Snohomish County v Woodway

Case No. 68049-8-I

Court of Appeals of Washington, Division 1

January 19, 2012

Reporter
2012 WA App. Ct. Briefs LEXIS 43 *

SNOHOMISH COUNTY and BSRE POINT WELLS, LP., Appellants vs. TOWN OF WOODWAY and SAVE RICHMOND BEACH, Respondents

Type: Initial Brief: Appellant-Petitioner

Counsel

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Title

Appellant Snohomish County's Opening Brief

Text

I. INTRODUCTION

Appellant BSRE Point Wells, L.P. ("BSRE") owns approximately 61 acres on Point Wells, [1] in the extreme southwest corner of Snohomish County. The site is bordered by Puget Sound on the west, the City of Shoreline ("Shoreline") in King County on the south, and the Town of Woodway ("Woodway") on the north and east. For decades the site has been used for industrial purposes as a petroleum storage facility, and storage tanks remain there today. In 2007, BSRE's predecessor in interest, Paramount of Washington, [2] sought a re-designation of the Point Wells site on the Snohomish County ("County") comprehensive plan map from an industrial designation to one that would allow it to redevelop the site with residential and commercial uses. By separate actions in 2009 and 2010, the County Council granted that request. It adopted ordinances under the authority of the Growth Management Act ("GMA") (chapter 36.70A RCW) re-designating **[*2]** the Point Wells site as an "Urban Center" on the County's comprehensive plan map in 2009. It adopted implementing Urban Center development regulations allowing mixed use development and rezoned the property to an Urban Center zone in 2010.

Neighboring jurisdictions Shoreline and Woodway, as well as Save Richmond Beach (also "SRB"), a neighborhood group of citizens in Shoreline opposed to BSRE's plans, challenged the County's enactments. They appealed the County's 2009 and 2010 ordinances to the growth management hearings board (also "Board" and "growth board"). While those appeals were pending with the Board but before the Board made a decision, BSRE filed permit applications with the County for a mixed use development on **[*3]** the site relying on the new Urban Center comprehensive plan provisions and development regulations then on appeal before the Board.

On April 25, 2011, the Board issued a decision ("Final Decision and Order" or "FDO"), ruling that the County's challenged enactments were adopted partly in violation of the GMA and the State Environmental Policy Act

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[1] This property is variously referred to herein as "site," "Point Wells site" and "property."

[2] For ease of reference, the property owner will be referred to herein as BSRE. However, some of the events discussed took place when the property was owned by Paramount of Washington.

("SEPA")(chapter 43.21 C RCW). The Board additionally found the challenged comprehensive plan provisions, but not the development regulations, "invalid" under the GMA, and remanded the enactments to the County for further action to bring them into compliance with the GMA and SEPA. The Board issued a Corrected FDO on May 17, 2011.

Under RCW 36.70A.302(2), a provision of the GMA, the Legislature has clearly established that a property owner may file development permit applications relying on adopted comprehensive plan and development regulation provisions then on appeal before the Board, thereby insulating its vested development rights under those challenged provisions from a later Board decision in that appeal. In this case, BSRE availed itself of that GMA provision and filed complete applications for an Urban Centers development on the Point **[*4]** Wells site to vest those development rights. Thus, prior to the Board's issuance of its FDO, BSRE had filed complete permit applications fully vesting its development rights under the County's Urban Centers plan provisions and development regulations.

Woodway and SRB were dissatisfied that through RCW 36.70A.302(2) the Legislature would allow BSRE to vest development rights under the County's legislative enactments that the Board later found were adopted partially in violation of the GMA and SEPA. Accordingly, five months after the Board issued its FDO, Woodway and SRB filed a Complaint for Declaratory Judgment and Injunctive Relief. [3] In that Complaint, they sought a court order declaring that BSRE had vested no development rights under the County's Urban Centers legislative provisions that the Board later found were adopted in partial violation of the GMA and SEPA. In other words, Woodway and SRB sought a judicial determination that RCW 36.70A.302(2) did not mean what it said - its lawsuit asked a judge to issue an order trumping the Legislature.
[*5]

The County and BSRE filed summary judgment motions requesting the court to dismiss the Complaint. Woodway and SRB filed a concurrent motion for summary judgment seeking the relief requested in the Complaint. Following arguments, King County Judge Dean S. Lum issued an order on November 23, 2011, denying the County's and BSRE's motions, and granting that of Woodway and SRB. [4]

Nullifying black letter statutory law, the trial court rewrote the GMA, ruling that BSRE's permit applications (which were deemed vested when filed) instead were not vested to the County's recently amended comprehensive plan and development regulation provisions then on appeal before the Board. That ruling is squarely contrary to the explicit language of RCW 36.70A.302(2). Instead of granting the County's and BSRE's summary judgment motions and dismissing the Complaint, the trial court **[*6]** granted the Plaintiffs' motion, issuing an injunction halting the County's processing of BSRE's Urban Centers applications. The trial court's ruling was erroneous and must be reversed by this court.

II. ASSIGNMENTS OF ERROR

Snohomish County makes the following assignments of error:

A. The trial court erred by denying the County's and BSRE's Motions for Summary Judgment.

B. The trial court erred by granting Woodway's summary judgment motion.

C. The trial court erroneously held that a landowner's development permit application is not entitled to the benefits of Washington's vesting rules if the growth board later determines that the ordinances that application relies upon were enacted without fully complying with SEPA procedures.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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[3] Shoreline, a co-petitioner in the growth board appeal, did not join in this action.

[4] The County will henceforth refer to Woodway and Save Richmond Beach collectively as "Woodway," except when referring to pleadings filed solely by SRB.

The issues pertaining to the County's assignments of error are as follows:

A. Whether a landowner's development application vests to a local jurisdiction's land use comprehensive plan provisions and development regulations at the time a complete application is filed, even if a growth board subsequently determines that the local jurisdiction did not fully comply **[*7]** with SEPA's procedural requirements in its enactment of those plan provisions and regulations that the landowner relies on for its application.

B. 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.

C. 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 legislative enactments relied upon by a project applicant is later determined by a growth board to have been adopted in violation of SEPA's procedural requirements.

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

IV. STATEMENT OF THE CASE

The County incorporates by reference the Statement of the Case in the Brief of Appellant BSRE.

