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No. 88405-6

SUPREME COURT
OF THE STATE OF WASHINGTON

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

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

TOWN OF WOODWAY and SAVE RICHMOND BEACH,

Petitioners,

vs.

BSRE POINT WELLS, LP and SNOHOMISH COUNTY,

Respondents.

SUPPLEMENTAL BRIEF OF SAVE RICHMOND BEACH

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ORIGINAL

TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | INTRODUCTION | 1 |
| II. | ISSUES | 2 |
| III. | STATEMENT OF THE CASE..... | 2 |
| IV. | AUTHORITY AND ARGUMENT..... | 2 |
| | A. The Court of Appeals decision undermines SEPA and allows the use of vesting as a “sword” rather than a “shield.” | 2 |
| | B. Woodway and Save Richmond Beach’s Claims are not Barred by the Land Use Petition Act..... | 5 |
| | 1) Woodway and Save Richmond Beach filed an action to determine the vesting status of BSRE’s Urban Center development applications, not an appeal of Snohomish County’s “determination” of completeness. | 6 |
| | 2) There has been no “land use decision” for purposes of LUPA – Washington courts have held that LUPA does not apply to interim decisions made in the process of reaching a “final determination.” | 7 |
| | a) BSRE and Snohomish County Misconstrue the Plain Language of RCW 36.70C.020(2)’s Definition of “Land Use Decision.” | 8 |
| | b) A Determination of Completeness is Not a “Land Use Decision” that Requires a LUPA Appeal. | 10 |
| | c) In Order to be Appealable Under LUPA, a “Land Use Decision” Regarding Vested Rights Requires a Final Determination by a Local Official, Hearing Officer, or City or County Council..... | 12 |
| | C. The language in the Notices of Application regarding additional approvals and no further appeals cannot trigger a LUPA challenge..... | 15 |
| V. | CONCLUSION..... | 18 |

TABLE OF AUTHORITIES

Cases

| | |
|---|--------|
| <i>Abbey Rd. Grp. LLC v. City of Bonney Lake</i> , 167 Wn.2d 242, 218 P.3d 180 (2009)..... | 3 |
| <i>Abbey Road Group, LLC v. City of Bonney Lake</i> , 167 Wn.2d 242, 218 P.3d 180 (2009)..... | 13 |
| <i>Achen v. Clark County</i> , 131 Wn. App. 1056, 2006 WL 541329 at *3 (2006)..... | 14 |
| <i>Alberg v. King County</i> , 108 Wn. App. 1005, 2001 WL 1011935 at *3 (2001)..... | 13 |
| <i>Alverado v. Wash. Pub. Power Supply System</i> , 111 Wn.2d 424, 759 P.2d 427 (1988)..... | 2 |
| <i>Asche v. Bloomquist</i> , 132 Wn. App. 784, 133 P.3d 475 (2006), <i>review denied</i> , 159 Wn.2d 1005 (2006)..... | 10 |
| <i>Berst v. Snohomish County</i> , 114 Wn. App. 245, 57 P.3d 273 (2002)..... | 6 |
| <i>Caswell v. Pierce County</i> , 99 Wn. App. 194, 992 P.2d 534 (2000)..... | 13 |
| <i>Chaney v. Fetterly</i> , 100 Wn. App. 140, 995 P.2d 1284 (2000)..... | 7 |
| <i>City of Seattle v. McCready</i> , 123 Wn.2d 260, 868 P.2d 135 (1994)..... | 2 |
| <i>Clean Water Alliance v. Whatcom County</i> , 106 Wn. App. 1036, 2001 WL 603600 at *2 (2001)..... | 14 |
| <i>Durland v. San Juan County</i> , 171 Wn. App. 1019, 298 P.3d 757, 763 (2012)..... | 11, 17 |
| <i>Erickson & Associates, Inc. v. McLerran</i> , 123 Wn.2d 864, 872 P.2d 1090 (1994)..... | 3, 5 |

