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

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

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

Respondents,

v.

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Appellants.

OPENING BRIEF OF APPELLANT BSRE

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I. INTRODUCTION

Appellants BSRE Point Wells, LP (“BSRE”) and Snohomish County have appealed the decision of the Honorable Dean S. Lum which denied summary judgment motions filed by BSRE and Snohomish County, and granted summary judgment to Respondents Town of Woodway (“Woodway”) and Save Richmond Beach, Inc. (“Save Richmond Beach”). The trial court’s summary judgment order is in direct conflict with settled Washington caselaw, and is in direct conflict with the language of the Growth Management Act, RCW 36.70A, and the Land Use Petition Act, RCW 36.70C.

This lawsuit was filed by Woodway and Save Richmond Beach seeking declaratory judgment and an injunction against Snohomish County and BSRE. Woodway and Save Richmond Beach asked the trial court to reverse Snohomish County’s determination that BSRE’s permit applications were vested to Snohomish County’s Urban Center Development Regulations which were in place at the time BSRE’s complete permit applications were submitted. All parties agreed that BSRE’s permit applications were complete, and that Snohomish County had determined that the applications were vested to the Urban Center regulations.

Woodway and Save Richmond Beach nonetheless asked the trial court to overturn Snohomish County’s vesting determinations, because many weeks after BSRE’s submission of the complete applications, the

Central Puget Sound Growth Management Hearings Board (the “Growth Board”) concluded that the County’s Urban Center Development Regulations had been enacted without full compliance with the procedural requirements of the State Environmental Policy Act (SEPA), RCW 43.21C. In its decision, the Growth Board did not find the Urban Center Development Regulations to be invalid, but rather made the lesser determination that the County needed to take further steps to bring those regulations into full SEPA compliance.

All parties to this action agreed that the issues raised by the Complaint were legal in nature, and that there were no genuine issues of material fact. All parties filed summary judgment motions. Snohomish County and BSRE argued that (a) BSRE’s applications were vested to the regulations in place on the date the complete applications were submitted; and (b) Woodway and Save Richmond Beach had no standing to challenge the County’s vesting decision through a collateral declaratory action, as they had failed to appeal the Growth Board’s decision which expressly left the County’s Urban Center regulations in place, and had not timely challenged the County’s vesting determination under the Land Use Petition Act (LUPA), RCW 36.70C.

The trial court granted summary judgment in favor of Woodway and Save Richmond Beach, and denied summary judgment to Snohomish County and BSRE. The Court’s ruling was based on the erroneous legal conclusion that a party has no vested right to have its permit applications

reviewed and regulated under ordinances in effect at the time of application, where a Growth Board sometime later finds those regulations to be non-compliant with SEPA (but not invalid). The trial court also erred in concluding that Woodway and Save Richmond Beach could ignore the “exclusive remedy” provisions of LUPA, and instead seek reversal of Snohomish County’s vesting decision through a collateral declaratory action.

BSRE and Snohomish County have appealed the trial court’s summary judgment order because it is inconsistent with Washington’s Vested Rights Doctrine and because it is contrary to the statutory dictates of the Growth Management Act (GMA) which provides: (a) that Growth Boards have exclusive jurisdiction to hear and decide challenges to local land use regulations, whether those challenges are based on the GMA or SEPA; (b) that local ordinances are presumed to be valid upon enactment; (c) that a local ordinance remains valid even if a Growth Board subsequently determines that the ordinance is out of compliance with GMA or SEPA, and (d) that even if a regulation is invalidated by a Growth Board, invalidation applies prospectively only.

BSRE respectfully asks this Court to reverse the summary judgment order entered by the trial court and to direct entry of summary judgment for BSRE and Snohomish County.

II. ASSIGNMENTS OF ERROR

Appellant BSRE makes the following assignments of error:

1. The trial court erroneously held that a landowner's development permit application is not entitled to the benefits of Washington's vesting rules if it is later determined that the ordinance under which it was submitted was enacted without fully complying with SEPA procedures.

2. The trial court erroneously held that Woodway and Save Richmond Beach had standing to challenge Snohomish County's vesting decisions through a declaratory action, even though they had failed to timely appeal the Growth Board's decision, and failed to challenge the County's vesting decisions under LUPA.

3. The trial court erred in denying the summary judgment motions of BSRE and Snohomish County.

4. The trial court erred in granting the summary judgment motions filed by Woodway and Save Richmond Beach.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The issues pertaining to BSRE's assignments of error are best stated as follows:

(1) Whether a landowner's development project vests to a local jurisdiction's land use regulations at the time a complete application is submitted, even if a Growth Board subsequently determines that the local jurisdiction did not fully comply with SEPA's procedural requirements in its enactment of the regulations.

(2) Whether Washington's vested rights doctrine and the GMA allow a landowner to have its project considered under the land use ordinances in effect at the time of the filing of a complete application.

(3) Whether a trial court commits reversible error when it determines that Washington's vested rights doctrine, as codified in the GMA, does not apply when the subject regulation is later determined by a Growth Board to have been adopted without compliance with SEPA's procedural requirements.

(4) Whether LUPA provides the exclusive remedy for challenging a local government's decision on a site-specific land use permit application.

(5) Whether the trial court committed reversible error in allowing Woodway and Save Richmond Beach to ignore LUPA and challenge the County's decision through a declaratory action.

(6) Whether the trial court committed reversible error in enjoining Snohomish County from processing BSRE's permit application.

IV. STATEMENT OF THE CASE

Respondent BSRE is the owner of approximately 61 acres of waterfront property in southern Snohomish County known as Point Wells. For approximately 100 years, the property has been used for petroleum-based industrial uses. (CP 3).