V. SUMMARY OF ARGUMENT

The GMA contains a series of statutes which govern appeals of county and city legislative enactments to the Board. One of those provisions is RCW 36.70A.302(2). That statute contains express provisions describing **[*8]** what happens to land use permit applications that are filed with counties and cities relying on recently adopted GMA enactments (comprehensive plan provisions and development regulations) that are then being challenged in an administrative appeal before the Board. RCW 36.70A.302(2) states that those complete and filed applications vest to those challenged plan provisions and regulations regardless of how the Board later rules in the administrative appeal. In this case, over a month after BSRE's Urban Centers permit application was filed the Board ruled that the challenged comprehensive plan provisions violated the GMA and SEPA, and the development regulations were adopted in violation of SEPA. Under RCW 36.70A.302(2), the Board's ruling was irrelevant to BSRE's permit applications. Those applications had already vested and could not be affected by the Board's FDO.

Before the trial court, Woodway posed the novel argument that RCW 36.70A.302(2) does not mean what it says. Instead, Woodway argued that once the Board found the County's Urban Centers plan provisions and development regulations were adopted in violation of SEPA, any permit applications that had been filed relying on them **[*9]** were "void." Woodway argued that BSRE could vest no development rights relying on those plan and regulatory provisions, and further that a superior court had authority in an independent action to declare those permit applications void and enjoin their processing. Woodway relied for this argument on SEPA case law from the 1970s and 1980s, holding that permits issued in violation of SEPA were void. Grafting that dated, pre-GMA case law onto the law related to Board appeals in 2011, Woodway argued that the effect of the Board's finding of SEPA noncompliance was that BSRE's applications were "void," i.e., they became somehow "unvested," and the County could no longer process them.

However, Woodway's old authorities involved different and inapplicable fact situations and did not address the crucial vesting question at issue in this case. More importantly, Woodway's authorities all pre-date the GMA, and in particular the 1997 enactment of RCW 36.70A.302(2), which controls this case. That statute is clear: a complete land use application relying on GMA enactments which are on appeal to the Board vest to those enactments on the date of filing of the application. Those complete and filed applications, **[*10]** once vested, cannot become "unvested" by a later Board ruling. There are no exceptions to the vesting rule in RCW 36.70A.302(2), not for SEPA or any other reason. The GMA does not allow for an exception to this strict vesting rule based on SEPA because

the Legislature made a policy choice not to make such an exception. The trial court's ruling was contrary to established law and must be reversed.

VI. ARGUMENT

A. Standard of Review.

On an appeal from summary judgment, the Court of Appeals engages in the same inquiry as the trial court, and the standard of review is de novo. *Bainbridge Citizens United v. Washington State Dept. of Natural Resources, 147 Wn. App. 365, 371, 198 P.3d 1033 (2008)* (citing *Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004)).* It is the reviewing court's duty to correctly apply the law, and the court is not confined by the legal issues and theories that the parties argued. Id., [citing *King County v. Boundary Review Bd., 122 Wn.2d 648, 670, 860 P.2d 1024 (1993)* (applying *Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970))].* **[*11]**

On review of a summary judgment in which there are no disputed material facts, the appellate court, under CR 56(c), determines if the moving party is entitled to judgment as a matter of law. *Federated American Ins. Co. v. Erickson, 67 Wn. App. 670, 672, 838 P.2d 693 (1992).* Here, the parties are in agreement that there are no genuine issues of material fact; this Court's decision is purely a legal determination.

B. Because BSRE's Development Permit Applications Were Filed Prior to the Issuance of the Growth Board's FDO, They Are Vested to the County's Urban Center Ordinances. (Assignments of Error II.A and C).

BSRE's development permit applications were filed with the County and deemed both complete and consistent with County regulations prior to the issuance of the Board's FDO. [5] That is the crucial fact in this case, and is dispositive of its outcome. Under this state's vested rights doctrine, as articulated by clear statutory language in the GMA, BSRE's applications were "vested" to the County regulations in existence on the date of filing, and must be considered under those regulations.
[*12]

1. The Vested Rights Doctrine in Washington.

In Washington, "(a) property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto." [6] Under this rule, when a property owner files a permit application with a county or city, there are only two inquiries: (1) is the application complete; and (2) does the application comply with the law in effect on the date of application? If the answer to both questions is yes, the local government is obligated to issue the permit. [7]

Washington's vested rights rule was founded on the notions of fairness and certainty. The bright line "date of filing" rule was fair because it balanced the interests of the developer with those of the **[*13]** public. As stated by the Washington Supreme Court in *Erickson & Associates v. McLerran, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994):*

> Development interests . . . protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

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[5] Woodway stipulated that BSRE's applications were complete. CP 400, 403-04 (Petitioners' Joint Response at pp. 2, 5-6). Its arguments are based solely on the alleged effect of the Board's FDO on those applications, i.e., that because the County's enactments were adopted in violation of SEPA, the applications are void.

[6] State *ex rel. Ogden v. City of Bellevue, 45 Wn.2d 492, 495, 275 P.2d 899 (1954).*

[7] Roger D. Wynne, "Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It," *24 Seattle U. L. Rev. 851, 858-59 (2001).*

> This court recognized the tension between public and private interests when it adopted Washington's vested rights doctrine. The court balanced the private property . . . rights against the public interest by selecting a vesting point which prevents "permit speculation," and which demonstrates substantial commitment by the developer, such that the good faith of the applicant is generally assured. The application for a building permit demonstrates the requisite level of commitment.

The rule provided certainty because it was easy to administer. This reason was cited in one of the early cases explaining **[*14]** why the Washington Supreme Court chose this "bright line" vesting rule over the rule adopted in some other states which evaluated how much time and money the developer had expended:

> Notwithstanding the weight of authority, we prefer to have a date certain upon which the right vests to construct in accordance with the building permit. We prefer not to adopt a rule which forces the court to search through . . . the moves and countermoves of . . . parties ... by way of passing ordinances and bringing actions for injunctions - to which may be added the stalling or acceleration of administrative action in the issuance of permits - to find that date upon which the substantial change of position is made which finally vests the right. The more practical rule to administer, we feel, is that the right vests when the party . . . applies for his building permit. [8]

Freezing in time the law applicable to a local government's consideration of a filed application assures predictability and certainty for the permit applicant. [9]
[*15]

Initially, the vested rights doctrine applied only to building permits. [10] However, over the course of the late 1960s and 1970s, the rule was extended to conditional use permit applications, [11] grading permit applications, [12] shoreline substantial development permit applications [13] and septic tank permit applications. [14] In 1987, the Legislature extended the rule to preliminary subdivisions, [15] and codified the doctrine's application to building permits. [16]
[*16]

The vested rights doctrine does not apply to all types of applications. It is inapplicable to highly discretionary applications such as rezones, [17] as well as to binding site plan approval requests unaccompanied by building permit applications [18] and master use permits. [19] However, it is uncontroverted that the vested rights doctrine applies to the permit applications filed by BSRE in this case. [20]

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[8] *Hull v. Hunt, 53 Wn.2d 125, 130, 331 P.2d 856 (1958).*

[9] Wynne, at 861-64.

