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No. 68048-0-I

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

TOWN OF WOODWAY and SAVE RICHMOND
BEACH,

Respondents,

v.

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Appellants.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner is the Town of Woodway, a non-charter, optional municipal code city.

B. COURT OF APPEALS' DECISION

The Court of Appeals issued its decision on January 7, 2013. A copy of the decision is attached as Appendix 1 to this brief.

C. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' decision require that the holding of the Cases (cases that held that violation of SEPA resulted in a void agency action) be overruled?
2. If so, is there sufficient proof of legislative intent to overrule these Cases?
3. Does RCW 36.70A.302(2) create vested rights or only preserve rights that have vested under other law?

D. STATEMENT OF THE CASE

This is a case of first impression in this state. The issues presented involve the intersection of the State Environmental Policy Act (SEPA), the Growth Management Act (GMA) and the vested rights doctrine.

The Town of Woodway¹ is a small town located in the southwest corner of Snohomish County, just north of the King County line. Located to the west of the Town lies a 61-acre tract in unincorporated Snohomish County known as Point Wells. It was the site of a former oil storage facility, which is now inactive. Point Wells lies within the Town's urban growth area according to the Snohomish County Comprehensive Plan. As such, the Town has for several years planned for the possible annexation of Point Wells, and in its Comprehensive Plan set forth its vision for future redevelopment of the area. The Town envisioned a mixed use development with a residential component.

However, in response to requests by the current owner, BSRE, the County amended its Comprehensive Plan and zoning code to allow significantly more density and intensive uses than contemplated in the Town's plan. The Town challenged the County's amendments before the Growth Management Hearings Board. After the hearing on the merits but prior to the Board issuing its decision, BSRE filed an application for development of the Point Wells site, taking advantage of the increased densities and uses allowed under the challenged Comprehensive Plan amendments and associated development regulations. The Board

¹ The Town is a non-charter, optional municipal code city under RCW 35A. Its official name is the Town of Woodway.

eventually concluded that the County had violated SEPA with respect to the comprehensive plan amendments and development regulations, but declined to issue an order of invalidity. The Town filed an action in superior court seeking a declaration that BSRE's application was not vested. The superior court found in favor of the Town. On appeal, the Court of Appeals reversed and issued the opinion in Appendix 1.

The Town further adopts by reference the Statement of the Case in Save Richmond Beach's Petition.

E. ARGUMENT

1. Review should be accepted under RAP 13.4(b)(1) and (2) because the Court of Appeals' decision conflicts with previous decisions of both the Supreme Court and the Court of Appeals.

a. Prior SEPA cases hold that government actions taken in violation of SEPA are *void ab initio*.

From the initial adopting of SEPA in the 1970s, both the Supreme Court and the Court of Appeals have uniformly held that violation of SEPA's procedural requirements resulted in voiding any agency action taken subsequent to and in reliance upon the SEPA decision. Richard Settle, quoted extensively by the Court of Appeals in this case, stated as follows:

Since state and local agency authority to act is qualified by the requirements of SEPA, agency action attended by SEPA noncompliance is unlawful, outside the agency's authority, *ultra vires*. The usual remedial result of a judicial determination of SEPA violation is simply invalidation of the agency action. Thus, action which was not preceded by a proper threshold determination process is invalid and the agency must begin the decision-making process anew; and action for which a required EIS was inadequate or not prepared is rendered a nullity and remanded for reprocessing in light of an EIS.

Richard L. Settle, *The Washington State Environmental Policy Act* § 20.09 (Dec. 2010).

As authority for the above, Professor Settle cites several cases, including *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973) (“invalidating” a grading permit issued in violation of SEPA); *Noel v. Cole*, 98 Wn.2d 375, 378-83, 655 P.2d 245 (1982) (contract entered into by State for logging without SEPA compliance was *ultra vires* and “void at its purported inception”); *South Tacoma Way, LLC v. State of Washington*, 169 Wn.2d 118, 126, 233 P.3d 871 (2010) (reaffirming *Noel* and concluding an agency's failure to act in accordance with SEPA policy in RCW 43.21C.030(2)(b) that “presently unquantified environmental amenities and values will be given appropriate consideration in decision making” rendered action *ultra vires*). Also supporting the rule that violation of SEPA results in a void ordinance are

Lassila v. Wenatchee, 89 Wn.2d 804, 817, 576 P.2d 54 (1978) (invalidating and “vacating” a comprehensive plan amendment where there was insufficient showing of compliance with SEPA) and *Barrie v. Kitsap County*, 93 Wn.2d 843, 861, 613 P.2d 1148 (1980) (declaring rezone ordinance invalid after holding County’s EIS was inadequate for failing to address reasonable alternatives and to adequately discuss socio-economic impacts of the development). In short, a wealth of case law exists at both the Court of Appeals and Supreme Court levels which identify the consequences of failing to comply with SEPA as voiding agency action. Perhaps more important with respect to the implications for the vested rights doctrine, this wealth of case law clearly establishes that noncompliance with SEPA results in a void action--not voidable after further action is taken. As stated in *Noel*, the ultra vires action is “void at its inception.” *Noel*, 98 Wn.2d at 383.

- b. Prior to the enactment of the GMA, the Supreme Court held that a void ordinance or permit does not allow a project to vest.

The holding of the numerous cases cited above -- that SEPA noncompliance results in a void or *ultra vires* action -- precludes the acquisition of vested rights in permits or ordinances approved or enacted in violation of SEPA. Because Washington courts have clearly held that

actions taken in violation of SEPA are void and *ultra vires*, it logically follows that vested rights may not arise from an ordinance that is, at its inception, void.

That vested rights may not be obtained in an invalid permit or regulation was addressed in two previous Supreme Court cases: *Eastlake Cmty. Council v. Roanoke Assocs.*, 82 Wn.2d 475, 513 P.2d 36 (1973) and *Responsible Urban Growth Group v. City of Kent* (“RUGG”), 123 Wn.2d 376, 868 P.2d 861 (1994). In *Eastlake Community Council*, the Court held that violations of SEPA rendered the government action in approving a building permit void. *Eastlake* involved the construction of a condominium project on east Lake Union in Seattle. *Eastlake*, 82 Wn.2d at 477. There, the developer had received a building permit, renewed it once and then had it renewed a second and third time. *Id.* at 480. Between the second and third renewals, SEPA became effective. However, the City did not perform any environmental analysis for the third renewal. *Id.* at 487-88.

