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

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Appellants,

vs.

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

Respondents.

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RESPONDENT SAVE RICHMOND BEACH'S PETITION FOR
DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Save Richmond Beach, Inc., a Washington nonprofit corporation.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the Published Opinion of the Court of Appeals, Division I, filed in this case on January 7, 2013. A copy of the Opinion is attached as Appendix A to this brief

III. ISSUES PRESENTED FOR REVIEW

Can a development application validly vest to land use designations and development regulations that have been adopted in violation of State Environmental Policy Act (SEPA), even where the ordinances in question were adopted at the behest of the developer, are significantly more permissive, and the developer was well aware of the alleged SEPA deficiencies at the time of its application? Put another way, may Washington's vested rights doctrine, as codified in the Growth Management Act (GMA), be used as a "sword" to avoid compliance with SEPA's procedural requirements, rather than a "shield" to guard against subsequent legislative enactments?

IV. STATEMENT OF THE CASE

This case presents a question of first impression concerning the balance between two of our State's compelling policy interests: on the one

hand, the need for economic vitality, protection of property rights, and predictability as embodied by Washington's vested rights doctrine; on the other hand, the need for a healthful environment and thoughtful consideration of environmental impacts as embodied by SEPA, Washington's primary environmental protection law.

A. The Point Wells site and surrounding community.

The case arises from the proposed redevelopment of Point Wells, a 61-acre tract on the shores of Puget Sound in the far southwest corner of Snohomish County, just across the boundary from King County. CP 280. Although Point Wells is located within unincorporated Snohomish County, it is bordered on three sides by the Town of Woodway, with Puget Sound serving as a boundary to the west. CP 100. The Richmond Beach neighborhood in the City of Shoreline lies immediately to the south of Point Wells across the county line. *Id.*

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

complaints from the surrounding neighborhood. *Id.* This is presumably because Point Wells is tucked away at the end of a winding two-lane, local road with *no* passersby and very little traffic in general. *Id.* The only land-based access to the site is via Richmond Beach Drive, which runs to the south across the King County line, making it impossible to access Point Wells by car without passing through Woodway and Richmond Beach (Shoreline). CP 101. Because Point Wells is in unincorporated Snohomish County, it falls within the County's land use jurisdiction. However, most of the urban services for Point Wells, including roads and other urban infrastructure, would likely have to be provided by Woodway and Shoreline. CP 101-2. Thus, Snohomish County potentially stands to benefit financially from the re-development of Point Wells (in the form of permit fees, taxes, etc.), while Woodway and Shoreline would likely bear the burden of providing urban services to the site.

In its Final Decision and Order dated April 25, 2011, the Central Puget Sound Growth Management Hearings Board ("GMHB" or "Board") aptly described the traffic limitations of the Point Wells Site:

A major obstacle [to redevelopment] is limited access. Point Wells lacks highway access. Due to the steep bluffs upland, the only way to access the property by land is through the City of Shoreline from the south via Richmond Beach Drive, a two-lane street that dead-ends at Point Wells. The nearest major highway is State Route 99, approximately 2.5 miles east, via Richmond Beach Drive

and N. 185th Street in Shoreline.... The [environmental impact statement] points out the bluff to the east and northeast limits the potential for additional access roads.

Point Wells also lacks transit service. Express transit service, whether offered by King County Metro or Community Transit, is 2.5 miles away, on State Route 99, and Sound Transit's proposed light rail line is beyond — on Interstate 5. While the rail line through Point Wells provides commuter service between Seattle and Everett, Sound Transit, which operates commuter rail, has no present plan to provide a Point Wells station. Even if the King County Metro bus line which now terminates half a mile from Point Wells were extended to Point Wells in the future to serve the anticipated population, this would not be express or high-capacity service. CP 102-3.

Point Wells is located within the Town of Woodway's Municipal Urban Growth Area (MUGA). CP 102. Woodway stands to be significantly affected by the proposed "Urban Center" development of the Point Wells site, both in terms of traffic/environmental impacts and the provision of urban services. *Id.* Woodway has historically supported mixed-use redevelopment of the Point Wells site, but not at the massive "Urban Center" densities that are the subject of this case. *Id.*

