ RCW 36.70B.010 and RCW 36.70B.020(2).

²² It is well settled that when statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself. *Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002). Courts must give effect to a statute's plain meaning and should assume the Legislature meant exactly what it said. *Id.* Courts are "obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh." *Id.* quoting *State v. Johnson*, 104 Wn.2d 179, 181, 703 P.2d 1052 (1985); *State v. Chapman*, 140 Wn.2d 436, 450, 998 P.2d 282 (2000) (citing *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997)). *Geschwind v. Flanagan*, 121

recognized that the local permit process was complicated, resulting in significant burdens and expense being imposed on persons seeking permits.²³ In passing this legislation, the Legislature intended to create a uniform and consistent process.²⁴ RCW 36.70.070 reads, in relevant part, as follows:

**36.70B.070 Project permit applications —
Determination of completeness — Notice to applicant.**

- (1) *Within twenty-eight days* after receiving a project permit application, a local government planning pursuant to RCW 36.70A.040 shall mail or provide in person a written determination to the applicant, stating either:
 - (a) That the application is complete; or
 - (b) That the application is incomplete and what is necessary to make the application complete.
- ...
- (4) (a) *An application shall be deemed complete under this section if the local government does not provide a written determination to the applicant that the application is incomplete as provided in subsection (1)(b) of this section.*²⁵

Wn.2d 833, 841, 854 P.2d 1061 (1993) (citing *State v. Pike*, 118 Wn.2d 585, 591, 826 P.2d 152 (1992)). [Emphasis Added].

²³ RCW 36.70B.010(3).

²⁴ Laws of Washington, 1995 c 347 §§ 404 and 405. While RCW 19.27.095 defines the content for a complete building permit application, RCW 36.70B.070 defines the procedure by which the local jurisdiction must process the application and issue a determination that the application is "complete" for purposes of vesting.

²⁵ RCW 36.70B.070. [Emphasis Added].

The provisions of Chapter 36.70B RCW apply to building permit applications.²⁶ Under RCW 36.70B.070 an application is "complete" when either 1) the local government issues a written determination to that effect, or 2) after twenty-eight days if no written determination is issued by the local government.²⁷ Furthermore, an application may be "complete" even if additional information is needed for review.²⁸

In this case, the Garrison application was filed in March 2004. There is nothing in the record to indicate that County staff issued a written determination that the application was not complete, in fact, all evidence is to the contrary.²⁹ Therefore, the Garrisons' permit application was deemed "complete" in April 2004 by operation of law, twenty-eight days after the application was filed. Because the application was complete, the Garrisons were vested to the regulations that were in effect as of March 2004.

B. ISSUES RAISED BEFORE THE COURT OF APPEALS WHICH WERE NOT DECIDED.

As noted in the Garrisons' Answer to Lauer's Petition for Review, in reaching its decision, Division II declined to reach three issues raised in

²⁶ RCW 36.70B.020(4) (Defining "Project permit" or "project permit application" to include building permits).

²⁷ 36.70B.070(1) and (4).

²⁸ 36.70B.070(2).

²⁹ In fact, the permit was sufficiently complete that in May 2004 the County issued a building permit. RP at 8.

the briefing by the parties.³⁰ These additional issues presented alternative grounds for denying Lauer's appeal. As this Court has accepted review, the Garrisons respectfully request that the following issues also be decided by this Court.

1) The Superior Court Erred in Failing to Strike the Claim Alleged in Paragraph Eight of the Petition for Review because the Facts Asserted in the Claim are Not Supported by Facts in the Record.

It begs reason that standing to file a LUPA petition can be based upon facts which are directly contradicted by the unchallenged findings made by the Hearing Examiner in the underlying decision. Yet, in this case this is exactly what Lauer attempts to accomplish in the effort to establish standing. RCW 36.70C.130 limits the record of review to evidence presented to the Hearing Examiner.³¹

In paragraph eight of the Petition for Review, CP at 2-3, Lauer asserts facts which they contend demonstrate that they have standing:

1. "The proposed development on the Garrison's property, as approved by the Examiner's decision, will negatively impact Respondent's property."

³⁰ *Lauer*, 157 Wn.App. at 710, FN 12. In footnote 12, Division II discusses two issues; however the issues of standing also included the question of whether certain evidence should have been stricken.

³¹ Absent certain exceptions, this Court's review under LUPA is limited to the record created at the hearing before the Hearing Examiner. RCW 36.70C.120; *see also, Isla Verde Intern. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002); *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 162, 43 P.3d 1250 (2002). Lacking prior consent by the Court, it is improper for the parties to present facts that are not part of the record. RCW 36.70C.120(5).