| | |
|--|-------|
| <i>Graham Neighborhood Ass'n v. F.G. Assoc's.</i> , 162 Wn. App. 98, 252 P.3d 898 (2011)..... | 12 |
| <i>Hanson v. City of Snohomish</i> , 121 Wn.2d 552, 852 P.2d 295 (1993)..... | 2 |
| <i>Harrington v. Spokane Cty.</i> , 128 Wn. App. 202, 114 P.3d 1233 (2005)..... | 17 |
| <i>Isla Verde Int'l Holdings, Inc. v. City of Camas</i> , 99 Wn. App. 127, 990 P.2d 429 (1999)..... | 14 |
| <i>Julian v. City of Vancouver</i> , 161 Wn. App. 614, 628, 255 P.3d 763 (2011)..... | 13 |
| <i>Kelly v. County of Chelan</i> , 167 Wn.2d 867, 870, 224 P.3d 769 (2010)..... | 13 |
| <i>King County v. Central Puget Sound Growth Mgmt Hearings Bd.</i> , 91 Wn. App. 1, 30, 951 P.2d 1151 (1998), <i>reversed in part on other grounds in</i> 138 Wn.2d 161, 979 P.2d 374 (1999)..... | 15 |
| <i>Lakeland Estates, LLC v. King County</i> , 138 Wn. App. 1060, 2007 WL 1589426 at *2 (2007)..... | 13 |
| <i>Lakey v. Puget Sound Energy, Inc.</i> , 176 Wn.2d 909, 296 P.3d 860 (2013)..... | 7 |
| <i>Lauer v. Pierce County</i> , 173 Wn.2d 242, 267 P.3d 988 (2011)..... | 3, 12 |
| <i>Manna Funding, LLC v. Kittitas County</i> , 173 Wn. App. 879, 890, 295 P.3d 1197 (2013)..... | 9 |
| <i>Myers v. City of Cheney</i> , 103 Wn. App. 1014, 2000 WL 1663652 at *6 (2000)..... | 14 |
| <i>Samuel's Furniture, Inc. v. Dep't of Ecology</i> , 147 Wn.2d 440, 54 P.3d 1194 (2002)..... | 11 |
| <i>State v. Leek</i> , 26 Wn. App. 651, 614 P.2d 209 (1980)..... | 9 |

| | |
|--|--------|
| <i>State, Dep't of Transp. v. James River Ins. Co.</i> , 176 Wn.2d 390, 397, 292 P.3d 118 (2013)..... | 9 |
| <i>Stientjes Family Trust v. Thurston County</i> , 152 Wn. App. 616, 623, 217 P.3d 379 (2009)..... | 11 |
| <i>Sylvester v. Pierce County</i> , 148 Wn. App. 813, 821, 201 P.3d 381 (2009)..... | 13 |
| <i>Twin Bridge Marine Park, LLC v. Wash. State Dep't. of Ecology</i> , 162 Wn.2d 825, 175 P.3d 1050 (2008)..... | 14 |
| <i>Valley View Indus. Park v. City of Redmond</i> , 107 Wn.2d 621, 637, 733 P.2d 182 (1987)..... | 3 |
| <i>WCHS v. City of Lynnwood</i> , 120 Wn. App. 668, 86 P.3d 1169 (2004)..... | 11, 12 |
| <i>Wells v. Whatcom County Water Dist. No. 10</i> , 105 Wn. App. 143, 19 P.3d 453 (2001)..... | 14 |
| <i>Westside Business Park, LLC v. Pierce County</i> , 100 Wn. App. 599, 602, 5 P.3d 713 (2000)..... | 13 |

Statutes

| | |
|---------------------------|------|
| RCW 36.70B.110(2)(e)..... | 16 |
| RCW 36.70C.010..... | 10 |
| RCW 36.70C.020(1)..... | 10 |
| RCW 36.70C.020(2)..... | 9 |
| RCW 36.70C.020(2)(b)..... | 5 |
| RCW 36.70C.020(2)(c)..... | 9 |
| RCW 36.70C.060(2)(d)..... | 11 |
| RCW Ch. 36.70A..... | 1 |
| RCW Ch. 36.70C..... | 1, 5 |

| | |
|---------------------|------|
| RCW Ch. 43.21C..... | 1, 3 |
| RCW Ch. 7.24..... | 5 |
| RCW Ch. 7.40..... | 6 |

I. INTRODUCTION

This case presents a question of first impression concerning the balance between two of our State's compelling policy interests: on 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. Petitioners Save Richmond Beach and the Town of Woodway ask the Court to harmonize these often-competing interests by holding that development applications may not vest to local ordinances that are *ultra vires* and void because they have been adopted in violation of the State Environmental Policy Act, RCW Ch. 43.21C (SEPA), in the first instance.

