NO. 371298

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

(Okanogan County Superior Court Case No. 16-2-00312-7)

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Appellant,

v.

OKANOGAN COUNTY
Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Yakama Nation's Complaint in this action challenges a 2016 Okanogan County Ordinance adopting certain planning and zoning regulations, specifically the Zone Code and Zone Code Map. See Complaint, CP 8-24. In March 2017, the trial court entered a stipulation and proposed order of dismissal without prejudice (the "Stipulated Dismissal Order"). The Stipulated Dismissal Order provided, *inter alia*, that (1) Okanogan County (the "County") would undertake an *ab initio* environmental review of its Comprehensive Plan and Zone Code, and (2) by December 31, 2018, the County would repeal and replace these documents. CP 241-6. The County worked diligently to develop replacements for its Comprehensive Plan and Zone Code in compliance with the procedural requirements of the State Environmental Policy Act ("SEPA"), including multiple consultations with the Yakama Nation to address its concerns. Despite these efforts, the County was unable to meet the Stipulated Dismissal Order's December 31, 2018 deadline. The County's efforts to develop a new Comprehensive Plan continued after the deadline, including continued outreach and consultations with the Yakama Nation. CP 26-27.

While this process was ongoing, the Yakama Nation filed the Motion to Vacate Under CR 60 that is the subject of the instant appeal. The Yakama Nation sought to vacate the Stipulated Dismissal Order, to reinstate the litigation, to compel the County to meet the terms of the Stipulated Dismissal Order and to impose remedial sanctions for contempt of court. CP 265-6. The trial court denied the Yakama Nation's motion to vacate and

subsequent motion for reconsideration. See CP 239-40; CP 237-38. The Yakama Nation now appeals from both orders. CP 160-7.

II. ASSIGNMENT OF ERROR

A. The Yakama Nation Assigned Error to a Jurisdictional Issue That Was Not the Basis for the Trial Court's Decision.

The Yakama Nation assigns error to the trial court's order denying its motion to vacate and defines only one issue pertaining to this assignment of error as follows: "Does a court retain jurisdiction to enforce its own orders after dismissal when the terms of the order are unquestionably violated?" Brief of Appellant ("BOA"), p. 5. This assignment of error ignores the basis of the trial court's decision, which ultimately did not turn on the court's "jurisdiction" to consider the Yakama Nation's motion, but rather Yakama Nation's failure to establish a proper "basis" for granting its motion.[1]

The existence of a "valid" underlying cause of action is a condition precedent to vacating a judgment. RCW 4.72.050 "contemplates an adjudication that a meritorious cause of action exists, before the judgment can be vacated." *Haller v. Wallis*, 89 Wn.2d 539, 549, 573 P.2d 1302, 1307 (1978) (citation omitted). The Yakama Nation fails to assign error the trial court's "adjudication" of this question.

The Yakama Nation has waived any assignment of error other than the one based on jurisdiction and thus has waived the opportunity to

[1] See RP 71:15-20 ("I think the Court has jurisdiction to consider your motions as such. . . . the Court is denying that based on the Civil Rules, as such, that you have not established a basis for which the Court can grant your motion.").

challenge the actual basis for the trial court's decision, a decision that may be affirmed on any basis appearing in the record. As the trial court explained, it declined to vacate its prior order of dismissal because there was not, at that stage, a "justiciable issue" for resolution in the underlying case, in light of the County's ongoing efforts to develop a new Comprehensive Plan and Zone Code. See RP 64:15, 67:7, 68:8, 70:10. The Yakama Nation has failed to assign error to this finding. The Yakama Nation's failure to assign error to the actual basis for the trial court's decision is dispositive of its appeal. See RAP 10.3(c)(barring consideration of new issues raised for the first time on reply).

B. The Trial Court's Denial of the Motion to Vacate Based on Justiciability Was Not an Abuse of Discretion.

In any event, the trial court's decision not to vacate the Stipulated Dismissal Order based on the lack of a justiciable controversy was not an abuse of discretion. In moving to vacate an order of dismissal under CR 60, the Yakama Nation had the burden to show "there is a valid cause of action," and "to make an independent showing of facts which would entitle him to relief." RCW 4.72.050; *Haller*, 89 Wn.2d at 549 (citation omitted). At the time the Yakama Nation moved to vacate the Stipulated Dismissal Order, the County was actively engaged in revising the Comprehensive Plan and Zone Code. Accordingly, the underlying litigation did not present a justiciable controversy. The Yakama Nation's judicial challenge to the Zone Code was not ripe, nor Could the trial court provide effective, final relief.

The Washington Supreme Court and numerous other courts have held that for sound reasons of public policy courts are barred from entertaining interlocutory challenges to planning and zoning ordinances — under the identical planning and environmental statutes cited in the Yakama Nation's Complaint — pending final government action to adopt them. The Yakama Nation's causes of action, all of which seek to require the County to revisit its zoning regulations, were moot and not ripe. The County was in the middle of doing exactly what the Yakama Nation sought, through the underlying complaint, to compel it to do. The trial court correctly found that there was no justiciable controversy. Accordingly, the Yakama Nation did not satisfy a condition precedent to vacating a judgment: the existence of a valid and meritorious underlying cause of action.

III. STATEMENT OF THE CASE

The County submits this statement of the case pursuant to RAP 10.3(b) to supplement the Statement of the Case provided by the Yakama Nation.

A. The County Agreed to Review its Comprehensive Plan and Zoning Ordinance *Ab Initio* and with Serious Consideration to All Issues Raised by the Yakama Nation.

The Complaint in this action challenges Okanogan County's Zone Code and Zone Code Map, as adopted on July 26, 2016 by Ordinance 2016-4 and codified at Okanogan County Code Title 17A (the "Zoning Ordinance"), on grounds that they allegedly violate the requirements of several statutes: "the Planning Enabling Act ('PEA') (Chapter 36.70 RCW),

the Growth Management Act ('GMA') (Chapter 36.70A RCW), the State Environmental Policy Act ('SEPA') (Chapter 43.21C RCW), the Shoreline Management Act ('SMA') (Chapter 90.58 RCW), and other applicable provisions of state law." CP 8, ¶ 1. The Complaint further alleges that environmental documents supporting Ordinance 2016-4, specifically, the Draft Environmental Impact Statement ("DEIS"), and the Final Environmental Impact Statement ("FEIS"), violate Chapter 14.04 of the Okanogan County Code ("OCC"), SEPA, and Chapter 197-11 WAC. *Id*, ¶ 2.

On March 20, 2017, the Yakama Nation and the County entered a stipulation and proposed order to dismiss the action. CP 241-6. Pursuant to the stipulation, the County agreed undertake a series of actions, including (1) review of the County's Comprehensive Plan and Zoning Ordinance; (2) environmental review of the same under SEPA and applicable County ordinances; (3) during said reviews, an affirmation of the County's "intention to give serious consideration to all issues raised by the Yakama Nation, along with any issues raised by the general public, other governments, or County staff or officials"; (4) during said reviews, continued processing of land use permits and other development applications under the applicable County ordinances presently in place, and as amended; (5) no later than December 31, 2018, final legislative action(s) to (a) repeal, in their entirety, the current Comprehensive Plan and current Zoning Ordinance (including all associated zoning maps), and (b) adopt a

new Comprehensive Plan and new Zoning Ordinance (including new zoning maps). CP 242-3.

