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SUPREME COURT
OF THE STATE OF WASHINGTON

CEDAR RIVER WATER AND SEWER DISTRICT and
SOOS CREEK WATER AND SEWER DISTRICT,

Appellants,

v.

KING COUNTY, *et al.*,

Respondents.

BRIEF OF RESPONDENT SNOHOMISH COUNTY

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ORIGINAL

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I. INTRODUCTION

This is a case about a regional sewage treatment plant known as “Brightwater” which was built by King County in Snohomish County. The planning process began over a decade ago, and litigation plagued the project until a 2005 Settlement Agreement between Snohomish and King Counties resolved the disputes over the siting and regulation of Brightwater and allowed the plant to be built. In 2008, Cedar River Water and Sewer District and Soos Creek Water and Sewer District (“the Districts”) sued King County, Snohomish County, 17 cities, and 14 other sewer districts in the Puget Sound region in Pierce County Superior Court. Among other claims, the Districts challenge the legality of a Settlement Agreement between King and Snohomish County, to fund reasonable mitigation for the effects of the siting, construction and ongoing operation of the Brightwater sewage treatment plant on the affected communities.

The trial court dismissed the Districts’ claims challenging the mitigation under the Settlement Agreement on summary judgment motions. The trial court first ruled that the Districts’ claims were an untimely challenge to a land use decision and violated the 21-day deadline under the Land Use Petition Act, chapter 36.70C RCW. After allowing the Districts to take additional discovery regarding the mitigation under the Settlement Agreement, the trial court ruled that a sufficient nexus

existed between the mitigation measures agreed to by Snohomish County and King County and the Brightwater project. The Court should affirm the trial court's well-reasoned decisions.

II. STATEMENT OF THE CASE

Brightwater is a regional sewage treatment plant owned, built and operated by King County but located in unincorporated Snohomish County.¹ Brightwater was designed to serve the sewage treatment needs of residents of King County and southern Snohomish County for the next 50 years and process 54 million gallons of sewage per day, most of which is expected to come from King County. The construction of Brightwater, and its related tunnels and pipes, was completed in late 2011, and the plant is currently operating, but King County's planning process for this essential public facility began a decade ago.

A. Essential Public Facilities.

The Growth Management Act, chapter 36.70A RCW ("GMA"), gives special importance to facilities like Brightwater – facilities that constitute necessary public infrastructure but that most people do not want constructed near their homes. Such facilities are known as "essential public facilities" or "EPFs."² Other examples of EPFs that are difficult to

¹ CP 5407, 5412.

² RCW 36.70A.200(1); WAC 365-196-200(8); WAC 365-196-550.

site are airports, jails and prisons, solid waste handling facilities, group homes, and secure community transition facilities.³ The GMA requires local jurisdictions to allow the siting and construction of such facilities within their boundaries.⁴ However, the GMA authorizes jurisdictions to impose reasonable “conditions” or “requirements” on the construction of EPFs “to mitigate the impacts of the project.”⁵ Regulations adopted to implement GMA provisions regarding EPFs instruct permitting jurisdictions to “identify what conditions are necessary to mitigate the impacts associated with the essential public facility,” and to “consider provisions for amenities or incentives for neighborhoods in which facilities are sited.”⁶ The conditions imposed may not render it impossible or impracticable to site, construct or operate the essential public facility.⁷

B. Litigation Regarding Brightwater.

King County’s regional planning efforts for the location of a new regional treatment plant in northern King County or southern Snohomish County date back to 1997. In early 2003, King County selected several potential sites for Brightwater, all of which were within Snohomish

³ Id.

⁴ RCW 36.70A.200(5); WAC 365-196-550.

⁵ WAC 365-196-550(6)(a)&(c).

⁶ WAC 365-196-550(6)(d)&(e).

⁷ WAC 365-196-550(6)(d).

County. At the time, Snohomish County had not yet adopted any development regulations pertaining to EPFs.⁸ Many citizens of Snohomish County were opposed to the construction of a new sewer treatment plant in their communities.

On February 19, 2003, the Snohomish County Council adopted Amended Ordinance No. 03-006, (“EPF Ordinance I”) setting standards for siting and permitting EPFs such as Brightwater.⁹ On April 16, 2003, in response King County filed a Petition for Review and Declaratory Ruling with the Central Puget Sound Growth Management Hearings Board (“Board”), challenging the adoption of EPF Ordinance I.¹⁰ (“King County I”). On October 13, 2003, the Board determined that EPF Ordinance I did not comply with the GMA because it allowed for too many iterative loops of review, lacked predictability, and allowed the denial of a Conditional Use Permit (“CUP”) for an EPF.¹¹ This result meant Snohomish County could not effectively regulate the siting and permitting of an EPF within its borders.¹² Snohomish County appealed and the case was transferred to Thurston County.

On October 22, 2003, the Snohomish County Council adopted

⁸ CP 110.

⁹ CP 2895-2901.

¹⁰ CP 2750-2751 at ¶¶ 10-11; CP 4100 at ¶ 3.

¹¹ CP 4106-4122.

¹² CP 2751.

Emergency Ordinance No. 03-145, imposing a moratorium on accepting applications for permits for certain wastewater treatment facilities and wastewater conveyance systems to preserve the status quo while the County appealed the Board's decision to Court.¹³ Without it, King County could have filed a permit application for Brightwater and vested to the regulations in effect at that time.¹⁴ King County appealed this ordinance to the Board, challenging the County's ability to enact the moratorium to prevent the siting of an EPF. ("King County II").¹⁵

Meanwhile, on December 1, 2003, King County formally announced the completion of its extensive siting process.¹⁶ On December 29, 2003, Snohomish County appealed the Board's decision on EPF Ordinance I ("King County I").¹⁷

On February 11, 2004, the Snohomish County Council adopted Emergency Ordinance No. 04-019 ("EPF Ordinance II"), establishing new regulations for siting and permitting EPFs, and Emergency Ordinance No. 04-020 repealing sections of Emergency Ordinance No.

¹³ CP 2903-2919.

¹⁴ CP 2751-2752.

¹⁵ CP 4100.

¹⁶ CP 2921-2926.

¹⁷ CP 2752-2753 at ¶ 15.

03-145.¹⁸ As a result, King County II was dismissed. However, King County was unhappy with EPF Ordinance II and challenged it by filing a new petition for review with the Board. (“King County III”).¹⁹ The Board again ruled against Snohomish County and struck down most of the ordinance.²⁰

On March 14, 2005, Thurston County Superior Court Judge Paula Casey heard oral argument and announced her ruling on matters argued in combined cases King County I and II.²¹ The ruling determined that, although Snohomish County could not block the siting of Brightwater, “[t]he County does have a role, however, and the County may impose reasonable conditions on the essential public facilities [EPF] and may require reasonable mitigation in their development.”²² On May 23, 2005, Judge Casey issued her written ruling, establishing Snohomish County could continue to regulate Brightwater, which might cause delay.²³ Simultaneously, Snohomish County was getting criticism in the press for being an obstructionist, and Sno-King Environmental Alliance (“SKEA”), a citizen’s group, was gaining momentum in their

¹⁸ CP 2928-2956.

¹⁹ CP 4100-4101 at ¶ 7; CP 2753.

²⁰ CP 2753 -2754; CP 2973-2979.

²¹ CP 2958-2971.

²² CP 2960.

²³ CP 2973-2979.

claims that Brightwater was not safe because it was sited on an earthquake fault.²⁴ As litigation continued, Snohomish County adopted two more emergency ordinances which were appealed in May, 2005.²⁵

In July of 2005, King County issued a Final Supplemental Environmental Impact Statement (“FSEIS”) for Brightwater.²⁶ Snohomish County filed an appeal under the State Environmental Policy Act (“SEPA”) with the King County Hearing Examiner challenging the adequacy of the FSEIS. Among other things, Snohomish County contended the EIS documents failed to identify all of the impacts the Brightwater project would have on the surrounding community and failed to propose adequate mitigation measures for those impacts.²⁷

C. Settlement Negotiations.

By the summer of 2005, the two Counties were engaged in no fewer than seven distinct lawsuits.²⁸ Brightwater had been brought to a halt by litigation, and the counties were exchanging invective-filled letters, which were being reported in the press. The State of Washington was

²⁴ CP 2754-2756 at ¶¶ 20-21.