The Supreme Court held that the third renewal was “unlawful” because it was a “major action” requiring preparation of an EIS. It further rejected the developer’s contention that because they had started construction during the pendency of the appeal, the project was so

complete as to remove it from SEPA consideration. *Id.* at 487, 497. The

Court dismissed this argument:

The developer contends that at time of trial and appeal construction had continued despite the litigation, and the project has thereby achieved a present state of completion removing it from SEPA. Advancement towards the project's completion done in disregard of litigation-raising issues, such as SEPA, which may be held to be correct, can be of no consequence in the effort to refute the act's applicability. To permit such a contention would invite circumvention of SEPA by those quick to advance their projects to completion.

Id. at 497 (emphasis added). Clearly, the submittal of the building permit did not "vest" the developer and exempt it from complying with SEPA.

Likewise in *RUGG*, the Court found that vested rights may not be obtained in a void regulation. There, a citizen's group challenged the City Council's adoption of a rezone ordinance, claiming that the City failed to give proper notice of the rezone and that the Council violated the appearance of fairness statute by failing to disclose ex parte meetings between the councilmembers and the developer. *Id.* at 381. The developer contemporaneously attempted to obtain a building permit pursuant to the challenged ordinance, but was met with stiff opposition from *RUGG*. "Three years after its initial application and approximately 2 months before trial, SDM [the developer] was granted the building permit and began foundation work on the . . . property." *Id.* (emphasis added).

The trial court ultimately agreed with the citizen's group, holding that the rezone ordinance was enacted without proper notice and in violation of the appearance of fairness doctrine. *Id.* Consequently, the trial court held as follows:

All actions taken pursuant to Ordinance 2837, including any permits issued in reliance thereon, are also hereby declared invalid and void, as of the date of their issuance or inception, and defendants are hereby permanently stayed and enjoined from taking any action in reliance upon or under the authority of Ordinance 2837 or otherwise not in compliance with established law. Defendant City of Kent is further permanently stayed and enjoined from taking any action changing or affecting the zoning for the Ward Property, as established under Ordinance 2771, until legal prerequisites for rezone of that property have been completed in accordance with the provisions of the Kent Zoning Code, State law, and due process requirements.

Id. (emphasis added).

Of primary importance to the present case, the trial court also denied the developer's motion for reconsideration, which included an argument "that the building permit could not be voided for equitable reasons because the developer had started construction and, therefore, had vested rights." *Id.* at 382.

The Supreme Court ultimately affirmed the trial court, holding that the ordinance adopting the rezone was invalid because it was adopted without satisfying statutory or due process notice requirements. *Id.* at 389.

In addressing the developer's argument that it was entitled to a balancing of the equities because it had already begun construction and, therefore, had vested rights in the project, the Supreme Court stated:

First, [the developer] argues that it was entitled to a balancing of the equities because it had already begun construction and, therefore, had vested rights in the project. As the trial court held, however, the balancing of the equities doctrine is reserved for the innocent developer who proceeds without any knowledge of problems associated with the construction. *Bach v. Sarich*, 74 Wash.2d 575, 582, 445 P.2d 648 (1968). In this case, SDM had full knowledge that the validity of ordinance 2837 and the building permit were hotly contested and that trial was approaching. RUGG had already requested injunctive relief in its petition and, therefore, SDM was apprised of the possibility that any development made pursuant to ordinance 2837 would be enjoined and proceeded with construction at its own risk. We hold that the trial court properly granted the permanent injunction and did not err by failing to balance the equities.

Id. at 389-90 (emphasis added). Thus, the *RUGG* Court affirmed that vested rights may not be wielded as a sword by a developer to effectively validate and render unreviewable an otherwise illegal ordinance. The Court declined to recognize vested rights where the developer knowingly assumed the risk that the ordinance was improperly enacted, which is precisely the factual situation presented in the instant matter where BSRE filed its development applications shortly after the

hearing before the Growth Board but prior to the issuance of its Final Decision and Order.

- c. The Court of Appeals' decision interpreting the GMA directly conflicts with Supreme Court and Court of Appeals case law establishing the consequences of a failure to comply with SEPA and thwarts enforcement of SEPA's procedural requirements.

While the Supreme Court as recently as 2010 in *South Tacoma Way* reinforced that the legal remedy for failure to comply with SEPA is the nullification of agency action, the Court of Appeals disregarded this well-settled concept. Specifically, the Court of Appeals concluded that a developer vests to an ordinance enacted in violation of SEPA.. The Court arrived at this holding by erroneously interpreting RCW 36.70A.302(2)² in a manner that directly conflicts with Court of Appeals and Supreme Court case law discussed in Sections E.1.a and E.1.b, *supra*.

In attempting to determine whether a failure to comply with SEPA nevertheless allows a developer to vest to an ordinance enacted in

² RCW 36.70A.302(2) states: "A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local rules before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project."

violation of SEPA, the Court of Appeals decision misconstrued RCW 36.70A.302(2). The Court stated³:

“We conclude that RCW 36.70A.302(2)’s invalidity provisions controls the present dispute....As quoted above, RCW 36.70A.302(2) states that those complete and filed applications vest to those challenged plan provisions and regulations, regardless of the Growth Board’s subsequent ruling in the administrative appeal. . . .In addition to specifying the conditions under which the Growth Board may hold a local enactment invalid, RCW 36.70A.302 also provides that development permit applications filed *prior* to the time the city or county receives the Growth Board’s determination of invalidity vest to the development regulations under which they were submitted.”

In fact, RCW 36.70A.302(2) performs no such magic. The statute only provides that vested rights are not “extinguished” by a determination of invalidity and does not transform any right into a vested right that was not already vested under state or local law. The Court of Appeals thus erroneously interpreted the statute as creating vesting rights, when in fact it only protects rights that have otherwise vested “under state or local law”. In order to obtain the protection of RCW 36.70A.302(2), the project has to be vested pursuant to other law. By erroneously interpreting the statute, the Court of Appeals’ decision directly conflicts with those cases that had previously held that violation of SEPA resulted in a void

³ Page 16 of the decision, Attachment 1.

ordinance that cannot result in vested rights as cited by Professor Settle, and the holdings in *Eastlake* and *RUGG*.

In addition, by misconstruing RCW 36.70A.302(2) as creating vested rights, the Court of Appeals declined to address the issue of whether *RUGG* and other pre-GMA cases were overruled or repealed.⁴ However the Court of Appeals' interpretation of the plain words of RCW 36.70A.302(2), combined with its decision that BSRE is vested to the original development regulations, means the decision squarely conflicts with the cases cited above unless those cases have been legislatively overruled by GMA, which Petitioner asserts has not occurred. See *infra* Section E.1.d. Overruling court of appeals decisions issued by other divisions and, of course, Supreme Court decisions is exclusively within the Supreme Court's purview.