This Supplemental Brief first addresses the interplay between these competing policy interests as informed by the undisputed facts of this case, and then addresses BSRE and Snohomish County's argument – raised in both the trial court and the Court of Appeals – that this action is barred by the exclusive remedy provision of the Land Use Petition Act, RCW Ch. 36.70C (LUPA). Because the Washington State Court of Appeals, Division I, reversed the trial court's decision and remanded for dismissal based solely on its interpretation of the Growth Management Act, RCW Ch. 36.70A (GMA), it declined to address the LUPA arguments. Decision at 21, note 28. However, because Save Richmond Beach and Woodway now ask this Court to reverse the Court of Appeals,

it may be necessary for the Court to reach and dispose of the jurisdictional LUPA arguments. This Court has the inherent discretionary authority to reach issues not briefed by the parties if those issues are necessary for decision. *City of Seattle v. McCready*, 123 Wn.2d 260, 269, 868 P.2d 135 (1994) (court had to consider magistrate's authority to issue warrants before upholding warrants); *Hanson v. City of Snohomish*, 121 Wn.2d 552, 557, 852 P.2d 295 (1993) (court had to consider whether conviction for assault conclusively established probably cause as a matter of law); *Alverado v. Wash. Pub. Power Supply System*, 111 Wn.2d 424, 429-30, 759 P.2d 427 (1988) (consideration of federal preemption doctrine was necessary to properly resolve the matter before the court).

II. ISSUES

Save Richmond Beach adopts the Statement of Issues Presented for Review found at page 1 of its Petition for Discretionary Review. In addition, this Supplemental Brief addresses the question of whether this action for declaratory judgment and injunctive relief is barred by LUPA's exclusive remedy provision, as alleged by Snohomish County and BSRE in the courts below.

III. STATEMENT OF THE CASE

Save Richmond Beach adopts the Statement of the Case found at pages 1-12 of its Petition for Discretionary Review.

IV. AUTHORITY AND ARGUMENT

A. The Court of Appeals decision undermines SEPA and allows the use of vesting as a "sword" rather than a "shield."

At its core, this case addresses the problem recognized by this Court in *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 873-874, 872 P.2d 1090 (1994), (and recently affirmed in *Lauer v. Pierce County*, 173 Wn.2d 242, 261-263, 267 P.3d 988 (2011)), of vested rights subverting the public interest by being “too easily granted.” Although this case arises in the context of a local land use dispute, it presents a question of statewide significance concerning the relationship between SEPA, RCW Ch. 43.21C, and Washington’s vested rights doctrine. Specifically, the question here is whether a development application can legitimately vest to ordinances that have been *adopted* in violation of SEPA’s procedural requirements, even where those ordinances 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 a developer’s application to vest under these circumstances would be contrary to well-settled case law and would not only serve none of the policies behind Washington’s vested rights doctrine, but also fundamentally undermine our state’s primary environmental protection law.

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 doctrine on its 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 fluctuating land use policies. The Court of Appeals’ decision in this case does not shield BSRE from oppressive new land use ordinances. Nor does it uphold important principles such as protection of property rights, certainty, predictability, due process, good faith, or fairness. To the contrary, the developer in this case urged the County to adopt the illegal ordinances in question, sat through the Growth Board hearing challenging those ordinances, and then strategically submitted its permit application just two days later, before the Growth Board could actually rule.¹

Rather than promoting fairness, certainty, and due process, the Court of Appeals decision has given developers and complicit local jurisdictions an option to *effectively avoid* SEPA’s procedural requirements in the process of adopting more development-friendly land use ordinances. Snohomish County and BSRE have advanced (and the Court of Appeals has endorsed) nothing short of an approach that would allow developers and local jurisdictions to *negate any SEPA review* of local GMA enactments by simply submitting a development application whenever a SEPA challenge is filed. Indeed, if the Court accepts BSRE and Snohomish County’s interpretation of the GMA, the outcome would

¹ The Growth Board Hearing took place on March 2, 2011 (CP 95) and BSRE filed its master permit application on March 4, 2011 (CP 248).

be no different than 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 at 873-874.