²⁵ CP 2981-2983; CP 2985-2988.

²⁶ CP 5414 at ¶ 30; CP 5468 (CD containing FSEIS). Cedar River Utility District and Soos Creek Water and Sewer District were on the King County Brightwater EIS Distribution List to receive the EIS documents and/or notices of their availability.

²⁷ CP 3018-3056; The SEPA appeal was withdrawn by Snohomish County on January 6, 2006, after the parties executed the Settlement and Development Agreements. See also CP 5403-6725, Christie True’s declaration regarding these events.

²⁸ See CP 2747-2757 for background to the litigation.

threatening to announce a building moratorium if more sewage treatment capacity was not forthcoming, which would have been an untenable situation for both King and Snohomish Counties; “[a] sewer connection moratorium would have significant economic consequences in King and Snohomish Counties.”²⁹

On July 25, 2005, the first of several settlement conferences was held, and attended by King County Executive Ron Sims and Snohomish County Council Chair Gary Nelson and Councilman Dave Gossett. The posture of the litigation and Judge Casey’s decision had created a critical situation. The plant was going to end up in Snohomish County at the Brightwater site, a loss for Snohomish County, but the plant was going to be regulated by Snohomish County and possibly delayed, a loss for King County.³⁰ Two of the most hotly contested issues were (i) the types and extent of impacts Brightwater would have on the community in which it was constructed, and (ii) the types and extent of mitigation measures that would adequately compensate for those impacts. The parties acknowledged the need for a new regional wastewater treatment plant, and were mindful of the GMA’s mandate that permitting jurisdictions must allow EPFs to be sited and constructed, and that the

²⁹ CP 272-273.

³⁰ CP 2990-3015; CP 2754-2760 at ¶¶ 21-31.

GMA authorized permitting jurisdictions to impose conditions on EPFs to mitigate the negative impacts of such facilities.³¹

Settlement negotiations spanned months and involved significant public input, including public hearings, informal outreach meetings, and solicitation of comments.³² The negotiations were the subject of numerous newspaper articles, editorials, and letters to the editor.³³

Snohomish County was tasked with compiling a list of potential mitigation opportunities to mitigate the impact of Brightwater on the surrounding community.³⁴ The search for potential projects was exhaustive and the list of all potential mitigation opportunities contemplated more than 85 projects and totaled over \$800,000,000.³⁵ Citizens played no small part in the discussions about mitigation; the community complaints about Brightwater spanned a broad geographical region and seemingly every citizen had an opinion on mitigation.³⁶ Both Counties took community comments into consideration.³⁷ Both King County and Snohomish County investigated each mitigation project

³¹ CP 2754-2760; CP 2990-3015.

³² CP 2760 at ¶ 31. The Districts did not participate in this public process in any manner. See, e.g., CP 4402, 4422-4423, 4505-06, 4529-31, 4536-38.

³³ CP 2754-2755.

³⁴ For a detailed overview of this process, see CP 3125-3135.

³⁵ CP 3127-3128; at ¶ 21; CP 3180-3190.

³⁶ CP 3133-3135.

³⁷ Id.

proposed, rejecting projects when the “nexus” between the mitigation opportunity and Brightwater was too remote.³⁸

After months of vetting potential projects, environmental review, community meetings, and site visits, King County and Snohomish County finally agreed on the list of 17 projects, set forth in Exhibit B to the Settlement Agreement.³⁹ It was a package both parties agreed would best mitigate negative impacts to the community most affected by the Brightwater siting. Prior to reaching agreement on those projects, Snohomish County and King County engaged in an exhaustive analysis of the potential impacts of Brightwater and potential mitigation measures for those impacts.⁴⁰ The parties performed the individualized, fact-specific analysis required by RCW 82.02.020 and through that process identified mitigation measures reasonably necessary as a direct result of Brightwater.⁴¹ While the Districts may disagree with the impacts identified by the Counties or question the wisdom of the mitigation measures to which the parties agreed, there is no dispute that the Settlement Agreement was specifically tailored to the facts and circumstances presented by Brightwater, as required by RCW 82.02.020.

³⁸ CP 3131 at ¶ 32.

³⁹ For a complete description of the mitigation projects selected, *see* CP 3135-60.

⁴⁰ CP 2729-2746; CP 2765-2811; CP 3119-3262; CP 3263-4020.

⁴¹ *Id.*

D. The Agreement.

After lengthy negotiations, the settlement discussions ultimately resulted in the Settlement Agreement and the Development Agreement, each of which is expressly incorporated into the other by reference (together, the “Agreement”).⁴² The Agreement resolved the four outstanding lawsuits between the parties, established the process and conditions pursuant to which King County’s land use application to construct Brightwater would be reviewed and approved, and established that King County would pay approximately \$70 million (the “Mitigation Payment”) to Snohomish County to fund mitigation projects (“community mitigation”) intended to offset the negative impacts Brightwater would have on the community in which it was constructed.⁴³ Exhibit B to the Settlement Agreement explicitly described the mitigation measures to be funded by the Mitigation Payment.⁴⁴

The Settlement Agreement between King County and Snohomish County also contains the following language:

No Third Party Beneficiary. Nothing in this Agreement shall be construed to create any rights in or duties to any third party, nor any liability to or standard of care with

⁴² CP 146-177.

⁴³ The \$70 million was composed of \$67,050,000 in cash, and \$2,950,000 for the construction of the Community Resource Center to be built as part of Brightwater. CP 147-148.

⁴⁴ CP 176-177.

reference to any third party. This Agreement shall not confer any right, or remedy upon any person other than the parties hereto...⁴⁵

E. Legislative Action Approving the Agreement.

On October 17, 2005, after a properly noticed public hearing,⁴⁶ the Snohomish County Council adopted Motion No. 05-451, conditionally approving the Settlement Agreement and authorizing the Snohomish County Executive to sign it.⁴⁷ The condition was that approval of the Settlement Agreement would not become effective unless and until the Snohomish County Council adopted an ordinance approving the Development Agreement, in the form attached to the Settlement Agreement.⁴⁸

On December 7, 2005, after another properly noticed public hearing,⁴⁹ the Snohomish County Council adopted Amended Ordinance No. 05-127, approving the Development Agreement and authorizing the Snohomish County Executive to sign it. The adoption of Amended Ordinance No. 05-127 satisfied the condition contained in Motion No. 05-

⁴⁵ CP 151 at § 15.

⁴⁶ Note, neither of the Districts participated in the public hearing. See, e.g., CP 4402, 4422-4423, 4505-06, 4529-31, 4536-38.

⁴⁷ CP 182-184; 186.

⁴⁸ Id.

⁴⁹ The Districts did not participate in this public hearing either.

451, making the Settlement Agreement effective.⁵⁰ While RCW 36.32.330 authorizes any interested person to appeal legislative action taken by a county and RCW 36.70B.200 allows an appeal of a decision on a development agreement to be brought under LUPA, no one appealed Motion No. 05-451 or Amended Ordinance No. 05-127.

The Development Agreement was fully executed on December 15, 2005, and recorded under Snohomish County Auditor's File No. 200601260381. The Settlement Agreement was fully executed on December 20, 2005.⁵¹ No one appealed the execution of either Agreement.

F. The Binding Site Plan.

In early 2006, King County submitted to Snohomish County's Department of Planning and Development Services ("PDS") an application for approval of a binding site plan for Brightwater (the "BSP Application"). As provided by the Agreement, the BSP Application was reviewed by PDS, then scheduled for public hearing before an independent Hearing Examiner.⁵² On April 4, 2006, the independent Hearing Examiner presided over the public hearing, admitted evidence into the record, and took testimony for the purpose of determining whether

⁵⁰ CP 188-192.

⁵¹ CP 146-177.