The Court of Appeals' decision further fails to acknowledge that "invalidity" is a term of art under GMA. Invalidity can occur only if the Growth Board finds that a non-compliant ordinance's continued validity would substantially interfere with the fulfillment of the goals of the GMA.⁵ Nowhere do the appeal provisions of the GMA, SEPA, or the SEPA regulations reference a determination of "invalidity" under SEPA

⁴ Court of Appeals Decision, footnote 26.

⁵ RCW 36.70A.302(1) and RCW 36.70A.300(4).

alone. Under the GMA, “invalidity” only relates to ordinances found to substantially interfere with the GMA goals.

Accordingly, there exists a certain class of cases, of which this case is one, where a procedural violation of SEPA does not result in a violation of the GMA goals. In those particular instances, the prospective invalidity provisions of RCW 36.70A.302(2) do not apply. Instead, the pre-Regulatory Reform rule that vested rights cannot be obtained in an invalid ordinance applies and prevails.

The Court of Appeals correctly notes⁶ that under this interpretation a less severe finding (mere non-compliance versus invalidity) results in a loss of vested rights. The Petitioners have acknowledged this situation, but have argued that it is in accord with the strict language of the statute and, in any case, is preferable to the situation where violations of SEPA have different consequences depending on whether the Growth Board, or some other administrative or judicial body is deciding the question. A more consistent approach would be for this court to hold that the legislature has not overruled the prior case law, at least with respect to SEPA, and that the language regarding validity and vesting only relates to violations of GMA.

⁶ Court of Appeals decision, footnote 24

- d. The Court of Appeals' decision is in conflict with case law requiring an unmistakable implication of overruling.

The issue squarely presented in this case, and which the Court of Appeals expressly declined to address, is whether the legislature impliedly overruled prior case law establishing the remedies for a violation of SEPA in enacting the GMA, and particularly RCW 36.70A.302(2). It is a well established principle that “courts do not favor the repeal of settled principles of law by mere implication,” and that the intent to overturn settled principles of law will “not be presumed unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication.” *State v. Greenwood*, 120 Wn.2d 585, 593, 845 P.2d 971 (1993). To the contrary, “the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed, unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication, and the language employed admits of no other reasonable construction.” *Ashenbrenner v. Dep't of Labor and Indus.*, 62 Wn.2d 22, 26, 380 P.2d 730 (1963) (citing 50 *Am. Jur.*, *Statutes* § 340, p. 332) (emphasis added).

For example, in *Ashenbrenner*, a worker injured in 1955, when the statutory disability payment was \$100 a month, appealed a decision by the

Board of Industrial Insurance Appeals not to increase her payment to \$155 a month, which was the statutory disability payment in effect when she reopened her case to be declared permanently and totally disabled in 1957. The worker argued that because the 1957 statute inserted language stating that payments would be made “when the supervisor of industrial insurance shall determine that permanent total disability results from the injury,” she should be paid the 1957 rate. *Id.* at 24-25. However, relying upon the principles described above--that the courts will not repeal settled principles of law by mere implication--the Court rejected the worker’s interpretation of the statute and found that the 1957 amendments were not intended to overturn long-established principles that rights under the Workers Compensation Act are determined by the law in effect on the date of injury. *See also Flannery v. Bishop*, 81 Wn.2d 696, 701-02, 504 P.2d 778 (1973) (holding that, according to the principle that courts will not repeal settled principles of law by mere implication, amendment of usury statute to include a six-month statute of limitations did not control common law usury rights of action with a 3-year limitation period).

In this case there is no such clear intention to overrule the decades-old progeny of cases cited above regarding the consequences of SEPA noncompliance and acquiring vested rights in void ordinances. The Court

of Appeals decision quoted from various legislative Task Force reports that studied various aspects of GMA. However, none of the excerpts quoted address the issue presented in this case, namely whether a project may still vest to an ordinance rendered void due to SEPA violations. In fact, SEPA was never even addressed in the discussion of vested rights by the Task Force.

2. Review should be accepted under RAP 13.4(b)(4) because this case involves an issue of substantial statewide public interest that will dramatically affect the application and continued efficacy of SEPA in land use decision-making.

The Court of Appeals' decision creates a dichotomy in the administration and enforcement of SEPA. According to the Court of Appeals, an ordinance passed in violation of SEPA remains valid, and any project with a complete application submitted prior to the Board's decision remains vested, provided that the ordinance is challenged as violating the GMA before the Growth Board. However, presumably, if the challenge to the ordinance is brought on another basis before another administrative or judicial body⁷, a violation of SEPA would result in a void ordinance and a loss of vested rights for any permits previously filed. This dichotomy will

⁷ For instance a challenge to a permit brought before the Shoreline's Hearings Board pursuant to RCW 43.21C.075(7) alleging a violation of the SMA and SEPA, an action brought under RCW 36.70C challenging a permit and alleging a violation of SEPA, or an administrative SEPA appeal before a hearing examiner or local decisionmaker.

result in terrible confusion about the consequences of SEPA noncompliance among state and local governments if such consequences vary depending upon the venue of review.

In addition to the confusion created by the forum-specific analysis, the continued efficacy of SEPA as a tool to guarantee each citizen the “fundamental and inalienable right to a healthful environment”⁸ is called into question by the Court of Appeals’ decision. As stated above, if vested rights may be obtained by racing to file an application while Growth Board review of SEPA compliance is pending, then compliance with SEPA is effectively unreviewable. Citizens of this state can no longer be assured that, despite forty years of jurisprudence to the contrary, environmental values will be given appropriate consideration in government decision making. Thus, the Supreme Court should take this opportunity to clarify the interaction between SEPA, GMA, and vested rights.

The Town further incorporates the arguments of Save Richmond Beach with respect to this portion of the Petition.

⁸ RCW 43.21C.020.

F. CONCLUSION

Petitioner, the Town of Woodway, respectfully requests the Court to grant its Petition for Review and overrule the Court of Appeals. This case presents a dramatic expansion of vested rights and corresponding weakening of SEPA enforcement that should be considered by the Supreme Court. It will ultimately impact not only forty years of SEPA case law written by this Court and others, but also will impact the way in which development occurs in this State for years to come.

RESPECTFULLY SUBMITTED this 6th day of February, 2013.

OGDEN MURPHY WALLACE, P.L.L.C.