B. Woodway and Save Richmond Beach's Claims are not Barred by the Land Use Petition Act

In its brief to the Court of Appeals, BSRE claims that the trial court erred in allowing Woodway and Save Richmond Beach to ignore the "exclusive remedy" provisions of the Land Use Petition Act, RCW Ch. 36.70C (LUPA).² BSRE overlooks the fact that Woodway and Save Richmond Beach did not appeal a "land use decision" subject to LUPA, but invoked the original jurisdiction of the Superior Court pursuant to the Uniform Declaratory Judgments Act, RCW Ch. 7.24, to determine as a matter of law whether a development application can vest to an ordinance adopted in violation of SEPA. The County and BSRE attempt to bind vested rights and completeness together and package them both as a "land use decision" under RCW 36.70C.020(2)(b), but there has been no "land use decision" to appeal – LUPA does not apply to interim decisions made in the process of reaching a "final determination."

² Snohomish County made a similar LUPA argument before the trial court, but has abandoned the argument on appeal.

Woodway and Save Richmond Beach properly brought their challenge to the vested status of BSRE's application before the Superior Court in this declaratory judgment action.

- 1) **Woodway and Save Richmond Beach filed an action to determine the vesting status of BSRE's Urban Center development applications, not an appeal of Snohomish County's "determination" of completeness.**

Woodway and Save Richmond Beach properly brought a declaratory judgment action and request for injunctive relief before the Superior Court to determine the status of any vested rights associated with BSRE's Urban Center development application. Woodway and Save Richmond Beach did not challenge the completeness of BSRE's development application through this action, nor did they appeal any decision on the merits of the application. Any such challenges would have to have been made as part of the County's hearing examiner process, and then appealed at the appropriate time in accordance with LUPA.

The Superior Court had jurisdiction to hear this controversy under the Uniform Declaratory Judgments Act and its equitable powers to issue an injunction, as codified in RCW Ch. 7.40. Because LUPA does not provide a remedy, there is no bar to Respondents' declaratory judgment action. *See Berst v. Snohomish County*, 114 Wn. App. 245, 254, 57 P.3d 273 (2002). The superior courts have original jurisdiction under the Uniform Declaratory Judgment Act, and LUPA applies only when a party asks the court to exercise *appellate* jurisdiction – not when a party invokes the court's *original* jurisdiction. *See Chaney v. Fetterly*, 100 Wn. App.

140, 151, 995 P.2d 1284 (2000) (plaintiffs' original action for injunction and damages in boundary line dispute was not subject to LUPA because it did not seek review of the county's approval or failure to act).³ Woodway and Save Richmond Beach seek to bring a separate cause of action for declaratory judgment on the issue of BSRE's vested rights, and the superior court has jurisdiction to hear these claims.

This position does not contradict the exclusive remedy provisions of LUPA. LUPA is still the exclusive remedy for an *appeal* of a final land use or permit decision. Woodway and Save Richmond Beach's petition to the Superior Court is not an appeal of any decision. Rather, Woodway and Save Richmond Beach properly invoked the original jurisdiction of the Superior Court to issue a declaratory judgment regarding the application of the vested rights doctrine, and to grant declaratory and injunctive relief regarding the underlying ordinances' failure to comply with SEPA.⁴

2) There has been no "land use decision" for purposes of LUPA – Washington courts have held that LUPA does

³ This Court recently affirmed the original jurisdiction of the superior court to hear claims that could not have been brought before the hearing examiner, and that LUPA did not apply to claims for inverse condemnation related to a city hearing examiner's decision on a variance. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 928, 296 P.3d 860 (2013).

⁴ Contrary to BSRE and Snohomish County's position, Petitioners' declaratory judgment action is not a "collateral attack" of an earlier land use decision. BSRE and Snohomish County cite *Habitat Watch* and *Wenatchee Sportsman*, which are distinguishable. In both cases the appeal period for an approved permit had passed and the petitioners tried to resuscitate the appeal period for the earlier approval via collateral challenge to a subsequent permit. Here, no decision has been made on BSRE's permit application, so there is no decision for Woodway and Save Richmond Beach to collaterally attack.

not apply to interim decisions made in the process of reaching a “final determination.”

Even if Woodway and Save Richmond Beach had sought to appeal the County’s stamp of completeness on BSRE’s application, they would not have been able to bring a LUPA action at this time because no *final* “land use decision” has been made. BSRE’s argument to the contrary lacks merit. To be clear, BSRE is arguing that the County’s “decision” to simply *accept* BSRE’s permit application was a *final* decision triggering LUPA review. As Judge Lum correctly pointed out at oral argument, this means there could be a dozen such “final” decisions before the application is actually approved or denied, each of which would trigger its own LUPA appeal deadline. This is clearly not the law.