⁵² CP 154-157.

the proposed BSP was consistent with the Development Agreement.⁵³ Over the course of the public proceeding, the Examiner considered both oral and written testimony, including written comments from the public, SKEA and the City of Woodinville. On May 5, 2006, the Examiner issued a Report and Decision approving the BSP for Brightwater subject to conditions.⁵⁴ The Hearing Examiner's decision expressly incorporated approval of the Mitigation Payment required by the Agreement as a condition of the BSP.⁵⁵ The Examiner found in relevant part that:

In addition to the significant environmental mitigation provided on site, the applicant will provide to Snohomish County \$30,400,000 for recreation and parks, \$25,850,000 in public safety improvements, \$10,800,00 in habitat mitigation, and a \$2,950,000 community resource center located on the site (Exhibit "110"). [Totaling \$70 million.]⁵⁶

With respect to traffic impacts, the Examiner determined:

... the applicant need not provide traffic impact fees. However, as mitigation for overall plant impacts, the applicant will provide \$25,850,000 in public safety improvements. (Exhibit "110" and "111")[,] The applicant and Snohomish County have negotiated mitigation measures for construction traffic which provides hours of construction shifts so that workers arrive and depart from the site during non-peak periods (Exhibit "70"). Such minimizes the potential for traffic conflicts.⁵⁷

⁵³ CP 2857-2863.

⁵⁴ CP 2857-2893.

⁵⁵ Id.

⁵⁶ CP 2871 at ¶ 12.

⁵⁷ CP 2873 at ¶ 19.

The BSP approval was also subject to the following conditions:

The site plans marked Exhibits 40A through 40H shall be the official building site plans for this project. Revisions of the binding site plans [are] regulated by the Brightwater Settlement Agreement (Exhibit 58).⁵⁸

On May 28, 2006, the City of Woodinville filed an appeal under the Land Use Petition Act, chapter 36.70C RCW (“LUPA”) challenging the Hearing Examiner’s Report and Decision approving the BSP.⁵⁹ The Snohomish County Superior Court determined, and the City of Woodinville acknowledged, that it was really a challenge to the provisions and lawfulness of the Development Agreement and not the BSP. The Court decided the appeal of the Development Agreement was untimely and dismissed the lawsuit.⁶⁰ Interestingly, the Petition was denied as untimely when filed just 23 days after the independent Hearing Examiner issued his Report and Decision approving the BSP. This is an example of how strictly the 21-day deadline is enforced for reasons explained herein.⁶¹

⁵⁸ CP 2889 at § A.

⁵⁹ CP 115.

⁶⁰ CP 194-210.

⁶¹ See § III B, *infra*.

G. Construction Commenced.

After the LUPA appeal period for the BSP decision expired, King County began pursuing the necessary permits to construct Brightwater. Snohomish County issued 43 permits and approvals for the Brightwater project, 6 of which were for mitigation projects adjacent to the treatment site.⁶² King County made the Mitigation Payment to Snohomish County in installments. Snohomish County began using those funds to perform the mitigation projects identified in the Agreement.

H. This Lawsuit.

Years passed and, on August 6, 2008, the Districts filed this lawsuit. The Districts sought injunctive, declaratory, and monetary relief, including an order declaring the Mitigation Payment illegal, and attorneys' fees under the common fund doctrine.⁶³

Snohomish County and King County moved for partial summary judgment arguing: (i) the Districts' challenges to the Agreement were barred by LUPA's statute of limitations; and (ii) the Districts lacked standing⁶⁴ to challenge the Settlement Agreement. The Honorable

⁶² CP 126.

⁶³ Although now central to their argument, the Districts devoted only one paragraph to the claim that these payments were impact fees under RCW 82.02.020. CP 16 at ¶ 44. CP 29 at ¶ 12. The Districts' law firm received a 7-figure fee award in Okeson v. City of Seattle, 150 Wn.2d 540, 78 P.3d. 1279 (2003). Judge Felnagle has reserved ruling on the Districts common fund award request here. CP 18682 at ¶ 107.

⁶⁴ This argument was made by Snohomish County.

Thomas J. Felnagle of the Pierce County Superior Court (“Judge Felnagle”) granted partial summary judgment to Snohomish County and King County based on the first legal theory – the challenges to the Settlement Agreement and Development Agreement which together constituted a development agreement were time-barred under LUPA.⁶⁵ The court then allowed the Districts to conduct additional discovery regarding the mitigation projects in Exhibit B to the Settlement Agreement and their “nexus” to Brightwater.⁶⁶

The trial court held on summary judgment that the community mitigation provided under the Settlement Agreement had “the necessary nexus” with the impacts of Brightwater on the community.⁶⁷

The Districts tried the remainder of their claims against King County and lost on the vast majority of those claims. Shortly after Judge Felnagle issued his final, appealable Order and Judgment, King County completed construction of Brightwater. The sewage treatment plant has been operating since August of 2011. On July 15, 2011, the Districts filed this appeal.⁶⁸

⁶⁵ CP 18708-18711. However, this Court could affirm Judge Felnagle’s grant of summary judgment on either of the grounds originally urged in Snohomish County’s motion.

⁶⁶ RP 106-107; 115-123.

⁶⁷ RP 236 II.11-12. See also CP 4092-4098; CP 4962-5402; CP 5403-6725.

⁶⁸ CP 18695-18761.

III. ARGUMENT⁶⁹

A. Standard of Review.

The standard of review for this portion of the appeal is de novo. An appellate court may sustain a trial court's decision on any theory established by the pleadings and supported by the record, even if the trial court did not consider it.⁷⁰

In this case, the Districts challenge the validity of the Agreement approved by legislative action of the Snohomish County Council. "Where a court is asked to review a legislative decision, the applicable standard of review is the 'arbitrary and capricious' test."⁷¹ "An act is arbitrary or capricious if it is a willful and unreasonable action, without consideration and regard for facts or circumstances."⁷² "Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration."⁷³

B. Judge Felnagle Properly Dismissed the Districts' Challenges to the Community Mitigation Payments Under the Agreement as Time-Barred Under LUPA.

Under contract law, the Settlement Agreement and the

⁶⁹ Snohomish County Incorporates by reference King County's Brief.

⁷⁰ Burnet v. Spokane Ambulance, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997).

⁷¹ Teter v. Clark County, 104 Wn.2d 227, 234-35, 704 P.2d 1171 (1985).

⁷² Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 769-70, 49 P.3d 867 (2002) (internal quotation marks and citations omitted).

⁷³ Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) (citation omitted).

Development Agreement comprise a single integrated contract.⁷⁴ Because the purpose and function of the Agreement was to resolve the parties' disputes regarding Brightwater and establish the process by which Snohomish County would review and approve development permits for Brightwater, the Agreement constituted a "development agreement" as that term is used in RCW 36.70B.170. As a "development agreement" relating to a project permit, the Agreement constituted a final land use decision under LUPA and was subject to the 21-day statute of limitations. Because the Districts filed their lawsuit more than 2 ½ years after LUPA's statute of limitations expired, Judge Felnagle properly held the Districts' claims regarding the Agreement failed as a matter of law.

1. The Settlement Agreement and Development Agreement is a Single Integrated Contract.

In general, "[i]nstruments which are part of the same transaction, relate to the same subject matter and are executed at the same time should be read and construed together as one contract."⁷⁵ This is especially true

⁷⁴ RP 49 II. 23-25 ("The attempt to divorce the settlement agreement from the development agreement is strained and not persuasive to the Court.")

⁷⁵ Turner v. Wexler, 14 Wn. App. 143, 146, 538 P.2d 877 (1975), citing Levinson v. Linderman, 51 Wn.2d 855, 859, 322 P.2d 863 (1958) ("[u]nder such circumstances, although the documents are physically separate, they constitute a single contract"); Kruger v. Horton, 106 Wn.2d 738, 742, 725 P.2d 417 (1986) ("it is a well-settled principle that written instruments contemporaneously executed as part of the same transaction will be considered and construed as one transaction") (citations omitted); Matter of Estates of Wahl, 99 Wn.2d 828, 831, 664 P.2d 1250 (1983); Kenney v. Read, 100 Wn. App. 467, 474, 997 P.2d 455 (2000).

where the documents expressly reference one another.⁷⁶ “It is well established that if the parties to a contract clearly and unequivocally incorporate by reference into their contract the terms of some other document, those terms become part of the contract.”⁷⁷ This rule applies to settlement agreements resolving litigation.⁷⁸

The two contracts here meet the criteria described above. Thus, Judge Felnagle properly found “the attempt to divorce the Settlement Agreement from the Development Agreement is strained and not persuasive to the Court.”⁷⁹ The Settlement Agreement and the Development Agreement were negotiated simultaneously, and executed within days of each other. The unified purpose of the Agreement was to resolve litigation regarding King County’s proposed construction of Brightwater and establish the procedure and conditions pursuant to which land use and development permits for the facility would be issued.⁸⁰ The

⁷⁶ Satomi Owners Ass’n v. Satomi, LLC, 167 Wn.2d 781, 801, 225 P.3d 213 (2009) (“[i]f the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of the contract”); Green River Valley Found., Inc. v. Foster, 78 Wn.2d 245, 248, 473 P.2d 844 (1970) (“The agreement consists of two documents, the printed earnest money form and the promissory note, each of which references the other. These should be read together.”).