[10] *Ogden, supra;Hull, supra.*

[11] *Beach v. Board of Adjustment of Snohomish County, 73 Wn.2d 343, 347, 438 P.2d 617 (1968).*

[12] *Juanita Bay Valley Community Association v. City of Kirkland, 9 Wn. App. 59, 84-85, 510 P.2d 1140,* review denied,***83 Wn.2d 1002 (1973).***

[13] *Talbot v. Gray, 11 Wn. App. 807, 811, 525 P.2d 801 (1974).* review denied,***85 Wn.2d 1001 (1975).***

[14] *Ford v. Bellingham-Whatcom County District Board of Health, 16 Wn. App. 709, 715, 558 P.2d 821 (1977).*

[15] RCW 58.17.033(1).

[16] RCW 19.27.095(1).

[17] *Teed v. King County, 36 Wn. App. 635, 642-43, 677 P.2d 179 (1984).*

[18] *Abbey Road Group. LLC v. City of Bonney Lake, 167 Wn.2d 242, 253, 218 P.3d 180 (2009).*

[19] *Erickson & Associates v. McLerran, 123 Wn.2d 864, 874-75, 872 P.2d 1090 (1994).*

[*17]

2. Washington's Vested Rights Rule, as Codified in the GMA, Insulates Vested Permit Applications from Later Board Rulings Concerning the Legislative Enactments Upon Which Those Permit Applications Rely.

a. Under the GMA, all SEPA Challenges Must Be Raised With GMA Challenges at the Time of the Appeal to the Board.

The Legislature adopted the GMA in 1990. [21] It was adopted amid great controversy, with environmental groups demanding state regulation of land use and other interest groups staunchly defending the status quo. [22] The GMA imposed obligations on counties required or choosing to plan under it to adopt comprehensive plans and development regulations to carry out the goals and requirements of the GMA. [23] In 1991, the Legislature amended the GMA, adopting provisions allowing administrative appeals of plans and development regulations to a hearings board. [24] From this early date, the Legislature provided that the growth management hearings boards had jurisdiction to review petitions alleging that a plan or development regulation was adopted not only in violation of the requirements of the GMA, but of SEPA ("A growth . . . board shall hear and determine only those **[*18]** petitions alleging either: (a) That a state agency, county, or city is not in compliance with the requirements of this chapter, or chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.040;. . . ." [25]). This provision, as codified at RCW 36.70A.280(1), now reads:

> The growth management hearings board 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 master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 . . . . [26]

Thus, from the outset, the Legislature clearly said that the Board had authority to review challenges to legislative enactments based on both GMA and SEPA grounds.
[*19]

b. Under the GMA's 1995 Legislation Imposing a Determination of Invalidity, a Board Finding of a Violation of SEPA in the Adoption of the Underlying Legislative Enactments Does Not Impact Vested Development Rights.

The Legislature amended the GMA every year during the 1990s, [27] perhaps because, "unlike SEPA and SMA (Shoreline Management Act), GMA was spawned by controversy, not consensus." [28] In 1994, Governor Lowry's Task Force on Regulatory Reform issued a report which became the focus of landmark land use legislation during the 1995 legislative session. Part of that report focused on the issue of property owners and developers being able

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[20] See, e.g., Snohomish County Code Section 30.34A.170(6)("A complete application for urban center approval meeting requirements of this section is deemed to have vested to the zoning code, development standards and regulations as of the date of submittal.")

[21] Laws of 1990, Ch. 17, 1st Ex. Sess., Sec. 1 (citing the need for coordinated and planned growth).

[22] Richard Settle, "Washington's Growth Management Revolution Goes to Court," 23 Seattle University Law Review 5, 7 (1999).

[23] Laws of 1990, Ch. 17, 1st Ex. Sess., Sec. 2, 4.

[24] Laws of 1991, Ch. 32, 1st Sp. Sess., Sec. 5-7, 9-14. Although initially called a growth management planning board, the 1994 Legislature changed the name to "growth management hearings board." Laws of 1994, Ch. 249, Sec. 26-33.

[25] Id., Sec. 9.

[26] RCW 36.70A.280(1)(emphasis added).

[27] Settle, "Washington's Growth Management Revolution Goes to Court," 23 Seattle University Law Review 5, 8 (1999).

[28] Id. at 34.

to vest development rights by filing permit applications relying on legislation **[*20]** adopted by counties and cities under the GMA while that legislation was on administrative appeal to the growth boards and further appeal to court. Environmental interest groups believed property owners and developers should have no right to develop land until the final decision maker on appeal (either the board or a reviewing court) found the challenged legislative provisions to be compliant with the GMA. Property owners and developers believed that, consistent with the State's vested rights doctrine, they should be able to file permit applications and vest development rights as long as that legislation was in effect. The Task Force recommended that "a comprehensive plan or development regulation which is found to be invalid should remain in effect, unless the Growth Management Hearings Board determines that continued enforcement of plan would violate the policy of the GMA." [29] The Task Force thus recommended leaving the individual determination of the imposition of a determination of invalidity to the Board on a case-by-case basis. [30] **[*21]**

Following receipt of the Governor's Task Force Report, the 1995 Legislature adopted legislation broadly integrating growth management planning and environmental review. [31] The legislation amended the GMA, SEPA and the Shoreline Management Act. [32] Additionally, it adopted entire new chapters imposing regulatory reform on permit processing, [33] and providing for an entirely new method of appealing local land use permit decisions through the Land Use Petition Act. [34]

One of the 1995 amendments to the GMA responded **[*22]** to the recommendation of the Governor's Task Force Report by giving the growth management hearings boards the authority to issue a determination of invalidity. [35] The Legislature adopted a compromise approach, choosing to keep intact the ability of developers to vest permit applications during the pendency of any appeal of the challenged legislation to the Board. However, if the Board found that a plan provision or development regulation was noncompliant with the GMA or SEPA, and additionally found that it substantially interfered with the fulfillment of the goals of the GMA, the Board could issue a determination of invalidity on that portion of the challenged plan or regulation. In that event, no further development applications could vest from the date of the Board's invalidity order until the county or city adopted new legislation which the Board found no longer met the invalidity test. As adopted, that provision read:

> (2) A finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand, unless the board's final order also:
>
> (a) Includes a determination, supported by findings of **[*23]** fact and conclusions of law, that the continued validity of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
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> (b) Specifies the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
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> (3) A determination of invalidity shall:
>
> (a) Be prospective in effect andshall not extinguish rights that vested under state or local law before the date of the board's order: and

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[29] CP 452 [Petitioner Town of Woodway's Reply on Summary Judgment, Attachment 1 (Governor's Task Force on Regulatory Reform, Final Report, December 20, 1994, p. 52)].