BSRE cannot take a preliminary, administrative step in the permit review process and ratchet it up into a final “land use decision” purely by its own assertion. Nor can it bring the vesting status of project application within LUPA’s exclusive remedy provision simply by calling it a “vesting decision.” This would undermine the very purpose of LUPA by allowing parties to manipulate the statute and create extraneous opportunities for judicial review at any step of the permitting process.

A) BSRE AND SNOHOMISH COUNTY MISCONSTRUE THE PLAIN LANGUAGE OF RCW 36.70C.020(2)’S DEFINITION OF “LAND USE DECISION.”

BSRE and Snohomish County argue that the assumed “determination that BSRE’s development applications were vested” is a “land use decision” under LUPA, because they consider it to be an “interpretive or declaratory decision regarding the application of

ordinances to a specific property.” RCW 36.70C.020(2)(c). The plain language of the statute indicates otherwise.

RCW 36.70C.020(2) states that a “[l]and use decision” means a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination” on an issue that falls into the categories listed in subsections (a)-(c), including “interpretive or declaratory decision[s]” as described in subsection (c). A term whose statutory definition declares what it “means,” as used in the instant case, excludes any meaning that is not stated. *State v. Leek*, 26 Wn. App. 651, 655-6, 614 P.2d 209 (1980). Statutes should be interpreted so that all language is given effect and no portion is rendered meaningless or superfluous. *Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 879, 890, 295 P.3d 1197 (2013). A section must be read as a whole and a subsection must be given an appropriate reading in order to give meaning to the entire section. *State, Dep’t of Transp. v. James River Ins. Co.*, 176 Wn.2d 390, 397, 292 P.3d 118 (2013). RCW 36.70C.020(2)’s definition of a “land use decision” is clear and precise in its requirement of a “final determination,” and that such determination must fall within the areas set forth in subsections (a)-(c).

BSRE and Snohomish County attempt to circumvent the plain language of the definition of “land use decision” by disregarding the “final determination” language of Section (2) of RCW 36.70C.020 and applying only the secondary language of subsection (2)(c). These subsections apply only where the initial section requirements have been satisfied. It makes

no difference whether or not a determination of completeness or a vesting decision falls within the subsection (c)'s classification of "interpretive or declaratory decision" if there has been no final determination on the issue.

B) A DETERMINATION OF COMPLETENESS IS NOT A "LAND USE DECISION" THAT REQUIRES A LUPA APPEAL.

BSRE argues that LUPA applies to a determination of completeness but cannot establish its finality, an essential element for LUPA review. BSRE's only authority on this point, *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006), *review denied*, 159 Wn.2d 1005 (2006), simply held that LUPA applies to challenges to a permit's validity and to interpretations of zoning ordinances.⁵ BSRE and Snohomish County also cite *Nykreim*, which, like *Bloomquist*, involved petitions for judicial review of the approval of a permit application and does not apply.

LUPA was enacted to establish "uniform, expedited appeal procedures and uniform criteria for reviewing [land use] decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. A "land use decision" requires "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals." RCW 36.70C.020(2). A "final determination" for LUPA review is "[o]ne which leaves nothing open to further dispute and which sets at rest the

⁵ The petitioners in *Bloomquist* did not even contend that the building permit was not a final decision, so the court only considered whether the petition fell under the scope of RCW 36.79.030(b). *Id.* at Note 3.

cause of action between parties.” *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002) (receipt of grading, fill and building permits were “final decisions”). A decision is final when it “concludes the action by resolving the plaintiff’s entitlement to the requested relief. *Durland v. San Juan County*, 171 Wn. App. 1019, 298 P.3d 757, 763 (2012). In contrast, an interlocutory decision intervenes between the commencement and the end of a suit and decides some point or matter, but is not a final decision of the whole controversy. *Id.*

LUPA does not apply to interim decisions, regardless of whether they are related to permit applications or fall under the subsection category of “interpretive decisions.” Washington courts have found nothing “final” about an agency’s determination of an action’s completeness. In *WCHS v. City of Lynnwood*, this Court found that LUPA did not apply because a declaration of an application’s completeness was “an interim decision made in the process of, but prior to, reaching a final decision on a permit.” 120 Wn. App. 668, 679-680, 86 P.3d 1169 (2004). The *WCHS* case, which is directly on point, is dispositive of BSRE’s argument that Respondents have missed a deadline to appeal under LUPA.