⁷⁷ Santos v. Sinclair, 76 Wn. App. 320, 325, 884 P.2d 941 (1994), citing Brown v. Poston, 44 Wn.2d 717, 719, 269 P.2d 967 (1954), and citing Washington Trust Bank v. Circle K Corp., 15 Wn. App. 89, 93, 546 P.2d 1249 (1976).

⁷⁸ 15A C.J.S. *Compromise & Settlement* § 30 (2011).

⁷⁹ See § II D-E at pp. 10-13, *Infra*, and RP 49, ll. 23-25.

⁸⁰ CP 147 § 4; CP 154 (Preamble at p. 1).

Development Agreement is Exhibit A to the Settlement Agreement and is expressly incorporated into the Settlement Agreement by reference.⁸¹ Similarly, the Settlement Agreement is expressly incorporated by reference into the Development Agreement. The approval and execution of the Development Agreement was a condition precedent to the effectiveness of the Settlement Agreement. Thus, both the plain language of the Agreement and the circumstances surrounding the negotiation and execution of the Agreement unequivocally establish Snohomish County's and King County's intent that the Agreement constitutes one unified transaction.

2. The Agreement is a "Development Agreement" Under the Local Project Review Act.

The Agreement constitutes a "development agreement" as that term is used in the Local Project Review Act, chapter 36.70B RCW. RCW 36.70B.170 authorizes a local government to enter into a "development agreement" with "a person having ownership or control of real property within its jurisdiction." The statute provides that a development agreement "must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the

⁸¹ CP 147 ¶ 5; 154-177.

duration specified in the agreement.”⁸² The types of “development standards” that may be addressed by a development agreement are broad.⁸³ Additionally, a development agreement “may obligate a party to fund or provide, services, infrastructure, or other facilities.”⁸⁴ A development agreement may only be approved by ordinance or resolution after a public hearing.⁸⁵ Once approved, a development agreement must be recorded in the real property records of the county in which the real property at issue is located.⁸⁶ Any permits or other land use approvals subsequently issued for the project must be consistent with the development agreement.⁸⁷

The record here clearly shows that the Agreement meets the definition of a “development agreement.” Snohomish County was the permitting jurisdiction for Brightwater and King County was the land

⁸² RCW 36.70B.170(1).

⁸³ Development standards include but are not limited to: (a) project elements such as permitted uses of the property, densities and intensities or building sizes, (b) the amount and payment of impact fees imposed or agreed to, any reimbursement provisions, or other financial contributions to be made by the property owner, (c) mitigation measures, development conditions, and other requirements under chapter 43.21C RCW, (d) design standards, setbacks, drainage and water quality requirements, landscaping and other development features, (e) affordable housing, (f) parks and open space; (g) phasing; (h) review procedures and standards for implementing decisions, (i) build-out or vesting period, and (j) any other appropriate development requirement or procedure. RCW 36.70B.170(3).

⁸⁴ RCW 36.70B.170(4). “The execution of a development agreement is a proper exercise of county and city police power and contract authority.”

⁸⁵ RCW 36.70B.200.

⁸⁶ RCW 36.70B.190.

⁸⁷ RCW 36.70B.180.

owner seeking to develop its real property. The Agreement provided for “regulatory certainty to both Snohomish County and its citizens, as well as King County for the timely construction of Brightwater,” settled all outstanding litigation between the parties, including future appeals, and established the total amount of mitigation funds that would be provided for the construction of projects to mitigate the community impacts of Brightwater.⁸⁸ The Settlement Agreement was conditionally approved by motion of the Snohomish County Council after a public hearing. The Development Agreement was approved by the Snohomish County Council by ordinance after a public hearing. The Development Agreement was then recorded with the Snohomish County Auditor.

As contemplated by the Agreement, once the LUPA appeal period for the Agreement had passed, King County submitted to Snohomish County an application for approval of a BSP for Brightwater. As required by the Agreement, the Hearing Examiner evaluated the BSP application, comparing it to the requirements set forth in the Agreement and applicable provisions of the Snohomish County Code. After considering the testimony and entire record in the matter, the Hearing Examiner issued a Report and Decision approving the BSP subject to numerous conditions; the most notable being the community mitigation required by the

⁸⁸ CP 147-49 at ¶¶ 4-6.

Agreement.⁸⁹ Following the permit process, Snohomish County issued all subsequent ministerial permits necessary to construct Brightwater consistent with the approved BSP and the Agreement. Thus, the Agreement clearly meets the definition of a “development agreement” as that term is used in the Local Project Review Act, chapter 36.70B RCW.

3. Development Agreements Regarding Project Permit Applications Are Governed by LUPA.

As an integrated “development agreement” under the Local Project Review Act, any challenges to the Agreement are governed by LUPA. RCW 36.70B.200 states that if a development agreement “relates to a project permit application, the provisions of chapter 36.70C RCW shall apply to the appeal of the decision on the development agreement.” The term “project permit application” is defined, in pertinent part, by RCW 36.70B.020(4) as follows:

[A]ny land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan[.]

It is uncontroverted that the Agreement in this case was related to a project action, which included binding site plan and permit approvals for

⁸⁹ CP 2871 at ¶ 12.

the siting and construction of a sewage treatment plant. But for Brightwater, there was no other reason for a development agreement.

4. LUPA's 21-Day Statute of Limitations Bars the Districts' Challenges to the Agreement.

LUPA applies to judicial review of all land use decisions with some exceptions noted in the statute.⁹⁰ A land use decision means:

[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, on: (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used ...; (b) An interpretive or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property[.]⁹¹

“Judicial review under LUPA is commenced by filing a land use petition in superior court within 21 days of the issuance of the land use decision.”⁹² The failure to challenge a land use decision within that 21-day time period is fatal to such challenge.⁹³ Strict compliance with LUPA's statutory requirements for filing and service is required because there is a strong public policy favoring administrative finality in land use

⁹⁰ RCW 36.70C.010-.030.

⁹¹ RCW 36.70C.020(1)(a), (b).

⁹² James v. County of Kitsap, 154 Wn.2d 574, 583, 115 P.3d 286 (2005), citing RCW 36.70C.040(2).

⁹³ Knight v. City of Yelm, 173 Wn.2d 325, 337, 267 P.3d 973 (2011) (citations omitted).

decisions.⁹⁴ Because LUPA prevents a court from reviewing a petition that is untimely, a land use decision becomes valid once the opportunity to challenge it passed.⁹⁵ This is true even if the land use decision at issue was improper, illegal or otherwise flawed.⁹⁶ “The purpose and policy of the law in establishing definite time limits is to allow property owners to proceed with assurance in developing their property.”⁹⁷

The trial court properly rejected the District’s argument that they “were not seeking review of a land use decision,”⁹⁸ finding that the challenges to the community mitigation and the Mitigation Payment under the Agreement (and subsequently imposed through the Hearing Examiner’s Report and Decision approving the BSP) were subject to LUPA and therefore untimely. The court stated:

2. The Court concludes that the December 20, 2005 Settlement Agreement between King County and Snohomish County, read in conjunction with the December 15, 2005 Development [A]greement between the two counties, constitutes at least in part a “land use decision” within the meaning of the Land Use Petition Act (“LUPA”). Therefore[,] the 21-day time limit of LUPA (RCW 36.70C.040(3)) bars any claims by plaintiffs challenging the validity, legality or

⁹⁴ Chelan County v. Nykreim, 146 Wn.2d 904, 931-32, 52 P.3d 1 (2002).