By 
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APPENDIX

Court of Appeals Decision, Published Opinion
January 7, 2013.....A-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TOWN OF WOODWAY and)	NOS. 68048-0-1
SAVE RICHMOND BEACH, INC., a)	68049-8-1
Washington non-profit corporation,)	(Consolidated Cases)
)	
Respondents,)	DIVISION ONE
)	
v.)	
)	
SNOHOMISH COUNTY and)	
BSRE POINT WELLS, LP,)	PUBLISHED OPINION
)	
Appellants.)	FILED: January 7, 2013
)	

Lau, J. — Under the Growth Management Act (GMA), a landowner's development permit application vests to a local jurisdiction's land use comprehensive plan provisions and development regulations at the time a complete application is filed, despite a Growth Management Hearings Board's (Growth Board) later determination that the local jurisdiction did not fully comply with the State Environmental Policy Act's (SEPA) procedural requirements in its enactment of those plan provisions and regulations. Because BSRE Point Wells, LP filed complete development permit applications before the Growth Board issued its final decision and order, those

applications vested to Snohomish County's urban center ordinances. We reverse the trial court's summary judgment order granting declaratory and injunctive relief in favor of Town of Woodway and Save Richmond Beach, Inc. (SRB) and remand for entry of an order dismissing this lawsuit on Snohomish County's and BSRE's summary judgment motions.

FACTS AND PROCEDURAL HISTORY

The parties agree this appeal raises questions of law and not fact.¹ BSRE owns a 61-acre site on Puget Sound known as Point Wells. The site is located in unincorporated Snohomish County, just north of the King County-Snohomish County border. Because Puget Sound lies to the west and steep bluffs rise to the east, ingress is limited to a two-lane road running through the city of Shoreline's Richmond Beach neighborhood in King County and then through Woodway in Snohomish County. The road dead-ends at Point Wells. The nearest highway, State Route 99, lies approximately two and one-half miles to the east.

During the last century, Point Wells accommodated a petroleum terminal, a tank farm, and an asphalt plant. In 2007, BSRE sought a redesignation of the Point Wells site on the Snohomish County (County) comprehensive plan map from an industrial designation to one that would allow it to redevelop the site with residential and commercial uses. The county council granted that request in two separate actions in 2009 and 2010. Under the authority of the GMA, it adopted ordinances redesignating

¹ Because this appeal presents pure legal questions, our review is de novo. CR 56(c); Blue Diamond Grp., Inc. v. KB Seattle 1, Inc., 163 Wn. App. 449, 453-54, 266 P.3d 881 (2011); Mathioudakis v. Fleming, 140 Wn. App. 247, 252, 161 P.3d 451 (2007).

the Point Wells site as an “urban center” on the County’s comprehensive plan map in 2009. Neighboring jurisdictions Woodway and the city of Shoreline, together with neighborhood group SRB, petitioned for review of the comprehensive plan amendments and the adequacy of the County’s SEPA review before the Growth Board.²

Meanwhile, the county council in 2010 rezoned Point Wells to an “urban center” zone and adopted development regulations accommodating mixed-use development at the site.³ Environmental review of the development regulations consisted of a determination of nonsignificance based on the final supplemental environmental impact statement used to support the 2009 comprehensive plan amendments. Woodway, Shoreline, and SRB also petitioned for review of the development regulations.⁴ The Growth Board consolidated the petitions, and BSRE intervened. All parties appeared at a hearing on the merits.

Following the Growth Board hearing, but before it issued its final decision and order, BSRE applied to the County for several development permits. On February 14, 2011, it filed a master permit application for a preliminary short plat (subdivision) and a land disturbing activity permit. On February 20, 2011, the County published a notice indicating that BSRE had filed a completed subdivision application. In addition, on March 4, 2011, BSRE filed a master permit application for a shoreline management

² The petitions were consolidated as Growth Management Hearings Board case 09-3-0013c Shoreline III.

³ Snohomish County amended ordinances 09-079 and 09-080.

⁴ The petitions were consolidated as Growth Board case 10-3-0011c Shoreline IV.

substantial development permit, an urban center development permit, a site (development) plan, a land disturbing activity permit, and a commercial building permit. On March 13, 2011, the County published a second notice indicating BSRE had filed completed applications for the shoreline substantial development permit, the urban center development permit, the site plan, and the commercial building permit.

On April 25, 2011, the Growth Board issued a final decision and order,⁵ ruling that the County's challenged enactments were adopted partly in violation of the GMA and partly in violation of SEPA. The Growth Board also found the challenged comprehensive plan provisions, but not the development regulations, invalid under the GMA.⁶ The Growth Board remanded to the County, directing it to bring its comprehensive plan amendments into compliance with the GMA and SEPA. As to the regulations, the Growth Board found them noncompliant with SEPA and remanded for remedial action.

On September 12, 2011, Woodway and SRB⁷ filed a complaint in superior court seeking (1) a declaration that BSRE's development permit applications had not vested to the County's urban center designation or development regulations in effect at the

⁵ The Growth Board issued a corrected final decision and order on May 17, 2011, that remedied clerical errors.

⁶ Woodway and SRB had argued for invalidation of both the comprehensive plan provisions and the development regulations.

⁷ Although a copetitioner in the Growth Board appeal, Shoreline is not a party to this appeal. We note that Shoreline was the only party that argued to the Growth Board that the County's enactments violated SEPA. Woodway never raised SEPA before the Growth Board, and SRB's SEPA challenge was dismissed for lack of standing.

time of filing and (2) an injunction barring the County from processing BSRE's development permit applications until the County achieved GMA and/or SEPA compliance on all remanded ordinances, as directed by the Growth Board's final decision and order. Woodway and SRB moved for summary judgment, seeking the relief requested in the complaint. The County and BSRE separately moved for summary judgment, requesting dismissal of the complaint.

After oral argument, the trial court granted Woodway and SRB's summary judgment motion and denied the County's and BSRE's motions. The court concluded that "BSRE is not vested to the Snohomish County ordinances in effect at the time BSRE made application for the urban center permits." It also issued an injunction preventing the County from processing BSRE's development permit applications until the County complied with the Growth Board's final decision and order. We consolidated appeals by the County and BSRE.

ANALYSIS

The dispositive question is whether, under the GMA, a landowner's development permit application vests to a local jurisdiction's land use comprehensive plan provisions and development regulations at the time a complete application is filed, despite a Growth Board's subsequent determination that the jurisdiction did not fully comply with SEPA's procedural requirements in its enactment of those plan provisions and regulations.⁸

⁸ At oral argument in this court, Woodway formulated the issue as follows: "And the legal question is whether or not if they filed to a void ordinance, can you vest? That's the legal question that we think has been answered by those pre-GMA cases that were not overruled by .302 or .300(4). That is our position. If you find that .302 or

The County and BSRE argue that BSRE had a vested right to have its development permit applications processed under the urban center designation and development regulations in effect at the time of filing. Woodway and SRB argue BSRE acquired no vested rights because SEPA noncompliance renders the County's urban center ordinances ultra vires and/or void and thereby incapable of supporting vested rights. To fully understand the parties' various claims, we first discuss the vested rights doctrine and the development of the GMA.