Furthermore, LUPA was specifically enacted to discourage “judicial review on a piecemeal basis.” *Stientjes Family Trust v. Thurston County*, 152 Wn. App. 616, 623, 217 P.3d 379 (2009) (board decision to remand to hearing examiner was not final). RCW 36.70C.060(2)(d) “prevents a party from needlessly turning to a court for judicial relief when a local authority may still provide the requested relief.” *Id.* at 623.

To apply the LUPA requirements to interim decisions such as this would contravene the statute's express purpose. While BSRE and Snohomish County argue that the stamp of completeness and assumption of vested rights "was not an 'interim' decision for the County which would be revisited at some point in the future," the County has yet to even approve or deny BSRE's permit application, let alone reach the extent of the administrative permit processes set forth by the County. BSRE and Snohomish County's LUPA argument fails as a matter of law, because any declaration of completeness of an application and appurtenant vested rights would clearly be an interim decision. *WCHS*, 120 Wn. App. at 679-680.

C) IN ORDER TO BE APPEALABLE UNDER LUPA, A "LAND USE DECISION" REGARDING VESTED RIGHTS REQUIRES A FINAL DETERMINATION BY A LOCAL OFFICIAL, HEARING OFFICER, OR CITY OR COUNTY COUNCIL

Every case in which Washington courts have determined that LUPA was the appropriate means of appealing a determination of vested rights had one of the following: 1) a final decision by a local official on a permit application, 2) an appeal of that decision to a hearing examiner, or 3) multiple appeals to a city or county council. *See Lauer v. Pierce County*, 173 Wn.2d 242, 267 P.3d 988 (2011) (LUPA petition appealed hearing examiner's approval of variance and determination of vested rights); *Graham Neighborhood Ass'n v. F.G. Assoc's.*, 162 Wn. App. 98, 107, 252 P.3d 898 (2011) (LUPA petition appealed hearing examiner's determination of completeness and vested rights after application had been

cancelled); *Julian v. City of Vancouver*, 161 Wn. App. 614, 628, 255 P.3d 763 (2011) (LUPA petition appealed hearing examiner's approval of short plat and determination of vested rights under earlier provisions of municipal code); *Kelly v. County of Chelan*, 167 Wn.2d 867, 870, 224 P.3d 769 (2010) (LUPA petition appealed hearing examiner's approval of conditional use permit and determination that rights had vested under earlier land use regulations); *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 248, 218 P.3d 180 (2009) (LUPA petition appealed hearing examiner's determination that site plan application was not complete and rights had not vested); *Sylvester v. Pierce County*, 148 Wn. App. 813, 821, 201 P.3d 381 (2009) (LUPA petition appealed hearing examiner's approval of reasonable use permit and determination that rights had vested); *Lakeland Estates, LLC v. King County*, 138 Wn. App. 1060, 2007 WL 1589426 at *2 (2007) (LUPA petition appealed denial of binding site plan and concluded that the community's PUD authorization did not create vested rights); *Alberg v. King County*, 108 Wn. App. 1005, 2001 WL 1011935 at *3 (2001) (LUPA petition appealed county's denial of grading and mining permit and rejection of claim for vested rights); *Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 599, 602, 5 P.3d 713 (2000) (LUPA petition appealed hearing examiner's decision that short plat application had vested rights under ordinances in effect at time of filing); *Caswell v. Pierce County*, 99 Wn. App. 194, 197, 992 P.2d 534 (2000) (LUPA petition appealed hearing examiner's decision that application was complete and vested despite the requested variance).

If a board or hearing examiner has made a final decision on the issue of vested rights, then a LUPA appeal is the only way to challenge that decision. *See Twin Bridge Marine Park, LLC v. Wash. State Dep't. of Ecology*, 162 Wn.2d 825, 832-833, 175 P.3d 1050 (2008) (holding that DOE was required to bring a LUPA petition to appeal the county's reinstatement of building permits); *see also Achen v. Clark County*, 131 Wn. App. 1056, 2006 WL 541329 at *3 (2006) (petitioners waived right to challenge final subdivision approval by failing to file LUPA appeal of board of commissioners' decision and denial of vested rights). On the other hand, if no determination has been made by a hearing examiner on the issue of vested rights, a LUPA appeal is not ripe. *See Wells v. Whatcom County Water Dist. No. 10*, 105 Wn. App. 143, 157-8, 19 P.3d 453 (2001) (court could not consider issue of vested rights on LUPA appeal, because hearing examiner did not base his decision on landowner's property rights); *Clean Water Alliance v. Whatcom County*, 106 Wn. App. 1036, 2001 WL 603600 at *2 (2001) (petitioners failed to raise vesting issue before hearing examiner and therefore could not raise it on LUPA appeal); *Myers v. City of Cheney*, 103 Wn. App. 1014, 2000 WL 1663652 at *6 (2000) (LUPA did not apply to appeal of hearing examiner's finding of no jurisdiction, because it was not a "land use decision" for LUPA purposes); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 143, 990 P.2d 429 (1999) (issues of impact fees and vested rights under earlier capital facilities plan was not ripe for LUPA appeal because no formal decision had been made nor had any fees

