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

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

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

Respondents,

v.

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Appellants.

RESPONSE BRIEF OF RESPONDENT TOWN OF
WOODWAY

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A. INTRODUCTION

This case is about the efforts of a developer to shoehorn a mega-sized project into a small and isolated portion of Snohomish County where it really does not fit. Aided by a compliant county government, which violated the requirements of the State Environmental Policy Act (SEPA) and the Growth Management Act (GMA), the developer obtained a change in the comprehensive plan and zoning to construct up to 3,000 residential units and 100,000 square feet of retail/commercial space. *See* CP 162-63; 249-51. Then, after the Town of Woodway (Woodway), among others, challenged these actions before the Growth Management Hearings Board (Board), the developer sought to moot any adverse decision by attempting to vest itself to these challenged regulations. The superior court ruled that the developer did not vest to the development regulations and this appeal followed. CP 488. The outcome of this case will effect whether SEPA continues to be a potent force in enlightened decision-making, or whether it will be relegated to the sidelines in the rush to make money.

The developer responsible for the above is Appellant BSRE Point Wells, LP (BSRE), a foreign-owned entity which owns 61 acres of property located in the extreme southwest portion of Snohomish County.

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CP 100; 178. BSRE submitted various applications to Appellant Snohomish County (County) to develop BSRE's property,¹ which is bordered by Woodway and the Richmond Beach neighborhood. CP 100-101. These applications were filed with the County while Woodway and Save Richmond Beach's appeal of the County's Urban Center development regulations was pending before the Board, *i.e.*, subsequent to the hearing before the Board but prior to the Board's issuance of its Final Decision and Order. CP 47-50; CP 51-57; CP 167.

The Board issued its Final Decision and Order approximately two months after BSRE filed its development applications and determined that the Comprehensive Plan amendments and development regulations were enacted in violation of SEPA. Subsequently, Woodway and Save Richmond Beach filed a declaratory judgment action in King County Superior Court, seeking an order declaring that BSRE had not vested to the County's Urban Center development regulations adopted in violation of SEPA. In addition, Woodway and Save Richmond Beach sought an order enjoining the County from processing the development applications under the existing regulations until compliance with SEPA was achieved. CP 1-8. King County Superior Court Judge Dean S. Lum granted

¹ Those applications are contained in the record at CP 47-50; CP 51-57.

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Woodway and Save Richmond Beach's summary judgment motion and denied the County and BSRE's motions for summary judgment. CP 487-90.

The trial court's decision should be affirmed by this Court. Contrary to the County and BSRE's suggestion, upholding the trial court's decision that BSRE's applications did not vest to development regulations enacted in violation of SEPA will not nullify, undermine, or trump statutory law² -- specifically RCW 36.70A.300(4) and RCW 36.70A.302. Rather, the trial court's ruling harmonizes these statutes consistently with the policies and purposes underlying SEPA and the vested rights doctrine and in accordance with a well-established body of case law setting forth the consequences of noncompliance with SEPA.

The impact upon vested rights of a Growth Management Hearings Board decision determining that development regulations are enacted in violation of SEPA (but without determining that the regulations were "invalid" under the GMA) is an issue of first impression in this state. It is also an issue of great importance to the public. If developers are permitted to vest to development regulations enacted in violation of SEPA, SEPA compliance effectively becomes unreviewable for GMA planning

² *Snohomish County's Opening Brief at 4, 27.*
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jurisdictions. SEPA's purpose, to ensure that adverse environmental impacts are taken into consideration when making legislative decisions, will be thwarted because there will be no consequence for violations and, therefore, very little incentive to comply with SEPA procedures. Thus, where the legislature has been silent with respect to the consequences of a Board's determination of SEPA noncompliance, the plain language of the GMA and SEPA jurisprudence must be harmonized to ensure that SEPA's purpose is not eviscerated.

B. STATEMENT OF THE CASE

Woodway hereby incorporates by reference the Statement of the Case contained in Respondent Save Richmond Beach's Response Brief.

C. RE-STATEMENT OF THE ISSUES

The issues in this appeal are properly framed as follows:

- A. Whether the trial court properly determined that BSRE cannot vest to ordinances found to be enacted in violation of SEPA, particularly where the development application was filed subsequent to the hearing before the Growth Management Hearings Board but prior to issuance of the Final Decision and Order?

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- B. Whether the trial court properly determined that pre-GMA case law, clearly establishing that failure to comply with SEPA resulted in a void action, was not explicitly or implicitly repealed by Regulatory Reform?
- C. Whether the trial court properly determined that Save Richmond Beach and Woodway's declaratory judgment action was not precluded by LUPA where the action did not involve a challenge to a "final land use decision"?
- D. Whether the trial court properly issued an injunction?³

D. ARGUMENT

- 1. Pre-GMA case law unquestionably establishes that violations of SEPA render government action void and *ultra vires*.

Government actions taken in violation of SEPA are void and *ultra vires*. See, e.g., *Juanita Bay Valley Community 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); *Lassila v. Wenatchee*, 89 Wn.2d 804, 817, 576 P.2d 54 (1978) (invalidating and "vacating" a comprehensive plan

³ Woodway will focus on the vesting/SEPA arguments while Save Richmond Beach will focus on the LUPA and injunction issues. Woodway incorporates Save Richmond Beach's arguments regarding both the LUPA and injunction issues..

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amendment where there was insufficient showing of compliance with SEPA); *Noel v. Cole*, 98 Wn.2d 375, 378-80, 655 P.2d 245 (1982); *South Tacoma Way LLC v. State of Washington*, 169 Wn.2d 118, 233 P.3d 871 (2010).