Vested Rights Doctrine

"Washington's vested rights doctrine, as it was originally judicially recognized, entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations." Abbey Rd. Grp., LLC v. City of Bonney Lake, 167 Wn.2d 242, 250, 218 P.3d 180 (2009) (citing Hull v. Hunt, 53 Wn.2d 125, 130, 331 P.2d 856 (1958)). "Vesting 'fixes' the rules that will govern the land development regardless of later changes in zoning or other land use regulations." Weyerhaeuser v. Pierce County, 95 Wn. App. 883, 891, 976 P.2d 1279 (1999).

Washington's rule is the minority rule, and it offers more protection of development rights than the rule generally applied in other jurisdictions. The majority rule provides that development is not immune from subsequently adopted regulations until a building permit has been obtained and substantial development has occurred in reliance on the permit. Our cases rejected this reliance-based rule, instead embracing a vesting principle which places greater emphasis on certainty and predictability in land use regulations. By promoting a

.200—or .300—overruled all of those cases, I guess we lose." Wash. Court of Appeals oral argument, Town of Woodway v. Snohomish County, No. 68048-0-1, (Nov. 7, 2012), at 1 hr., 30 min., 57 sec. (on file with court).

date certain vesting point, our doctrine ensures that “new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law.” Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 637, 733 P.2d 182 (1987). Our vested rights cases thus recognize a “date certain” standard that satisfies due process requirements.

Abbey Rd. Grp., 167 Wn.2d at 250-51.

Naturally, our “liberal” vesting rule comes at a price. Graham Neighborhood Ass'n v. F.G. Assocs., 162 Wn. App. 98, 115, 252 P.3d 898 (2011). Our Supreme Court has acknowledged that vesting implicates a delicate balancing of interests. Erickson & Assocs., Inc. v. McLerran, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994) (“The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. . . . If a vested right is too easily granted, the public interest is subverted.”).

By statute, development rights vest upon the filing of a “valid and fully complete building permit application.” RCW 19.27.095(1); Abbey Rd. Grp., 167 Wn.2d at 246. The vested rights doctrine also applies to subdivision applications⁹ and shoreline substantial development permit applications.¹⁰ The parties agree that before the Growth Board issued its final decision and order, BSRE had filed complete development permit applications.¹¹

⁹ By statute, “a proposed division of land must be ‘considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances’ in effect at the time that the fully completed application is submitted.” Graham, 162 Wn. App. at 115 (quoting RCW 58.17.033).

¹⁰ Talbot v. Gray, 11 Wn. App. 807, 811, 525 P.2d 801 (1974).

¹¹ The County determined that BSRE’s development permit applications were complete and therefore vested.

Development of the GMA¹²

The GMA is Washington's fundamental land use planning law. Before its enactment, local land use planning was optional. See Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. Puget Sound L. Rev. 867, 876 (1993). In the 1980s, public concern mounted over rapid population growth and increasing development pressures within the state. See *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 546, 14 P.3d 133 (2000). Adopted by the legislature in 1990, the GMA responded to these concerns by, among other things, requiring the state's fastest-growing counties to adopt comprehensive growth management plans¹³ and development regulations¹⁴ to implement those plans.¹⁵

¹² The GMA's comprehensive legislative history leaves no doubt the legislature created no "loophole" to be filled in by the common law.

¹³ The comprehensive plan is the generalized coordinated land use policy statement adopted by a jurisdiction which will be used to guide its land use decisions well into the future. It has been described as a "blueprint" or "guide" for all future development. *Barrie v. Kitsap County*, 93 Wn.2d 843, 849, 613 P.2d 1148 (1980).

¹⁴ Development regulations are the controls placed on development or land use activities by a county or city. They must be consistent with and implement the comprehensive plan. RCW 36.70A.040.

¹⁵ In general, the GMA promotes a de-centralized approach to growth management. "Local governments have broad discretion in developing [comprehensive plans] and [development regulations] tailored to local circumstances." *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000) (alterations in original) (quoting *Diehl v. Mason County*, 94 Wn. App. 645, 651, 972 P.2d 543 (1999)). But such discretion is bounded by the GMA's enumerated planning goals, which were created and must be used "exclusively for the purpose of guiding the development of comprehensive plans and development regulations." RCW 36.70A.020.

In 1991, the legislature amended the GMA to establish an administrative review process to address the GMA's lack of administrative enforcement mechanism. Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County, 135 Wn.2d 542, 548, 958 P.2d 962 (1998). It adopted provisions, among others, to allow administrative appeals of comprehensive plan provisions and development regulations to the Growth Board.¹⁶ It also provided the Growth Board with authority to review petitions alleging that a comprehensive plan provision or development regulation was adopted not only in violation of the GMA's requirements but also of SEPA. RCW 36.70A.280(1).

Under the current formulation of the statute, if a petitioner challenges a comprehensive plan provision or development regulation, the Growth Board, after a hearing, must issue a final order "based exclusively" on whether the state agency, county, or city is "in compliance" or "not in compliance" with the requirements of the GMA, SEPA, or the Shoreline Management Act (SMA), ch. 90.58 RCW. RCW 36.70A.300(1), (3). Comprehensive plan provisions and development regulations are "presumed valid upon adoption," and the Growth Board must make a finding of compliance "unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the [Growth B]oard and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(1), (3). If the Growth Board makes a finding of noncompliance, it must remand the plan or regulation to allow

¹⁶ Originally, the GMA provided for three independent Growth Management Hearings Boards with regional authority in Eastern Washington, Western Washington, and Central Puget Sound, respectively. See Skagit Surveyors, 135 Wn.2d at 548. In 2010, the legislature consolidated the regional Growth Boards into a statewide Growth Management Hearings Board. Laws of 2010, ch. 211, § 4.

the affected jurisdiction to achieve compliance. RCW 36.70A.300(3)(b).

The 1995 GMA Amendments

In 1994, the Governor's Task Force on Regulatory Reform (Task Force)¹⁷ issued a report that served as the basis for landmark land use legislation during the 1995 legislative session. A portion of that report highlighted "a new legal issue"—the vested rights status of filed development permit applications during the pendency of an administrative appeal to the Growth Board. The Task Force observed:

The adoption of the GMA has created a new legal issue that several members of the local government, development, and environmental community believe must be resolved. Under the GMA, a local government's development regulations must be consistent with its comprehensive plan. If a comprehensive plan is declared invalid, or if a development regulation is found to be inconsistent with the plan, the validity of any permits issued by the local government under the authority of those development regulations will be called into question.

Because there are many different circumstances in which this issue may arise, it is not possible to develop a single principle which would apply in all cases. Therefore, the Task Force is recommending giving the Growth Management Hearings Boards discretion to make the determination on a case-by-case basis. The presumption should be that the plan or regulation will remain in effect unless the Board determines this would violate the policy of the GMA.