On March 21, 2017, the trial court accordingly entered the parties' proposed Stipulated Dismissal Order requiring the County to undertake the foregoing actions, consistent with the parties' stipulation. CP 245-6.[2] While the Stipulated Order of Dismissal required the County to "give serious consideration to all issues raised by the Yakama Nation," it did not require the County to adopt every policy proposed by the Yakama Nation.

As set forth below, following the trial court's entry of the Stipulated Dismissal Order, the County worked diligently to complete as expeditiously as possible — consistent with its obligations under applicable law — the reviews it agreed to perform as a prerequisite to adoption of a new Comprehensive Plan and Zone Code, and to respond to the specific goals and policies proposed by the Yakama Nation. The trial court found that "the parties are both serious in this – in conducting those reviews" (RP 66:22-23) and that the County's review process had afforded "the general public, other governmental or County staff and officials" as well as the "the Yakama Nation the opportunity to participate and to have

[2] Prior to entry of March 2017 Stipulated Dismissal Order, this case was consolidated with two others by agreed order on September 1, 2016: *MVCC and Futurewise v. Okanogan County*, Case No. 16-2-00313-5 (also appealing Okanogan County's adoption of Title 17A), and *MVCC and Futurewise v. Okanogan County*, Case No. 15-2-00005-7 (appealing Okanogan County's adoption of its Comprehensive Plan). On June 21, 2017, the trial court stayed those two actions, ruling that a declaratory judgment was inappropriate in the remaining consolidated cases because a justiciable controversy did not exist in light of the Stipulated Dismissal Order in this case. See CP 196-219.

comments." RP 66:25-67:4. The trial court further ruled that: "The County is involved in ongoing rule making and -- and -- ordinances procedure and they have not arrived at a final ordinance." RP 71:3-5. The Yakama Nation has not assigned error to these findings. Accordingly, they are verities on appeal. In any event, as set forth below, ample evidence supports the trial court's findings that the County's efforts to update its Comprehensive Plan and Zone Code in compliance with the Stipulated Dismissal Order (1) were "serious," (2) had afforded the Yakama Nation and members of the public the opportunity to participate, and (3) were ongoing.

B. The County Invited the Yakama Nation's Participation in Drafting a Revised Comprehensive Plan Before the Public Comment Period.

Consistent with the County's obligations under the Stipulated Dismissal Order, on May 22, 2017, the Okanogan County Board of County Commissioners ("BOCC") began discussion of the schedule for review and the extent of the revisions contemplated for the Comprehensive Plan. CP 93-94, ¶ 7. In response to feedback the BOCC had received, including issues raised by Yakama Nation, the BOCC determined that a revised water section would be included in the proposed revisions. *Id.*

On September 11, 2017, the BOCC received written comments from Gerald Lewis, Chairman of the Fish and Wildlife Committee of the Yakama Nation, regarding the water section of the Comprehensive Plan. CP 94, ¶ 9, CP 107-8. On September 14, 2017, the former Planning Director for the County Perry Huston responded to Mr. Lewis' letter, stating that "The BOCC would appreciate the opportunity to discuss the concerns of the

Yakama Nation and they anticipate those discussions will yield a list of common issues for which by working together we can identify solutions." CP 107. On behalf of the BOCC, Mr. Huston suggested that the parties collaborate to "create a list of subjects and schedule of meetings" for the BOCC to hear from the Yakama Nation in person about their issues of concern. *Id.* Mr. Huston also invited the participation of appropriate staff of the Yakama Nation in drafting the DEIS for the Comprehensive Plan. *Id.* In response to some specific issues raised in the letter, Mr. Huston explained that the County had revised its review processes for permit exempt wells in light of the "Whatcom-Hirst decision and the subsequent adoption of OCC Title 20."[3] *Id.* Mr. Huston explained in detail the process that the County was using for approval of permit exempt wells, consistent with current law and regulations, and the permit tracking system being developed by staff: "The tracking system my staff is refining will treat withdrawals from permit exempt wells as surface water for purposes of debiting the withdrawals from the 2 CFS reserve." CP 107. Mr. Huston stated that the BOCC was committed to discharging is responsibilities under the *Whatcom Cty. v. Hirst* decision "through continuously refining our review process and building

[3] In *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 675, 381 P.3d 1 (2016), the Washington State Supreme Court held that "the GMA places the burden on counties to protect groundwater resources, and requires counties to assure that water is both factually and legally available before issuing building permits." OCC Title 20 governs development permit procedures and administration, with the purpose, among other things, "to encourage the preparation of appropriate information early in the permitting process; to process permit applications in a timely manner; to provide the general public with an adequate opportunity for review and comment; and to provide the development community with a standardized process and enhanced predictability." See OCC 20.02.005.

our tracking system" toward the goal of an "accurate accounting of current and future demand on available water supplies." CP 108. Thus, the BOCC expressed its interest in "exploring new tools for water management," including some ideas proposed by the Yakama Nation: "Under that banner the BOCC is very interested in the presentation by Mr. Ring on water banking that was offered by your attorney." *Id.*

On the following dates, the BOCC engaged in further activities relating to the development of the water section of the Comprehensive Plan:

- October 9, 2017: Discuss water availability study area code.
- October 23, 2017: Review of previous Comprehensive Plan scoping comments.
- October 30, 2017: Continued review of comments.
- November 6, 2017: Discuss review schedule.
- November 20, 2017: Review revised sections.

CP 94, ¶ 9. On December 4, 2017, the BOCC adopted a new water section of the Comprehensive Plan. CP 94, ¶ 10.

The BOCC then proceeded to discuss other sections of the Comprehensive Plan in response to comments from the Yakama Nation and the Methow Valley Citizens Council, with particular emphasis on the land use designations. CP 95, ¶ 11. To that end, the BOCC engaged in the following activities on the following dates:

- December 4 & 11, 2017: Discuss additional sections of Comprehensive Plan for review.
- January 22 & 29, 2018: Review revised draft Comprehensive Plan.
- February 5 & 12, 2018: Review revised draft Comprehensive Plan.

CP 95, ¶ 12.

The BOCC drafted a revised draft Comprehensive Plan and the discussion moved to scheduling and review of the associated maps. CP 95, ¶ 13. On the following dates, the BOCC continued its discussion of the Comprehensive Plan:

- February 26, 2018: Discuss approach and schedule for SEPA review.
- March 5 & 6, 2018: Additional study sessions held for Comprehensive Plan review.
- March 12, 19 & 26, 2018: Review Comprehensive Plan drafts.
- April 2, 9 & 16, 2018: Review Comprehensive Plan draft.

CP 95, ¶ 14.

C. The County Met With Representatives of the Yakama Nation, Adopted Interim Controls to Preserve Water Resources, and Responded in Detail to the Yakama Nation's Policy Proposals.