This well-established principle was discussed, for example, in *Noel v. Cole*, where the State Lands Commissioner awarded a contract for the harvest of timber on state trust lands without environmental review, apparently in reliance on a WAC that purported to exempt most actions of the Department of Natural Resources (DNR). The court later invalidated the WAC and issued a permanent injunction prohibiting logging, which terminated the contract between the State and the logger. The logger cross-claimed against the DNR for resulting damages and was awarded over a million dollars. On appeal, the DNR alleged that the contract, made in violation of SEPA, was *ultra vires* and thus no damages could be awarded. The Supreme Court agreed, holding as follows:

While the vast majority of governmental ultra vires cases have dealt with government purchases in violation of spending guidelines (see *State v. O'Connell*, 83 Wn.2d 797, 825-26, 523 P.2d. 872 (1974) and cases cited herein) the doctrine is equally applicable where authority is lacking due to failure to comply with SEPA. One of the central purposes of SEPA is to “insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making”. RCW 43.21C.030(2)(b). It is intended to prevent action which is

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“ill-considered” (E. McQuillin, *supra*) from an environmental perspective. The ultra vires doctrine is just as necessary to prevent ill considered financial action.

Id. at 379-80 (emphasis added).

South Tacoma Way LLC v. State of Washington, 169 Wn.2d 118, 233 P.3d 871 (2010), recently cited *Noel*'s reasoning favorably when determining whether the State's failure to give written notice to abutting property owners prior to selling surplus land voided the sale. The *South Tacoma Way* Court stated:

In *Noel*, we considered a challenge to the State's sale of timber rights on public land to a private company, Alpine Excavating, Inc. In making the sale, the State failed to comply with the State Environmental Policy Act (SEPA), chapter 43.21C RCW, requirement to prepare an environmental impact statement (EIS) prior to the sale. We held that the State's failure to comply with the SEPA requirement rendered the sale contract ultra vires and void. *Noel*, 98 Wash.2d at 381, 655 P.2d 245. Although the circumstances in *Noel* are in many ways similar to those before us here, one important distinction exists. In *Noel*, we emphasized the policy underlying SEPA, that “ ‘presently unquantified environmental amenities and values will be given appropriate consideration in decision making.’” *Noel*, 98 Wash.2d at 380, 655 P.2d 245 (quoting RCW 43.21C.030(2)(b)). The State, in making its sale, not only failed to comply with SEPA's requirement for an EIS, it also failed to act in accordance with the policy underlying SEPA.

Id. at 126. Thus, as recently as 2010, the Supreme Court has upheld the reasoning of *Noel*, reaffirming that violations of SEPA render government action void and *ultra vires*.

BSRE argues that Respondents' cited case law does not support this proposition because "most of the cases cited do not even address the doctrines of 'voidness *ab initio*' or '*ultra vires*.'"⁴ However, Richard Settle, quoted extensively by Snohomish County,⁵ reached the same conclusion as Respondents on this point:

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). Settle supported these statements by specifically citing several cases Respondents already cited for this exact proposition. *Id.* (citing *Juanita Bay*, 9 Wn. App. at 73; *Noel*, 98 Wn.2d at 378-80; and *South Tacoma Way*, 169 Wn.2d at 126).

⁴ *BSRE's Opening Brief* at 22.

⁵ *Snohomish County's Opening Brief* at 31-33.

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BSRE and the County also dismiss *Noel* because it is a contract case.⁶ However, there is nothing in SEPA or the case law that would permit a court to conclude that approving a contract in violation of SEPA leads to a different consequence for any other action subject to SEPA. Thus, it is clear that violations of SEPA rendered government action void and *ultra vires* according to pre-GMA case law.

2. According to *RUGG*, vested rights cannot arise in a void ordinance.

The holding of the 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 both *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

⁶ *BSRE Opening Brief at 22; Snohomish County Opening Brief at 29.*
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SEPA rendered the government action in approving a building permit void. *Eastlake* involved the construction of Roanoke Reef, 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 a “major action” requiring preparation of an EIS and 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.
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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

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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

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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.

BSRE and the County's meager attempts at distinguishing *RUGG* and *Eastlake* are unpersuasive. In fact, BSRE failed to cite *RUGG* in its Opening Brief at all. BSRE does attempt to distinguish *RUGG* implicitly, however, where it states that "Woodway and Save Richmond Beach were unable to cite even a single case that holds that a local government's failure to comply with SEPA in a legislative enactment renders an earlier

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permit application void ab initio such that the application is de-vested.”⁷ Though *RUGG* did not involve SEPA noncompliance specifically, its holding is certainly applicable in the SEPA context. Given that previous case law (*Juanita Bay*, *Lassila*, and *Noel*) held SEPA noncompliance voided and vacated government action, *RUGG*’s holding that vested rights cannot be obtained in an invalid *legislative enactment* is directly on point. The trial court’s ruling in the present case thus comported with *RUGG*’s refusal to recognize vested rights in an invalid ordinance.

Likewise, BSRE’s continued insistence that Woodway and Save Richmond Beach failed to cite authority dealing with SEPA in the “nonproject” or “legislative” context is simply incorrect.⁸ *RUGG* is relevant case authority demonstrating that the Supreme Court has examined vested rights in the context of a void or invalid legislative enactment, *i.e.*, a “non-project” situation, and has refused to recognize the vested rights of a developer, particularly where it was known by the developer that the validity of the ordinance was hotly contested. In addition, in *Lassila v. Wenatchee*, the Court concluded that where the City was unable to demonstrate compliance with SEPA, its comprehensive plan amendment incorporating a riverfront development plan was vacated and

⁷ *BSRE Opening Brief at 23.*

⁸ *BSRE Opening Brief at 22-23.*

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all redevelopment activities that had taken place under the plan were vacated. *Lassila*, 89 Wn.2d at 817. *Lassila* is yet another example of the Court finding a legislative enactment, such as a comprehensive plan amendment, void for failure to comply with SEPA procedure.