Save Richmond Beach is a community organization composed of individual residents in Woodway and the Richmond Beach neighborhood of Shoreline. CP 305. Its mission is to preserve the character of Richmond Beach and surrounding neighborhoods through responsible, sustainable planning. *Id.* The members of Save Richmond Beach use the

public amenities in the communities adjacent to Point Wells on a daily basis, including streets, schools, parks, libraries, and other City- or County- services. *Id.* Many of these members regularly walk or drive the quiet residential roads near Point Wells, and many of them live on or adjacent to these roads. *Id.* Because these roads currently provide the only access to Point Wells, all of the members who rely or live on them stand to be adversely impacted by the intensive development that Snohomish County's invalid "Urban Center" re-designation would allow. *Id.* Among other things, such intensive development will lead to increased traffic congestion in the Richmond Beach neighborhood, which does not have adequate transportation infrastructure or public facilities to support development on an "Urban Center" scale. *Id.* In sum, the proposed redevelopment of Point Wells as a massive "Urban Center" poses a very real threat to the property interests, safety, environment and overall quality of life of Save Richmond Beach's members. CP 306.

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

B. The re-designation and re-zoning of Point Wells.

In 2006, BSRE¹ applied to Snohomish County to re-designate Point Wells from an “Urban Industrial” land use designation to an “Urban Center” designation. CP 181-186. “Urban Center” is Snohomish County’s most intensive, high density land use classification for mixed-use developments. CP 197-8. It contains no maximum residential density – only a minimum. In short, “Urban Center” means what it says: a downtown-style, high rise development where the County has seen fit to concentrate a population “center.” As one might expect for this type of development, Urban Centers are supposed to be “located along an existing or planned high capacity transit route.” CP 214. Despite Woodway’s, Shoreline’s, and Save Richmond Beach’s objections, the Snohomish County Council granted BSRE’s request to re-designated Point Wells as an “Urban Center” on August 12, 2009. CP 94-5. Point Wells thus became one of only seven designated Urban Centers within Snohomish County.

Unlike the other “Urban Centers,” which are all located near major highways and intersections, Point Wells is, by virtue of its unique topography and geography, relatively isolated. To the west and northwest,

¹ Then known as Paramount of Washington, L.L.C.

it is bounded by approximately 3,500 feet of Puget Sound shoreline; to the east and northeast, it is sheltered by a steep, environmentally-sensitive slope ascending approximately 150 to 200 feet high. CP 100. The transportation impacts of designating Point Wells as an urban center were the subject of many of the public comments by Woodway, Shoreline, and Save Richmond Beach, and ultimately became one of the primary bases for these parties' appeal to the Growth Management Hearings Board.

Meanwhile, Snohomish County undertook to adopt new development regulations for all "Urban Centers" within the County, including the newly-designated Point Wells Urban Center. CP 216. The County ultimately adopted two ordinances as a result of this effort—one to adopt a new Chapter 30.34A of the Snohomish County Code ("SCC") adding a new "Urban Center" zoning classification and new regulations governing urban center development; and another to adopt area wide rezones to implement the new "Urban Center" zone. CP 95. At BSRE's request, the Snohomish County Council applied the same permissive, high-density "Urban Center" development regulations to Point Wells that it did to all of the other urban centers within the County. *Id.* Once again, Woodway, Shoreline and Save Richmond Beach appealed to the Growth Management Hearings Board.

C. Snohomish County's flawed SEPA process.

In response to BSRE's request to re-designate and rezone the Point Wells site, Snohomish County issued a Determination of Significance stating that an EIS was required for the Comprehensive Plan amendments changing the designation of Point Wells to "Urban Center." CP 218-220. But rather than developing a new EIS, the County relied on an existing EIS developed for previously-considered Comprehensive Plan updates, and on February 6, 2009, issued a Draft Supplemental EIS ("DSEIS"). CP 95. In response to the DSEIS, the County received detailed comments from interested parties such as Woodway, the City of Shoreline, and various transit agencies pointing out significant, unmitigated, adverse environmental impacts including transportation issues, roadway concerns, and adequacy of emergency and public services. CP 136-139, 221-236.

The DSEIS was followed in June 2009 by a Final Supplemental EIS (FSEIS), which responded to comments but deferred some analysis of impacts and mitigation to the permitting stage. CP 146. The FSEIS considered only two alternatives: (1) the "Proposed Action" requested by BSRE, as summarized above; and (2) the "No Action Alternative" to retain the existing comprehensive plan and zoning designations at Point Wells. *Id.* In other words, the EIS considered only the existing land use designation for the site and the most intensive land use designation

available – “Urban Center.” No other alternatives were analyzed. Nor did the EIS consider an alternative location for an Urban Center in southwest unincorporated Snohomish County. *Id.* Once again, interested parties provided comments challenging the sufficiency of the EIS. CP 238-247. At no point did the County order a new EIS to determine the impacts of the ordinances, but instead relied upon the DSEIS and FSEIS previously issued.