On March 20, 2018, Phil Rigdon, Superintendent of the Yakama Nation Department of Natural Resources, sent a letter to the County raising specific issues regarding the draft Comprehensive Plan. CP 96, ¶ 16. See also CP 110-17 (the County's 7/14/18 letter response).

On April 23, 2018, the BOCC met with representatives of the Yakama Nation and discussed the Comprehensive Plan, Zone Code, and land use policies in the Methow Valley generally. CP 95-96, ¶ 15. During this meeting, counsel for the Yakama Nation requested that the County furnish a specific response to the points raised in Mr. Rigdon's letter of March 20. *Id.*, ¶ 16; see also CP 110-17 (7/14/18 letter response). After this discussion, the BOCC engaged in further review of the Comprehensive

Plan and began to discuss issues involving the Zone Code in response to comments received by the Yakama Nation and Methow Valley Citizens Council, which they wanted to address through the adoption of interim controls. CP 95-96, ¶ 15.

As evidenced by the Yakama Nation's submission in support of its Motion to Vacate, the County in fact responded to the Yakama Nation's comments and concerns by adopting a series of interim controls to limit development pending further study of water availability as follows:

- August 28, 2018: **Ordinance 2018 – 13**, finding that additional information is necessary before it can be determined if sufficient groundwater exists in the Upper and Lower Tunk Basins to meet the requirements of RCW 58.17.110 for an adequate supply of potable water for land division proposals and therefore designating the Upper Tunk Basin, Lower Tunk Basin, and Tamarack Springs Basin in WRIA 49 as water availability study areas. CP 85-86.
- April 1, 2019: **Ordinance 2019-5**, finding that additional information is necessary before it can be determined if sufficient groundwater is legally accessible in the restricted areas of WRIA #48 to meet the requirements of RCW 58.17.110 for an adequate supply of potable water for land division proposals and adopting interim amendment to OCC 17A.400.130 which designated the restricted areas of the closed surface waters as listed in WAC 173-548-050 as water availability study areas. CP 64-67.
- May 20, 2019: **Ordinance 2019-8**, maintaining Ordinance 2019-5 in force, pending further review. CP 80-81.
- May 20, 2019: **Ordinance 2019-9**, approving immediate adoption of interim amendments to the text of the Okanogan County Zone Code as necessary to avoid the vesting of applications for multi-family development for which "adequate provisions for potable water" cannot be made as required by RCW 19.27.097. CP 69-78.

On or about April 30, 2018, the BOCC began a detailed review of the Comprehensive Plan's land use designation maps. CP 96, ¶ 17. The 2014 Comprehensive Plan departed from the terminology in the Growth Management Act ("GMA") for resource land designation, and the BOCC wanted the revised Comprehensive Plan to use the terminology in the GMA with a more rigid adherence to the classification criteria. *Id.* Throughout May of 2018, the BOCC continued its review of the land use designation maps. CP 96, ¶ 18.

On May 21, 2018, the BOCC reviewed the correspondence previously received from the Yakama Nation on March 20 in light of its subsequent work on the Comprehensive Plan and maps. CP 96, ¶ 19. On June 4, 2018, at the direction of the BOCC, Mr. Huston drafted a response to the Yakama Nation, addressing each of the policies proposed by the Yakama Nation in its letter of March 20 and explaining as to each either (1) the specific language in the draft Comprehensive Plan that was addressed to that issue, or (2) alternatively explaining the BOCC's reasoning as to why it did or did not intend to adopt to the Yakama Nation's preferred policy. CP 96, ¶ 19; CP 110-17 (letter dated June 14, 2018). For example, under the heading of the Yakama Nation goal to "Protect water quality and quantity," the Yakama Nation proposed as its "Policy 1": "Support data collection for water quality and quantity which can be used to evaluate land uses, development, habitat quality, and water availability." CP 110. In the County's June 14 response, it cited specific language from various sections of the Comprehensive Plan that was addressed to this goal

and explained its plan for how the environmental review of the proposed Comprehensive Plan would be conducted. CP 110-11. The County's June 14 letter responded to each of the 17 separate policies proposed by the Yakama Nation. CP 110-17.

As a result of the BOCC's April meeting with the Yakama Nation and following review of the Yakama Nation's comments, including its March 20 letter, the BOCC made further changes to the 2014 Comprehensive Plan, consistent with Mr. Huston's letter response of June 14. CP 97, ¶ 20. The maps were revised to designate resource land based more closely on the designation criteria and additional language was added regarding critical areas and habitat protection. *Id.*

Through the summer and fall of 2018, the BOCC continued its review of the Comprehensive Plan and maps, as reflected in the following activities:

- June 11, 18 & 25, 2018: More review of resource maps.
- July 2 & 9, 2018: More review of resource maps.
- August 1 & 21, 2018: BOCC workshop to review Comprehensive Plan draft.
- August 27, 2018: Update of Comprehensive Plan drafting.
- September 10, 2018: Update of Comprehensive Plan drafting.
- October 8, 2018: Review alternatives for SEPA review.

CP 97, ¶ 21.

From May of 2018 forward, as noted above, the BOCC continued its review of the land use designation maps. CP 97, ¶ 22. On August 8, 2018, the BOCC sent a draft Comprehensive Plan with largely finalized maps to the Yakama Nation. *Id.* In addition to the map review, comments

and changes offered by the Yakama Nation resulted in some of the following changes in the draft Comprehensive Plan dated August 7, 2018:

- Page 9, lines 265-269: Policy language was included which promoted the use of best management practices and informational programs to inform landowners of why and how to prevent groundwater contamination.
- Page 9, lines 269-271: Policy language was included which states that the County will actively participate with state agencies to enforce limitations on surface water diversion and groundwater withdrawal.
- Page 17, lines 411-418: Policy language was included stating support for the use of water banking as a mitigation measure for new water users.
- Page 17, lines 417-418: Policy language was included that requires the County to adopt regulations for the administration and tracking of permit exempt wells.
- Page 53, lines 1574-1577: Policy language was included that supports the use of conservation easements as a conservation tool.
- Page 53, lines 1579-1602: Policy language was included that requires the County to utilize SEPA as a means to review projects for impacts that are not otherwise mitigated by existing regulation; the County will utilize SEPA as a means to review the project site of development proposals for physical evidence of soil and groundwater contamination; the County will utilize SEPA, in conjunction with existing critical areas regulation, to review project proposals for impacts brought about by anticipated construction activities such as clearing, dredging, and road construction and propose appropriate conditions to mitigate identified impacts.
- Page 55, lines 1668-1670: Policy language was included that states the County will work with the Department of Ecology, Department of Health and other agencies with jurisdiction to identify areas that are contaminated or have a high risk of future contamination.
- Page 58, lines 1761-1765: Policy language was included that states that the County, through its own regulation and by actively participating with all agencies with jurisdiction, will

> work to control the illegal discharge of wastes to both surface and groundwater bodies.

CP 97-99, ¶¶ 23-30.