On August 12, 2009, as a part of its Comprehensive Plan amendment process, Snohomish County adopted ordinances amending its

Comprehensive Plan Policy and Land Use Map for the redesignation of Point Wells from Urban Industrial to Urban Center (the “Comprehensive Plan Ordinances”). On May 12, 2010, Snohomish County adopted an Urban Centers Code which, among other things, would accommodate and regulate the development of Urban Centers in designated locations in the County, including Urban Center development at Point Wells (the “Development Regulations Ordinance”). The County’s adoption of these ordinances was appealed to the Central Puget Sound Growth Management Hearings Board. (CP 4).

On February 14, 2011, BSRE filed a Master Permit Application for preliminary approval of a preliminary short plat, as well as a permit for land disturbing activity. (CP 43, 48-49). On February 20, 2011, a Notice of Application was published by Snohomish County in the Herald newspaper which provided “Date of Application/Completeness Date: February 14, 2011.” (CP 329).

On March 4, 2011, BSRE submitted a Master Permit Application for a Shoreline Management Substantial Development Permit, an Urban Center Development Permit, a Site (Development) Plan, a Land Disturbing Activity Permit and a Commercial Building Permit. (CP 5, 44). Representatives from the Town of Woodway and the City of Shoreline were present at the permit “intake meeting” on March 4, which

lasted for several hours.¹ (CP 44). On March 13, 2011, a Notice of Application was published in the Herald which provided “Date of Application/Completeness Date: March 4, 2011.” (CP 329).

On March 14, 2011, the City of Shoreline sent a letter to the Snohomish County Planning and Development Services Department, arguing that BSRE’s Preliminary Short Subdivision application and the Urban Center application were incomplete and arguing that BSRE’s applications should not be deemed vested. On the same date, Save Richmond Beach sent a letter to Planning and Development Services stating its concurrence with the views expressed in the City of Shoreline’s letter, and asserting that the Point Wells Redevelopment Preliminary Short Subdivision was incomplete and could not be considered vested. (CP 44-45).

On March 29, 2011, Darrell Eastin, Snohomish County’s Principal Planner/Project Manager for the Point Wells application, responded to the City of Shoreline, stating that the County found that the materials and information submitted by BSRE complied with the requirements of the County application process, and the County found no reason to reverse its decision determining that BSRE’s applications for short subdivision and land disturbing activity were complete at submittal and therefore vested.

¹ Approximately a week before the March 4 application submittal, BSRE undertook a “dry run” to ensure that it was submitting all of the necessary documents for Snohomish County’s review. The County had advised BSRE that it would not accept the applications unless they were complete. (CP 44).

A copy of Mr. Eastin's letter was sent to the Planning Director for the Town of Woodway. (CP 67-68).

Thus, Woodway and Save Richmond Beach were on notice by February 20, 2011 that the County had determined that BSRE's subdivision application was complete and vested as of the date of filing. They were also on notice as of March 13, 2011 that the March 4, 2011 application for a Shoreline Permit, an Urban Center Permit, a Site (Development) Plan and a building permit had been deemed complete and vested by Snohomish County.

Although Woodway and Save Richmond Beach were aware of the BSRE permit applications at the time they were submitted and were on notice when the County declared them complete, they did not file a challenge under LUPA within 21 days after either of the County's determinations of completeness and vesting.

On April 25, 2011, many weeks after the BSRE applications were deemed complete and vested, the Growth Board issued a Final Decision and Order ("FDO") on the appeal of the Snohomish County Comprehensive Plan and Development Regulations ordinances. (CP 4). Among other things, the Growth Board determined that the County had failed to comply with certain provisions of the GMA and SEPA with respect to adoption of the ordinances. The Board remanded the matter to Snohomish County to bring its Comprehensive Plan amendments into compliance. The Board also declared the Comprehensive Plan

amendment for Point Wells invalid as of April 25, 2011. (The GMA expressly provides that a Growth Board's declaration of invalidity is prospective only, and cannot affect private rights which have already vested. RCW 36.70A.302(2)). The Board did not invalidate the Urban Center Code (the Development Regulations). (CP 166-167). No appeal of the Board's decision to leave the Urban Center Code in place was filed.

On or about September 12, 2011, Woodway and Save Richmond Beach filed the instant lawsuit, seeking to reverse Snohomish County's determinations that BSRE's Urban Center applications were vested, by means of a complaint for declaratory and injunctive relief.

All parties agreed that the issues in this lawsuit were legal in nature, and that there were no genuine issues of material fact precluding summary judgment. All parties filed motions for summary judgment under CR 56. The motion of Woodway and Save Richmond Beach argued that the vested rights doctrine should not apply to BSRE's applications because Snohomish County's Urban Center Regulations were later determined to have been enacted without full compliance with SEPA procedural requirements. The motions of BSRE and Snohomish County argued that the lawsuit was subject to dismissal because Snohomish County's vesting decision was in full conformance with the statutory dictates of the GMA and with relevant case authority under Washington's Vested Rights Doctrine. BSRE and Snohomish County further argued that the Court had no jurisdiction to grant declaratory and injunctive relief to

Woodway and Save Richmond Beach, as they had failed to file a timely challenge to the Growth Board's decision, and failed to challenge Snohomish County's vesting decisions under LUPA.

After reviewing the briefs and arguments of the parties, the trial court on November 23, 2011 granted summary judgment to Woodway and Save Richmond Beach. The order effectively overturned Snohomish County's vesting decision and prohibited Snohomish County from processing BSRE's applications until the County's development regulations are brought into full compliance with SEPA. (CP 487-488). Notices of Appeal were filed by both Snohomish County and BSRE.