⁹⁵ Wenatchee Sportsmen Ass’n v. Chelan County, 141 Wn.2d 169, 181, 4 P.3d 123 (2000).

⁹⁶ Chelan County v. Nykreim, 146 Wn.2d at 932-33.

⁹⁷ James v. County of Kitsap, 154 Wn.2d at 589.

⁹⁸ Districts’ Opening Brief at p. 41.

enforceability of the Settlement Agreement, including any land use aspects of that Agreement, and any such claims of plaintiffs are hereby dismissed.⁹⁹

The trial court's ruling is consistent with this Court's holding in James v. County of Kitsap, 154 Wn.2d 574, 590, 115 P.3d 286 (2005), that "conditions imposed on the issuance of permits are inextricable from land use decisions and are subject to the procedural requirements of LUPA." Once the 21-day appeal period under LUPA lapses, the conditions on the issuance of the permit are no longer reviewable.¹⁰⁰ Thus, the mitigation and other conditions of development under the Agreement and the BSP are valid and not subject to challenge via collateral attack.¹⁰¹

The Districts' untimely challenge to Brightwater's conditions of development was not the first; the City of Woodinville filed a LUPA petition challenging the Hearing Examiner's approval of the BSP (and the Development Agreement) which was subsequently dismissed because it was filed two days after the statute of limitations expired.¹⁰²

⁹⁹ CP 18710 (Emphasis added).

¹⁰⁰ James v. County of Kitsap, 154 Wn.2d at 590; See also Brotherton v Jefferson County, 160 Wn. App. 699, 704-705, 249 P.3d 666 (2011) ("Brothertons' requested relief demonstrates that they are ultimately challenging the County's land use decision." Their "arguments arise directly from the County's final land use decision. Accordingly, LUPA applies.")

¹⁰¹ Samuel's Furniture, Inc. v. Dep't of Ecology, 147 Wn.2d 440, 463-64, 54 P.3d 1194 (2002).

¹⁰² CP 194-210.

The facts of this case illustrate why Washington law favors finality and certainty in land use decisions. Brightwater has been constructed and, as of the date of this brief, has been operating for several months. Now, any judicial invalidation of the Agreement, the BSP approved pursuant to the Agreement, or any of the 43 permits and approvals issued by Snohomish County pursuant to the BSP would be problematic for and prejudicial to Snohomish County and its citizens, and King County, and its citizens.

C. The Mitigation Payment Is Lawful.

While the merits of Plaintiffs' allegations regarding the illegality of the Agreement need not be reached by this court, Snohomish County briefly addresses the substance of Plaintiffs' assertions below. Judge Felnagle considered them in granting the second summary judgment motion at issue here.¹⁰³

1. The Mitigation Payment Was Part of a Negotiated Settlement Agreement Resolving Litigation.

The Mitigation Payment was negotiated and agreed upon by the parties in settlement of litigation. It was imposed upon King County by Snohomish County through a development permit application process.

¹⁰³ CP 18713-18717.

Both Snohomish County¹⁰⁴ and King County¹⁰⁵ have the power and authority to settle litigation and compromise claims.¹⁰⁶ It is absurd to assert Snohomish County and King County were not permitted to assess the potential risks of litigation, perform a cost/benefit analysis, and arrive at an appropriate settlement amount and a certain means to move forward. The Districts cite no authority for that proposition because there is none.

Further, Washington law strongly favors settlement of litigation.¹⁰⁷ “[S]ettlement of cases serves the dual and valuable purposes of reducing the strain on scarce judicial resources and preventing the parties from incurring significant litigation costs.”¹⁰⁸ Accordingly, courts generally uphold settlement agreements as a matter of public policy.¹⁰⁹ “A valid

¹⁰⁴ Snohomish County is a charter county governed by Title 36 RCW and the Snohomish County Charter. Title 36 RCW grants broad powers to counties, including the power to enter into contracts and to sue and be sued. RCW 36.01.010.

¹⁰⁵ King County is both a metropolitan municipal corporation governed by chapter 35.58 RCW and a charter county governed by Title 36 RCW. Chapter 35.58 RCW grants broad powers to metropolitan municipal corporations, including the power to enter into contracts and to sue and be sued. RCW 35.58.180. See also RCW 35.58.060.

¹⁰⁶ The power to contract, combined with the power to sue and be sued is interpreted as giving municipalities the power to enter into settlement agreements. See 56 Am. Jur. 2d Municipal Corporations, Etc. § 707 (2012); 64A C.J.S. Municipal Corporations § 2528 (2011); Warburton v. Tacoma School Dist. No. 10, 55 Wn.2d 746, 751-52, 350 P.2d 161 (1960); Christie v. Port of Olympia, 27 Wn.2d 534, 179 P.2d 294 (1947); Abrams v. City of Seattle, 173 Wash. 495, 502, 23 P.2d 869 (1933).

¹⁰⁷ American Safety Casualty Ins. Co. v. City of Olympia, 162 Wn.2d 762, 772, 174 P.3d 54 (2007); City of Seattle v. Blume, 134 Wn.2d 243, 258, 947 P.2d 223 (1997); Seafirst Center Ltd. Partnership v. Erickson, 127 Wn.2d 355, 365-66, 898 P.2d 299 (1995).

¹⁰⁸ 15A. C.J.S. Compromise & Settlement § 1 (2011); see also 15B Am. Jur. 2d Compromise and Settlement § 3 (2012).

¹⁰⁹ 15B Am. Jur. 2d Compromise and Settlement § 29 (2012) (“[c]ourts are reluctant to set aside settlement agreements”); Jain v. State Farm Mut. Auto. Ins. Co., 130 Wn.2d

compromise agreement made in good faith is enforceable, so long as it possesses all of the elements of a valid contract, regardless of what the result might have been if the case had been litigation [sic] rather than settled.”¹¹⁰

While there are circumstances under which courts will invalidate a settlement agreement, those circumstances are not present in this case. For instance, “[u]nder contract law, a release is voidable if induced by fraud, misrepresentation or overreaching or if there is clear and convincing evidence of mutual mistake.”¹¹¹ Additionally, settlement agreements entered into by municipal entities can be invalid if the agreement was ultra vires or constituted a “manifest abuse of discretion.”¹¹² Here there is no evidence the Settlement Agreement was the result of fraud, misrepresentation, overreaching, mutual mistake or was ultra vires or

688, 693, 926 P.2d 923 (1996) (“the law favors private settlement of disputes, and, accordingly, releases are given great weight in establishing the finality of the settlement”); Bennett v. Shinoda Floral, Inc., 108 Wn.2d 386, 395-96, 739 P.2d 648 (1987) (rejecting on public policy grounds a challenge to the validity of a settlement agreement).

¹¹⁰ 15A C.J.S. Compromise & Settlement § 66 (2011); see also Rogich v. Dressel, 45 Wn.2d 829, 843, 278 P.2d 367 (1954); Opitz v. Hayden, 17 Wn.2d 347, 369-71, 135 P.2d 819 (1943).

¹¹¹ Nationwide Mutual Fire Ins. Co. v. Watson, 120 Wn.2d 178, 187, 840 P.2d 851 (1992) (citation omitted); see also Finch v. Carlton, 84 Wn.2d 140, 142-45, 524 P.2d 898 (1974) (discussing circumstances under which settlement agreements may be voided in personal injury cases).

¹¹² Warburton v. Tacoma School Dist. No. 10, 55 Wn.2d at 751-52.

constituted a manifest abuse of discretion. Accordingly, Judge Felnagle's decisions upholding the Settlement Agreement should be affirmed.

In an effort to cast doubt on the validity of the Settlement Agreement, the Districts intimate the four lawsuits resolved by the Settlement Agreement did not constitute legitimate, bona fide disputes. Instead, they insinuate those lawsuits were undertaken by Snohomish County in bad faith to express "political opposition" to Brightwater, secure a "bribe" and extort "illegal exactions" from King County's "open pocketbook."¹¹³ To substantiate this characterization of Snohomish County's conduct, the Districts present quotations from an editorial columnist, a demand letter from King County to Snohomish County written during litigation, and language from King County's 2003 FEIS for Brightwater (which Snohomish County later appealed) stating that the FEIS fully identified and disclosed all potential environmental impacts of the project and provided adequate mitigation measures for same.¹¹⁴ These biased sources demonstrate nothing more than the existence of a public dispute.