In the fall of 2018, the BOCC continued its review of the Comprehensive Plan. CP 99, ¶ 31. Its focus at this stage was on the final review of the draft maps. *Id.* During a BOCC study session discussion, members of the Methow Valley Citizens Council suggested that the BOCC consider a different approach to the alternatives offered in the Comprehensive Plan. *Id.* As a result of that discussion, the Comprehensive Plan draft dated October 12, 2018 contained three different alternatives. *Id.* Rather than use each of the three population increase projections prepared by the Office of Financial Management with no action as Alternative 1 (leaving the 2014 Comprehensive Plan in place), the decision ultimately was to use the medium range projection for population growth and draft two alternative approaches to accommodate the growth. *Id. See also* CP 48-51.

In the October 12, 2018 draft Comprehensive Plan, Chapter 12 was amended to include more detailed policies for protecting natural areas, including policies regarding wildfire protection. CP 99, ¶ 32.

On October 15, 22 & 29, 2018, Mr. Huston provided updates to BOCC on the Comprehensive Plan and the status of the Draft Environmental Impact Statement ("DEIS"). CP 99, ¶ 33. On November 5, 2018, the BOCC discussed the schedule for environmental review of the Comprehensive Plan. CP 100, ¶ 34.

D. The County Published a Draft Comprehensive Plan, Which Initiated the Public Comment Period.

On November 9 and 14, 2018, the County signed and published, respectively, a draft Comprehensive Plan and issued a Determination of Significance. CP 100, ¶ 35; CP 45-52. This publication initiated the scoping period for the DEIS, which is the formal opportunity for the public, tribal governments, and other local, state and federal agencies to comment on a proposal's alternatives, impacts, and potential mitigation measures to be analyzed in the EIS. *Id.;* WAC 197-11-360; WAC 197-11-408. As outlined above, however, the Yakama Nation had already been afforded significant opportunities to comment on the Comprehensive Plan during the BOCC's review and drafting process. *Id.*[4]

During the period from January 18, 2019 through July 17, 2019, Mr. Huston, on behalf of the County, reviewed the scoping comments and drafted the Draft Environmental Impact Statement. CP 100, ¶ 37. During this time period, the BOCC received weekly updates during Mr. Huston's study session. *Id.*

Late in 2018, the Department of Ecology ("DOE") implemented a change in policy regarding the restricted areas of the basins closed to further appropriation by WAC 173-548-050. CP 100, ¶ 38. The County altered its policies in response to the DOE, and the BOCC subsequently adopted Ordinance 2019-5 on April 1, 2019 which designated certain areas as water availability study areas in accordance with OCC 17A.400. *Id.* See CP 64-

[4] On December 31, 2018, at the request of the Methow Valley Citizens Council, the County extended the scoping comment period to January 18, 2019. CP 100, ¶ 36.

67. The effect of the designation is to prohibit the approval of any land division application that would rely on a permit exempt well for potable water. *Id.*

On April 2, 2019, representatives of the County met with representatives of the Yakama Nation, Futurewise, and the Methow Valley Citizens Council ("MVCC") to discuss an extension of the timeline for review and adoption of the Comprehensive Plan. CP 100-101, ¶ 39; CP 26. A specific concern expressed by both the MVCC and Futurewise was the potential for additional development applications being processed under the 2016 Zone Code during the time period before a new zone code would be adopted. *Id.* The discussion ended with the projection of a tentative timeline for review of the Comprehensive Plan and a discussion of the steps already taken by the Commissioners, such as the designation of water availability study areas (which restrict the further subdivision of land in the designated areas), in recognition of the expressed concerns. *Id.*

On April 22, 2019, the County Planning Commission began a series of workshops to discuss the revised draft of the Comprehensive Plan, and the structure, alternatives, and significant issues for the DEIS. CP 101, ¶ 41. It held additional study sessions on May 20, 2019, June 10, 2019, and June 24, 2019. *Id.*

On May 20, 2019, the BOCC approved Ordinance 2019-9 which reduced or eliminated the multi-family densities in Rural-1, Rural-5, and Rural-20 zones. CP 101, ¶ 40; CP 69-78. In response to public comments and staff analysis, the BOCC grew concerned that the 2 cubic feet per

second ("2CFS") reserve in the Lower Methow River Reach was not sufficient to provide an appropriate water supply as required by RCW 58.17.110 and RCW 19.27.097 for the existing lots and the lots that could be created in accordance with underlying zoning. CP 102, ¶ 43.[5] In response to these concerns, on June 10, 2019, the BOCC approved Ordinance 2019-10 which adopted interim amendments to the official Zone Map and converted most of the Rural-1 zoning in the Lower Methow River Reach to Rural-5, thereby increasing the minimum lot size from one acre to five. CP 102-3, ¶ 43; CP 119-22.

E. The Yakama Nation Filed its Motion to Vacate While the County's Legally-Mandated Process for Adopting a New Comprehensive Plan and Zone Code Was Underway.

On July 10, 2019, the Yakama Nation filed the Motion to Vacate that is the subject of its current appeal, arguing that the County had "failed to meet the conditions" of the Stipulated Dismissal Order, and seeking to hold the County in contempt of court. See CP 258-72. These allegations will be discussed below.

On July 17, 2019, the County published a DEIS for the Comprehensive Plan, and this initiated a comment period through September 3, 2019. CP 103, ¶ 44. On July 22, 2019, the Planning

[5] Aspect Consulting used grant money obtained from the Washington Department of Ecology ("WDOE") to create a system for the watershed council and the County for tracking the use of the remaining 2CFS reserve in WRIA 48. CP 101-1., ¶ 42. Regarding work the County had done toward implementing a county-wide online public permit tracking system, the County represented that the planning department created a template and a database, but it was not available online to date. CP 178, n. 4. The County stated that it had applied for grant money from WDOE for funds to assist with entering the data into the database. *Id.*

Commission received an update on the Comprehensive Plan and DEIS. *Id.* At the Planning Department study session on July 22, 2019, the BOCC reviewed an ordinance that, if approved, would reduce the size of the neighborhood commercial zone surrounding unincorporated towns within the County. CP 103, ¶ 45. The effect of the ordinance would be to reduce allowed density, consistent with the County's ongoing efforts to conserve the available water supply. *Id.*

A public hearing on the Comprehensive Plan and DEIS was scheduled with the Planning Commission on August 19, 2019 with the goal of completing public hearings during August of 2019. CP 103, ¶ 44. The Planning Commission set aside September and October 2019 for its deliberations. *Id.* It was anticipated that when the Planning Commission completed its review, including the selection of a preferred alternative and crafting amendments to the Comprehensive Plan and land use designation maps consistent with the alternative chosen, the Final Environmental Impact Statement ("FEIS") would be prepared, and the revised draft of the Comprehensive Plan and FEIS would be transmitted to the BOCC for its review. CP 103, ¶ 44. The County anticipated — and so informed the trial court — that the new Comprehensive Plan would be adopted by the end of 2019 or early in 2020. *Id.* See also, CP 179. The County further explained that adoption of an interim Zone Code consistent with the revised Comprehensive Plan would follow shortly thereafter, with subsequent review of the Zone Code by the Planning Commission to follow. *Id.*