Moreover, BSRE's statement that its obligation to comply with SEPA "will be analyzed and determined as a part of the permitting process," is a red herring. The point of the instant appeal is to determine whether BSRE has vested to the urban center development regulations adopted in violation of SEPA. Woodway agrees that the individual project permits' compliance with SEPA will be analyzed at a later time. At the moment, the issue is whether processing of the applications can even move forward when it was filed under the auspices of the void development regulations. *King County v. Boundary Review Board*, 122 Wn.2d 648, 667, 860 P.2d 1024 (1993) (enjoining further agency action until preparation of an EIS was complete following reversal of a DNS). The Comprehensive Plan Urban Center designation was ruled invalid under the GMA, and therefore, will have to be significantly revised. CP 165. Once that occurs, the development regulations will also have to be reconsidered such that they are consistent with the newly-revised Comprehensive Plan. Therefore, Woodway and Save Richmond Beach

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believe that once the proper considerations are given to the GMA and SEPA, the zoning regulations governing BSRE's property will be substantially different.

Finally, the County argues that the cases cited by Woodway (stating that a violation of SEPA is grounds for voiding the issuance of a permit) are factually distinguishable from the case at bar.⁹ Specifically, the County states that none of the cases involved preemptive attacks seeking to prevent the local jurisdiction from processing the permit application.¹⁰ While it may be true that these cases involved the voiding of permits already issued, the underlying premise is still true -- actions taken in violation of SEPA are void and vested rights cannot be acquired. Thus, this argument hardly dismisses Woodway and Save Richmond Beach's argument that pre-GMA case law provided that noncompliance with SEPA rendered government action void and *ultra vires* and, therefore, vested rights could not be acquired. Developers could not act in reliance upon such a permit or legislative enactment.

3. The trial court's ruling did not nullify the express language of the GMA, but rather properly harmonized the GMA with SEPA case law.

⁹ *Snohomish County Opening Brief at 28 (citing Juanita Bay, Eastlake, and RUGG).*

¹⁰ *Id.*

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The County repeatedly asserts that upholding the trial court’s decision (determining that BSRE’s applications did not vest to development regulations determined to be enacted in violation of SEPA) will nullify, undermine, and trump statutory law¹¹ -- specifically RCW 36.70A.300(4) and RCW 36.70A.302. The County further argues that it “is an affront to the Legislature to rule, as the trial court did here, that a violation of SEPA” is grounds to stop the processing of a vested permit application.¹² The Appellants’ statements are grounded in the belief that the Regulatory Reform amendments to the GMA either explicitly or implicitly repealed the pre-GMA case law cited by Respondents above in Sections 1 and 2, *supra*.

Contrary to these arguments, Woodway and Save Richmond Beach do not seek to contradict, overturn, or nullify statutory law or otherwise “overrule the will of the Legislature.”¹³ Rather, Respondents request that the Court, in affirming the trial court’s decision, harmonize the GMA consistently with the policies and purposes underlying SEPA and the vested rights doctrine and in accordance with a well-established body of case law setting forth the consequences of noncompliance with SEPA.

¹¹ *Snohomish County’s Opening Brief at 4, 27.*

¹² *Snohomish County’s Opening Brief at 30.*

¹³ *Snohomish County’s Opening Brief at 37.*

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Where the Legislature did not explicitly or implicitly repeal this body of case law, the County and BSRE's arguments must fail.

- a. The GMA's prospective invalidity terms apply only where the Board finds a violation of the GMA goals and therefore do not apply in this case.

The County and BSRE repeatedly assert that the authorities cited by Woodway and Save Richmond Beach pre-date Regulatory Reform and are therefore inapposite.¹⁴ Woodway and Save Richmond Beach fundamentally disagree that the Regulatory Reform amendments to the GMA changed the "rule" that vested rights may not be obtained in ordinances determined to be noncompliant with SEPA, at least in those cases where GMA invalidity is not also found.

Respondents' position with respect to vesting and SEPA does not conflict with RCW 36.70A.300(4) and RCW 36.70A.302(2). This latter section states in full:

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.

¹⁴ *BSRE Opening Brief at 22; Snohomish County Opening Brief at 28.*
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RCW 36.70A.300(4) provides:

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.

By their own plain language, RCW 36.70A.302(2) and RCW 36.70A.300(4) pertain to “invalidity” under the GMA, not SEPA. “Invalidity” is a defined term of art under the GMA. RCW 36.70A.302(1) specifically provides that “invalidity” refers to comprehensive plans and development regulations that are noncompliant under the GMA, SEPA, or a Shoreline Master Program and would substantially interfere with the fulfillment of the goals of the GMA.¹⁵ Thus, in order for the Board to invalidate a development regulation on the basis of SEPA noncompliance, the Board must also find that the noncompliance conflicts with the goals of the GMA. Nowhere do the appeal provisions of the GMA, SEPA, or the SEPA regulations reference a determination of “invalidity” under

¹⁵ RCW 36.70A.302(1) provides: “The board may determine that part or all of a comprehensive plan or development regulations are invalid if the board: (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300; (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.”). (Emphasis added).
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SEPA 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.

Davidson Serles & Assocs. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 159 Wn. App. 148, 244 P.3d 1003 (2010), confirms that SEPA noncompliance does not always result in the violation of GMA goals and, consequently, invalidation under RCW 36.70A.302(2). There, the *Serles* Court explained that finding noncompliance with SEPA does not automatically result in invalidity under the GMA because of the fact that the Board must also find a violation of a GMA goal, such as Goal 10¹⁶, to declare the development regulation invalid:

[C]ontrary to Davidson’s assertions, the legislature did not grant the Board the authority to invalidate comprehensive plans or development regulations simply because those enactments were based on an inadequate EIS. Rather, the Board is restricted by the plain terms of the GMA.

¹⁶ Goal 10 states: “Protect the environment and enhance the state’s high quality of life, including air and water quality, and the availability of water.” RCW 36.70A.020(10).
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To find invalidity in this instance, the Board would have needed to determine that the continued validity of the SEPA-noncompliant ordinances would “substantially interfere with the fulfillment of the goals” of the GMA. RCW 36.70A.302(1)(b).

Serles, 159 Wn. App. at 157-58 (emphasis added).

Serles further explained that there are circumstances where failure to properly conduct the required environmental review does not interfere with the fulfillment of the GMA’s environmental goal. In fact, *Serles* was one of those cases. *Serles*, 159 Wn. App. at 158 (“On the appropriate facts, the Board could find that failure to properly conduct the required environmental review for a city or county action interfered with fulfillment of the GMA’s environmental goal, and, upon such a finding, could invalidate the relevant ordinance. This case does not, however, present such appropriate facts.”) (emphasis added). Therefore, the Board may find noncompliance with SEPA but not implicate the prospective invalidity provisions of RCW 36.70A.302(2).