2. "Impacts include, but are not limited to, impacts related to development near and alteration of an existing stream that crosses Garrison's property, including erosion caused to altered surface water flow and increased turbidity in Henderson Bay [sic]."³²

CP at 2-3, 16-19 and 42. Lauer's assertions are in direct contraction to the only expert testimony presented to the Hearing Examiner by the County's Biologist, Scott Sisson, and the Garrisons' Biologist, Kim Schaumburg. AR at 30-31, and RP at 4-6, 12-16, and 38-40. It is this testimony by Sisson and Schaumburg that supported the Hearing Examiner's decision to grant the variance, and which was *never* challenged by Lauer – rendering these findings of fact verities on appeal. CP 1-32, and RAP 10.3. At the initial hearing, the Garrisons moved to strike these unsupported facts. The Superior Court erred in denying the Garrisons' motion to strike.

Simply put, the only facts relied upon by Lauer to establish standing are facts which violate the requirements of RCW 36.70C.120 and RAP 10.3. To allow a LUPA Petitioner to establish standing in such a manner renders the purpose behind such rules virtually meaningless.

³² Nor is there any evidence that either Petitioner Lauer or Petitioner deTienne were qualified or had the expertise to "testify" that these alleged impacts would occur. ER 701-703.

2) *The Superior Court Erred in Failing to Dismiss the Petition for Review because Petitioners Failed to Establish Standing Under RCW 36.70C.060(2).*

Assuming for the sake of argument that the facts presented in the Petition for Review were actually supported by the record, the motion to dismiss should have been granted because the facts asserted by Lauer were insufficient to establish standing. There are four elements of standing under RCW 36.70C.060(2) – each of which *must* be established by Lauer.

a. Petitioners Do Not Have Standing Because They are Not Prejudiced or Likely to be Prejudiced by the Decision.

To have standing under LUPA, a petitioner must establish an “injury in fact” and *more than* just “the simple and abstract interest of the *general public...*”³³ As discussed above, Lauer asserts prejudice because: 1) they own adjacent properties, and 2) alteration to the stream on the Garrisons’ property will result in “altered surface water flow and increased turbidity in Henderson Bay.” Putting aside the fact that these assertions lack any factual support as discussed above; Lauer has never explained how these impacts *result from* the alleged error – specifically the application of the 1997 Critical Areas regulations rather than the 2005

³³ *Nykreim, supra*, 146 Wn.2d at 934-935. [Emphasis Added].

regulations.³⁴

Lauer failed to establish that the Hearing Examiner's ruling prejudiced them in some concrete and particular manner. Accordingly, Lauer does not have standing and the Petition for Review should have been dismissed.

b. Petitioners Do Not Have Standing Because Their Interests are Not Among Those that the Local Jurisdiction Was Required to Consider.

As to the second element of standing, Lauer must establish their interests are within the "zone of interests" that the County was required to consider when it determined the Garrisons' building permit was complete.³⁵ The determination that an application is "complete" does not involve any consideration of any person's interests other than the applicant. Either County staff compares the submittal to a pre-printed checklist and make a determination, or it occurs automatically if the government agency fails to send written notice that the application is not complete. Lauer failed to establish a necessary element of standing and

³⁴ In fact, the stream that is affected by the Hearing Examiner's decision lies *solely* on the Garrison property and empties into the Bay. CP at 16-17. The surface water flow will not be altered except in compliance with the conditions that attached to the variance, the terms of which Petitioners chose not to appeal. CP at 1-11, 16-17, and 22-14.

³⁵ *Nykreim, supra*, 146 Wn.2d at 937. The question is not whether the agency considered Petitioners' "interests" but whether it was *required* to do so. *Asche v. Bloomquist*, 132 Wn. App. 784, 794, 133 P.3d 475 (2006), *review denied*, 153 P.3d 195 (2007). The test is whether the underlying ordinance or regulation "was intended to protect Petitioners' interest. *Nykreim, supra*, 146 Wn.2d at 937; and *Asche, supra*, 132 Wn. App. at 794-795.

therefore their Petition should have been dismissed.

c. Petitioners Do Not Have Standing Because the Requested Relief will Not Eliminate or Redress the Prejudice Asserted by Petitioners.

As discussed above, Lauer has failed to establish how they are prejudiced by the Hearing Examiner's decision that the application was vested, nor have they demonstrated how their alleged "injury" would be redressed by application of the 2005 County regulations. Accordingly, the Petition for Review should have been dismissed.

d. Petitioners Do Not Have Standing Because Petitioners Have Failed to Exhaust Their Administrative Remedies.

Only "final" decisions may be appealed under the provisions of LUPA.³⁶ In this case, Lauer claims are a thinly disguised collateral attack on a ministerial decision that was rendered by staff in 2004. The Petition for Review's statement of errors is focused entirely on the underlying determination that the Garrison building permit application was complete.