F. The County Diligently Pursued the Review Process Required by the Stipulated Dismissal Order.

As described above, the County has given serious consideration to the issues raised by the Yakama Nation concerning the development of a new Comprehensive Plan and in the other actions outlined above. CP 104, ¶ 46. The County met with representatives of the Yakama Nation on at least two occasions (4/23/18 and 4/2/19) to learn about its concerns and has exchanged correspondence with its representatives explaining in detail how the County had already or intended to respond to the specific policies proposed by the Yakama Nation. *Id.* The County also responded to the concerns and specific proposals offered by the Methow Valley Citizens Council and members of the public. CP 104, ¶ 46. As described above, the BOCC adopted numerous changes to the draft Comprehensive Plan in response to these concerns. *Id.* The County also adopted a series of new ordinances imposing interim land use controls to restrict further development, pending adoption of a final Comprehensive Plan. *Id.* These interim controls have furthered the goals expressed by the Yakama Nation regarding the preservation of natural resources. *Id.*

In part as a result of all of these efforts, the County did not meet the deadline of December 31, 2018 to adopt a new Comprehensive Plan and new Zoning Ordinance, including new zoning maps. CP 104-5, ¶ 47. However, as outlined above, the County furnished abundant and undisputed evidence that it has worked diligently toward achieving these goals as quickly as reasonably possible, consistent with applicable law, the County's finite resources with respect to budget and staffing, and its duty to seek and

respond to public comments, including the extensive comments and input furnished by the Yakama Nation. *Id.* No County official, agent or employee has sought to impede the County's progress in accomplishing the tasks set forth in the Stipulated Dismissal Order or otherwise acted with the intent of disobeying the trial court. *Id.* The Yakama Nation has failed to furnish any such evidence.

G. The Yakama Nation Moved to Vacate the Stipulated Dismissal Order and Then for Reconsideration of the Trial Court's Denial of its Motion.

On August 12, 2019, the trial court heard argument from the parties on the Yakama Nation's Motion to Vacate and denied the motion. CP 239-40; RP 3-33. On August 22, 2019, the Yakama Nation moved for reconsideration pursuant to CR 59. See CP 143-59. On September 18, 2019, the trial court heard oral argument and entered an order denying the motion for reconsideration. CP 237-8; RP 34-73. This appeal followed.

IV. ARGUMENT

A. Summary of Argument.

The Yakama Nation asserts a single assignment of error in this appeal. This assignment is premised on the assumption that the sole basis for the trial court's denial of its Motion to Vacate was a ruling that it lacked jurisdiction. The Yakama Nation thus frames the issue on appeal as follows: "Does a court retain jurisdiction to enforce its own orders after dismissal when the terms of the order are unquestionably violated?" BOA, p. 5.

The Yakama Nation's assignment of error misses the mark. The trial court expressly informed counsel on the record that it believed it had

jurisdiction to consider the Yakama Nation's motions, both its original Motion to Vacate and the Motion for Reconsideration: "Your issue you're raising is does this Court -- have jurisdiction. I think the Court has jurisdiction to consider your motions as such." RP 71:14-16. The trial court went on to explain that the basis for its ruling was the Yakama Nation's failure to establish a proper basis to grant its Motion to Vacate: "Again, the Court is denying that based on the Civil Rules, as such, that you have not established a basis for which the Court can grant your motion, as such." RP 71:17-20. In the hearing on the Yakama Nation's Motion for Reconsideration, the trial court repeatedly clarified that the basis for its ruling was the lack of a "justiciable" issue in the underlying litigation. See RP 64:15, 67:7, 68:8, 70:10.

RCW 4.72.050 sets forth certain conditions precedent to vacating a judgment, including that "if the plaintiff seeks its vacation, that there is a valid cause of action." (Emphasis added.) Construing this condition precedent, the Washington Supreme Court held: "the statute contemplates an adjudication that a meritorious cause of action exists, before the judgment can be vacated. We held, in effect, that the petitioner could not rely upon the allegations in the original complaint to establish negligence, but must make an independent showing of facts which would entitle him to relief." *Haller*, 89 Wn.2d at 549 (emphasis added), citing *Handley v. Mortland*, 54 Wn.2d 489, 496-97, 342 P.2d 612, 616 (1959).

Here, the trial court did not simply rule that it lacked "jurisdiction" to "enforce" the Stipulated Dismissal Order. Rather, the trial court made

the "adjudication," as required under RCW 4.72.050 and *Haller,* that the underlying cause of actions were not, at that time, "valid" and "meritorious." The trial court found that the "enforcement" sought by the Yakama Nation would amount to an order for the County to continue what it was already doing, and that this "lack of an appropriate remedy" was "probative -- of the fact that the claim was not justiciable until the County decided its [zoning] classifications." RP 64:9-11, citing *Save Our Scenic Area & Friends of the Columbia Gorge v. Skamania Cty*., 183 Wn.2d 455, 468-69, 352 P.3d 177, 183 (2015). The trial court correctly reasoned that once the County has "decided its comprehensive plan or the County establishes zoning ordinances. Only then does it really arise to a justiciable issue." RP 64:13-15.

B. Standard of Review.

"A motion to vacate a judgment is to be considered and decided by the trial court in the exercise of its discretion, and its decision should be overturned on appeal only if it plainly appears that it has abused that discretion." *Haller*, 89 Wn.2d at 549, citing *Martin v. Pickering*, 85 Wn.2d 241, 533 P.2d 380 (1975). The judgment of the trial court will not be reversed where it can be sustained on any theory supported by the record, including grounds not articulated by trial court. *Wright v. Colville Tribal Enter. Corp*., 159 Wn.2d 108, 118, 147 P.3d 1275, 1281 (2006), citing *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998).

C. The Yakama Nation's Assignment of Error is Premised on a "Jurisdictional" Argument That the Trial Court Did Not Adopt.

The Yakama Nation has framed a single, narrow issue on appeal: whether a trial court retains "jurisdiction" to enforce a settlement agreement that is "reduced to a court order." BOA, p. 8. Per the Yakama Nation, the trial court's decision to deny the Motion to Vacate was "based on *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009)," and the trial court also relied on *State v. Taylor*, 150 Wn.2d 599, 602, 80 P.3d 605 (2003). BOA, p. 8, 10, citing RP 28. According to the Yakama Nation, the trial court erroneously concluded from these authorities that a voluntary dismissal does not result in a "final judgment," and such a dismissal leaves the parties "as if the action had never been brought." BOA, p. 9, citing *Kraft*, 165 Wn.2d at 492. From there, the Yakama Nation contends that the trial court's ruling amounts to a pronouncement that the Stipulated Dismissal Order was a "nullity" and the trial court had no "jurisdiction" to enforce it. BOA, p. 12-13.

The Yakama Nation's argument is misguided insofar as it relies exclusively on certain cases admittedly cited by the trial court, while conveniently ignoring the full scope of the trial court's reasoning in denying the Yakama Nation's Motion to Vacate and subsequent Motion for Reconsideration. It also mischaracterizes the trial court's ruling as based on a determination as to the trial court's "jurisdiction" to adjudicate the Yakama Nation's motions. Because the trial court's ruling can be affirmed based on any grounds appearing in the record, even including grounds not articulated by the trial court, (see *Wright v. Colville Tribal Enter. Corp.*,

supra), the Yakama Nation's decision to cherry-pick from the trial court's oral rulings while ignoring the remainder is at least misguided, if not frivolous. Having committed itself to one narrow issue in this appeal, the Yakama Nation is foreclosed from raising further issues on reply. RAP 10.3(c). "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Accordingly, it is too late for the Yakama Nation to assign error to the justicability rationale for the trial court's decision.