In sum, RCW 36.70A.302(1)(b) and *Davidson Serles* provide that the Board has the authority to issue an order of invalidity, which is prospective only in effect according to RCW 36.70A.302(2), only in the circumstances where a violation of the GMA goals is also present. Thus, there is a small set of cases in which the prospective invalidity provisions

of RCW 36.70A.302(2) plainly do not apply. For this reason, BSRE's argument that because the Board declined to issue an order of invalidity, the regulations are not void, is unpersuasive;¹⁷ this argument conflates the meaning of two distinct concepts, "invalidity" which is a term applicable only to GMA, and "void ab initio," which has been a recognized consequence of procedural SEPA violations.

Consequently, in circumstances where the Board finds SEPA noncompliance only, the Legislature has not altered the application of preexisting case law concluding that government actions taken in violation of SEPA are void. Those government actions must be started anew; vested rights cannot be obtained in such a void and *ultra vires* enactment.

Snohomish County has cited a section of Settle's treatise on SEPA for the opposite proposition, *i.e.*, that the 1995 Regulatory Reform amendments to the GMA did change the law with respect to vesting.¹⁸ However, Professor Settle did not cite any authority for his statements and did not discuss the presumption against implied repeal of existing case

¹⁷ *BSRE Opening Brief at 16.*

¹⁸ Settle states: "However, a 1995 regulatory reform amendment to the Growth Management Act (GMA) . . . 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 applicat could 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."
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law.¹⁹ Moreover, Professor Settle, though recognized as an authority on SEPA issues, has not necessarily been correct in all circumstances. In fact, in the case cited by the County, the Court disagreed with Professor Settle's interpretation that SEPA extended otherwise shorter appeal periods to thirty days for land use actions. *Waterford Place Condo. Ass'n v. City of Seattle*, 58 Wn. App. 39, 45-46, 791 P.2d 908 (1990) (Waterford's argument that SEPA extends shorter appeal deadlines to 30 days was supported by Professor Richard Settle; this interpretation of the statute was "not supported by the express language of the statute or its administrative rules."); *see also State v. Grays Harbor County*, 122 Wn.2d 244, 253 n.5, 857 P.2d 1039 (1993) (noting that the administrative rules interpreting RCW 43.21C.075(5) appear to conflict with scholarly comment on the issue by Professor Settle). The Court may similarly decline to follow Professor Settle's interpretation of the issue at bar.

The GMA's prospective invalidity terms in RCW 36.70A.302(2) and RCW 36.70A.300(4) apply only where the Board finds a violation of the GMA goals and compliance with SEPA, or at the very least, a violation of the GMA goals and noncompliance with SEPA. The statutes

¹⁹ *See, infra Section 3(b).*
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do not apply in this case (SEPA noncompliance only).²⁰ Although BSRE points out that the latter approach would lead to an “illogical” result where noncompliance with SEPA alone prevents vesting, while noncompliance with SEPA and violation of the GMA goals does not,²¹ this situation is preferable to the incongruity that arises if the result of noncompliance with SEPA outside of the GMA context results in void action but the action is not void if subject to review by the Board. This interpretation ensures that the consequences of SEPA violations are consistent, regardless of whether the SEPA decision is made by the Board, the courts, or other agencies authorized to make SEPA determinations, like the Shoreline Hearings Board.

- b. The Legislature is presumed not to have repealed pre-existing case law by implication.

As explained above, the plain language of RCW 36.70A.302(2) and RCW 36.70A.70A.300(4) does not conflict with the trial court’s ruling because these statutory provisions apply only where the Board finds “invalidity” based upon the GMA. In addition to the fact that the plain

²⁰ Woodway’s argument does not preclude this court holding that the “prospective invalidity” provision of RCW 36.70A.302(2) does not apply to SEPA violations in any circumstances. This follows from the fact that the Legislature did not consider the effects of GMA on prior case law and therefore did not repeal prior law for SEPA violations regardless of whether the SEPA violation substantially interferes with the fulfillment of GMA goals.

²¹ *BSRE Opening Brief at 26.*

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language does not conflict with the trial court's ruling, an examination of the legislative history of Regulatory Reform confirms that the trial court's interpretation of these statutes is correct. Namely, it is striking that the extensive body of legislative history on Regulatory Reform is completely silent with respect to any intent to overrule case law establishing the consequence for violations of SEPA.

First, it is important to note that Regulatory Reform made many amendments to SEPA, but none involved adding language that stated a procedural violation of SEPA did not affect the validity of the governmental action. Indeed, it has been some 16 years since Regulatory Reform adopted RCW 36.70A.300(4) and RCW 36.70A.302(2), and yet WAC 197-11-070(1)(a)-(b) is still in effect and has not been legislatively repealed. That regulation provides that during the pendency of the environmental process and until a final EIS is issued, the government may take no action that would have an adverse environmental impact or limit the choice of reasonable alternatives.

The County expends considerable effort to emphasize the fact that the invalidity provisions of the GMA have withstood multiple revisions over the years and that the Legislature is presumed to know the existing state of case law in the areas in which it is legislating, suggesting that the

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pre-Regulatory Reform rules regarding noncompliance with SEPA no longer apply for any GMA planning jurisdiction.²²

The County's argument runs afoul of the 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.

²² *Snohomish County Opening Brief at 14-27.*

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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).

The simple fact is that, as explained in Section 3.a above, it is not necessary to construe RCW 36.70A.300(4) and RCW 36.70A.302(2) as mandating prospective invalidity only in the instance where a procedural violation of SEPA did not also result in a violation of the GMA goals. Rather, a construction of RCW 36.70A.300(4) and RCW 36.70A.302(2) that preserves the consequence of SEPA noncompliance (voiding) is a

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reasonable construction that harmonizes the statutes with pre-existing case law regarding the effect of noncompliance with SEPA. Thus, because the language employed in the Regulatory Reform amendments to the GMA does admit other reasonable construction, the Legislature did not implicitly overrule preexisting SEPA case law.