The Mitigation Payment was part of a negotiated settlement package agreed upon by sophisticated parties acting in good faith to

¹¹³ Districts' Opening Brief at pp. 1, 4, 11, and 39 n.117.

¹¹⁴ Districts' Opening Brief at p. 10, 12, and 39 n.117.

resolve bona fide litigation regarding genuinely contested legal issues. Settlement of litigation is not governed by RCW 82.02.020, and the Mitigation Payment was not imposed on King County pursuant to RCW 82.02.020. Thus, the Districts invocation of RCW 82.02.020's requirements is irrelevant to the legality and validity of the Mitigation Payment.

2. The Mitigation Payment Complies With RCW 82.02.020.

Even if the Mitigation Payment is subject to the requirements and limitations of RCW 82.02.020, it is still lawful because it complies with the statute. RCW 82.02.020 establishes a general prohibition on the imposition by local jurisdictions of taxes, fees or charges on development. The statute then creates exceptions to that general prohibition.¹¹⁵ Pertinent here is the exception authorizing permitting jurisdictions to enter into "voluntary agreements" that "allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development." Any such payment must be "reasonably necessary as a direct result of the proposed development," and

¹¹⁵ Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 753-54, 49 P.3d 867 (2002).

must be spent on “capital improvement[s] agreed upon by the parties to mitigate the identified, direct impact.”¹¹⁶

The Mitigation Payment meets these criteria. Snohomish County, as the permitting jurisdiction, and King County, as the property owner, voluntarily entered into the Settlement Agreement to facilitate the development of King County’s land. Section 6 and Exhibit B of the Settlement Agreement establish the reasonably necessary Mitigation Payment that King County would make to Snohomish County to mitigate the direct impacts of Brightwater’s construction and on-going operation on the surrounding communities. The Settlement Agreement identifies the specific capital improvement projects on which the Mitigation Payment funds will be spent. Thus, the requirements of RCW 82.02.020 are met.

The Districts complain that the impacts identified by Snohomish County and King County in the Settlement Agreement are not the “true adverse environmental impacts of Brightwater.”¹¹⁷ However, the Districts offer neither legal authority nor reasoned argument supporting their contention. The only evidence the Districts point to is the text of King County’s 2003 FEIS for Brightwater. The 2003 FEIS states it contains a

¹¹⁶ While RCW 82.02.020 also imposes certain procedural accounting requirements on payments made pursuant to a “voluntary agreement,” Districts do not allege Snohomish County has violated those accounting requirements.

¹¹⁷ Districts’ Opening Brief at p. 40.

full and complete evaluation of all potential environmental impacts of and appropriate mitigation measures for Brightwater. The Districts argue that, because King County's 2003 FEIS did not describe any of the mitigation measures funded by the Mitigation Payment, those mitigation measures must not have been reasonably necessary to mitigate the direct impacts of Brightwater.

The Districts' reliance on the content of the 2003 FEIS is misplaced. Though the EIS process identified many of the impacts caused by Brightwater, Snohomish County challenged the adequacy of the Brightwater EIS, specifically the 2005 FSEIS, arguing that the EIS documents did not identify the full impacts of Brightwater and did not propose adequate mitigation measures for those impacts.¹¹⁸ Indeed, the extent of the impacts Brightwater would have on the community in which it would be constructed and the types of capital improvement projects that would adequately mitigate those impacts were two of the central issues contested by the parties.¹¹⁹ Snohomish County eventually agreed to accept the Brightwater EIS - a concession that is part of the settlement.

The fundamental fact the Districts' allegations ignore is that siting and constructing an EPF is not simple, straightforward, and discrete. It is

¹¹⁸ CP 5426-37; 5768-79.

¹¹⁹ Id.

instead complex, controversial, and protracted. There is no official list (whether legislative or judicial) specifying what types of direct impacts inhere in the construction of a new sewage treatment facility or how those impacts should, ought, or must be mitigated. RCW 82.02.020 does not provide a ready-made list of approved impacts and acceptable mitigation measures. Instead, RCW 82.02.020 provides a process to be followed when creating such a list. RCW 82.02.020 requires decision makers to conduct an individualized, fact-specific analysis of each development project to determine the specific impacts of that specific development project and appropriate mitigation measures for same.¹²⁰

Here, the record establishes that Snohomish County and King County engaged in an exhaustive analysis of the potential impacts of Brightwater and potential mitigation measures for those impacts prior to agreeing upon the list of mitigation measures described on Exhibit B to the Settlement Agreement.¹²¹ Though the trial court disposed of the Districts'

¹²⁰ Isla Verde, 146 Wn.2d at 761.

¹²¹ CP 633-692 (King County Motion for Summary Judgment); CP 693-930 (Thomsen Declaration); CP 1229-1257 (KC Reply); CP 1258-1272 (SC Reply); CP 1427-1584 (Leyh Declaration); CP 1708-1732 (KC Supp. Memorandum); CP 1733-1812 (Thomsen Declaration); CP 2679-2726 (SC Response to Cross Motion); CP 2727-2728 (Nelson Declaration); CP 2729-2746 (Mueller Declaration); CP 2747-2764 (Judge Declaration); CP 2765-2811 (Bailey Declaration); CP 2812-3118 (Seder Declaration); CP 3119-3262 (Dickson Declaration); CP 3263-4020 (Leonetti Declaration); CP 4021-4091 (KC Response to Cross Motion); CP 4081-4091 (Hill Declaration); CP 4092-4098 (Triplett Declaration); CP 4099-4215 (Bromley Declaration); CP 4216-4961 (Thomsen Declaration); CP 4962-5402 (Popiwny Declaration); CP 5403-6725 (True Declaration).

claims regarding the community mitigation and Mitigation Payment on procedural grounds, the court also considered the relationship or “nexus” of the individual mitigation measures to the Brightwater project. In reviewing each of the projects, the trial court found:

that they are all, in some way, mitigating against the negative impacts of siting a sewage treatment plant or having a sewage treatment plant in your neighborhood. And whether you call it incentives and amenities or you use some other term – and I don’t necessarily think that incentives and amenities is the only way you could term this – but it’s a good concept for what the test ought to be.

It needs to be a mitigation of the siting and the development, the creation of this capital improvement, and all of these things do go to assisting in creating this capital improvement, which is, I believe, the necessary nexus, which is why I’m prepared to grant summary judgment for the defendants.¹²²

While the Districts may disagree with the impacts identified by the Counties or question the wisdom of the mitigation measures to which the parties agreed, there is no dispute that the Settlement Agreement was specifically tailored to the facts and circumstances presented by Brightwater, as required by RCW 82.02.020.

D. Plaintiffs Lack Standing Under Contract Law.

Even if the Settlement Agreement is viewed as an ordinary contract rather than as part of an integrated “development agreement,” the

¹²² RP 235-236.

Settlement Agreement would be governed by the general law of contracts, and the Districts still cannot challenge it.¹²³ Here, a third party – a stranger to the contract – asks this Court to declare the Settlement Agreement illegal and void, and order the refund of the Mitigation Payment.¹²⁴ There are several problems with the Districts’ requests, but the most basic of those problems is dispositive: the Districts are neither parties to nor third-party beneficiaries of the Settlement Agreement and therefore lack standing to sue regarding the Settlement Agreement.¹²⁵ This is analogous to the litigation after the Seattle Supersonics left the City: many were disappointed in the result, but no one could attack the arms-length settlement agreement reached by the parties.¹²⁶

As a general rule, the only persons entitled to sue regarding a contract are the parties to the contract.¹²⁷ Courts routinely dismiss

¹²³ McGuire v. Bates, 169 Wn.2d 185, 188-89, 234 P.3d 205 (2010) (“[t]his court interprets settlement agreements in the same way it interprets other contracts”); 15B Am. Jur. 2d Compromise and Settlement §§ 1 & 4 (2012); 15A C.J.S. Compromise & Settlement § 30 (2011).

¹²⁴ CP 28.