In addition to cherry-picking from the trial court's oral rulings, the Yakama Nation omitted the substance of the trial court's reasoning regarding the "jurisdiction" issue. Contrary to the position of the Yakama Nation, the trial court expressly stated that it *had jurisdiction* to consider the merits of the Yakama Nation's Motion to Vacate and subsequent Motion for Reconsideration:

> Your issue you're raising is does this Court -- have jurisdiction. I think the Court has jurisdiction to consider your motions as such. You're asking to set it aside. Again, the Court is denying that based on the Civil Rules, as such, that you have not established a basis for which the Court can grant your motion, as such.

RP 71:14-20 (emphasis added). Thus, the trial court clarified that it had "jurisdiction" to consider the Motion to Vacate, and was denying it on the merits, *i.e.*, because "you have not established a basis for which the Court can grant your motion." *Id.*

The Yakama Nation's sole assignment of error is based on a position regarding jurisdiction that was rejected by the trial court: "Does a court retain jurisdiction to enforce its own orders after dismissal when the terms of the order are unquestionably violated? (Assignment of Error 1)." BOA, p. 5. The trial court did not assert that the Motion to Vacate was not within its "jurisdiction to consider": "I think the Court has jurisdiction to consider your motions as such." RP 71:15-16. Rather, the trial court couched its decision in the Yakama Nation's failure to "establish[] a basis for which the Court can grant your motion." RP 71:19-20. Thus, the Yakama Nation's sole assignment of error misses the mark by attempting to ascribe to the trial court a jurisdictional rationale that it expressly rejected.

The trial court's stated reason for denying the motion was not jurisdictional, but merits-based: "the Court is denying [the motion] based on the Civil Rules, as such, that you have not established a basis for which the Court can grant your motion." RP 71:17-20. Specifically, the trial court explained that it had found a lack of a "justiciable" issue.

The trial court noted that the deadline for repeal and replacement of the Comprehensive Plan and Zone Code under the Stipulated Dismissal Order had passed. RP 63:25-64:1 ("I think the County has already admitted that that deadline has passed"). However, the trial court reasoned that this event, of itself, did not in this instance necessarily give rise to a justiciable controversy, given that the only remedy would be to order the County to do what it was already doing. The trial court cited the Washington Supreme Court's ruling in *Save Our Scenic Area & Friends of the Columbia Gorge*

v. Skamania Cty., 183 Wn.2d 455, 468-69, 352 P.3d 177, 183 (2015), where a county was in the process of updating its zoning ordinance, as follows:

> . . . the County submitted the -- Save our Scenic Area v. Skamania County case, 182 Wn. 455, it's a 2015 case and they - - they talk, in terms of that case, that – that there's -- appears at this point that there's a lack of appropriate remedy. That it has, as indicated, probative -- of the fact that the claim was not justiciable until the County decided its classifications.

RP 64: 3-11 (emphasis added). The trial court here paraphrased the following reasoning of the Washington Supreme Court regarding the "lack of appropriate remedy" or a "justiciable" claim pending the county's adoption of a final zoning ordinance:

> The only remedy available had the suit been brought in 2007 would have been a court order to update the ordinances—the very process that the County declared numerous times that it was already undertaking. This lack of appropriate remedy is probative of the fact that this claim was not justiciable until the County decided the "unmapped" classifications were final.

Skamania Cty., 183 Wn.2d at 469 (emphasis added).

The trial court went on to reason that the process that the County was engaged in was "legislative" and that it would be inappropriate for a court to interfere: "It's a process that I don't think the Court can interfere, in a sense, with the legislative process here." RP 64:19-21:

> The Court doesn't write the comprehensive plan for Okanogan County. The Court doesn't write the zoning ordinance; that's the legislative process. Can this Court order them to do it? That – would interfere, I think, with the review process.

RP 65:4-8. The trial court noted that the Yakama Nation had been given the "opportunity to participate and to have comments" and that the review process was ongoing, such that there was not a justiciable controversy pending adoption of a final plan and zoning ordinance:

> That gave . . . Yakama Nation the opportunity to participate and to have comments, as such. And then the County is in that reviewing process. And so, I'm finding that at this time that there's no justiciable issue as the County has not, at this point, reached a final decision as to those various comprehensive - zoning or otherwise, those plans.

RP 67:3-10 (emphasis added). Again, the trial court reiterated that the controversy would be justiciable once public comment had been completed and the zoning ordinances were finalized: "that's when it's justiciable, from the Court's point of view." RP 68:8-9.

At the close of the hearing, counsel for the Yakama Nation asked for clarification of the trial court's ruling "for the record, for purposes of appeal." RP 69:12-13. Counsel for the Yakama Nation acknowledged that the trial court had found a lack of justiciable issues in light of the County's ongoing process: "I believe you just indicated you found there is no justiciable issues as the County has not reached a final decision as to its ongoing process. That -- that's clear enough." RP 69:15-18. Counsel for the Yakama Nation then asked the trial court if it was also "finding the Court has no jurisdiction to vacate this case, given that it's a dismissal without prejudice?" RP 69: 21-23.

The trial court noted that cases cited by the Yakama Nation, such as *Condon v. Condon*, 177 Wn.2d 150, 298 P.3d 86 (2013), were distinguishable insofar they involved settlements which were final, whereas here the County was engaged in an ongoing process: "There appeared to be finality in those cases and which then I don't see that we have here finality, as such. The County is involved in ongoing rule making and -- and -- ordinances procedure and they have not arrived at a final ordinance, as such." RP 71:1-5. The trial court then expressly addressed the question of jurisdiction and explained that it did, in fact, have "jurisdiction to consider your motions," but was denying them because "you have not established a basis for which the Court can grant your motion." RP 71:14-20. In short, the Yakama Nation is now raising as the sole ground for its appeal a "jurisdictional" rationale for the trial court's denial of its Motion to Vacate that was not adopted and was indeed expressly rejected by the trial court.

D. The Yakama Nation's Appeal is Moot Because This Court Cannot Provide Effective Relief.

It is well-settled that Washington appellate courts will not address moot questions. *Norman v. Chelan County Pub. Hosp. Dist. No. 1*, 100 Wn.2d 633, 635, 673 P.2d 189 (1983), quoting *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). "An appeal is moot where it presents 'purely academic' questions and where 'the court cannot provide the basic relief originally sought, or can no longer provide effective relief.'" *Gronquist v. Dep't of Corr.*, 177 Wn. App. 389, 401, 313 P.3d 416, 422 (2013), quoting *IBF, LLC v. Heuft*, 141 Wn. App. 624, 630-31, 174 P.3d 95

(2007) (citations and internal quotation marks omitted). Here, as found by the trial court, the courts cannot provide "effective relief" because the relief sought by the Yakama Nation through its Motion to Vacate is to order the County to continue to do what it is already in the process of doing, to wit, to repeal and replace its Comprehensive Plan and Zone Code. The Washington Supreme Court has rejected this form of judicial intervention in the planning and zoning process, and described precisely the scenario presented by this case as lacking an "appropriate remedy":

> The only remedy available had the suit been brought in 2007 would have been a court order to update the ordinances—the very process that the County declared numerous times that it was already undertaking. This lack of appropriate remedy is probative of the fact that this claim was not justiciable until the County decided the "unmapped" classifications were final.