V. ARGUMENT

A. The BSRE Permit Applications Are Vested to the Snohomish County Regulations in Effect in February/March 2011.

The trial court erred in finding Washington's vested rights doctrine inapplicable to the complete permit applications which were submitted by BSRE to Snohomish County in February and March of 2011, and which were determined by Snohomish County to have been complete and vested shortly after they were submitted. Snohomish County's application of the vesting rules to BSRE's application was fully supported by statute and by settled Washington judicial precedent regarding vesting.

The Vested Rights Doctrine refers to the notion that a land use application will be considered under the land use statutes and ordinances in effect at the time of the filing of a complete application. Noble Manor v. Pierce County, 133 Wn.2d 269, 275, 943 P.2d 1378 (1997). The

purpose of the Vested Rights Doctrine is to provide a measure of certainty to landowners and to protect their expectations against fluctuating land use policies. Id. at 278. It is frequently said that Washington's vesting laws are among the strongest in the country, providing protection of development rights which are greater than those found in many other jurisdictions. Abbey Road Group, LLC v. Bonney Lake, 167 Wn.2d 242, 250-51, 218 P.3d 180 (2009). The rule in Washington allows landowners and developers to proceed with their projects without fear of later land use regulation changes that would preclude the use. WCHS, Inc. v. City of Lynnwood, 120 Wn. App. 668, 674-75, 86 P.3d 1169 (2004). The rule is based on constitutional principles of fundamental fairness and due process. Weyerhaeuser v. Pierce County, 95 Wn. App. 883, 891, 976 P.2d 1279 (1999).

Washington's vesting rule originally applied only to applications for building permits. Erickson & Associates, Inc. v. McLerran, 123 Wn.2d 864, 867-68, 872 P.2d 1090 (1994). Washington caselaw expanded the doctrine to cover conditional use permits (Beach v. Board of Adjustment, 73 Wn.2d 343, 347, 488 P.2d 617 (1968)); grading permits (Juanita Bay Valley Community v. Kirkland, 9 Wn. App. 59, 83-84, 510 P.2d 1140 (1973), rev. denied, 83 Wn.2d 1002); and shoreline substantial development permits (Talbot v. Gray, 11 Wn. App. 807, 811, 525 P.2d 801 (1974), rev. denied, 85 Wn.2d 1001). In 1987 the Washington legislature codified the vested rights doctrine with respect to vesting of

building permit applications, and at the same time enlarged the doctrine to make it applicable to subdivision applications. See, RCW 19.27.095; RCW 58.17.033. It is now settled that when a developer submits an application for a subdivision or planned development, he has the right to have all of the uses disclosed in the application considered under the laws in effect at that time. Noble Manor, supra, 133 Wn.2d at 285.

Washington caselaw establishes that a plat (subdivision) application which includes a Planned Unit Development (PUD) proposal creates a vested right to have the entire application, including the PUD, considered under ordinances in effect at the time of filing the subdivision application. Association of Rural Residents v. Kitsap County, 141 Wn.2d 185, 193, 4 P.3d 115 (2000). Where a plat application is inextricably linked to a Planned Unit Development application, the applicant is vested not only to subdivide the property, but to develop it in conformance with the PUD. Schneider Homes, Inc. v. City of Kent, 87 Wn. App. 774, 779, 942 P.2d 1096 (1997), rev. denied, 134 Wn.2d 1021. Moreover, as noted above, the filing of a complete Shoreline Substantial Development Permit application vests the project to the current shoreline regulations. Talbot v. Gray, supra, 11 Wn. App. 807, 811 (1974).

Here, each of BSRE's applications (the February 14 Subdivision application and the March 4 Urban Center, Shoreline and Building Permit applications) disclosed in detail the nature of the uses for which BSRE was applying. The application for the Preliminary Short Plat

(Subdivision) was deemed complete by Snohomish County shortly after it was submitted on February 14, 2011. Indeed, Snohomish County issued a Notice of Application on February 20, 2011, confirming that the BSRE Preliminary Short Plat (Subdivision) application had been determined to be complete. Additionally, the Master Permit Application which was filed on March 4, 2011 (for the Urban Center Permit, the Shoreline Permit and the Building Permit) was deemed complete by Snohomish County shortly after filing, as confirmed in the March 13, 2011 Notice of Application which was published by the County. Snohomish County correctly concluded that BSRE is entitled to have the proposed Point Wells development processed and regulated under the land use regulations in effect in February/March 2011. Snohomish County's Urban Center Development regulations expressly provide that "[a] complete application for Urban Center approval meeting [the submittal requirements] is deemed to have vested to the Zoning Code, Development Standards and Regulations as of the date of submittal." SCC 30.34A.170(6).

Woodway and Save Richmond Beach had no reasonable basis to challenge the County's determinations, even if they had timely filed LUPA appeals. The courts give deference to the construction of local ordinances by local officials charged with their enforcement. Friends of the Law v. King County, 63 Wn. App. 650, 654, 821 P.2d 539 (1991), rev. denied, 119 Wn.2d 1006. This rule applies with special force in the context of determinations of completeness of permit applications. The

Washington Local Project Review statute provides that an application is complete when it meets the procedural requirements of the local jurisdiction:

A project permit application is complete for purposes of this section when it meets the procedural submission requirements of the local government and is sufficient for further processing, even though additional information may be requested or project modifications may be undertaken subsequently.

RCW 36.70B.070(2). Further, the Washington subdivision statute grants to local governments the authority to determine the requirements for a fully completed subdivision application. RCW 58.17.033(2). Erickson & Associates v. McLerran, *supra*, 123 Wn.2d at 873. Given the thoroughness of the applications submitted by BSRE, and the clear determinations by Snohomish County of their completeness, there were no grounds to set aside those determinations. A developer's application vests when the County knows of the intended use and accepts the application as complete. Westside Business Park, LLC v. Pierce County, 100 Wn. App. 599, 5 P.3d 713 (2000), *rev. denied*, 141 Wn.2d 1023.