Wash. Office of Fin. Mgmt., Governor's Task Force on Regulatory Reform: Final Report at 52 (Dec. 20, 1994). The Task Force recommended that

a comprehensive plan or development regulation which is found to be invalid should remain in effect, unless the Growth Management Hearings Board determines that continued enforcement of the plan would violate the policy of the GMA. The Board should make appropriate findings and conclusions to support this determination and should limit the effect of its determination to those portions of the plan or regulation that violate the policy of the GMA.

Final Report, supra, at 52

In response to the Task Force report, the legislature in 1995 adopted regulatory

¹⁷ The Task Force was established in 1993 by executive order 93-06.

reform legislation broadly integrating growth management planning and environmental review. Laws of 1995, ch. 347, § 1. This legislation amended the GMA, SEPA, and the SMA. Laws of 1995, ch. 347, Parts I, II, and III. It also adopted new chapters imposing regulatory reform on project permit processing, chapter 36.70B RCW, and providing for a new method of appealing local land use permit decisions—the Land Use Petition Act, chapter 36.70C RCW.

On the question of what happens to vested rights when a development permit application is filed pending a Growth Board appeal, the legislature responded by amending the GMA to authorize a determination of invalidity by the Growth Board. Skagit Surveyors, 135 Wn.2d at 561-62. It left intact the developer's ability to vest development permit applications while any appeal of the challenged enactment remained pending. If the Growth Board found a comprehensive plan provision or development regulation noncompliant with the GMA or SEPA and the noncompliance substantially interfered with the fulfillment of the GMA's goals, the Growth Board could issue a determination of invalidity as to the challenged comprehensive plan provision or development regulation. Under that determination, no development permit applications could vest from the date of the Growth Board's invalidity order until the county or city adopted compliant legislation.

As enacted, the amendment stated:

(2) A finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand, unless the board's final order also:

(a) Includes a determination, supported by findings of fact and conclusions of law, that the continued validity of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and

(b) Specifies the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

(3) A determination of invalidity shall:

(a) Be prospective in effect and shall not extinguish rights that vested under state or local law before the date of the board's order; and

(b) Subject any development application that would otherwise vest after the date of the board's order to the local ordinance or resolution that both is enacted in response to the order of remand and determined by the board pursuant to RCW 36.70A.330 to comply with the requirements of this chapter.

Laws of 1995, ch. 347, § 110 (some emphasis omitted). This amendment simplified the GMA review process by providing the Growth Board “two distinct alternatives” to address noncompliant comprehensive plans and development regulations: (1) make a finding of noncompliance or (2) enter a determination of invalidity. King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 138 Wn.2d 161, 181, 979 P.2d 374 (1999).

The 1997 GMA Amendments

Even with the enactment of the 1995 invalidity provision, the legislature remained concerned about the impact of allowing development permit applications to vest to comprehensive plan provisions and development regulations during appeal. It ordered the 14-member Land Use Study Commission, originally created by the 1995 legislation,¹⁸ to further study that issue:

The commission shall:

.....
(4) Monitor instances state-wide of the vesting of project permit applications during the period that an appeal is pending before a growth management hearings board, as authorized under RCW 36.70A.300. The commission shall also review the extent to which such vesting results in the approval of projects that are inconsistent with a comprehensive plan or development regulation provision ultimately found to be in compliance with a board's order or remand. The commission shall analyze the impact of such approvals on ensuring the attainment of the goals and policies of chapter 36.70A RCW, and make recommendations to the governor and the legislature on statutory changes to address any adverse impacts from the provisions of RCW 36.70A.300. The commission shall provide an initial report on its findings and recommendations by November 1, 1995, and submit its further findings and recommendations subsequently in the reports required under section 803 of this act.

Laws of 1995, ch. 347, § 804(4). The commission was also directed to submit annual reports to the legislature and governor stating its findings, conclusions, and recommendations.

The commission made the following finding and recommendation regarding invalidity:

Since their creation, the Boards have had the authority to determine that plans or regulations do not comply with the GMA. This authority led to concerns

¹⁸ Laws of 1995, chapter 347, section 801 charged the commission to "integrat[e] and consolidat[e] . . . the state's land use and environmental laws into a single manageable statute."

about the effect of a decision of non-compliance on permit applications and projects that are dependent upon those plans or regulations. The Legislature sought to clarify this impact in 1995 by providing that a determination of noncompliance did not apply to permits unless the Board made a specific finding that the plan or regulation was invalid. This order only applies to permits filed after the date of the Board's order. Those projects are subject to the plan or regulations determined by the Board as complying with the GMA. The Boards have issued approximately 10 invalidity orders since the authority was granted to them.

The exercise of this authority has proven to be a potent tool for encouraging compliance with the GMA. However, it has also proven to be a focus for complaints that the Boards are undermining the original purpose of the GMA that local elected officials should make the planning decisions for their communities. The options considered by the Commission to address this authority ranged from eliminating the authority, to allowing projects to be reviewed under the goals and policies of the GMA until a new plan or development regulations are approved, to clarifying the types of permits affected and not affected by the order.

Wash. Land Use Study Comm'n, 1996 Annual Report § VI.B(2) (Jan. 14, 1997).

Despite the legislature's concern, the commission recommended no changes that would weaken protections for vested rights. Instead, it recommended

the authority to invalidate comprehensive plans should remain with the Boards. [The commission] is recommending changes that clarify that projects that vested prior to the determination are not affected by the order, exempt some types of permits from the effect of a determination of invalidity, and clarify the options available to a local government to have an order lifted.

Wash. Land Use Study Comm'n, 1996 Annual Report § VI.B(2) (Jan. 14, 1997)

(emphasis added).

The 1997 legislature recodified the GMA's invalidity provision in a new, stand-alone section, RCW 36.70A.302. Laws of 1997, ch. 429, § 16. The legislature retained the grounds for finding invalidity (substantial interference with the fulfillment of the GMA goals) in subsection (1) of new section .302. The vested rights provision adopted by

the 1995 legislature was moved, with little change, to the first sentence of subsection (2). Then, responding to the commission's 1996 recommendation that it clarify with even greater emphasis that "projects that vested prior to the determination [of invalidity] are not affected by the order," the legislature added a second sentence to the vesting provision in subsection (2). In full, subsection (2) states:

A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

RCW 36.70A.302(2). The commission issued a final report on December 30, 1998, which included a "Study of the Impact of Vesting During GMHB Appeals." Wash. Land Use Study Comm'n, Final Report, ch. 14 (Dec. 30, 1998). The 1997 invalidity provision remains unchanged to this day.