[30] Id.

[31] Laws of 1995, Ch. 347.

[32] Id., Parts I, II and III.

[33] Part IV, now codified at chapter 36.70B RCW.

[34] Part VII, now codified at chapter 36.70C RCW.

[35] See discussion in *Skagit Surveyors & Engineers. LLC v. Friends of Skagit County, 135 Wn.2d 542, 561-62, 958 P.2d 962 (1998).*

(b) Subject any development application that would otherwise vest after the date of the board's order to the local ordinance or resolution that both is enacted in response to the order of remand and determined by the board pursuant to RCW 36.70A.330 to comply with the requirements of this chapter. [36]

Through this statutory language, the Legislature gave the Board the additional remedy of imposing a determination of invalidity, but left intact Washington's vested rights rule that applications that had already been filed and were vested to the challenged enactments remained vested regardless of the outcome of any pending appeal to the Board.

[*24]

Tellingly, the Legislature restricted the Board's authority to issue a determination of invalidity to only those instances where the challenged enactment would "substantially interfere with the fulfillment of the goals of [the GMA]." Following the recommendation of the Governor's Task Force that invalidity be limited to those situations where continued enforcement of the challenged plan "would violate the policy of the GMA," and after substantial public input and vetting of the proposed legislation during the 1995 session, the Legislature determined that the remedy of invalidity should only be invoked in those extreme circumstances where the county or city enactment would "substantially interfere with the fulfillment of the goals" of the GMA. [37]

After a thorough review of the legislative **[*25]** history of the invalidity provision in 1995, the County found no evidence that a violation of SEPA in the adoption of the challenged enactment was ever considered by the Legislature as grounds for a determination of invalidity. This is undoubtedly because although compliance with SEPA is a required component of adopting a legislative land use enactment, it is only a procedural requirement. [38] As stated in *Moss v. City of Bellingham, 109 Wn. App. 6, 14, 31 P.3d 703 (2001),* "SEPA does not demand a particular substantive result in governmental decision making; rather, it ensures that environmental values are given appropriate consideration." Simply put, a procedural SEPA violation did not rise to the type of substantive violation of GMA principles that the Legislature was concerned about in its enactment of the invalidity provision. [39]

[*26]

Despite the fact that the Regulatory Reform Act of 1995 was adopted in part to integrate SEPA with other land use laws, and despite the fact that RCW 36.70A.280(1) clearly gave the growth boards the authority to rule on violations of SEPA as well as GMA, the Legislature did not extend the invoking of a determination of invalidity to include violations of SEPA. Thus, the Legislature decided that a procedural violation of SEPA, by itself, was not grounds for a determination of invalidity. [40]

c. The 1997 Legislature Reaffirmed the Rule that Vested Permit Applications Cannot be Affected by a Later Determination of Invalidity.

The issue of allowing permit applications to vest while challenged enactments were on appeal to the growth board was not laid to rest by the adoption of the 1995 invalidity statute. The Legislature was sufficiently concerned about

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[36] Laws of 1995, Ch. 347, Sec. 110; former RCW 36.70A.300(2), (3)(emphasis added).

[37] Id., former RCW 36.70A.300(2).

[38] *SORE v. Snohomish County, 99 Wn.2d 363, 371, 662 P.2d 816 (1983)*("SEPA is essentially a procedural statute to ensure that environmental impacts and alternatives are properly considered by the decision makers.")

[39] The GMA goals, codified in RCW 36.70A.020, do not contain any reference to a violation of SEPA. However, GMA Goal 10 concerns environmental issues ("Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water"). This Court, in *Davidson Series & Associates v. Central Puget Sound Growth Management Hearings Board, 159 Wn. App. 148, 158, 224 P.3d 1003 (2010),* noted that "(o)n the appropriate facts, the Board could find that failure to properly conduct the required environmental review for a city or county action" justified a declaration of invalidity based on substantial interference with the fulfillment of that goal. However, none of the petitioners before the Board raised Goal 10 as grounds for invalidity in challenging the County's enactments. CP 131-44 (Corrected FDO, pp. 39-52).

[40] *Davidson Series & Associates v. Central Puget Sound Growth Management Hearings Board, 159 Wn. App. at 157-58.*

the impacts of allowing **[*27]** vesting of permit applications to comprehensive plan provisions and development regulations that were on appeal that it ordered the Land Use Study Commission, established by that same 1995 legislation, to study that issue and make a report on it:

The commission shall: . . .

> (4) Monitor instances state-wide of the vesting of project permit applications during the period that an appeal is pending before a growth management hearings board, as authorized under RCW 36.70A.300. The commission shall also review the extent to which such vesting results in the approval of projects that are inconsistent with a comprehensive plan or development regulation provision ultimately found to be in compliance with a board's order or remand. The commission shall analyze the impact of such approvals on ensuring the attainment of the goals and policies of chapter 36.70A RCW, and make recommendations to the governor and the legislature on statutory changes to address any adverse impacts from the provisions of RCW 36.70A.300. The commission shall provide an initial report on its findings and recommendations by November 1, 1995, and submit its further findings and recommendations subsequently in the **[*28]** reports required under Section 803 of this act. [41]

The Land Use Study Commission's 1995 report failed to report on this topic due to lack of these permitting instances during 1995, and indicated it would report back in its 1996 Annual Report. [42]

In its 1996 Annual Report, the Land Use Study Commission made the following finding and recommendation regarding invalidity:

> Since their creation, the Boards have had the authority to determine that plans or regulations do not comply with the GMA. This authority led to concerns about the effect of a decision of noncompliance on permit applications and projects that are dependent upon those plans or regulations. The Legislature sought to clarify this impact in 1995 by providing that a determination of noncompliance did not apply **[*29]** to permits unless the Board made a specific finding that the plan or regulation was invalid. This order only applies to permits filed after the date of the Board's order. Those projects are subject to the plan or regulations determined by the Board as complying with the GMA. The Boards have issued approximately 10 invalidity orders since the authority was granted to them.
>
> The exercise of this authority has proven to be a potent tool for encouraging compliance with the GMA. However, it has also proven to be a focus for complaints that the Boards are undermining the original purpose of the GMA that local elected officials should make the planning decisions for their communities. The options considered by the Commission to address this authority ranged from eliminating the authority, to allowing projects to be reviewed under the goals and policies of the GMA until a new plan or development regulations are approved, to clarifying the types of permits affected and not affected by the order.
>
> RECOMMENDATION:
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> The Commission recommends the authority to invalidate comprehensive plans should remain with the Boards. It is recommending changes that clarify that projects that vested **[*30]** prior to the determination are not affected by the order, exempt some types of permits from the effect of a determination of invalidity, and clarify the options available to a local government to have an order lifted. [43]

The 1997 Legislature re-codified the GMA's invalidity provisions in a new, stand-alone section of the Act, RCW 36.70A.302. [44] The Legislature retained the grounds for finding invalidity (substantial interference with the fulfillment

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[41] Laws of 1995, Ch. 347, Sec. 804(4); former RCW 90.61.040(4).