D. Growth Management Hearings Board decision.

The Town of Woodway and Save Richmond Beach, along with the City of Shoreline, filed appeals with the GMHB, challenging the County’s comprehensive plan and zoning ordinances as well as the SEPA process utilized by the County. CP 95-96. BSRE was granted permission to intervene. *Id.* On April 26, 2011, the Board issued its Final Decision and Order (“FDO”), finding the designation of Point Wells as an Urban Center to be clearly erroneous in three respects. CP 93. First, the designation was internally inconsistent with the County’s comprehensive plan provisions concerning Urban Centers, in violation of RCW 36.70A.070. CP 114. Second, the action was also inconsistent with the City of Shoreline’s GMA requirements for capital facilities and transportation planning. CP 129. Third, the Board found that the action was not guided by GMA planning goal. CP 143. As a result, the FDO provided, in part,

that the County's designation of Point Wells as Urban Center violated the Growth Management Act ("GMA") and was declared invalid.

The Board also found that the County failed to comply with SEPA with respect to the Comprehensive Plan amendments as well as the amendments to the development regulations. The County's FSEIS failed to identify and analyze reasonable alternatives, in violation of SEPA. Consequently, the DNS for the Urban Center development regulations was also found to be legally inadequate based on its reliance on the inadequate EIS. CP 156. The Board ordered that the County comply with both GMA and SEPA. No appeal was made of this FDO.

E. BSRE's application to develop Point Wells as an Urban Center.

On or about March 4, 2011, following the Growth Board's hearing on the merits but prior to the Board's Final Decision and Order, BSRE filed applications to subdivide the Point Wells property and develop it as a massive Urban Center with approximately 3,000 residential units and 100,000 square feet of retail space (collectively, the "BSRE Permit Application"). CP 248-262. Having participated in the Growth Board proceeding, BSRE was well aware at the time of its application that the Ordinances in question had allegedly been adopted in violation of SEPA's procedural requirements. Nonetheless, both the County and BSRE

consider the BSRE Permit Application complete and vested to the ordinances that were subsequently found to be invalid under GMA and adopted in violation of SEPA.² In sum, BSRE persuaded Snohomish County to adopt a series of illegal ordinances allowing for more permissive development of the Point Wells site, and then strategically vested to those ordinances before they could be thrown out by the Growth Board.

F. The present action.

On September 12, 2011, in response to Snohomish County and BSRE's efforts to proceed with the illegally-designated "Urban Center" at Point Wells, Woodway and Save Richmond Beach filed a declaratory judgment action in King County Superior Court seeking an order declaring that BSRE's application had *not* vested to the Snohomish County ordinances in question because those ordinances had been *adopted* in violation of SEPA. CP 1-8. In addition, Woodway and Save Richmond Beach sought an order enjoining the Snohomish County from processing

² Under Snohomish County's development regulations, an urban center development application is automatically deemed complete if the County does not act on the application or request additional information within 28 days. *SCC 30.70.040(2)*. Snohomish County took no action on the BSRE Permit Application within the requisite time period, deeming it complete by default, as evidenced by a Notice of Application that listed the "Date of Application/Completeness Date" as March 4, 2011. CP 425.

the development application under the existing regulations until it came into compliance with SEPA. The parties subsequently filed cross-motions for summary judgment. Following oral argument on November 23, 2011, The Honorable Dean S. Lum granted Woodway and Save Richmond Beach's summary judgment motion, and denied the County and BSRE's cross-motions. CP 487-490. Judge Lum's Order stated that BSRE was not vested to the Urban Center ordinances, which had been adopted in violation of SEPA, and enjoined the County from further processing BSRE's application until the County complied with SEPA. *Id.*

Snohomish County and BSRE filed separate appeals to the Court of Appeals, Division I, which were consolidated in the present action. CP 491-506. On January 7, 2013, the Court of Appeals issued a published opinion reversing Judge Lum's decision and remanding for entry of an order dismissing the action on Snohomish County and BSRE's summary judgment motions. Opinion, attached as Appendix A. The Court of Appeals relied largely on its interpretation of the "plain text" of the GMA's vesting provision, RCW 36.70A.302, in holding that a "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] later determination that the location jurisdiction did not fully comply with

[SEPA's] procedural requirements... ." Opinion at 16. Save Richmond Beach and Woodway now petition the Washington State Supreme Court for discretionary review.