been assessed); *King County v. Central Puget Sound Growth Mgmt Hearings Bd.*, 91 Wn. App. 1, 30, 951 P.2d 1151 (1998), *reversed in part on other grounds in* 138 Wn.2d 161, 979 P.2d 374 (1999) (LUPA appeal was not ripe where hearing examiner declined to rule on vesting status).

This is the critical distinction – the stamp of completeness on BSRE’s application does not suffice for a “land use decision.” No jurisdiction has made a final determination regarding the status of BSRE’s vested rights that would be appealable by LUPA petition. By the same reasoning, BSRE and Snohomish County’s position that “all manner of land use decisions are subject to LUPA, unless specifically excluded under RCW 36.70C.030,” is irrelevant, because no land use decision has been made regarding BSRE’s vested rights.

C. The language in the Notices of Application regarding additional approvals and no further appeals cannot trigger a LUPA challenge.

Even if a land use decision had been made, and LUPA was the only process available for appeal, the Notices of Application failed to “advise... interested parties that the administrative review process relative to completeness and vesting had ended,” as BSRE and Snohomish County claim. Following BSRE’s permit applications, Snohomish County published three separate Notices of Application, each indicating that “[t]here is no appeal opportunity for this application at this point in the process. Additional notice will be provided of any future appeal opportunities.” CP 423-432. By this language, Snohomish County indicates that this is an interlocutory decision, with no appeal opportunity

at this point in the process. No further notice was given of any future appeal opportunities. The County failed to give any indication what appeal process was available, let alone a specified deadline, procedure, or forum for appeals. Any appeal rights are required to be included in the Notice of Application under RCW 36.70B.110(2)(e). This statutory provision requires an agency to specify the availability of an appeal at the application stage, in an attempt to avoid this type of dispute.

The County also corresponded with Save Richmond Beach via email and explained that it would continue to accept public comments after the stated period had expired. CP 430-432. At no point did the County mention that any appeal was available. BSRE now claims that Respondents' window to appeal under LUPA closed 21 days after each "determination of completeness" (on March 4th and March 25th, 2011). Yet these dates were apparently within the public comment periods for the Notices of Application. Furthermore, the 2nd Notice of Application was issued many months after the "deadline" that BSRE claims Woodway and Save Richmond Beach missed. CP 433. The public comment period for the applications did not close until August 3, 2011. *Id.* It defies common sense to claim that Respondents should have brought an appeal regarding the application's status when the public comment period on that very issue was still open, and when the County sent a Notice of Application several months later indicating (once again) that no appeal was available.

There is no language in the Notices of Application that indicates that BSRE's permit applications are complete, aside from the boilerplate

heading of "Date of Application/Completeness Date." CP 423-433. The dates listed on the Notices of Application do not indicate whether they are the "date of application" or the "completeness date."

A letter or notice does not meet this definition "unless it clearly asserts a legal relationship and makes clear that it is the final point of the administrative process." *Harrington v. Spokane Cty*, 128 Wn. App. 202, 212, 114 P.3d 1233 (2005) (letter regarding compliance of proposed septic system was not a "final decision"). Such decision must be clearly cognizable as a final determination of rights, and any doubts regarding a decision's finality will be resolved against the agency. *Id.* The Notices of Application set forth that additional approvals would be required and that further notice of determination of concurrency and notice of project decision would be issued. CP 423-433. At best, the Notices of Application provided information about the process to be followed and the upcoming procedural steps that would be taken before reaching a final land use decision on BSRE's permit application. Mere decisions about the process to be followed in making a land use decision are not final land use decisions. *Durland, supra*, 298 P.3d at 763.