[42] Land Use Study Commission 1995 Annual Report, Section VI. This can be accessed at http://www.commerce.wa.gov/landuse/annualrp/95_002b.html#VI.

[43] Land Use Study Commission, 1996 Annual Report, January 14, 1997, Sec. VI.B.2 (emphasis added). This can be accessed at http://www.commerce.wa.gov/landuse/annualrp/96report.html.

[44] Laws of 1997, Ch., 429, Sec. 16.

of the GMA goals) in subsection (1) of RCW 36.70A.302. The vested rights provision was codified in subsection (2) of new section .302. It reads as follows:

> 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 **[*31]** 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) (emphasis added). The sentence related to vesting adopted by the 1995 Legislature was moved, with little change, to the first sentence of new RCW 36.70A.302(2). Then, responding to the Land Use Study Commission's recommendation in its 1996 Annual Report that the Legislature clarify with even greater emphasis that "projects that vested prior to the determination [of invalidity] are not affected by the order," the 1997 Legislature added the second sentence to RCW 36.70A.302(2), specifically providing that a "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." [45]
[*32]

The Land Use Study Commission issued a Final Report on December 30, 1998, which included a "Study of the Impact of Vesting During GMHB Appeals." [46] It found that allowing permit applications to vest during the time of appeal had either little, or only localized, impact. [47] It recommended no further changes to the invalidity provisions. [48]

d. Subsequent Efforts to Amend the GMA Vesting Provisions Have Been Unavailing.

RCW 36.70A.302(2) remains unchanged from 1997 to this date. However, that does not mean that the effort to prevent vesting of development rights during the period of board appeals has gone away. To the contrary, that debate has continued, as exemplified by several recent unsuccessful legislative proposals to change the vesting laws led by State Senator Adam Kline.

In the 2007 session, **[*33]** companion bills SB 5507 and HB 1463, Section 4, would have amended RCW 36.70A.302 to make a board determination of invalidity retroactive, applying to land use permit decisions that occurred relying on the legislative enactments the board found invalid. See Appendix A, attached hereto. However, the bills did not advance beyond committee.

Then in the 2008 session, companion bills SB 6784 and HB 3202, Section 2, would have amended RCW 36.70A.290 to provide that no development rights vested during the 60-day period for appeal of a legislative enactment to the growth board, or in the event of an appeal, until the board issues a decision upholding such enactment, whichever was later. See Appendix B, attached hereto. Again, the bills did not advance beyond committee.

Yet again, during the 2009 session, SB 5148 was introduced. That bill mirrored the 2008 proposals. See Appendix C, attached hereto. No action was taken on it. Senator Kline co-sponsored the Senate bills in all three years: 2007, 2008 and 2009.

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[45] The Senate Final Bill Report for ESB 6094 acknowledged the Land Use Study Commission report (at p. 1). It further explained the 1997 changes to the invalidity statute as follows: "An order of invalidity is only prospective in effect. The order does not affect an application filed prior to receipt of a board's determination of invalidity, nor does the order affect vested rights." Id., p. 3.

[46] Land Use Study Commission, Final Report, December 30, 1998, Chapter 14; this can be accessed at: http://www.commerce.wa.gov/landuse/report/chapter14.html.

[47] Id.

[48] Id.

The failure of the Legislature to amend the GMA vesting provisions despite the efforts of some proponents demonstrates that it intended the vesting provisions in RCW 36.70A. **[*34]** 302(2) to remain in effect. The Legislature's will, that permit applications relying on legislative enactments then on appeal to the growth board vest development rights, is clear.

3. The Trial Court's Decision that a Violation of SEPA Can Unvest BSRE's Development Applications Was Without Legal Authority and Was Contrary to the Will of the Legislature.

Before the trial court, Woodway conceded that GMA's invalidity provisions did not allow a determination of invalidity based on a violation of SEPA alone, [49] but charged that this was a "loophole" [50] that the trial court was required to fill to maintain the integrity of SEPA. The trial court decided to fill that alleged loophole by using the Board's finding of SEPA noncompliance in an administrative proceeding independent of this lawsuit as grounds for ruling in this case that BSRE's applications are void and "unvested." This ruling was both unprecedented and legally indefensible.
[*35]

It is a fundamental principle of statutory construction that the Legislature is presumed to know the existing state of case law in the areas in which it is legislating. [51] As discussed in subsection VI.B.2.a above, SEPA appeals of GMA enactments were already part of the GMA appeals process in RCW 36.70A.280(1) beginning in 1991. The Board's authority to review GMA enactments for SEPA violations is part of the panoply of statutes governing Board administrative review of local GMA enactments. [52] Not only did the growth boards have jurisdiction to review SEPA claims in GMA challenges, but a recent case held that this jurisdiction is exclusive.

In *Davidson Series & Associates v. City of Kirkland, 159 Wn. App. 616, 246 P.3d 822 (2011),* neighboring **[*36]** property owners challenged two City of Kirkland ordinances amending the comprehensive plan and zoning code designations of a developer's property by filing an appeal with the Board. They also filed a separate declaratory judgment action in superior court raising, *inter alia,* SEPA challenges. [53] Both the developer and City of Kirkland moved to dismiss the declaratory judgment action, asserting that the Board had exclusive jurisdiction over any SEPA challenges to the ordinances. [54] In affirming the trial court's dismissal of the SEPA claims, the Court noted that the Legislature had clearly placed the review of any SEPA challenge to legislative enactments with the Board:

> 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. [55]

See similarly, *Brinnon Group v. Jefferson County, 159 Wn. App. 446, 486-89, 245 P.3d 789 (2011),* decided five days before Davidson Series, where Division II of the Court of Appeals dismissed **[*37]** a writ action challenging a comprehensive plan provision that had also been appealed to the growth board, holding that the growth board appeal provided an adequate remedy at law.

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[49] CP 292-96 (Petitioners' Brief in Support of Motion for Summary Judgment, pp. 14-18).

[50] Id., p. 17, line 16.

[51] *Price v. Kitsap Transit, 125 Wn.2d 456, 463, 886 P.2d 556 (1994).*

[52] See RCW 36.70A.295(4) ("… [T]he provisions of RCW 36.70A.280 through 36.70A.330,… specify the full nature and extent of board review,....")