Certainly, because the Legislature did not make an “express declaration” that the Regulatory Reform amendments to the GMA were intended to overrule preexisting SEPA case law, it cannot be plausibly argued that the Legislature “explicitly” repealed such prior case law.²³ None of the legislative history preceding the Regulatory Reform amendments in 1995 and 1997, which added the provisions regarding prospective GMA invalidity, evidences a legislative intent to repeal case law discussing the effect of noncompliance with SEPA procedures. Governor Lowry created the Governor’s Task Force on Regulatory Reform in August 1993 through Executive Order 93-06, which was charged with finding ways of simplifying the state’s increasingly complex and sometimes overlapping land use rules and regulations. The Task Force’s recommendations contained in the “Final Report of the Governor’s Task Force on Regulatory Reform” dated December 20, 1994,

²³ *Snohomish County Opening Brief* at 34.
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from which the final Regulatory Reform legislation was crafted, is completely silent with respect to any intent to overturn previous case law explicitly describing the voiding and ultra vires effect of noncompliance with SEPA. In fact, it states:

The Task Force recommends 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.

“Task Force,” at 52 (emphasis added).²⁴ Thus, the Task Force’s recommendations were limited to violations of the GMA only.

The Task Force did not address the situation presented by this case where a violation of SEPA did not result in the violation of GMA policy. Likewise, the Final Bill Reports of ESHB 1724 (1995) and ESB 6094 (1997) do not address this situation.²⁵ Thus, the Legislature has not expressly or implicitly evidenced any intent to repeal existing case law relating to noncompliance with SEPA procedures.

²⁴ CP 448-52.

²⁵ CP 454-58; CP 460-65.

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Interestingly, the County appears to take different positions on the Task Force Report in its brief. At page 17 of its Opening Brief, the County states that “[a]fter a thorough review of the legislative history of the invalidity provision in 1995, the County found no evidence that a violation of SEPA in the adoption of the challenged enactment was ever considered by the Legislature as grounds for a determination of invalidity.” Yet, on page 26, the County states that the legislative history “shows that the 1995 Legislature, with input from the Governor’s Task Force in 1994, made a conscious choice in 1995 that SEPA violations were not grounds for invalidity, and that vested rights in permit applications relying on legislative enactments on appeal to the growth board would be protected.” The County fails to explain how the Legislature could possibly make a conscious choice that SEPA violations alone would not affect the vested rights in permit applications if the Legislature never even considered SEPA in its discussion of invalidity for failure to comply with GMA goals, as it admits on page 17. Woodway and Save Richmond Beach agree that the Legislature excluded procedural violations of SEPA alone as grounds for a determination of invalidity; that is clear from a cursory review of RCW 36.70A.300(2)(1)(b), which requires the Board to find that continued validity would substantially

interfere with the fulfillment of the goals of chapter 36.70A. But the County cannot construe silence with respect to procedural violations of SEPA as an overruling of preexisting SEPA case law describing the effect of violations.

Moreover, the County cites extensively to Senator Kline's efforts to repeal the GMA vesting provisions in 2007, 2008, and 2009 as evidence that the Legislature intended the vesting provisions in RCW 36.70A.302(2) remain in effect.²⁶ Unquestionably, the GMA vesting provisions have remained intact despite failed efforts to repeal them, but that has no bearing on how RCW 36.70A.300(4) and RCW 36.70A.302(2) should be interpreted in relation to the unique circumstances presented by this case, *i.e.*, where a procedural violation of SEPA did not result in a violation of GMA goals. None of the proposed bills cited by the County even discussed the vesting provisions of the GMA and their impact upon legislative enactments violative of SEPA. Therefore, the proposed bills cannot be used to uphold the County's interpretation of the GMA as applied to the unique facts of this case.

Further, Washington case law indicates that legislatures express their intent by enacting law, not by remaining silent. *Buchanan v. Int'l*

²⁶ *Snohomish County Opening Brief at 22-23.*

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Broth. Teamsters, 94 Wn.2d 508, 518, 617 P.2d 1004 (1980) (Horowitz, J., dissenting). For example, in *City of Medina v. Primm*, 160 Wn.2d 268, 280, 157 P.3d 379 (2007), individuals challenged their convictions in Kirkland Municipal Court of violations of neighboring cities' municipal codes, alleging that the Interlocal Cooperation Act did not allow for municipal courts to hear cases in neighboring cities' court facilities. In making this argument, the individuals pointed to the legislature's failure to act on a bill that would have amended Chapter 3.50 RCW, governing municipal courts, by adding language specifically authorizing such interlocal agreements. *Id.* at 279. Failure to pass this amendment, they claimed, indicated that the legislature did not intend to authorize intercity court-sharing arrangements. *Id.* at 280. The Court rejected this rationale:

We decline to speculate on the reasons for the legislature's failure to adopt the amendment to RCW 3.50.020. In the absence of a court decision holding that chapter 39.34 RCW does not confer the supplemental statutory authority referenced in RCW 3.50.020, nothing can be inferred from the legislature's inaction on the proposed bill. See *State v. Conte*, 159 Wash.2d 797, 813, 154 P.3d 194 (2007) (“legislative intent cannot be gleaned from the failure to enact a measure”); *Spokane County Health Dist. v. Brockett*, 120 Wash.2d 140, 153, 839 P.2d 324 (1992) (a reviewing court will not speculate on the legislature's reasons for rejecting a proposed amendment); compare *State v. Edwards*, 84 Wash. App. 5, 12–13, 924 P.2d 397 (1996) (legislature's failure to amend the law in response to a court's interpretation implies agreement with that interpretation).

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Id.