Significantly, in response to the motions filed by BSRE and Snohomish County, Woodway and Save Richmond Beach conceded that the BSRE applications were complete at the time they were submitted, and that Snohomish County had acted within its authority in finding those applications to be complete. (CP 400). Notwithstanding those concessions, Woodway and Save Richmond Beach asked the trial court to

overturn Snohomish County's vesting decision because many weeks after the permit applications were determined to be complete and vested, the Growth Board found the Urban Center Regulations to have been out of compliance with SEPA (but not invalid). The trial court erred in refusing to apply the Vested Rights Doctrine.

B. The GMA Provides that a Permit Application Vests to Current Regulations Even if the Regulations Are Later Found to be Unlawful.

The trial court's decision on the cross-motions for summary judgment was inconsistent with the unambiguous language of the Growth Management Act, and was inconsistent with clear judicial precedent from the Washington Supreme Court and the Court of Appeals regarding vesting of private development permits. In effect, the trial court accepted the argument of Woodway and Save Richmond Beach that Washington's liberal vesting rules can be ignored if a regulation in effect at the time of application is later found to have been out of compliance with SEPA's procedural requirements.

The Court's decision was in error for several reasons. First, the Growth Board did not make a determination that the Urban Center Development Regulations were "invalid." As noted above, although the Board held that the Point Wells Urban Center Comprehensive Plan Amendment (Ordinances 09-038 and 09-051) was invalid based on noncompliance with GMA, the Board did *not* invalidate the Development Regulations applicable to the Point Wells development (Ordinances 09-

079 and 09-080). To the contrary, the Growth Board rejected a request that the development regulations be invalidated, and instead only remanded the regulations to Snohomish County to bring its process into compliance with SEPA. (CP 167).

Because the Growth Board did not order invalidation of the Development Regulation Ordinance, the regulations contained therein are not void, as argued by Woodway and Save Richmond Beach. And because Woodway and Save Richmond Beach did not appeal the Growth Board's decision with respect to invalidity, they are foreclosed from asserting invalidity in a collateral action. RCW 36.70A.300(5). Torrance v. King County, 136 Wn.2d 783, 790-92, 966 P.2d 891 (1998). Woodway and Save Richmond Beach conceded to the trial court that Snohomish County's Urban Center Development Regulations were not invalidated by the Growth Board. (CP 405).

Moreover, even if the Growth Board had found the Development Regulation Ordinance invalid, such an order of invalidity could apply prospectively only, and would not affect BSRE's vested rights. RCW 36.70A.302(2). A change in a zoning ordinance does not operate retroactively so as to affect vested rights. Beach v. Board of Adjustment of Snohomish County, supra, 73 Wn.2d 343 at 347.

This rule has become even more clear with the enactment of the GMA, which unambiguously applies Washington's Vested Rights Doctrine relative to local land use ordinances. The GMA now provides

that (a) Growth Boards have *exclusive* jurisdiction to hear challenges to local land use ordinances, whether those challenges relate to GMA noncompliance or SEPA noncompliance (RCW 36.70A.280(1)); (b) a local land use ordinance is presumed valid at the time of enactment (RCW 36.70A.320(1)); (c) a finding by a Growth Board that an ordinance is “noncompliant” does not render it invalid; instead, the ordinance continues to be valid during the remand period as the local jurisdiction is working to bring the ordinance into compliance (RCW 36.70A.300(4)); and (d) even where the Growth Board makes the heightened determination that a land use ordinance is “invalid,” invalidity applies prospectively only, and does not affect applications which have already vested to the ordinance before it was determined invalid. (RCW 36.70A.302(2)).

In light of these clear statutory provisions, there was no basis for the trial court to overturn Snohomish County’s vesting decisions relative to BSRE’s applications.

As a part of Washington’s Growth Management Act, the Legislature has granted to Growth Management Hearings Boards the authority to hear and resolve challenges to local comprehensive plans and development regulations, whether those challenges are based on alleged violation of the GMA (RCW 36.70A), or based on alleged violation of the Shoreline Management Act (RCW 90.58), or based on violation of SEPA (RCW 43.21C):

The Growth Management Hearings Boards shall hear and determine only those petitions alleging either: (a) that . . . a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, Chapter 90.58 RCW as it relates to the adoption of shoreline management programs or amendments thereto, or Chapter 43.21C RCW as it relates to plans, development regulations or amendments adopted under RCW 36.70A.040 or Chapter 90.58 RCW.

RCW 36.70A.280(1).

Moreover, the GMA now provides unambiguously that a local land use ordinance is presumed to be valid and enforceable unless and until it is affirmatively determined by a Growth Board to be “invalid”:

Except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

RCW 36.70A.320(1). The GMA also makes clear that even when the Growth Board finds a local ordinance to be “noncompliant” with the GMA or with SEPA, the ordinance remains valid throughout the period of remand, as the local government takes steps to satisfy the Growth Board’s directives, and to bring the ordinance into compliance:

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.

RCW 36.70A.300(4). Thus, the Snohomish County Urban Center Development Regulations, though found by the Growth Board to have been noncompliant with SEPA, nonetheless continue to be valid while

Snohomish County takes steps to bring those regulations into full compliance with SEPA procedures.²

Further, the GMA specifically provides that even where an ordinance is determined by the Board to be *invalid*, the determination of invalidity applies *prospectively* only and therefore it cannot extinguish rights which have already vested under the invalidated regulations:

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

RCW 36.70A.302(2).