[53] *159 Wn. App. at 623.*

[54] *159 Wn. App. at 624.*

[55] *159 Wn. App. at 626* (citing *Woods v. Kittitas County, 162 Wn.2d 597, 614-15, 174 P.3d 25 (2007);Somers v. Snohomish County, 105 Wn. App. 937, 942-43, 945, 21 P.3d 1165 (2001)).*

As discussed in subsection VI.B.2.b above, when the Legislature was integrating SEPA and the GMA and other land use laws in 1995, it would have been logical for the Legislature to include a violation of SEPA as grounds for a finding of invalidity if it had wanted to. However, it did not. Instead, it restricted a determination of invalidity to only those situations where there was substantial interference with the fulfillment of the GMA goals.

Contrary to Woodway's arguments, and contrary to Judge Lum's decision, **[*38]** the legislative history of RCW 36.70A.302(2) does not reflect that the legislature left a "loophole" in the GMA invalidity provisions for violations of SEPA. Instead, that history shows that the 1995 Legislature, with input from the Governor's Task Force in 1994, made a conscious choice in 1995 that SEPA violations were not grounds for invalidity, and that vested rights in permit applications relying on legislative enactments on appeal to the growth board would be protected. Then, after the Land Use Study Commission studied the interrelationship between vesting and invalidity orders over several years, the Legislature amended the invalidity provisions in 1997 to add RCW 36.70A.302(2) emphasizing this vesting rule. Since then, the Legislature has left these provisions intact despite efforts by some legislators to change them. Furthermore, this Court in the recent Davidson Series decision confirmed that any SEPA claims concerning a GMA enactment must be brought to and considered by the growth board, not an independent court.

Despite these clear legal precedents, the trial court refused to follow the law. Under RCW 36.70A.302(2), it could not be clearer that BSRE's complete applications **[*39]** vested to and are to be considered under the County's Urban Center plan provisions and regulations. The applications were filed and vested on February 14 and March 4, 2011, and the Board did not issue its FDO determining certain of the County's enactments invalid until April 25, 2011, many weeks after the permit applications vested. By denying the County's and BSRE's motions for summary judgment, rather than following RCW 36.70A.302(2), the trial court issued a ruling that undermined and trumped that statute. This Court must rectify the trial court's error and reverse that decision.

C. The Fact that a Legislative Enactment Was Adopted in Violation of SEPA Does Not Create An Exception to RCW 36.70A.302(2). (Assignment of Error II.B)

Woodway presented various arguments to the trial court contending that RCW 36.70A.302(2) does not mean what it says. First, Woodway claimed that a Board finding of a violation of SEPA in the County's adoption of comprehensive plan provisions and development regulations meant that (a) BSRE's permit application relying on those legislative enactments was void, and (b) the superior court in an independent lawsuit for declaratory relief could **[*40]** issue an order voiding those applications. [56] Both of those claims are wrong.

First, Woodway cites several cases from the 1970s and 1980s arguing that a violation of SEPA is grounds for voiding the issuance of a permit. [57] However, these cases are either factually distinguishable from the facts in the case at bar, or do not stand for the proposition cited.
[*41]

In Juanita Bay, the reviewing court voided a permit because the local jurisdiction, had violated SEPA requirements in processing the permit application. [58] In Eastlake, the court struck down a building permit which had been issued in violation of local code requirements, and a third renewal of a building permit that had been issued in violation of SEPA. [59] In RUGG, the Supreme Court affirmed the trial court's invalidation of a rezone ordinance and permit

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[56] CP 287-97 (Petitioners' Brief in Support of Motion for Summary Judgment, pp. 9-19)

[57] CP 289-92, citing *Juanita Bay Valley v. Kirkland, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973);Lassila v. Wenatchee, 89 Wn.2d 804, 817, 576 P.2d 54 (1978);Noel v. Cole, 98 Wn.2d 375, 655 P.2d 245 (1982);Eastlake Community Council v. Roanoke Associates, 82 Wn.2d 475, 513 P.2d 36 (1973);Responsible Urban Growth Group v. City of Kent ("RUGG"), 123 Wn.2d 376, 868 P.2d 861 (1994).*

[58] *Juanita Bay, 9 Wn. App. at 73.*

[59] *Eastlake, 82 Wn.2d at 481-83, 488-93.*

based on the city's failure to provide notice and on appearance of fairness grounds. [60] However, all of these cases involved challenges to permits after they were issued. None involved preemptive attacks seeking to prevent the local jurisdiction from processing the permit application as this case does.

Woodway is wrong in claiming that the case law it relies upon says **[*42]** that a violation of SEPA means permit applications cannot vest. They say no such thing. None of the cases upon which Woodway relies are vesting cases; in fact, they do not discuss vesting. They address whether permits, [61] contracts [62] or legislative enactments [63] adopted in violation of SEPA are valid. Further, all of those cases involved challenges and decisions that came after the challenged permit, contract or legislative enactment alleged to have been issued in violation of SEPA was adopted. None of those cases involved a court ruling voiding a permit application before the local jurisdiction had made a decision on that permit application, as occurred in this case. None of those cases involved a trial court preemptively issuing an injunction preventing a local government from processing a permit application as Judge Lum did here. None of those cases found that a permit was about to be issued in violation of SEPA when environmental analysis had not yet been performed on that permit application. In short, Woodway's cases do not support Judge Lum's order.
[*43]

Moreover, this Court in the recent case of *Davidson Series & Associates v. Central Puget Sound Growth Management Hearings Board, 159 Wn. App. 148, 161, 244 P.3d 1003 (2010),* rejected an argument made by the petitioner in that case that was similar to that made by Woodway here. Citing many of the cases Woodway cites here, the petitioner in that case claimed that where the board found a violation of SEPA, it was required to enter an order of invalidity. This Court rejected that argument, finding that because the Board is a creature of the Legislature, its authority to issue a determination of invalidity was restricted to the grounds provided by the Legislature (in RCW 36.70A.302), which do not include a violation of SEPA. It is an affront to the Legislature to rule, as the trial court did here, that a violation of SEPA is not grounds for invalidity, but is grounds to stop the processing of a vested permit application.

Woodway makes the unprecedented **[*44]** argument that a vested permit application cannot even be processed because of SEPA defects in the adoption of legislative enactments upon which that application relies. [64] They have cited no cases standing for that proposition, and certainly none since the adoption of the GMA invalidity provisions in 1995.