Skamania Cty., 183 Wn.2d at 469 (emphasis added). Because there is no "appropriate remedy," the Yakama Nation's appeal is moot.

E. The Trial Court's Ruling Based on the Lack of a Justiciable Controversy was Correct.

RCW 4.72.050 sets forth certain conditions precedent to vacating a judgment, including that "if the plaintiff seeks its vacation, that there is a valid cause of action." (Emphasis added.) Construing this condition precedent, the Washington Supreme Court held: "the statute contemplates an adjudication that a meritorious cause of action exists, before the judgment can be vacated. We held, in effect, that the petitioner could not rely upon the allegations in the original complaint to establish negligence, but must make an independent showing of facts which would entitle him to

relief." *Haller*, 89 Wn.2d at 549 (1978) (emphasis added), citing *Handley*, 54 Wn.2d at 496-97.

Here, the trial court correctly determined that the Yakama Nation failed to make this showing, *i.e.*, that the Yakama Nation had failed to show that "justiciable controversy" existed for resolution by the court. At minimum, the trial court did not abuse its discretion in so ruling.

The Yakama Nation's Complaint challenges County's 2016 Zone Code and Zone Code Map and its supporting environmental documents, *i.e*., the draft and final environmental impact statements (DEIS and FEIS), for allegedly violating three statutes: the PEA, GMA and SEPA. CP 18-23. Each of the Yakama Nation's six causes of action seeks the same judicial determination that these statutes were violated. *Id.* It is well-settled that no determination of a violation can be made under these statutes before the challenged regulations are finalized. Accordingly, because the County is currently revising its Comprehensive Plan and Zone Code, the trial court correctly ruled that there is no justiciable controversy for resolution.

F. There is No Justiciable Controversy Under the PEA, GMA or SEPA Pending Adoption of a Final Zoning Ordinance.

There is no justiciable controversy under the PEA where a county is in the process of updating its zoning ordinance. For example, in *Save Our Scenic Area & Friends of the Columbia Gorge v. Skamania Cty*., 183 Wn.2d 455, 468-69, 352 P.3d 177, 183 (2015), cited by the trial court, the plaintiff alleged that Skamania County had failed "to ensure consistency between its 1986 zoning ordinance and its 2007 [Comprehensive] Plan," in violation of

the PEA. The Washington Supreme Court ruled that a justiciable challenge to the zoning ordinance did not exist until adoption of the final ordinance because "only final decisions are appealable." *Id*. at 468-69. The court held that there was no justiciable controversy pending adoption of final regulations, a fact that was underlined by the lack of an "appropriate remedy," *i.e.*, that the court could only order the county to do what it was already doing, *i.e.*, to update the existing ordinances:

> Now the County claims that SOSA should have nevertheless filed suit earlier, demanding an update to these areas while the County was in the midst of making those very same updates. The problem with this argument is that had SOSA brought the claim in 2007, the County could have successfully argued that the "unmapped" zones were only placeholders while the County completed the update process and that no inconsistency existed until those zones were adopted as final development regulations. The only remedy available had the suit been brought in 2007 would have been a court order to update the ordinances—the very process that the County declared numerous times that it was already undertaking. This lack of appropriate remedy is probative of the fact that this claim was not justiciable until the County decided the "unmapped" classifications were final.

Skamania Cty., 183 Wn.2d at 469 (emphasis added). The Washington Supreme Court thus affirmed that no "appropriate remedy" or "justiciable" claim exists under the PEA until a county adopts final zoning regulations. Accordingly, the trial court was correct in ruling that Yakama Nation did not have a "valid" or "meritorious" claim based on an alleged violation of the PEA.

Similar to the justiciability analysis under the PEA, courts have ruled that under the GMA, where a county did not meet a deadline to revise its comprehensive plan, the court was unable to provide effective relief. In *Summit-Waller Cmty. Ass'n v. Pierce Cty.,* the county had failed to revise its Comprehensive Plan by a certain deadline, and the court ruled that the issue was moot. "A case is moot if a court can no longer provide effective relief." *Summit-Waller Cmty. Ass'n v. Pierce Cty.*, 2019 Wash. App. LEXIS 305, at *38-39 (Ct. App. Feb. 6, 2019)(unpublished), quoting *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). "The Communities do not argue that the Board can still provide effective relief for the County's failure to review and revise its Comprehensive Plan by the deadline." *Id.* Here, similarly, the Yakama Nation failed to explain how the trial court could provide "effective relief," given that, as in *Skamania Cty.*, the only remedy would be for the trial court to order the County to undertake "the very process that the County declared numerous times that it was already undertaking." *Skamania Cty, supra.* The trial court's ruling that the Yakama Nation's challenge to the Zone Code, to the extent premised on the GMA, was not justiciable, was correct.

Finally, to the extent the Yakama Nation's underlying claims are premised on an alleged violation of SEPA, these too are not justiciable until final regulations are adopted. The Washington Supreme Court's position on this question is unequivocal: "Even though administrative review of threshold determinations may be allowed prior to final agency action, interlocutory judicial review of SEPA compliance never is permitted."

State ex rel. Friend & Rikalo Contractor v. Grays Harbor Cty., 122 Wn.2d 244, 250-51, 857 P.2d 1039, 1043 (1993), quoting R. Settle, *The Washington State Environmental Policy Act* § 20, at 244-45 (1993). The Washington Supreme Court explained that this limitation on judicial review serves three important purposes: "the purposes of the linkage requirement are to: [1] preclude judicial review of SEPA compliance before an agency has taken final action on a proposal, [2] foreclose multiple lawsuits challenging a single agency action and [3] deny the existence of 'orphan' SEPA claims unrelated to any government action." *Id.*

In a factually-similar case, the court ruled that the plaintiff's SEPA challenge to a zoning ordinance that was subsequently repealed was moot. The court ruled that judicial review of "SEPA compliance is precluded until an agency has taken final action on a proposal," because "[j]udicial review under SEPA shall without exception be of the governmental action together with its accompanying environmental determinations":

> The principal public policy of SEPA is to provide decision makers and the public with information about potential adverse impacts of a proposed action. *Save Our Rural Env't v. Snohomish County*, 99 Wn.2d 363, 371-72, 662 P.2d 816 (1983). A "recurring theme of the SEPA appeal statute is the insistence on 'linkage' between SEPA claims and the government action subject to SEPA." *State v. Grays Harbor County*, 122 Wn.2d 244, 249, 857 P.2d 1039 (1993). SEPA does not create a cause of action unrelated to a specific governmental action. RCW 43.21C.075(1). "Judicial review under SEPA 'shall without exception be of the governmental action together with its accompanying environmental determinations.'" *Int'l Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 519, 309 P.3d

> 654 (2013) (quoting RCW 43.21C.075(6)(c)). Consequently, judicial review of an agency's SEPA compliance is precluded until an agency has taken final action on a proposal. *Int'l Longshore & Warehouse Union, Local 19*, 176 Wn. App. at 519; *Grays Harbor County*, 122 Wn.2d at 251.