Had Woodway and Save Richmond Beach attempted to bring a LUPA action, BSRE and Snohomish County most certainly would have argued that such an action was barred by the Notice of Application, or premature because of the applications' very preliminary stage of review. BSRE cannot have it both ways - there is no question that the Notices of Application stated that no appeal was available at that time but that further

notice of appeals would be provided. BSRE cannot now claim that Woodway and Save Richmond Beach failed to timely file a LUPA appeal in order to prevent the Court from reaching the merits of this action.

BSRE takes the position that the “no appeal” language indicated that the administrative review process had ended and served as a trigger for the application of LUPA. But the Notice of *Application* could not have been the end of the administrative appeals process because no decision had been made on the merits of the application. Requiring a LUPA appeal before a final decision on an application’s merits would contravene LUPA’s express purpose, and force petitioners to bring a LUPA appeal at each interim step of the process. Furthermore, BSRE’s position is belied by the very language of the Notice of Application, which states “[a]dditional notice will be provided of any future appeal opportunities.” If the administrative appeals process had in fact ended, and LUPA was the only available remedy, then the Notice of Application would have indicated that there were no future administrative appeal opportunities available, as required by the GMA and the Snohomish County Code.

Save Richmond Beach further incorporates the arguments contained in the Town of Woodway’s supplemental brief.

V. CONCLUSION

The issues in this case are of critical importance not only for the residents of Richmond Beach and Woodway, but also for our state policies addressing environmental protection in the land use context. Save

Richmond Beach respectfully asks this Court to reject BSRE and Snohomish County's invitation to effectively eliminate SEPA review in the land use planning context, and to instead restore the delicate balance between the vested rights doctrine and the public interest, as embodied by our state's primary environmental protection law. To hold otherwise under the facts presented by this case would surely render vested rights "too easily granted."

Furthermore, this Court has the authority and can decide, if necessary, the question of LUPA's applicability to Woodway and Save Richmond Beach's claims. The Superior Court has original jurisdiction to hear Woodway and Save Richmond Beach's claims, and LUPA's exclusive remedy provision poses no bar because this action is not an appeal of a final land use decision. For the reasons set forth above, as well as those in the pleadings below and the Town of Woodway's Supplemental Brief, Save Richmond Beach respectfully requests that the Court of Appeals decision be reversed.

DATED this 5th day of July, 2013.

GRAHAM & DUNN PC

By 
Aimee K. Decker, WSBA# 41797
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Beach

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

TOWN OF WOODWAY and SAVE RICHMOND BEACH,

Petitioners,

vs.

BSRE POINT WELLS, LP and SNOHOMISH COUNTY,

Respondents.

DECLARATION OF SERVICE

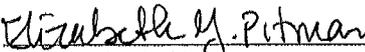
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Richmond Beach, Inc.

I, Elizabeth G. Pitman hereby declare that on this 5th day of July, 2013, I caused true and original copies of Save Richmond Beach's Supplemental Brief and this DECLARATION OF SERVICE to be served on the below parties via the method(s) indicated addressed as follows:

| | | |
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| <p>John R. Moffat Martin D. Rollins Matthew A. Otten Deputy Prosecuting Attorneys for Snohomish County Civil Division Robert J. Drewel Bldg., 7th Flr - M/S 504 3000 Rockefeller Ave Everett, WA 98201-4060 jmoffat@snoco.org mrollins@snoco.org motten@snoco.org <i>Counsel for Snohomish County</i></p> | <p><input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/></p> | <p>U.S. Mail, Postage Prepaid Hand Delivered (<i>for same day delivery by WA Legal Messengers</i>) Overnight Mail Facsimile Transmission Email</p> |
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| | <input type="checkbox"/> | <i>delivery by WA Legal Messengers)</i> |
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DATED this 5th day of July, 2013.


 Elizabeth G. Pitman

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, July 05, 2013 3:18 PM
To: 'Pitman, Elizabeth G.'
Cc: Decker, Aimee K.
Subject: RE: Case No. 88405-6 - Electronic Filing Submission

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Sent: Friday, July 05, 2013 3:12 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Decker, Aimee K.
Subject: Case No. 88405-6 - Electronic Filing Submission

Dear Clerk,

Attached for filing in case no. 88405-6, please find Save Richmond Beach's Supplemental Brief and Declaration of Service. T This filing is being submitted on behalf of Aimee K. Decker, WSBA #41797, adecker@grahamdunn.com, (206) 624-8300.

Thank you very much,

Elizabeth G. Pitman

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