The same principle applies in this case. In the absence of a court decision interpreting the application of the GMA vesting provisions to procedural SEPA violations (and there are none considering that this is an issue of first impression), nothing can be inferred from the legislature's inaction on the proposed bill. Thus, the County's arguments fail, even if somehow the Legislature's failure to enact the proposed legislation could be twisted and interpreted as an implicit statement that the GMA vesting provisions apply to and incorporate procedural violations of SEPA alone, as the County suggests.

In sum, the Legislature has expressed no intent explicitly or implicitly to overrule forty years of SEPA jurisprudence establishing the effect of SEPA noncompliance, *i.e.*, that the government action taken is void and *ultra vires*. The County's own extensive review of Regulatory Reform's legislative history has revealed that the Legislature never considered the issue. Therefore, where implicit repeal of prior law is disfavored, the Court should affirm the trial court's decision that vested rights cannot be obtained in ordinance violating SEPA.

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- c. Case law interpreting RCW 36.70A.300(4) and RCW 36.70A.302(2) dictates that BSRE's applications did not vest.

A recent court of appeals case, *Clark County v Western Washington Growth Board*, 161 Wn. App. 204, 254 P.3d 862 (2011), held that vested rights cannot be acquired until after the Board's decision has been rendered. *Clark County* thus precludes the County and BSRE's theory that BSRE's development applications vested when filed after the hearing before the Growth Board but prior to the Board's issuance of its final decision and order.

In *Clark County*, the County changed the urban boundary and assigned certain property to the UGA's of several cities. Certain individuals and organizations appealed this decision to the Western Washington Growth Board. However, subsequent to the Board's hearing, but before the Board's final decision was issued, the cities passed ordinances annexing the disputed parcels. The County then claimed that the issues before the Board were moot because the County had no jurisdiction over property within a city.

The court rejected the County's mootness claim premised upon RCW 36.70A.300(4) and RCW 36.70A.302(2). The court concluded that RCW 36.70A.300(4), providing that unless the Board makes a

determination of invalidity, 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, only addressed the effect of Growth Board decisions “during the period of remand.” Of course, as in this case, because the cities annexed the dispute parcels prior to the Board’s final decision, the period of remand had not yet begun. Likewise, RCW 36.70A.300(4) has no application in this instance because BSRE’s application was filed prior to the period of remand; RCW 36.70A.300(4) invalidity provisions do not apply to BSRE.

Moreover, the court held that RCW 36.70A.302(2)’s prospective only language did not apply to the cities’ annexations because “decisions related to the GMA that are timely challenged and pending review before the Growth Board and/or an appellate court are not final and cannot be relied on until either (1) the Growth Board's final order is not appealed or (2) the county's decisions are affirmed and a final order or mandated opinion is filed by a court sitting in its appellate capacity.” *Id.* at 225. Thus, according to the *Clark County* court, no vested rights could be acquired before receipt of the Growth Board’s decision. Again, RCW 36.70A.302(2) does not apply to preserve the vested nature of its

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applications because, according to *Clark County*, vested rights were never acquired.

4. The trial court properly determined that Respondents did not seek to collaterally attack the Board's Final Decision and Order.

BSRE has argued that because Woodway and Save Richmond Beach did not appeal the Growth Board's decision with respect to invalidity, Respondents are foreclosed from asserting invalidity in a collateral action.²⁷ Both BSRE and the County assert that the exclusive authority to address SEPA challenges to the County's Urban Center development regulations rests with the Growth Board--not this Court--and cite *Davidson Serles & Assocs. v. City of Kirkland* ("*Davidson Serles II*"), 159 Wn. App. 616, 246 P.3d 822 (2011) and *Brinnon Group v. Jefferson County*, 159 Wn. App. 446, 245 P.3d 789 (2011) for this proposition.²⁸ These arguments lack merit.

Respondents are not seeking to collaterally attack (or untimely appeal) the Board's decision regarding the development regulations. In fact, Woodway and Save Richmond Beach are quite satisfied with the decision because the Board found that the County failed to comply with

²⁷ *BSRE's Opening Brief at 16.*

²⁸ *BSRE Opening Brief at 25; Snohomish County Opening Brief at 24-26.*

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SEPA. Respondents do not challenge the Board's decision, but rather seek to enforce the Board's decision by precluding the processing of BSRE's development applications until SEPA compliance is achieved. Accordingly, *Torrance v. King County*, 136 Wn.2d 783, 790-92, 966 P.2d 891 (1998), cited by BSRE for the proposition that parties aggrieved by a Board decision must appeal or be foreclosed from challenging any aspect of a Board decision through a collateral action,²⁹ is inapplicable.

Moreover, Respondents did not sidestep the exclusive authority of the Board to ask the trial court to find a violation of SEPA. Instead, Respondents sought an injunction, which the Board otherwise lacked authority to issue, based upon the Board's finding of noncompliance with SEPA. In *Davidson Serles & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 246 P.3d 822 (2011), cited by the County and BSRE, the property owners challenging the City's action filed both a petition for review with the Board and a separate declaratory judgment action in superior court alleging both the legal inadequacy of an EIS and the improper enactment of ordinances in reliance upon the EIS under SEPA. The court concluded that the property owners' challenges should have been raised before the Board, which had exclusive jurisdiction to review the challenges to

²⁹ *BSRE Opening Brief at 16.*

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comprehensive plans and development regulations based on SEPA. *Id.* at 625. Unlike *Davidson Serles II*, Respondents in this case merely relied on the finding of SEPA noncompliance already made by the Board and did not seek to have the trial court make a separate finding of noncompliance with SEPA. Rather, Respondents only requested the trial court determine that the legal effect of the Board's ruling was to preclude BSRE from obtaining vested rights in an invalid ordinance.