Relying on the GMA's legislative history and the invalidity provision's plain text, the County and BSRE argue that "because BSRE's development permit applications were filed prior to the issuance of the Growth Board's [final decision and order], they are vested to the County's urban center ordinances." Snohomish County's Opening Br. at 9 (boldface and formatting omitted). Woodway and SRB respond arguing principally that

[u]nder the GMA, "invalidity" only relates to ordinances found to substantially interfere with the GMA goals.

Accordingly, there exists a certain class of cases, of which this case is one, where a procedural violation of SEPA does not result in a violation of the GMA goals. In those particular instances, the prospective invalidity provisions of RCW 36.70A.302(2) do not apply. Instead, the pre-Regulatory Reform rule that vested rights cannot be obtained in an invalid ordinance applies and prevails.

Woodway's Response Br. at 20. In essence, Woodway and SRB contend that the County's development regulations are void and the legislature left a "loophole" to be filled in by the common law.¹⁹

We conclude that RCW 36.70A.302(2)'s invalidity provision controls the present dispute. It unambiguously²⁰ describes what happens to development permit applications that are filed with counties and municipalities relying on recently adopted GMA enactments—comprehensive plan provisions and development regulations—that are challenged in a Growth Board administrative appeal. As quoted above, RCW 36.70A.302(2)²¹ states that those complete and filed applications vest to those challenged plan provisions and regulations, regardless of the Growth Board's subsequent ruling in the administrative appeal. The legislature made clear that the Growth Board may declare a local enactment invalid only when that enactment substantially interferes with the fulfillment of the GMA's goals. A violation of SEPA alone is not a sufficient ground for invalidity.²² Here, the Growth Board determined that

¹⁹ At the trial court, Woodway and SRB acknowledged that the GMA's invalidity provision disallowed a determination of invalidity premised on a violation of SEPA alone. They claimed this was a "loophole" that required judicial backfill.

²⁰ Woodway and SRB do not contend this provision is ambiguous.

²¹ In determining whether a statute conveys a plain meaning, "that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). "If the statute's meaning is plain on its face, we give effect to that plain meaning as the expression of what was intended." TracFone Wireless, Inc. v. Dep't of Rev., 170 Wn.2d 273, 281, 242 P.3d 810 (2010).

²² As we noted in Davidson Serles & Assocs. v. Central Puget Sound Growth Management Hearings Board, 159 Wn. App. 148, 158 n.8, 244 P.3d 1003 (2010),

the County's urban center development regulations violated no GMA requirements. The Growth Board instead concluded the regulations violated only SEPA's procedural rules.²³ Accordingly, the Growth Board did not invalidate the regulations. Therefore, those regulations remain valid.

In addition to specifying the conditions under which the Growth Board may hold a local enactment invalid, RCW 36.70A.302 also provides that development permit applications filed prior to the time the city or county receives the Growth Board's determination of invalidity vest to the development regulations under which they were submitted.²⁴ RCW 36.70A.302(2). Here, even if the urban center development regulations had violated the GMA's requirements and were later declared invalid, all development permit applications submitted prior to the County's receipt of the invalidity determination would remain vested to the invalidated development regulations.

Authoritative sources support the invalidity provision's plain meaning discussed above. In discussing GMA noncompliance and the effect of an invalidity determination's effect on vesting, Professor Richard L. Settle, a preeminent authority

the Growth Board has never invalidated an ordinance based solely on SEPA noncompliance.

²³ The Growth Board determined the County's deficiency was not that it failed entirely to make a threshold determination regarding SEPA's applicability or to prepare an environmental impact statement. It merely concluded the County's environmental review was insufficient because it failed to analyze reasonable alternatives in violation of RCW 43.21C.030(c)(iii).

²⁴ Woodway and SRB fail to explain why a less severe finding of procedural noncompliance with SEPA merits no vested rights. Our review of the GMA's legislative development finds no support for this illogical distinction.

on SEPA,²⁵ explained:

When a Growth Board has ruled that local plan provisions or regulations are violative of GMA's requirements, they are doomed, but not dead, unless they are subject to an "invalidity" order or until, after remand, they have been revised or repealed to comply with the Act. A 1995 GMA amendment [Laws of 1995, ch. 347, § 110] was enacted to clarify ambiguity about the legal status of local enactments after a Growth Board had determined that they were not in compliance with GMA requirements, but before they were locally amended.

The Growth Boards have no authority to adopt and impose local plan provisions or regulations. The Boards' remedial powers are limited to remanding noncompliant provisions to local government for rectification within a specified period of time. . . . As a result of the Boards' limited remedial powers, the uncertain legal status of noncompliant local provisions has tended to paralyze development, and the duration of the paralysis could be extended during judicial review of Board decisions.

The 1995 amendment, along with a more definitive 1997 amendment, [Laws of 1997, ch. 429, §§ 1-22], brought noncompliant GMA plans and regulations out of limbo by providing that "a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand . . . unless the Board makes a determination of invalidity." The statute goes on to provide that "[a] determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county."

Once a determination of invalidity has been properly issued and received by a city or county, the specified local provisions become legally inoperative and are not subject to vesting, except for subsequently filed permit applications for owner-built single-family homes, remodeling and expansion of existing structures, and lot line adjustments.

Richard L. Settle, Washington's Growth Management Revolution Goes to Court, 23 Seattle U. L. Rev. 5, 44-46 (1999) (footnotes omitted) (quoting RCW 36.70A.300(4); 302(3)).

In addition, Professor Settle's authoritative SEPA treatise, "The Washington State Environmental Policy Act – A Legal and Policy Analysis," provides no support for

²⁵ The parties agree that Professor Settle is a recognized authority on SEPA issues. His SEPA treatise has been frequently cited in numerous cases.

Woodway and SRB's claim that "in circumstances where the Board finds SEPA noncompliance only, the Legislature has not altered the application of preexisting case law^[26] concluding that government actions taken in violation of SEPA are void."