The above GMA language reflects the legislature's unambiguous policy decision that complete applications vest to adopted development regulations when filed, even though such regulations may be subject to a pending appeal to the Growth Management Hearings Board. Thus, even if the Growth Board had determined that the Snohomish County Urban Center Development Regulations were invalid (and it did *not* find invalidity) BSRE's development applications would still be vested to those regulations, because the Growth Board's decision was issued many weeks after those permit applications vested.

² The Growth Board has scheduled a compliance hearing for Snohomish County in May 2012. In the meantime, the regulations remain operative during the compliance process.

The application of the vested rights doctrine in this context was confirmed by the Washington Court of Appeals in Hale v. Island County, 88 Wn. App. 764, 94 P.2d 1192 (1997). In Hale, the issue was whether a permit application vested under a zoning regulation, even though the regulation was later found by the Western Washington Growth Management Hearings Board to have been in violation of the GMA, and invalid. Island County had granted preliminary use approval and the applicant (NBBB) had submitted an application for final approval. The Growth Board later determined that the zoning provisions upon which the preliminary approval had been based were invalid under the GMA. Notwithstanding invalidation, the Washington Court of Appeals rejected Hale's argument as to invalidity and vesting, and found that NBBB was fully vested to the ordinances in effect at the time of application:

Because NBBB's rights vested upon preliminary use approval, the Western Washington Growth Management Hearings Board's subsequent determination that Island County's nonresidential floating zone provisions violated the GMA did not affect NBBB's pending application.

88 Wn. App. at 772. The Court of Appeals stressed that a ruling of invalidity by a Growth Board applies only prospectively, and therefore cannot extinguish rights which have vested:

Since the Board has authority to make only prospective determinations of invalidity, the *WEAN* decision could not extinguish rights that had vested under the invalidated ICC provisions. RCW 36.70A.300(3)(a).

88 Wn. App. at 772.

The same principles apply here. Indeed, the facts supporting vesting are even stronger in this case, because the Growth Board did not find the Snohomish County Development Regulations invalid, but rather found them only “non-compliant,” a lesser finding that leaves the regulations in place during the remand compliance process. RCW 36.70A.300(4).

The trial court’s summary judgment order is in direct conflict with the language of the GMA and settled Washington caselaw. The order should be reversed, and summary judgment should be granted in favor of Snohomish County and BSRE.

C. A Regulation’s Noncompliance With SEPA Does Not Create an Exception to Washington’s Vested Rights Doctrine.

In their response to BSRE’s and Snohomish County’s motions for summary judgment, Woodway and Save Richmond Beach conceded that Washington’s Vested Rights Doctrine has been applied widely and liberally by the court for decades. Nor did they dispute that the GMA expressly provides that even a determination of invalidity by a Growth Board applies prospectively only. But they nonetheless argued – without recent case authority – that the vesting rights rule should be nullified and disregarded when a local land use regulation is later determined by a Growth Board to have been noncompliant with SEPA. Unfortunately, the trial court accepted the argument, and erroneously granted the motions of Woodway and Save Richmond Beach for summary judgment.

Relying on case law which predates the GMA, predates Regulatory Reform, and predates LUPA, Woodway and Save Richmond Beach argued that governmental action taken in violation of SEPA is *void ab initio* and *ultra vires*, and therefore vesting cannot occur if an ordinance is enacted in violation of SEPA. But the caselaw cited by Woodway and Save Richmond Beach is inapposite for several reasons.

First, most of the cases cited by Woodway and Save Richmond Beach do not even address the doctrines of “*void ab initio*,” and “*ultra vires*.” For example, Juanita Bay Valley v. Kirkland, 9 Wn. App. 59, 510 P.2d 1140 (1973) makes no mention of these terms. Similarly, the opinion in Lassila v. Wenatchee, 89 Wn.2d 804, 576 P.2d 54 (1978) makes no mention of the terms “void,” “*void ab initio*,” or “*ultra vires*” in the context of its SEPA analysis. The only case cited by Woodway and Save Richmond Beach that does mention the *ultra vires* doctrine is Noel v. Cole, 98 Wn.2d 375, 378-81, 655 P.2d 245 (1982). But significantly, Noel was not a permitting case but instead involved the voiding of an unauthorized government contract.

Moreover, nearly all of the cases cited by Woodway and Save Richmond Beach deal with SEPA in relation to a “project action” such as an approval of a subdivision or building permit. BSRE agrees that a “project action” can be denied based on the applicant’s failure to comply with SEPA. But in this case the SEPA noncompliance found by the Growth Board concerns a county’s *legislative* enactment, not a private

party's "project action." The obligation of BSRE to comply with SEPA will be analyzed and determined as a part of the permitting process. To date, there has been no decision of any kind by Snohomish County as to BSRE's compliance or noncompliance with SEPA. Rather, the declaratory action filed by Woodway and Save Richmond Beach relates only to a finding of noncompliance with respect to Snohomish County's *legislative enactment*. 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 permit application *void ab initio* such that the application is de-vested.

Furthermore, the cases relied upon by Woodway and Save Richmond Beach arose prior to the enactment of Washington's Regulatory Reform laws, including the Growth Management Act, RCW 36.70A, as modified in 1997; the Local Project Review statute, RCW 36.70B (1995) and the Land Use Petition Act, RCW 36.70C (1995). These statutes now define when and how local land use ordinances may be challenged, how and when they may be invalidated and the effect of determinations of invalidity. The early cases relied upon by Woodway and Save Richmond Beach provide no guidance to the Court in this case.