Moreover, *Brinnon Group*, a Division II case, is also inapposite. There, Brinnon Group challenged Jefferson County's enactment of an ordinance amending its comprehensive plan to permit a master planned resort. *Brinnon Group*, 159 Wn. App. at 454. Brinnon Group filed both a petition for review with the Board and a separate complaint in superior court for a constitutional writ of certiorari, alleging that the Board lacked the ability to review the County's compliance with the Planning Enabling Act. *Id.* at 460. Brinnon Group specifically alleged that it did not have any other adequate remedy at law--a prerequisite to obtaining a writ of certiorari--because it sought to "void [the] challenged [o]rdinance . . . from the beginning (void ab initio)," which was relief the Board could not provide. *Id.* at 462. However, the Board concluded that it had the authority to review the County's compliance with the Planning Enabling

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Act where the County incorporated the requirements of the Act as part of its process for adopting site specific plan amendments as a means of satisfying the GMA's public participation provisions. *Id.* at 461. For that reason, the trial court dismissed the superior court action, stating that "while the requested reliefs may not be identical, *i.e.* invalidity versus void, the substantive relief available to Brinnon Group on appeal of the Board's decision is essentially the same as that available through the writ process." *Id.* at 463. The Court of Appeals affirmed the dismissal of Brinnon Group's complaint for a constitutional writ of certiorari, concluding that because the Board had jurisdiction to consider Brinnon Group's arguments regarding the PEA as part of its broader GMA review, the Board could fully assess the PEA claims and that superior court review of the Board's decision could provide adequate relief. *Id.* at 488.

Unlike *Brinnon Group* and *Davidson Serles II*, Respondents here did not seek "two bites at the apple" by having the trial court reevaluate the County's compliance with SEPA. In *Brinnon Group* and *Davidson Serles II*, the challengers sought to relitigate issues that the Board had jurisdiction to decide. Here, Respondents relied upon the Board's finding of SEPA noncompliance to seek an injunction, which the Board lacked authority to issue.

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5. Public policy supports Woodway's interpretation of vested rights.

The County has emphasized that Washington's vested rights doctrine was founded upon principles of certainty and fairness to developers, providing a bright line rule that applications vest upon submittal which is easy to administer and apply.³⁰ The County reaches so far as to say that the rule Woodway and Save Richmond Beach propose would create a "potential nightmare for local jurisdictions" because of the uncertainty that would exist based on the outcome of litigation before the Board.³¹

First, the County's argument overlooks the fact that the rule Respondents propose simply affirms the applicability of a preexisting rule. The courts in *Eastlake* and *RUGG* applied the preexisting rule that developers cannot vest to a void ordinance, even after consideration of the developers' interests.

Moreover, the County's view discounts and diminishes the fact that the vested rights doctrine is intended to strike a delicate balance between fairness and certainty to developers and the public interest in enacting legislation that protects and shapes their communities.

³⁰ *Snohomish County Opening Brief at 10, 36.*

³¹ *Snohomish County Opening Brief at 36.*

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Acceptance of the County and BSRE's position will surely upset that balance because Washingtonians will no longer have the assurance that developers cannot proceed pursuant to local legislation adopted in violation of SEPA.

Moreover, adoption of the County and BSRE's argument that developers may vest, regardless of SEPA noncompliance, completely eviscerates meaningful review of compliance with SEPA procedures. Government accountability will take a backseat to development because stringent standards and consequences for failing to perform follow SEPA procedure will no longer exist.

- a. The rationale for the vested rights doctrine does not support a rule allowing property owners to vest to void regulations.

Woodway and Save Richmond Beach do not dispute that the vested rights doctrine is intended to further the goals of fairness and certainty for developers. *See, e.g., Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 870, 872 P.2d 1090 (1994) (“[O]ur vesting doctrine is rooted in constitutional principles of fundamental fairness. The doctrine recognizes that development rights represent a valuable and protectable property right. By promoting a date certain vesting point, our doctrine insures ‘that new land-use ordinances do not unduly oppress development

rights, thereby denying a property owner's right to due process under the law.”) (internal citations omitted); *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986) (the vested rights doctrine was created to protect landowners from fluctuating policy of the legislature and allows developers to fix the rules that will govern their land development).

However, this well-documented rationale for the vested rights doctrine, emphasizing fairness and certainty, does not support a policy allowing property owners to vest to ordinances that are determined to be void. And, particularly applicable to the circumstances of this case, the rationale does not support allowing a developer to vest to an ordinance, the validity of which he or she knows is actively being challenged.

While fairness and certainty are important foundation principles for the vested rights doctrine, commentators also state that the doctrine is not absolute. It is intended to strike a balance between “the interests of (a) developers in planning, financing, and implementing land use projects with some certainty that the rules of the game will not change mid-course; and (b) municipalities in revising their land use laws to meet the demands of growth, comply with new state laws, and avoid nonconforming uses.” Roger D. Wynne, *Washington’s Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, 24 Seattle U. L.

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Rev. 851, 861 (2001). In this vein, the courts have selected a vesting point which prevents “permit speculation” and which demonstrates substantial commitment by the developer to the project. In short, vesting is a shield to protect developers from government action purporting to change the rules. The Court’s holding in *Noble Manor* implemented this rationale because only uses that are disclosed in the application and which have been adequately planned for in reliance upon the existing development regulations are eligible to vest. *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997). See also Gregory Overstreet & Diana M. Kircheim, *The Quest for the Best Test to Vest: Washington’s Vested Rights Doctrine Beats the Rest*, 23 Seattle U. L. Rev. 1043, 1084 (2000) (citing *Noble Manor*, 133 Wn.2d at 283) (noting *Noble Manor*’s holding that a vested right protects the broad right to “develop” is consistent with commentators’ observations that vesting protections should extend to “development rights that are critical to the landowner’s investment-backed expectations.”).

The position asserted by the developer in this case contorts and perverts the balance that is struck between the protection of developer’s investment-backed decisions against fluctuating policies of the city’s legislative body and the interest of municipalities in updating the

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ordinances to reflect the growth and character of their community. By filing a permit application subsequent to the hearing before the Board challenging the validity of the applicable development regulations under both SEPA and the GMA and prior to the Board issuing its decision, the developer has clearly assumed the risk of loss. As stated in *Norco Constr., Inc. v. King County*, 97 Wn. 2d 680, 684, 649 P.2d 103 (1982), the purpose of the vested rights doctrine was to “avoid tactical maneuvering between [the] parties” The developer in this case, BRSE, has undoubtedly done exactly that -- strategically manipulated the land use process while considering the risk that the development regulations could be invalidated. The developer is not an “innocent” developer that proceeded without knowledge of the challenges to the ordinance. Thus, the developer was apprised of the possibility that any development sought under the permits could be nullified, and the vested rights doctrine should not offer protection.