Woodway claims that BSRE's application should be voided at the outset. However, Woodway and SRB confuse **non-project ("programmatic") SEPA** [65] in the adoption of the County's legislative enactments with **project-level SEPA** [66] in the processing of a permit application. [67] The environmental **[*45]** review for those actions is different. [68]

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[60] *RUGG, 123 Wn.2d at 388-90.*

[61] *Eastlake, supra;Juanita Bay, supra;RUGG, supra.*

[62] *Noel v. Cole, supra.*

[63] *Lassila v. Wenatchee, supra;RUGG, supra.*

[64] It is ironic that Woodway and SRB have raised this issue since neither of them successfully argued to the Board that the underlying County enactments violated SEPA. Woodway never raised SEPA as an issue, and SRB's SEPA challenge was dismissed for lack of standing. CP 144 (Corrected FDO, p. 52, lines 23-28). The Board ruled against the County on the SEPA issue based on arguments raised by Shoreline.

[65] *WAC197-11-704(2)(b)*.

[66] WAC 197-11-704(2)(a).

The fact that there was a SEPA defect in the adoption of the underlying comprehensive plan amendment and development regulations upon which BSRE's permit application relies does not equate to a SEPA violation in the processing of that application. Ironically, Woodway and SRB argue that the permit application should be denied based on SEPA when the County has not even had the opportunity to process and review the application under SEPA, and BSRE has not even had the opportunity to comply with SEPA by preparing a project-level environmental study for its application.
[*46]

Woodway argued that Professor Richard Settle's "respected treatise on SEPA," [69] "The Washington State Environmental Policy Act - A Legal and Policy Analysis" (2010), supports its position that permit applications relying on development regulations that were adopted in violation of SEPA are void. Woodway is wrong. In fact, Professor Settle's treatise says exactly the opposite. After first noting the cases cited by Woodway, Professor Settle states that the rule relied upon by Woodway changed with the adoption of the GMA amendments in 1995:

> Government action taken in violation of SEPA generally has been regarded as unlawful, ultra vires, a nullity. Thus, action taken without an environmental impact statement (EIS), where one was required, or without an inadequate (sic) EIS, generally has been held invalid. The agency must consider the proposed action anew enlightened by proper environmental review. Since generally one may not obtain vested rights in an invalid regulation, SEPA noncompliance in the adoption of a regulation logically would preclude vested rights in the regulation. However, a 1995 regulatory reform amendment to the Growth Management Act (GMA) provisions for the **[*47]** Growth Management Hearing (sic) Board would produce a contrary result. Under this amendment, a GMA plan, development regulation, or amendment, which the Board found to be in violation of SEPA, nevertheless could support vested rights. A building permit, plat, or, perhaps other regulatory approval applicant would have vested rights in a locally adopted plan or regulation even if the Board later decided that the local government violated SEPA by failing to make a proper threshold determination or prepare an adequate EIS. Moreover, under the amendment, vested rights could continue to arise even after the Board finds noncompliance with SEPA unless the Board's final order includes (1) a determination, supported by findings of fact and conclusions of law, that the continued validity of the plan or regulation would substantially interfere with the fulfillment of the goals of the GMA and (2) specification of the provisions of the plan or regulation deemed invalid. Such determination of invalidity are prospective only and do not extinguish rights that vested under state or local law before the date of the Board's order. [70]

This Court has found Professor Settle to be a "recognized **[*48]** authority on SEPA issues." *Waterford Place Condominium Ass'n. v. City of Seattle, 58 Wn. App. 39, 45, 791 P.2d 908 (1990).* [71] Professor Settle's treatise

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[67] See CP 485 (Save Richmond Beach's Reply in Support of Petitioners' Motion for Summary Judgment at p. 5, lines 5-11: "… [T]he County's attempts to proceed without adequate SEPA review violate … SEPA… [A]n injunction is the appropriate remedy when a jurisdiction attempts to disregard SEPA review and move forward without it.")

[68] See, e.g., WAC 197-11-442.

[69] CP 442-43 (Petitioner Town of Woodway's Reply on Summary Judgment, pp. 2-3).

[70] Id., Sec. 19.01 [10] (emphasis added), footnotes omitted.

[71] The Settle treatise on SEPA is cited in all of the following cases: Clallam County Citizens for Safe Drinking Water v. City of Port Angeles;*137 Wn. App. 214, 219, 151 P.3d 1079 (2007);Glasser v. City of Seattle, 139 Wn. App. 728, 739, 162 P.3d 1134 (2007);Preserve Our Islands v. Shorelines Hearings Bd., 133 Wn. App. 503, 539, 137 P.3d 31 (2006);* ***Thornton Creek Legal Defense Fund v. City of Seattle, 113 Wn. App. 34, 50, 52 P.3d 522 (2002);*** *Boss v. Washington State Dept. of Transp., 113 Wn. App. 543, 549, 54 P.3d 207 (2002);Moss v. City of Bellingham, 109 Wn. App. 6, 15, 21, 31 P.3d 703 (2001);Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. State, Dept. of Transp., 90 Wn. App. 225, 229, 951 P.2d 812 (1998);Dioxin/Organochlorine Center v. Pollution Control Hearings Bd., 131 Wn.2d 345, 357, 932 P.2d 158 (1997);Kiewit Const. Group Inc. v. Clark County, 83 Wn. App. 133, 140, 920 P.2d 1207 (1996);Saldin Securities. Inc. v. Snohomish County, 80 Wn. App. 522, 530, 910 P.2d 513 (1996);Foster v. King County. 83 Wn. App. 339, 345, 921 P.2d 552 (1996);Organization to Preserve Agr. Lands v. Adams County, 128 Wn.2d 869, 875, 913 P.2d 793 (1996);Citizens Alliance to Protect Our Wetlands v.*

supports the County's position, not Woodway's. A violation of SEPA in the adoption of the underlying plan provisions or development regulations does not prevent development rights from vesting, nor does it authorize a court to interfere in the permitting process.
[*49]

Woodway additionally argued to the trial court that the Legislature never changed the case law authority it relies on. It first claimed that the 1994 Governor's Task Force Report supported its position that a violation of SEPA in the adoption of comprehensive plan provisions and development regulations constituted grounds for voiding the permit applications upon which they rely. [72] Woodway and SRB then argued that the Legislature in 1995 failed to state that violations of SEPA in adoption of the underlying legislative enactments no longer caused any permit applications relying on them to be void; therefore, Woodway claims, the case law it relies on remains in effect since repeal of case law authority by implication is disfavored. [73] However, that argument ignores the clear language of the GMA. The Legislature did not repeal that prior case law by implication. It did it explicitly through the enactment of former RCW 36.70A.300(2) and (3) in 1995, and then the enactment of RCW 36.70A.302 in 1997. Those statutes clearly said what development rights vested during the appeal of GMA enactments and what ones did not. They also clarified that a violation of SEPA was not grounds for **[*50]** invalidity, and therefore was not grounds for the voiding of any permit applications relying on the underlying legislative enactments. Furthermore, as noted above, Professor Settle's treatise on SEPA, which Woodway recognizes as "respected," refutes Woodway's arguments: Settle clearly states that the 1995 legislative enactments changed the law. [74]

Moreover, Woodway's argument defies logic. When the Legislature adopted its regulatory reform legislation in 1995 integrating the State's land use and environmental statutes, it specifically provided in former RCW 36.70A.300(2) and (3) that vested development applications would be insulated from later Board orders. It makes no sense to believe that in doing so the Legislature also intended to leave intact, *sub silentio,* a rule that would allow **[*51]** courts to declare vested permit applications to be void and therefore "unvested" months or even years after issuance, if they relied on regulations adopted in violation of SEPA, as occurred in this case. If the Legislature had intended that bizarre result, it would have so provided in the 1995 legislation.