V. ARGUMENT

A. **This case presents an issue of substantial public interest concerning the scope of Washington's vested rights doctrine.**

Although this case arises in the context of a local land use dispute, it presents an important question of statewide significance concerning the relationship between SEPA, RCW Ch. 43.21C, and Washington's vested rights doctrine. The resolution of this case is important not only to the residents of Woodway and Richmond Beach, who will bear the impacts of this illegally-designated "Urban Center," but also to our State's policies addressing environmental protection in the land use context. Specifically, the question in this case – apparently one of first impression – is whether a development application can validly vest to ordinances that have been *adopted* in violation of SEPA's procedural requirements, even when the ordinances in question were adopted at the behest of the developer, are significantly more permissive, and the developer was well aware of the alleged SEPA deficiencies at the time of its application.

Allowing the developer's application to vest under these circumstances would serve none of the legitimate policies behind

Washington's vested rights doctrine, which include the protection of property rights, certainty and predictability, due process, and notions of good faith and fair play. *Abbey Rd. Grp. LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009) (protection of property rights, certainty and predictability, and due process); *Lauer v. Pierce County*, 173 Wn.2d 242, 261-263, 267 P.3d 988 (2011) (good faith and fairness). Washington's vesting doctrine is intended to ensure that "new land use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law." *Abbey Rd. Grp. LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250-251, 218 P.3d 180 (2009) (quoting *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987)). But in this case, BSRE and Snohomish County have turned the principles behind the doctrine on their head by strategically using vesting as a "sword" to push through an otherwise-illegal development, rather than as a "shield" to protect the property owner from new land use policies. The Court of Appeals' decision in this case does not shield BSRE from oppressive new land use ordinances. Instead, it would give developers and complicit local jurisdictions a license to *effectively avoid* SEPA's procedural requirements in the process of adopting new, more favorable land use ordinances. This is a matter of substantial public interest.

At its core, this case implicates the problem recognized by the Supreme Court in *Erickson & Associates, Inc. v. McLerran*,³ and recently affirmed in *Lauer*,⁴ of vested rights subverting the public interest by being “too easily granted.” Snohomish County and BSRE have advanced, and the Court of Appeals has accepted, an approach that would allow developers and complicit jurisdictions to effectively negate SEPA review of local GMA enactments by simply submitting a development application anytime a SEPA challenge is filed with the Growth Board. Indeed, based on the Court of Appeal’s interpretation of the GMA in this case, the outcome would be no different if Snohomish County had ignored SEPA’s procedural requirements altogether. Woodway and Save Richmond Beach argue, and the trial court agreed, that this expanded interpretation of the GMA’s vesting provision does not reflect the intent of the legislature, is contrary to longstanding SEPA case law, and subverts the public interest by making vested rights “too easily granted.” *See Erickson*, 123 Wn.2d 864 at 873-874.

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

⁴ 173 Wn.2d 242, 261-263, 267 P.3d 988 (2011).

B. The Court of Appeals decision in is conflict with SEPA's policies and underlying requirements.

RCW 43.21C.020 provides: "The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." "The Act's primary means of promoting its policies are 'action-forcing' procedural requirements designed to assure the integration of environmental values and consequences in the decision-making of all agencies of state and local government." Richard L. Settle, *The Washington State Environmental Policy Act* § 3.01 (Dec. 2010). The Act also pursues this environmental protection goal "by conferring sweeping authority and imposing responsibility on all state and local government decision-makers to decide on the basis of environmental values and consequences even if their decision previously was not discretionary." *Id.* Thus, to accomplish these goals, SEPA overlays and supplements all other state laws. RCW 43.21C.060; *Davidson Serles & Associates v. Central Puget Sound Growth Management Hearings Bd.*, 159 Wn. App. 148, 160, 244 P.3d 1003 (2010) (citing *Donwood, Inc. v. Spokane County*, 90 Wn. App. 389, 398, 957 P.2d 775 (1998)).

The primary example of SEPA's over-arching authority is that SEPA authorizes the denial of a project, even if the project meets other

development regulations. RCW 43.21C.060 provides that “Any governmental action may be conditioned or denied pursuant to this chapter,” subject to certain enumerated conditions. (Emphasis added.) For example, in *Polygon Corp.*, the Court rejected the notion that a building permit, which otherwise would have been issued as a ministerial act, could not be denied based on a failure to comply with SEPA. *Polygon Corp. v. City of Seattle*, 90 Wn. 2d 59, 63, 578 P.2d 1309 (1978). The Court found unpersuasive the argument that SEPA serves only an “informational” purpose and does not confer substantive authority to act with reference to the environmental impacts disclosed. *Id.* The Court reasoned that “[s]uch a reading of SEPA would thwart the policies it establishes and would render the provision that ‘environmental amenities and values will be given appropriate consideration in decision making’ a nullity.” *Id.* (citing RCW 43.21C.030(2)(b)).