¹²⁵ Plaintiffs are not taxpayers, who would have standing to challenge the legality of any governmental action pursuant to a taxpayer derivative suit. See State ex rel. Boyles v. Whatcom County Superior Court, 103 Wn.2d 610, 614, 694 P.2d 27 (1985); Tacoma v. O’Brien, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); Calvary Bible Presb. Church of Seattle v. Board of Regents, 72 Wn.2d 912, 917-18, 436 P.2d 189 (1967).

¹²⁶ City of Seattle v. Professional Basketball Club, LLC, 2008 WL 1994813.

¹²⁷ 17B C.J.S. Contracts § 836 (2011) (“a stranger to a contract may not bring a claim on the contract”); 17A Am. Jur. 2d § 416 (2012) (“a contract cannot be enforced by a person who is not a party to it or in privity with it”); American Pipe & Const. Co. v. Harbor

lawsuits seeking to enforce or challenge a contract when the aspiring plaintiff is not a party to the contract.¹²⁸ The affirmative defense of illegality similarly cannot be invoked by third persons.¹²⁹ In this case, it is undisputed that the only parties to the Settlement Agreement are Snohomish County and King County. Thus, the only persons with standing to sue regarding the Settlement Agreement are Snohomish County and King County.¹³⁰

The record in this case establishes that Snohomish County and King County entered into the Settlement Agreement to resolve multiple lawsuits and establish the process and conditions pursuant to which King County's land use and development permits for Brightwater would be issued. No one has alleged that by negotiating and executing the Agreement, Snohomish County or King County intended to benefit anyone other than themselves and their citizens. The Districts are not

Const. Co., 51 Wn.2d 258, 262-64, 317 P.2d 521 (1958); Kim v. Moffett, 156 Wn. App. 689, 700, 234 P.3d 279 (2010).

¹²⁸ See, e.g., Minton v. Ralston Purina Co., 146 Wn.2d 385, 395-97, 47 P.3d 556 (2002) (dismissing claim for breach of warranty contract because District was neither a party to nor a third party beneficiary of the warranty contract); Postlewait Const., Inc. v. Great American Ins. Companies, 106 Wn.2d 96, 99-101, 720 P.2d 805 (1986) (dismissing claim under insurance policy because District was neither party to nor third party beneficiary of insurance contract).

¹²⁹ 17A C.J.S. Contracts § 373; 17A Am. Jur. 2d Contracts § 306 (2012).

¹³⁰ There is no question that numerous individuals and interest groups were aware of the settlement negotiations between Snohomish County and King County. Had there been questions regarding the legality of the Settlement Agreement, potential plaintiffs could have timely raised such concerns with the courts. CP 2760 at ¶ 31. See also, e.g., CP 4402, 4422-4423, 4505-06, 4529-31, 4536-38.

mentioned in the Agreement, and Section 15 of the Settlement Agreement expressly provides that there are no third-party beneficiaries of the contract. As a matter of law, the Districts are not third-party beneficiaries of the Settlement Agreement. The Districts lack standing to challenge the Settlement Agreement, and the trial court was correct to dismiss their claims.

E. The Districts Cannot Challenge the Settlement Agreement Under the UDJA, Chapter 7.24 RCW.

The Districts lack standing to challenge the Settlement Agreement under the Uniform Declaratory Judgments Act, chapter 7.24 RCW (“UDJA”). The justiciable controversy requirement of the UDJA bars the Districts’ claims.¹³¹

Plaintiffs ask for a declaratory judgment that the Mitigation Payment is an “illegal exaction” under RCW 82.02.020.¹³² Standing under the UDJA, chapter 7.24 RCW is established in RCW 7.24.020. Courts interpret this statutory language to create a two-part test for standing.¹³³ First, a party must be within the “zone-of-interests” to be

¹³¹ This litigation has been similar to the “whack-a-mole” arcade game. The Districts try an argument, it gets “whacked”, and another one pops up. The UDJA was mentioned in the Complaint, CP 27-28, but has not been discussed much since. This section is included in case it “pops up” in the Reply.

¹³² Districts’ Opening Brief at 39; CP 16

¹³³ American Legion Post #149 v. Washington State Dept. of Health, 164 Wn.2d 570, 593, 192 P.3d 306 (2008).

protected or regulated by the statute or constitutional provision in question.¹³⁴ Second, the party must have suffered an “injury-in-fact,” economic or otherwise.¹³⁵

The Districts are not within the zone-of-interests protected by RCW 82.02.020. “In ascertaining the zone-of-interests protected by a statute, it is appropriate to look both to the operation of the statute, and the statute’s general purpose.”¹³⁶ RCW 82.02.020 is designed to protect the rights of property owners, not water-sewer districts.¹³⁷ The real property at issue in this case, the 114-acre site on which Brightwater has been constructed, is owned by King County, not by the Districts. Thus, the Districts are not within the zone-of-interests protected by RCW 82.02.020.

This Court analyzed the zone-of-interest protected by RCW 82.02.020 in the case of Organization to Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 894-95, 913 P.2d 793 (1996). In OPAL, an applicant for a land use permit had entered into a “mitigation agreement” with Adams County.¹³⁸ Pursuant to the mitigation agreement, the developer agreed to pay fees, make grants, and provide other benefits

¹³⁴ Branson v. Port of Seattle, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004).

¹³⁵ Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 186, 157 P.3d 847 (2007).

¹³⁶ Five Corners Family Farmers v. State, 173 Wn.2d 296, 304-305, 268 P.3d 892 (2001). (citations omitted).

¹³⁷ Org. to Preserve Agric. Lands v. Adams County, 128 Wn.2d 869, 894-95, 913 P.2d 793 (1996).

¹³⁸ Id. at 892.

to Adams County in exchange for its issuance of land use and development permits necessary for the developer to construct a regional landfill and recycling facility.¹³⁹ A third-party non-profit corporation sought to challenge the legality of the mitigation agreement under RCW 82.02.020, arguing that the “package of benefits” the property owner agreed to provide Adams County in the mitigation agreement “do not satisfy the requirements for voluntary mitigation under either Washington’s impact fee statute or SEPA.”¹⁴⁰ The OPAL court held RCW 82.02.020 is intended to “protect developers from a generalized tax on development,” thus, the court held neither the non-profit corporation nor its members were within the zone-of-interests protected by RCW 82.02.020, and they therefore lacked standing to challenge the legality of the mitigation agreement at issue.¹⁴¹

Here, as in OPAL, the Districts are third-parties seeking to challenge the legality of the Mitigation Payment in the Settlement Agreement under RCW 82.02.020. The rule established in OPAL – that third parties lack standing to challenge the legality of a voluntary mitigation agreement between a permitting jurisdiction and a property owner – applies to bar the Districts’ claims in this case.

¹³⁹ Id. at 893.

¹⁴⁰ Id. at 893-94.

¹⁴¹ Id. at 895-96.

While it deals with a different statute, the case of Branson v. Port of Seattle, 152 Wn.2d 862, 101 P.3d 67 (2004), is also instructive here. Branson involved the zone-of-interest under RCW 14.08.120, a statute governing the regulation of airports. Branson challenged the legality of certain fees the Port of Seattle charged to rental car companies operating out of Sea-Tac pursuant to RCW 14.08.120.¹⁴² He argued he was harmed by these fees because the rental car companies passed the fees through to their customers proportionately, as a separate line item on each customer's rental car bill.¹⁴³

After analyzing RCW 14.08.120, the Court determined the statute was intended to protect "only those entities to whom the Port actually charges fees."¹⁴⁴ Because the Port did not impose fees directly on rental car customers, only on rental car companies, Mr. Branson was not within the zone-of-interests protected by the statute.¹⁴⁵ The Court expressly rejected Mr. Branson's argument that he should have standing to challenge the fees because the rental car companies passed those fees on to him. The rental car companies' decision to pass fees on to their customers was irrelevant to Mr. Branson's lack of standing to challenge the legality of the

¹⁴² Id. at 871-72.

¹⁴³ Id. at 868.

¹⁴⁴ Id. at 876.

¹⁴⁵ Id. at 876.