Moreover, the arguments by Woodway and Save Richmond Beach as to SEPA noncompliance are logically untenable. SEPA is a product of the legislature, and the legislature enacted the GMA and regulatory reform, giving Growth Boards exclusive authority to decide challenges to

land use ordinances, as well as authority to remand for SEPA noncompliance. RCW 36.70A.300, .330. The “*void ab initio*” argument raised by Woodway and Save Richmond Beach would lead to an absurd result. If the local land use ordinance is determined to be *void ab initio*, then the Growth Board would be effectively divested of jurisdiction and would have no authority to remand the ordinance to the county and to oversee the county’s efforts to bring the ordinance into compliance. The suggestion that the legislature intended to remove all authority from the Growth Boards to remand and oversee the compliance process would render other sections of the GMA nonsensical. See, RCW 36.70A.300; RCW 36.70A.302.

Further, at least since the enactment of the GMA, it is simply not true that local land use ordinances enacted in violation of SEPA (or other statutes) are “*void ab initio*.” To the contrary, the GMA does not even provide that a local government’s noncompliance with SEPA warrants a determination of invalidity. Davidson Serles v. Hearings Board, 159 Wn. App. 148, 157-58, 224 P.3d 1003 (2010). In addition, RCW 36.70A.302(2) expressly provides that even where a Growth Board makes a determination of invalidity, it applies prospective only, and has no effect on a permit application that was filed prior to invalidation. There is no language in the GMA statute creating an exception to this rule where SEPA noncompliance is found.

The Growth Board's exclusive jurisdiction over challenges to local governments' adoption and amendment of comprehensive plans and development regulations was recently reaffirmed by this Court in Davidson Serles & Associates v. City of Kirkland, 159 Wn. App. 616, 246 P.3d 822 (2011). In that case, certain property owners challenged Kirkland's ordinances amending its Comprehensive Plan and the Zoning Code designation of a developer's property, by filing a petition for review with the Growth Board. They also filed a separate declaratory judgment action in Superior Court raising, among other things, a challenge under SEPA. The City of Kirkland and the developer moved to dismiss the declaratory judgment action, asserting that the Growth Board had exclusive jurisdiction over any SEPA challenges to the ordinances. In affirming the trial court's dismissal of the SEPA claims, the Court noted that the Washington legislature had clearly placed review authority over any SEPA challenge to legislative enactments with the Growth Boards:

The Board properly had jurisdiction over Davidson's SEPA challenge to the City Comprehensive Plan and zoning code amendments. The Board's jurisdiction over these challenges is exclusive. RCW 36.70A.280(1). Thus, the Superior Court does not have jurisdiction over such SEPA challenges.

159 Wn. App. at 626. Similarly, in this case, the exclusive authority to address SEPA challenges to Snohomish County's Urban Center Development Regulations rests with the Growth Board. The Board did not invalidate such regulations, but merely remanded them for further

compliance actions. The Superior Court had no jurisdiction, under the declaratory judgment statute or any other authority, to preemptively usurp the authority of the Growth Board.

Faced with the unambiguous language of RCW 36.70A.302(2), Woodway and Save Richmond Beach made a convoluted argument that the statute should not be construed according to its actual terms, but rather should be interpreted to be inapplicable where SEPA noncompliance is involved, or at least where an ordinance is found to be out of compliance with SEPA, but *not* subject to invalidation. Curiously, they argued that while a permit application may vest to an ordinance later found to be *invalid* based on SEPA considerations, somehow the vesting rules should not apply when the Growth Board has made the more limited determination that a regulation is non-compliant, but still valid! (CP 292-293). The argument is illogical on its face. Woodway and Save Richmond Beach do not explain why the Legislature would have allowed the vesting of permit applications to regulations which have been found to be entirely invalid, while preventing vesting to regulations which are found to be less problematic, i.e., out of compliance, but still valid and operative. The suggestion that the Legislature intended to allow vesting only to those regulations found to be the most seriously flawed is unreasonable on its face.

The efforts of Woodway and Save Richmond Beach to add language to the GMA which is not in the statute should be rejected. In

interpreting a statute, the Court should refrain from adding to, or subtracting from the statutory language unless imperatively required to make it rational. Millay v. Cam, 135 Wn.2d 193, 203, 955 P.2d 791 (1998). The language of the GMA must be construed as written, not as Woodway and Save Richmond Beach wish it were written.

In short, the argument that a party cannot vest to a regulation which is later found to be in partial noncompliance with SEPA, is supported by no applicable authority, and should have been rejected by the trial court. The summary judgment order should be reversed.

D. The Complaint Was Barred by the Failure to Timely Appeal Under LUPA.

A further reason why the action filed by Woodway and Save Richmond Beach should have been dismissed was their failure to comply with the exclusive appeal remedy under the Land Use Petition Act. The trial court erred in ignoring the “exclusive remedy” provisions of LUPA and allowing Woodway and Save Richmond Beach to challenge the County’s vesting decision by means of a collateral declaratory action.

In 1995, the Washington legislature enacted the Land Use Petition Act, RCW 36.70C et seq. (“LUPA”). The purpose of the statute was to simplify and streamline the process for appeals of local land use actions by creating uniform appeal procedures. RCW 36.70C.010. The statute replaces the old statutory writs, declaratory judgment actions and other methods previously utilized to challenge local land use decisions. Under

LUPA a party must file an appeal of a land use decision or other local government action within 21 days after notice of the action is provided. RCW 36.70C.040.

The statute provides that, with a few limited exceptions, LUPA is now the *exclusive* means of challenging a local land use action:

This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions. . . .