³⁶ RCW 36.70C.060(d); RCW 36.70C.020; and RCW 36.70C.030. A land use decision is not "final" within the meaning of LUPA nor does a petitioner have standing unless the petitioner has "exhausted his or her administrative remedies to the extent required by law." RCW 36.70C.060(2)(d); *Ward v. Board of County Comm'rs*, 86 Wn. App. 266, 272, 936 P.2d 42 (1997); and *West Coast, Inc. v. Snohomish County*, 104 Wn. App. 735, 742, 16 P.3d 30 (2000) (stating that "[j]udicial review of a land use decision may not be obtained under RCW 36.70C.060(2)(d) of LUPA unless all the administrative remedies have been exhausted"). Exhaustion of administrative remedies is a prerequisite to obtaining a decision that qualifies as a decision reviewable under LUPA." *Nykreim, supra*, 146 Wn.2d at 938, quoting, *Ward, supra*, 86 Wn. App. at 271 (citing *South*

CP at 9-10. Administrative appeals of these types of decisions are to be heard at a hearing by the hearing examiner within fourteen (14) days of the decision.³⁷ PCC 1.22.090. Had Lauer filed an appeal of that decision (assuming standing could be established), the Hearing Examiner would have conducted a hearing affording appropriate due process to the Garrisons and giving all parties an opportunity to present evidence and legal argument. PCC 1.22.090. Once the hearing examiner had reviewed the matter, the decision could have been appealed to Superior Court subject to the requirements of LUPA. RCW 36.70C.040.

Lauer, however, *did not appeal* this action as required by PCC 1.22.090. AR at 1-338, RP at 1-43. Lauer cannot now resurrect an appeal of this 2004 decision by raising it as an improper collateral attack on an *issue that was not properly before* the Hearing Examiner when he reviewed the Garrisons' request for a variance in 2007.³⁸

Hollywood Hills Citizens v. King County, 101 Wn.2d 68, 73, 677 P.2d 114 (1984)), *see also, Stanzel v. City of Puyallup*, 150 Wn. App. 835, 846, 209 P.3d 534 (2009).

³⁷ *See, e.g., Ward, supra*, 86 Wn. App. at 273 (Wards filed appeal to County Commissioners one day after deadline set by County Code, deemed failure to timely appeal).

³⁸ *Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology*, 162 Wn.2d 825, 844, 175 P.3d 1050 (2008) *citing, Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410, 120 P.3d 56 (2005) (Footnote 7 - Collateral attack of permit extensions cannot be made in petition for revocation when 21-day appeal period was not followed); *Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wn.2d 440, 463, 54 P.3d 1194 (2002) (Failure to timely appeal underlying land use decision bars DOE from a collateral challenge of that decision in a shoreline appeal); and *See, e.g., Ward, supra*, 86 Wn. App. at 273 (Wards filed appeal to County Commissioners one day after deadline set by County Code, deemed failure to timely appeal). Failure to timely file an appeal renders all land use decisions

Because Lauer failed to timely appeal the administrative determination that the application was complete, they cannot do so now. Accordingly, the Superior Court erred in failing to dismiss the LUPA Petition.

C. PETITIONERS WERE EQUITABLY ESTOPPED FROM ASSERTING THAT RESPONDENTS' APPLICATION IS NOT VESTED.

As discussed in more detail in the briefing to the Court of Appeals, the County and the Garrisons had reached a settlement agreement on a prior LUPA action which specifically contemplated that the Garrisons were vested to the 1997 Critical Areas Ordinance. AR at 335. Lauer chose not to participate in the previous LUPA action, and should not now be allowed to undermine this validly executed settlement agreement. The Court should affirm the Hearing Examiner's decision.

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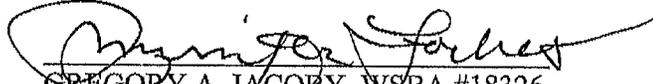
legal and binding, even those that might otherwise be "invalid" or "illegal." *Nykreim, supra*, 146 Wn.2d at 932 (Failure to timely file an appeal renders all land use decisions legal and binding, even those that might otherwise be invalid or illegal.); see also

IV. CONCLUSION

For the above-stated reasons, the Garrisons respectfully request that the Court affirm the Court of Appeals decision.

Dated this 4th day of April 2011

Respectfully submitted,



GREGORY A. JACOBY, WSBA #18326

JENNIFER A. FORBES, WSBA #26043

Attorneys for Respondents Garrison

Habitat Watch, supra, 155 Wn.2d at 407.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2011, a true and correct copy of the foregoing document was served upon counsel of record, via the methods noted below, properly addressed as follows:

Counsel for Petitioners Lauer and deTeinne:

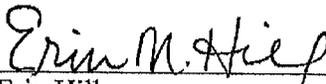
Margaret Archer	<u> X </u>	Via Email (stipulated)
Gordon Thomas Honeywell	<u> X </u>	U.S. Mail (first class, postage prepaid)
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of April 2011.



Erin Hill