Port's concession fees under RCW 14.08.120.¹⁴⁶ Thus, because the Port did not charge fees to the plaintiff, or any other car rental customers, he lacked standing to challenge the legality of the fees imposed by the Port.¹⁴⁷

Applying the reasoning in Branson to this case, the Districts lack standing to challenge the legality of the Mitigation Payment. In this case, the Districts argue they should be allowed to challenge the legality of the Mitigation Payment because King County has chosen to recoup part of the Mitigation Payment by passing it through to the Districts proportionately via their sewage disposal charges. Even if that is true, the fact that King County may have chosen to pass through to the Districts a portion of the Mitigation Payment does not imbue them with standing to challenge the legality of the Mitigation Payment. The Districts are not within the zone-of-interests protected by RCW 82.02.020 and therefore lack standing to invoke this Court's jurisdiction under the UDJA.

The second prong of the UDJA's standing test requires a plaintiff to demonstrate he has suffered an injury-in-fact due to the subject matter

¹⁴⁶ Id. at 875.

¹⁴⁷ Id. at 876.

of the lawsuit. Monetary damages typically constitute sufficient injury-in-fact to support standing.¹⁴⁸

Here, the Districts manifestly fail to show any injury-in-fact. The Districts fail to allege they suffered any direct injury-in-fact resulting from the Agreement. Instead, the only harm the Districts identify is that their sewage disposal charges are too high.¹⁴⁹ The Districts' sewage disposal charges are not a subject of the Agreement; King County's performance under the Agreement is unrelated to King County's performance under separate long-term sewage disposal contracts with the Districts. Because the Districts do not demonstrate they have suffered injury-in-fact as a result of the Settlement Agreement, they lack standing to challenge the legality of the Settlement Agreement under the UDJA.¹⁵⁰

F. **This Court Should Defer to the Decisions of the Elected Officials of Snohomish County and King County.**

The separation of powers doctrine recognizes that different branches of our government traditionally perform certain types of

¹⁴⁸ Nelson, 160 Wn.2d 173 (holding payment of \$79.23 constituted "injury-in-fact" under the UDJA); Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 802-03, 83 P.3d 419 (2004) (holding the prospect of paying higher taxes constituted "injury-in-fact" under the UDJA). Injury-in-fact has also been found under the UDJA when a plaintiff was cited for failing to comply with the statute being challenged and when a plaintiff's contract rights would have been nullified by the ballot initiative being challenged.¹⁴⁸ American Legion Post #149, 164 Wn.2d 570, 594; American Traffic Solutions, Inc. v. City of Bellingham, 163 Wn. App. 427, 433, 260 P.3d 245 (2011).

¹⁴⁹ Opening Brief at p. 28; CP 19.

¹⁵⁰ To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411-412, 27 P.3d 1149 (2001) (failure to show direct injury-in-fact was fatal to case).

functions better than others.¹⁵¹ The question of what constitutes proper mitigation for an EPF is a political question, not a judicial question. Thus, this Court should defer to the considered judgment of Snohomish County's and King County's elected officials in this matter.¹⁵² As former Chief Justice Durham wrote in Washington State Coalition for the Homeless v. Department of Social and Health Services, 133 Wn.2d 894, 946, 949 P.2d 1291 (1997):

The judicial branch is...[the branch of government] least capable of resolving complex social problems with significant political and budgetary overtones. We cannot hold public hearings to investigate issues and hear from the myriad of competing interests. We are ill-equipped to balance the competing visions of such interest groups. As a result, we should be most reluctant to involve ourselves in such political issues. We should leave their resolution to the political branches whose processes are more amenable to political give and take and the development of social policy.

¹⁵¹ City of Spokane v. County of Spokane, 158 Wn.2d 661, 678-80, 146 P.3d 893 (2006); State v. Moreno, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002); State v. Blilie, 132 Wn.2d 484, 489-90, 939 P.2d 691 (1997) (citations omitted); Carrick v. Locke, 125 Wn.2d 129, 134-36, 882 P.2d 173 (1994).

¹⁵² Washington State Legislature v. State, 139 Wn.2d 129, 152, 985 P.2d 353 (1999) (Madsen, J. concurring) ("many issues are better left to the more political branches of government to decide"), quoting Philip A. Talmadge, Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems, 22 Seattle U. L. Rev. 695, 739 (1999); CLEAN v. State, 130 Wn.2d 782, 797, 928 P.2d 1054 (1996) ("[t]he Legislature with its staff and committees is the branch of government better suited to monitor and assess contemporary attitudes than are the courts"); Capitol Hill Methodist Church of Seattle v. City of Seattle, 52 Wn.2d 359, 368, 324 P.2d 1113 (1958) ("the power of vacation of streets and alleys or portions thereof belongs to the municipal authorities, and the exercise of that power is a political function which, in the absence of collusion, fraud, or the interference with a vested right will not be reviewed by the court").

Deference to the decisions of Snohomish County and King County in this matter is also supported by the Growth Management Act and this Court's recent decision in Phoenix Development, Inc. v. City of Woodinville, 171 Wn.2d 820, 256 P.3d 1150 (2011):

Although this is not a Growth Management Act (GMA) (ch. 36.70A RCW) case, to the extent that the GMA is implicated, we note that the GMA does not prescribe a single approach to growth management. Instead, the legislature specified that 'the ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implementing a county's or city's future rests with that community. Thus, the GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs. These principles of deference apply to a local government's site-specific land use decisions where the GMA considerations play a role in its ultimate decision.¹⁵³

The long, heated, public debate regarding exactly where, when, and how King County would build a new sewage treatment plant is a classic example of the type of complex social and political issues Chief Justice Durham was advising courts to avoid.

Large development projects such as Brightwater are rare. The impacts of constructing a new EPF are difficult to fully define or quantify. There are few comparable projects available for comparison. While the Districts criticize the settlement Snohomish County and King County

¹⁵³ Phoenix Dev., Inc., 171 Wn.2d 820, 830.

agreed upon after years of litigation and negotiation, and with ample public input, they do not explain what alternative types of mitigation would have more appropriately compensated for the broad impacts of siting and constructing a new 114-acre sewage treatment plant. It is not possible for King County to construct an “anti-Brightwater” facility across the street as there is no such thing as an “anti-sewage treatment plant.” Thus, the question of how to effectively mitigate the impacts of such a development is perplexing.

Given the difficulty of defining and quantifying the broad and varied impacts construction and long-term operation of Brightwater will have on the community in which it is built, this Court should defer to the reasoned decisions of the elected officials of Snohomish County and King County in this matter. Determining what constitutes appropriate and sufficient mitigation for the nebulous and long-term impacts of constructing a new sewage treatment plant in south Snohomish County is a question better posed to the political branches of government than to the judiciary. Courts are not well suited to making such determinations as “[t]he judiciary is isolated from the opinion gathering technique of public

hearings as well as removed from politically sensitive, proportionately elected representatives.”¹⁵⁴

IV. CONCLUSION

The Districts downplay the adverse impacts Brightwater will have on nearby residents. They even attempt to characterize the construction of a sewage treatment plant as a benefit to the neighborhood. But even the state legislature recognizes that no one wants to live near facilities such as Brightwater. That is why the legislature categorized such developments as “essential public facilities” and enacted statutes requiring local jurisdictions to allow the construction of said facilities. If Washington’s citizens were all eager to live adjacent to a sewage treatment plant, there would have been no need for such legislation.

The Agreement resolved four separate lawsuits between Snohomish County and King County regarding Brightwater’s likely impacts and provided specific mitigation to compensate for those impacts. The Agreement established the process and conditions pursuant to which King County’s land use application to construct Brightwater would be reviewed and approved by Snohomish County. The Agreement served its intended purpose; construction of Brightwater was completed in August of 2011, and it began operating shortly thereafter. The citizens of King

¹⁵⁴ Matter of Salary of Juvenile Director, 87 Wn.2d 232, 249, 552 P.2d 163 (1976).

County and Snohomish County will benefit from this EPF for the foreseeable future.

The Districts have no legitimate interest in the Settlement Agreement here. Judge Felnagle's decision dismissing the Districts' challenges was correct and should be affirmed by this Court.

V. STATUTORY COSTS AND ATTORNEYS' FEES

Pursuant to Rule of Appellate Procedure 18.1, RCW 4.84.010 and 4.84.080, the County requests its statutory costs and attorneys' fees.

Respectfully submitted this 13th day of April, 2012.

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