In contrast, as explained extensively in section VLB above, the enactment of the GMA, and in particular the invalidity provisions in 1995, codified in statute what the rule of law was to be henceforth: permit applications vested to legislative enactments while they were on appeal to the Board, and an order of invalidity could not be issued for a violation of SEPA. For Judge Lum to rule that under this GMA statutory framework trial courts were still invited to void vested permit applications (1) outside of a Board appeal, (2) outside of a LUPA action, (3) before a local jurisdiction has even made a decision on the application, (4) before a project applicant had even attempted to comply with SEPA, and (5) in violation of the State's (and GMA's) vested rights doctrine, is in defiance of the Legislature's directive. That order was issued contrary to law and must be reversed.

D. [*52] The Trial Court's Ruling Undermines Washington's Vested Rights Rule Contrary to the Will of the Legislature. (Assignments of Error II.A, B and C)

The consequences of the trial court's ruling are far reaching, and undermine the State's long-standing rule on vested rights and the Legislature's explicit iteration of that rule in RCW 36.70A.302(2). Instead of a vesting system

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City of Auburn, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995); ***Klickitat County Citizens Against Imported Waste v. Klickitat County, 122 Wn.2d 619, 633, 860 P.2d 390 (1993),*** *also cited* in *Klickitat County Citizens Against Imported Waste v. Klickitat County, 866 P.2d 1256 (1994)* (order changing the opinion at ***122 Wn.2d 619, 860 P.2d 390);*** *Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 38, 873 P.2d 498 (1994);State v. Grays Harbor County, 122 Wn.2d 244, 249, 251, 857 P.2d 1039 (1993);Trepanier v. City of Everett, 64 Wn. App. 380, 382, 824 P.2d 524 (1992);Waterford Place Condominium Ass'n v. City of Seattle, 58 Wn. App. 39, 45-48, 791 P.2d 908 (1990).*

[72] CP 407-08 (Petitioners' Joint Response, pp. 9-10); CP 452 (Woodway Reply, Attachment 1 thereto).

[73] CP 406 (Petitioners' Joint Response, p. 8); CP 483 (SRB Reply, p. 3).

[74] See supra at p. 32.

grounded on principles of fairness and certainty, [75] there would be a system that was totally unfair and contained no certainty. A permit applicant would not be able to file his application and know that the application was vested, but would be subject to the vagaries of whether the underlying local legislation upon which that application relied was appealed to the Board. If so, someone could file an independent action months (or possibly years) later challenging that permit's vested status, based on an issue that the challenger had never raised before. [76]
[*53]

Moreover, this situation creates a potential nightmare for local jurisdictions. Where now permit applications are clearly either vested or not vested and local permitting authorities can proceed accordingly, under Judge Lum's decision, BSRE's applications that were vested have become "unvested." Further uncertainty exists based on the outcome of the litigation before the Board: Would BSRE's permit applications declared to be "unvested" later become "re-vested" once the County's comprehensive plan and development regulations come into compliance with SEPA? Or instead must BSRE reapply for its permits at that later date? The concept of vesting, which was supposed to provide certainty to both permit applicants and local jurisdictions, provides anything but certainty under this ruling.

The practical effect of the trial court's decision is to place a moratorium on any development permit applications relying on newly adopted GMA development regulations for months - and even years - while GMA appeals wind their way through the Board and courts. Local governments cannot issue permits because the permit applicant would not be able to rely on them. Judge Lum by judicial fiat has accomplished **[*54]** what Senator Kline and his cohorts have been unable to do in recent legislative sessions: [77] amend the GMA to prohibit permit applications from vesting while appeals challenging the underlying regulations are pending.

> As stated in *State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999):*
>
> [A] court should resist the temptation to rewrite an unambiguous statute to suit [its] notions of what is good public policy, recognizing the principle that "the drafting of a statute is a legislative, not a judicial, function." *State v. Enloe, 47 Wn. App. 165, 170, 734 P.2d 520 (1987).*

It goes without saying that a trial court may not overrule the will of the Legislature. However, that is what has happened in this case, in large part due to Woodway's urging of the trial court to make a policy choice not to follow the State's vesting rule. [78] That result is untenable.
[*55]

E. The Trial Court Erroneously Issued an Injunction Preventing the County from Processing BSRE's Permit Application. (Assignment of Error II.A, B and C)

The County incorporates by reference the arguments of BSRE on this issue.

VII. CONCLUSION

Through the enactment of RCW 36.70A.302(2), the Legislature has explicitly provided that vested development permit applications are to be insulated from the impact of Board orders that come after those applications have been filed and vested. Here, the trial court ignored that clear legislative directive and issued an order trumping the statute. That order was without legal authority. This Court should reverse the trial court's decision, and grant summary judgment for the County and BSRE dismissing this action.

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[75] See Subsection VI.B.1 above.

[76] See footnote 64.

[77] See Subsection VI.B.2.d supra, pp. 22-23.

[78] CP 298-301 (Petitioners' Brief in Support of Motion for Summary Judgment, pp. 20-23).

Respectfully submitted this 17th day of January, 2012.

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DECLARATION OF SERVICE

I, Regina McManus, hereby declare that I am an employee of the Civil **[*56]** Division of the Snohomish County Prosecuting Attorney, and that on this 17th day of January, 2012, Snohomish County's Opening Brief was served upon persons listed and by the method(s) indicated:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct **[*57]** to the best of my knowledge.

SIGNED at Everett, Washington, this 17th day of January, 2012.

/s/ Regina McManus
Regina McManus

[SEE APPENDIX A IN ORIGINAL]

[SEE APPENDIX A IN ORIGINAL]

[SEE APPENDIX B IN ORIGINAL]

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