Woodway's Response Br. at 22. On this point, it states the contrary. After noting that "[g]overnment action taken in violation of SEPA generally has been regarded as unlawful, ultra vires, a nullity," Professor Settle explains that the 1995 regulatory reform amendments to the GMA produce a contrary result:

Since generally one may not obtain vested rights in an invalid regulation, SEPA non-compliance in the adoption of a regulation logically would preclude vested rights in the regulation. However, a 1995 regulatory reform amendment to the Growth Management Act (GMA) provisions for the Growth Management Hearing Board would produce a contrary result. Under this amendment, a GMA plan, development regulation, or amendment, which the Board found to be in violation of SEPA, nevertheless could support vested rights. A building permit, plat, or, perhaps other regulatory approval applicant would have vested rights in a locally adopted plan or regulation even if the Board later decided that the local

²⁶ These cases do not address the critical vesting question at issue in this case. Woodway and SRB cite Noel v. Cole, 98 Wn.2d 375, 655 P.2d 245 (1982) (pre-GMA case holding that failure to prepare an environmental impact statement rendered a contract for the sale of timber rights ultra vires and void); Lassila v. City of Wenatchee, 89 Wn.2d 804, 576 P.2d 54 (1978) (pre-GMA case vacating comprehensive plan amendment for failure to make threshold determination under SEPA); Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wn.2d 475, 481, 513 P.2d 36 (1973) (pre-GMA case holding "no rights may vest where either the [building permit] application submitted or the permit issued fails to conform to the zoning or building regulations"); Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wn. App. 59, 510 P.2d 1140 (1973) (pre-GMA case remanding grading permit for failure to make threshold determination under SEPA); South Tacoma Way, LLC v. State of Washington, 169 Wn.2d 118, 233 P.3d 871 (2010) (non-GMA case involving sale of state land); Responsible Urban Growth Grp. v. City of Kent, 123 Wn.2d 376, 868 P.2d 861 (1994) ("RUGG") (non-GMA case holding actions taken under an ordinance adopted without sufficient public notice were invalid and void); and Clark County Wash. v. W. Wash. Growth Mgmt Hearings Bd., 161 Wn. App. 204, 254 P.3d 862 (2011) (inapposite GMA case involving no vested rights issue). And we decline to address the broader question of whether RUGG and the pre-GMA cases cited above are overruled or repealed.

government violated SEPA by failing to make a proper threshold determination or prepare an adequate EIS. Moreover, under the amendment, vested rights could continue to arise even after the Board finds noncompliance with SEPA unless the [Growth Board enters a determination of invalidity].

Richard L. Settle, *The Washington State Environmental Policy Act* § 19.01[10] (2010) (emphasis added) (footnotes omitted).

In response to Professor Settle's definitive statement on this issue, Woodway and SRB claim "Professor Settle did not cite any authority for his statements and did not discuss the presumption against implied repeal of existing case law."²⁷ Woodway's Response Br. at 22-23. These claims fail. The above quote is clear—Professor Settle relied on the GMA's 1995 regulatory reform amendments. As discussed above, these amendments and the subsequent 1997 amendments clearly spelled out when development rights vest during the appeal of GMA enactments and when they do not. They also clarified that a violation of SEPA was not grounds for invalidity and therefore not grounds for the voiding of any development permit applications relying on the underlying legislative enactments. Professor Settle correctly states the effect of these GMA amendments.

The Supreme Court's discussion in King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 138 Wn.2d 161, 979 P.2d 374 (1999), is instructive. It discusses the GMA's administrative review process for determining whether comprehensive plan

²⁷ Woodway and SRB also claim that Professor Settle "has not necessarily been correct in all circumstances." Woodway's Response Br. at 23. We are unpersuaded by this claim because the relevant question is whether he correctly states the rule in this case. We have found Professor Settle to be a "recognized authority on SEPA." Waterford Place Condo. Ass'n v. City of Seattle, 58 Wn. App. 39, 45, 791 P.2d 908 (1990).

provisions comply with the GMA's requirements. As discussed above, the GMA provides two alternatives—a finding of noncompliance under RCW 36.70A.300(3)(b) or a determination of invalidity under RCW 36.70A.302. The court explained:

If the Board finds “noncompliance” it may remand the matter to the county and specify action to be taken and a time within which compliance must occur. County plans and regulations, which are presumed valid upon adoption pursuant to RCW 36.70A.320, remain valid during the remand period following a finding of noncompliance. RCW 36.70A.300(4) (“Unless the board makes a determination of invalidity as provided in RCW 36.70A.302, a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand.”). Unlike a finding of noncompliance, a finding of invalidity requires the Board to make a determination; supported by findings of fact and conclusions of law, that the continued validity of the provision would substantially interfere with the fulfillment of the goals of the GMA. RCW 36.70A.302(b). Upon a finding of invalidity, the underlying provision would be rendered void.

This dichotomy was further explained in this court's recent decision in Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County, 135 Wn.2d 542, 958 P.2d 962 (1998). In that case, we emphasized the significance of a finding of invalidity versus a finding of noncompliance. Skagit cited to the legislative history of the GMA to explain the rationale for differentiating between the two determinations.

“If a comprehensive plan is declared invalid, or if a development regulation is found to be inconsistent with the plan, the validity of any permits issued by the local government under the authority of those development regulations will be called into question.”

“Because there are many different circumstances in which this issue may arise, it is not possible to develop a single principle which would apply in all cases. Therefore, the Task force is recommending giving the Growth Management Hearings Board discretion to make the determination on a case-by-case basis. The presumption should be that the plan or regulation will remain in effect unless the Board determines this would violate the policy of the [Growth Management Act].”

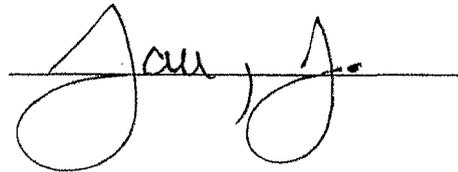
King County, 138 Wn.2d at 181-82 (footnote omitted) (alternation in original) (quoting Skagit Surveyors, 135 Wn.2d at 561-62).

Nothing in King County or the GMA's plain text and comprehensive legislative

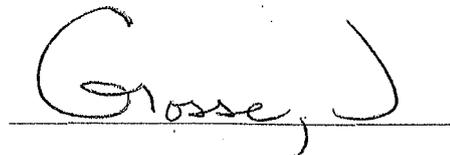
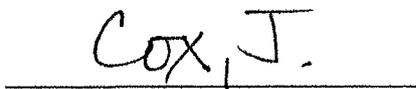
history supports Woodway and SRB's claim that pre-GMA or non-GMA cases control. Those cases do not apply because they do not address the critical vesting question here—what happens to development permit applications filed with counties and cities relying on recently adopted GMA enactments (comprehensive plan provisions and development regulations) that are being challenged in an administrative appeal before the Growth Board? This question is plainly addressed by the GMA's invalidity provision.

CONCLUSION

For the reasons discussed above, we reverse the trial court's summary judgment order granting declaratory and injunctive relief in favor of Town of Woodway and SRB and remand for entry of an order dismissing this lawsuit on Snohomish County's and BSRE's summary judgment motions.²⁸



WE CONCUR:



²⁸ Given our resolution, we need not address the County's and BSRE's alternative jurisdiction and Land Use Petition Act challenges.

68048-0-1, 68049-8-1/23

DECLARATION OF SERVICE

I, Gloria Zak, make the following true statement.

On the 6th day of January, 2013, I provided this Petition for Review via legal messenger to the Court of Appeals and via e-mail and regular mail to the following:

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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.

EXECUTED at Seattle, Washington this 6th day of January, 2013.


Gloria J. Zak