The Court of Appeals interpretation of the GMA, particularly RCW 36.70A.302(2), is in conflict with various SEPA various requirements and policies that remain good law today. For example, with regard to compliance with the act’s *procedural* requirements, SEPA’s implementing regulations make clear that until a local jurisdiction conducts the required SEPA review, “no action concerning the proposal shall be taken by a government agency that would: (a) Have an adverse

environmental impact; or (b) limit the choice of reasonable alternatives.” WAC 197-11-070. (Emphasis added.)⁵ This regulation was most recently adopted in 2003, well after the 1995 and 1997 GMA amendments relied upon by the Court of Appeals. Yet the Court of Appeals decision would allow BSRE’s development application to vest to the ordinances in question, thereby conclusively “limiting choice of reasonable alternatives,” even though the ordinances were indisputably adopted by Snohomish County without an adequate SEPA review.

As further evidence of the relationship between vested rights and SEPA, Washington’s vesting statutes, codified at RCW 58.17.033 (subdivision vesting) and RCW 19.27.095 (building permit vesting), both make clear that vested permit applications are still subject to SEPA review. For example, RCW 58.17.033(3) clarifies that “The limitations imposed by this section shall not restrict conditions imposed under chapter 43.21C RCW.” While these provisions do not specifically address vesting to ordinances *adopted* in violation of SEPA in the first instance, they are further evidence of SEPA’s over-arching authority and the legislature’s intent that the vested rights doctrine, as codified in RCW 58.17.033, RCW

⁵ Pursuant to 43.21C.095, SEPA’s implementing regulations shall be accorded “substantial deference” in the interpretation of the act.

19.27.095 and, most relevant to this case, RCW 36.70A.302(2), is still subject to SEPA's supplemental requirements.

The legislative history of RCW 36.70A.302(2) cited by the Court of Appeals decision does not suggest a different intent. Nowhere does the legislative history discuss SEPA in connection with the 1995 and 1997 amendments to RCW 36.70A.302(2), let alone evidence a clear legislative intent to repeal well-settled law establishing that government actions taken in violation of SEPA's procedural requirements are void and *ultra vires*. See, e.g., *Juanita Bay Valley v. Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973) (invalidating a grading permit issued in violation of SEPA); *Lassila v. Wenatchee*, 89 Wn.2d 804, 817, 576 P.2d 54 (1978) (invalidating a comprehensive plan amendment that was enacted in violation of SEPA).

In sum, the Court of Appeals opinion expands the GMA's vesting provision in a way that significantly undermines SEPA in the land use planning context. Taken to its logical conclusion, the Court's interpretation would allow developers and complicit jurisdictions to effectively negate SEPA review of local enactments governed by the GMA, and would allow a development application to vest even to an ordinance that was adopted in flagrant violation of SEPA's procedural requirements. Such a significant departure from SEPA's procedural

safeguards presents an issue of significant public interest, and in fact *subverts* the public interest by rendering vested rights “too easily granted.”
See Erickson, 123 Wn.2d 864 at 873-874.

C. The Court of Appeals’ decision is in conflict with prior decisions of both the Supreme Court and the Court of Appeals.

Save Richmond Beach supports and adopts by reference the Town of Woodway’s arguments regarding this portion of the Petition For Discretionary Review.

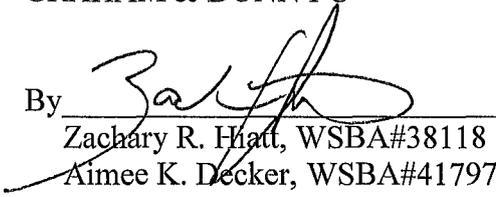
VI. CONCLUSION

For the foregoing reasons, Save Richmond Beach respectfully requests that the Court grant its Petition for Discretionary Review.

Respectfully submitted this 6th day of February, 2013.

GRAHAM & DUNN PC

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APPENDIX A

2013 JAN -7 AM 11:11

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 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

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).

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 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

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.

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 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

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.

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

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

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 .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).

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 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

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

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.

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

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

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

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.

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.

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 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

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

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 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 about the effect of a decision of non-compliance on permit applications and

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."

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

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 on SEPA,²⁵ explained:

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.

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

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 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 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].

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.

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 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:

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).

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:

Cox, J.

Jain, J.

Gross

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