As further explained in *Erickson & Associates*, vested rights come at a cost to the public interest:

Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public

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interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

Erickson, 123 Wn.2d at 873-74 (emphasis added). If actions similar to those taken by the developer in this case result in a vested right, it will further injure the public interest. Not only will the public suffer from the creation of nonconforming uses, it will also suffer from development pursuant to an ordinance that was void at its inception because it failed to comply with laws necessary to protect the environment of this State.

- b. Allowing vested rights to be acquired in development regulations found to be enacted in violation of SEPA will render the Board's SEPA review meaningless.

The County and BSRE's position regarding vested rights effectively precludes meaningful review of SEPA compliance. Tellingly, the County states in its summary of argument that the Board's ruling declaring the County's development regulations noncompliant with SEPA "was irrelevant to BSRE's permit applications."³² If Appellants' position that Regulatory Reform overrules SEPA case law regarding the effect of noncompliance is adopted, the County's statement will unfortunately become reality.

³² *Snohomish County Opening Brief at 6.*

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If the trial court's ruling is reversed, it will have a profound effect upon continued efficacy of SEPA procedure because it will eliminate meaningful review of SEPA determinations for GMA planning jurisdictions. Developers could vest to an ordinance regardless of whether the Board determines it was enacted in compliance with SEPA. Thus, the Court should carefully consider that there would be little remaining incentive to comply with SEPA's procedural requirements in GMA planning jurisdictions if the trial court is reversed. If the Board's ruling is "irrelevant," there is very little incentive to even pursue challenges unless a continued violation of the GMA goals will also result.

Where there will simply be little practical consequence for dispensing with SEPA's procedural requirements, government accountability is seriously compromised. 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." Settle, *State Environmental*

Policy Act § 3.01. SEPA 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.* Unfortunately, if the Board’s check upon government decisionmaking is crippled, Washington citizens can no longer be assured that the potential adverse environmental impacts of proposed actions will be adequately considered.

Taking the instant case as an example highlights the danger of the County’s approach. Here, the County designated an isolated shoreline area, previously used solely for petroleum storage, as a high-density urban center and adopted development regulations to implement the designation. CP 93-103. Despite protest from Woodway, Save Richmond Beach, and City of Shoreline based upon the lack of adequate transportation facilities, the County proceeded with its FSEIS, which merely incorporated environmental analysis done for previously-considered Comprehensive Plan updates. CP 95. Though every other urban center in Snohomish County is located near I-5 or other major thoroughfares, the County proceeded to designate BSRE’s property as an urban center, accessible only by two-lane road winding through an established neighborhood. CP

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107. If the trial court's ruling were reversed, this is the type of decisionmaking that could result in vested development because the Board's ruling on SEPA noncompliance would be, in the County's words, "irrelevant."³³

Clark County v W. Wash. Growth Bd., discussed previously in Section 3.c. above, similarly rejected an interpretation of the GMA which would preclude the Board's effective review of agency action. Specifically, Clark County directed the court to the "prospective only" provisions of the GMA, RCW 36.70A.300(4) and RCW 36.70A.302(2), which the County and BSRE have also extensively cited and discussed in this case, for the proposition that the Board's ruling could not affect the annexations that had already taken place. The appeals court rejected this mootness argument, holding:

Under the parties' interpretation of RCW 36.70A.300(4), .320(1), the former RCW 36.70A.302(2), the GMA would be unenforceable. The parties' interpretation would allow a county to incorporate any land into a UGA regardless of whether it satisfies the GMA's requirements; draw out the appeal at the Growth Board level until a city could pass an ordinance annexing the property; and then moot out any challenges by citing the county's lack of authority over the lands or argue, as it did here, that the annexation deprived the Growth Board of jurisdiction to review its decision to include the property in the UGA. The legislature did not intend to permit counties to evade review of their GMA

³³ *Snohomish County Opening Brief at 6.*

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planning decisions in his manner, and the GMA's statutory scheme does not allow them to do so.

Id. at 225 (emphasis added). Similarly, the Legislature did not intend for RCW 36.70A.300(4) and RCW 36.70A.302(2) to render the Board's SEPA determinations virtually meaningless if vested rights could be acquired in void ordinances anyway.

6. Woodway incorporates by reference the arguments made by Save Richmond Beach regarding LUPA and the appropriateness of an injunction.

Woodway hereby incorporates by reference the argument contained in the Brief of Respondent Save Richmond Beach that (1) Woodway and Save Richmond Beach's claims are not barred by the Land Use Petition Act (LUPA); and (2) the trial court properly granted an injunction precluding the County from processing BSRE's development applications until SEPA compliance is achieved.

E. CONCLUSION

This case will determine whether SEPA continues to provide citizens the means to protect their fundamental and inalienable right to a healthful environment and whether government will be held accountable to consider environmental factors when making decisions that affect the community. This case presents a classic example of what can happen if
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SEPA is relegated to a mere aspiration and not a robust tool for informed decision-making. The trial court's decision granting summary judgment in Woodway and Save Richmond Beach's favor should be upheld because the Regulatory Reform amendments to the GMA did not overrule prior case law determining the consequence for noncompliance with SEPA.

RESPECTFULLY SUBMITTED this 21st day of February, 2012.

Respectfully submitted,

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DECLARATION OF SERVICE

I, Gloria J. Zak, make the following true statement.

On February 21, 2012, I filed Response Brief of Respondent Town of Woodway with the Court of Appeals, Division I, and forwarded copies via e-mail and regular mail as follows:

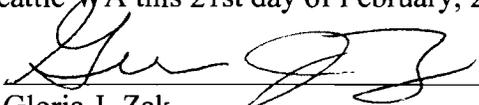
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated and signed in Seattle WA this 21st day of February, 2012.


Gloria J. Zak

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