RCW 36.70C.030(1). The statute goes on to identify several narrow settings in which LUPA does not apply, none of which is applicable here. For example, LUPA does not apply to challenges of legislative actions by a local government with respect to amendments of comprehensive plans and development regulations under the GMA. Such challenges are made to Growth Management Hearings Boards. But where a party is challenging a site-specific determination by local government as to an owner's land use application, LUPA is the exclusive means of appeal.

The "exclusivity" provisions of the Land Use Petition Act have been consistently and strictly applied by the Washington Supreme Court. For example, in Wenatchee Sportsmen v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000) the Supreme Court held that a county's decision to rezone a property could not be challenged except by timely petition under LUPA:

Because RCW 36.70C.040(2) prevents a court from reviewing a petition that is untimely, approval of the rezone became valid once the opportunity to challenge it passed.

Id. at 181. Subsequent cases have confirmed that LUPA is the exclusive means of challenging site-specific land use decisions, and that once the 21-day appeal period has expired, the decision is deemed to be valid and cannot be challenged in court by declaratory action or otherwise. In Chelan County v. Nykreim, 146 Wn.2d 904, 53 P.2d 7 (2002) the Chelan County Planning Department erroneously issued a boundary line adjustment to Mr. Nykreim. Several months later a new planning director realized that the approval had been issued in violation of Chelan County subdivision regulations. The County advised Mr. Nykreim that the boundary line adjustment would be revoked, and filed a declaratory judgment action seeking court approval of the revocation of the BLA. The trial court granted summary judgment in favor of Chelan County but the Supreme Court reversed, holding that the erroneous boundary line adjustment could only have been challenged by a timely LUPA petition filed within 21 days after issuance of the BLA:

Under *Wenatchee Sportsmen's Association*, approval of the BLA in this case despite its questionable legality "became valid once the opportunity to challenge it passed." Under this court's rationale in *Wenatchee Sportsmen*, the superior court should have dismissed Respondents' declaratory relief action because it was time barred under the 21-day appeal time limit of LUPA. . . . Compliance with such time limit is essential for the Court to acquire jurisdiction.

146 Wn.2d at 925-26.

The Nykreim court rejected Chelan County's argument that the exclusivity provisions of LUPA should not apply to mere ministerial

decisions such as an “over-the-counter” approval of a boundary line adjustment. The Supreme Court held that informal actions by a county on a specific land use permit application are subject to LUPA, just as much as formal quasi-judicial decisions:

While LUPA states that it replaces the writ of certiorari, it does not limit judicial review to quasi-judicial land use decisions. In fact it expressly states that LUPA “shall be the *exclusive* means of judicial review of land use decisions.”

Id. at 930. The Court stressed that unless a category of decision is expressly excluded under RCW 36.706.030, the decision can only be challenged by timely LUPA petition:

... according to its obvious meaning with regard to previous common law or, in this case Chapter 7.16 RCW, all land use decisions are subject to LUPA unless specifically excluded under RCW 36.70C.030.

Id. at 931.

Importantly, the Washington Supreme Court has held that even where defects in a land use decision would have rendered the action “void ab initio” under pre-LUPA caselaw, LUPA’s 21 day limitations period nonetheless is a bar to subsequent collateral challenges:

There should be no question that a challenge to a special use permit decision lies within LUPA even where the decision is allegedly void.

Habitat Watch v. Skagit County, 157 Wn.2d 397, 408, 120 P.3d 56 (2005).

The exclusivity provisions of LUPA are applicable not only to approvals of a permit application, but also to determinations that a

particular permit is *not* required. Thus, in Department of Ecology v. Samuel's Furniture, 147 Wn.2d 440, 54 P.3d 1194 (2002), the Washington Department of Ecology challenged a county's determination that a permit application was exempt from Shoreline Management Act permit requirements. But because the DOE had not filed a timely LUPA petition within 21 days after the County's decision, the Supreme Court held DOE had no standing to challenge the local government's interpretation:

Ecology's interpretation of the SMA would leave landowners and developers unable to rely on local government decisions – precisely the evil for which LUPA was enacted to prevent.

147 Wn.2d at 459.

The requirement that a local land use action be challenged under LUPA applies not only to decisions to issue a permit but also to *interpretive decisions* regarding the application of a zoning ordinance to specific property. The definition of "Land Use Decision" in RCW 36.70C.020 is very broad and includes not only actions on project permits but also:

An interpretive or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance or use of real property;. . . .

RCW 36.70C.020(2)(b). In Asche v. Bloomquist, 132 Wn. App. 784, 133 P.3d 475 (2006), rev. denied, 159 Wn.2d at 1005 the Court of Appeals confirmed that a county's interpretation regarding the application of an

ordinance to a building permit application must be timely challenged under LUPA, or the interpretation will be deemed valid:

... it does not matter whether the Asches are challenging the validity of the permit or the interpretation of the county zoning ordinance as applied to the piece of property. LUPA covers both.

Id. at 791. A determination of “completeness” and vesting is just such an interpretive decision.

Here, Woodway and Save Richmond Beach had notice of Snohomish County’s receipt of BSRE’s applications. They had actual notice that the applications were found to be complete and vested by Snohomish County on February 20, 2011 (for the February 14 applications) and March 13, 2011 (for the March 4 applications). Indeed, Save Richmond Beach submitted a letter to the County on March 14 arguing that BSRE’s applications should be considered incomplete and therefore not vested. (CP 44-45). The County responded on March 29, expressly rejecting the arguments made by Save Richmond Beach and the City of Shoreline. Yet no challenge under LUPA was filed within 21 days following the County’s February 20, 2011 determination of completeness as to the Subdivision application, and no timely LUPA challenge was filed within 21 days after the County’s March 13, 2011 Determination of Completeness for the Urban Center, Shoreline Permit and building permit applications.

Indeed, no LUPA challenge to the County's decisions on BSRE's applications was ever filed. Instead, Woodway and Save Richmond Beach ignored the exclusivity provisions of LUPA, and sought to challenge the County's decision on BSRE's Urban Center application by means of a collateral declaratory action. But that avenue was simply not available to them. Chelan County v. Nykreim, supra. If they felt that Snohomish County's determinations of completeness and vesting were incorrect, they were required to file a timely LUPA petition within 21 days of the County's decisions. They did not do so. Instead, they waited more than five months and then filed a collateral action seeking to set aside the County's Urban Center determination through declaratory judgment.

In response to the LUPA arguments, Woodway and Save Richmond Beach argued that Snohomish County's vesting decision was not a "final decision on a permit application." They contend that LUPA's exclusive remedy provisions apply only to the final decision issued by the local government on a landowner's permit application. But their argument is refuted by the broad definition of "land use decision" in RCW 36.70C.020 and by caselaw construing LUPA's exclusive remedy provisions. The definition of "land use decision" includes not only actions on project permits but also applies to "an interpretative or declaratory decision" regarding the application of ordinances to a specific property. RCW 36.70C.020(2)(b).

The Washington courts have rejected the argument that the exclusive remedy provisions of LUPA apply only to final decisions on land use permits. For example, in Chelan County v. Nykreim, *supra*, the county had not made a final decision on a land use permit application. To the contrary, Nykreim did not even apply for a permit to develop his property until several months after the boundary line adjustment was approved. Rather, he simply asked for an over-the-counter, ministerial boundary line adjustment. The Supreme Court nonetheless held that the county's approval of the BLA could not be challenged by declaratory action. The only challenge would be through a timely LUPA appeal. 146 Wn.2d at 930-31.

Woodway and Save Richmond Beach also argued that they cannot be foreclosed by LUPA's exclusive remedy provisions, because Snohomish County stated in its Notices of Application that there was no appeal opportunity for the application at this point in the process. They contend that the County should be estopped from arguing that they did not file a timely appeal under LUPA. But the language in the Notices refers to the absence of *administrative* appeals within Snohomish County. The County certainly cannot foreclose citizens from pursuing judicial remedies under LUPA. Indeed, the quoted language from the Notices of Application was in fact a trigger for the application of LUPA, in that it provided notice that the administrative review process had ended. Furthermore, even if Snohomish County could theoretically be estopped

by the language of the Notices of Application, BSRE cannot be estopped to raise LUPA's exclusive remedy provisions, because BSRE made no such statement.

Finally, the argument of Woodway and Save Richmond Beach that Snohomish County's vesting determination was not a final decision is belied by the fact that they challenged *that same decision* through a declaratory judgment action. The suggestion that Snohomish County's vesting decision was ripe for declaratory and injunctive challenge, but not ripe for a LUPA appeal is patently unreasonable. To the extent there was any legal basis to challenge the County's vesting decision, that challenge could only have been pursued through a timely LUPA petition filed within 21 days following the County's published completeness determination.

The claims of Woodway and Save Richmond Beach should have been dismissed for lack of jurisdiction, based on the exclusivity provisions of LUPA and the failure of Woodway and Save Richmond Beach to comply with the 21 day limitations period. The trial court erred procedurally and jurisdictionally in allowing Woodway and Save Richmond Beach to collaterally challenge and reverse Snohomish County's vesting decision through declaratory judgment.

E. The Trial Court's Grant of Injunctive Relief Was Improper.

The trial court's order of summary judgment included an injunction prohibiting Snohomish County from processing BSRE's applications under the Snohomish County Urban Center Development

regulations. But just as the trial court's declaratory judgment should be reversed, so should any injunctive relief included in the order. An injunction will not be granted unless the plaintiff can show either (1) probable success on the merits and the possibility of irreparable harm, or (2) serious questions regarding the merits, and the balance of hardships favoring the plaintiff. Kabbani v. Council House, Inc., 406 F.Supp. 1189, 1192 (W.D. Wash. 2005). Further, injunctive relief will not be granted when there is a plain, complete, speedy and adequate remedy at law. Tyler Pipe Industries, Inc. v. State Department of Revenue, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982).

In this case, injunctive relief was improper because: (1) Washington's vested rights doctrine precludes the substantive relief sought by Woodway and Save Richmond Beach; and (2) the trial court had no jurisdiction to entertain a SEPA challenge in the form of a declaratory judgment action. Where substantive claims are subject to dismissal, there can be no likelihood of success on the merits. Therefore, related claims for injunctive relief are also extinguished. Pepper v. J.J. Welcome Construction Co., 73 Wn. App. 523, 537, 871 P.2d 601 (1994), rev. den. 124 Wn.2d 1029.

The trial court's summary judgment order, and the injunctive relief contained therein, should be reversed as a matter of law.

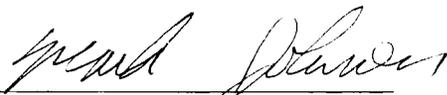
VI. CONCLUSION

BSRE's applications were determined by Snohomish County to be complete, and the applications are therefore vested under the County's Urban Center Development Regulations. The County's vesting determinations were correct as a matter of law. The trial court erred in disregarding Washington's Vested Rights Doctrine and the clear language of the GMA.

The trial court also erred in concluding that Woodway and Save Richmond Beach could collaterally attack Snohomish County's vesting decisions through a declaratory judgment action long after any appeal remedy under GMA or under LUPA had lapsed. Summary judgment should have been granted in favor of BSRE and Snohomish County. The trial court's summary judgment order should be reversed.

DATED this 20th day of January, 2012.

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