Friends of the White Salmon River v. Klickitat Cty., 2015 Wash. App. LEXIS 2217, at *8 (Ct. App. Sep. 15, 2015, at *8 (emphasis added; unpublished). See also *Conserv. Nw. v. Okanogan Cty.*, No. 33194-6-III, 2016 Wash. App. LEXIS 1410, at *65-66 (Ct. App. June 16, 2016)("SEPA demands that any '[j]udicial review . . . shall without exception be of the governmental action together with its accompanying environmental determinations.' RCW 43.21C.075(6)(c).")(unpublished).

In short, examination of the substantive statutory bases for the Yakama Nation's Complaint herein — the PEA, GMA and SEPA — reveals that where, as here, the regulations subject to challenge for alleged violation of these statutes are in the process of review and replacement, or have not yet been adopted in final form, none of these statutes admit of interlocutory judicial review. Otherwise stated, there is no justiciable controversy because no final regulations exist and thus the controversy is not ripe, nor can a court provide effective, final relief. Because the Yakama Nation's underlying claims are not justiciable, a condition precedent for vacating a judgment and proceeding with the underlying claims — a valid and meritorious cause of action under RCW 4.72.050 — is not satisfied. The trial court did not abuse its discretion in so ruling.

G. The Yakama Nation's Causes of Action Fail for Several Additional Reasons.

As explained above, the Yakama Nation sought the same relief for alleged violation of the PEA, GMA and SEPA through all six of its causes of action and the trial court correctly found that claims based on alleged violations of those statutes were not justiciable. This is so regardless of the specific cause of action used to bring the alleged violation before the trial court. Additionally, the specific causes of action pleaded by the Yakama Nation were lacking in validity — and thus a condition precedent to vacation pursuant to RCW 4.72.050 was not satisfied — for several additional, separate reasons.

Regarding the Yakama Nation's first cause of action for an alleged violation of LUPA, a LUPA claim is moot where the challenged land use decision has been rescinded. For example, where a party sought reversal of a decision upholding the defendant city's stop-work orders against its condominium project, but the orders were rescinded by the time the matter was heard, the court ruled that the case was moot: "A case is moot if a court can no longer provide effective relief." *Harbor Lands, LP v. City of Blaine,* 146 Wn. App. 589, 592, 191 P.3d 1282, 1284 (2008), quoting *Orwick*, 103 Wn.2d at 253. Here, similarly, a court cannot provide "effective relief" because the County is already complying, as expeditiously as possible, with the requirements of the Stipulated Dismissal Order and will rescind the existing Comprehensive Plan and Zone Code in due course, when their replacements have been determined.

Moreover, LUPA applies to specific "land use decisions," not general land use ordinances. See RCW 36.70C.020(2). "'Land use decisions' are applications, interpretive or declaratory decisions, and enforcement of certain ordinances." *Conserv. Nw. v. Okanogan Cty.*, No. 33194-6-III, 2016 Wash. App. LEXIS 1410, at *61-62 (Ct. App. June 16, 2016), citing *Chelan County v. Nykreim*, 146 Wn.2d, 904, 927, 52 P.3d 1 (2002)(other citations omitted). Thus, for example, this Court ruled that LUPA had no application to an Okanogan County ordinance regarding use of county roads: "No one applied for a project permit or governmental approval of use of his or her property. CNW challenges the adoption of an ordinance, not the enforcement of an ordinance concerning someone's use of property." *Id.* Because the Yakama Nation here challenges "the adoption of an ordinance" generally, as opposed to "the enforcement of an ordinance concerning someone's use of property," LUPA does not apply.

As to the Yakama Nation's five causes of action that are pleaded in the alternative to its LUPA claim — for a statutory or constitutional declaratory judgment and for statutory or constitutional writs of review or certiorari (CP 19-22) — the requirement of a justiciable controversy equally applies. "[A] 'justiciable controversy' must exist before a court's jurisdiction may be invoked." *DiNino v. State*, 102 Wn.2d 327, 330, 684 P.2d 1297 (1984), citing *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). A "justiciable controversy" is

> (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant,

> hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

DiNino v. State, 102 Wn.2d at 330-31, citing *Clallam Cy. Deputy Sheriff's Guild v. Board of Clallam Cy. Comm'rs*, 92 Wn.2d 844, 848, 601 P.2d 943 (1979). "Put another way, a claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual development, and the challenged action is final." *Neighbors & Friends v. Miller*, 87 Wn. App. 361, 382-83, 940 P.2d 286, 297-98 (1997), citing *First Covenant Church v. City of Seattle*, 114 Wn.2d 392, 400, 787 P.2d 1352 (1990), adhered to on remand, 120 Wn.2d 203, 840 P.2d 174 (1992).

> The rationale for the requirement of a justiciable controversy is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and to protect agencies from judicial interference until an administrative decision has been finalized.

Miller, 87 Wn. App. at 383, citing *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). In short, the requirement of justicability avoids premature judicial intervention. A claim is justiciable once the challenged action is final, such that the issues raised are primarily legal and do not require further factual development.

For example, where the plaintiff brought a constitutional challenge to the GMA and a county-wide planning ordinance adopted pursuant to that statute, but "no comprehensive plan affecting anyone's legal rights had yet

been adopted," the court reasoned that no justiciable controversy was presented: "A mere disagreement that is speculative or that cannot be conclusively resolved does not present a justiciable issue and therefore is subject to dismissal." *Postema v. Snohomish Cty.*, 83 Wn. App. 574, 579-80, 922 P.2d 176, 179-80 (1996)(citations omitted).

Similarly, in this case, at the time of the trial court's ruling the County had not yet adopted a new comprehensive plan and zone code, but was then engaged in developing these pursuant to the Stipulated Dismissal Order. The trial court did not abuse its discretion in finding that no justiciable controversy existed at that juncture, and accordingly that vacation was not warranted.

H. The Authorities Cited by the Yakama Nation Are Inapposite Because They Involve Disagreements Regarding the Parties' Obligations or Bad Faith Noncompliance.

The cases relied upon by the Yakama Nation are distinguishable and fail to address the justiciability rationale stated by the trial court. Additionally, the Yakama Nation fails to address the specific grounds for vacatur it cited below, to wit CR 60(b)(6) and (11). Moreover, the Yakama Nation fails to argue or prove that it has demonstrated "an extraordinary circumstance that justifies vacature," a burden that it must carry, as the Yakama Nation conceded in briefing to the trial court. See BOA, p. 261 (citing cases).

The Yakama Nation places primary reliance on *Condon v. Condon*, 177 Wn.2d 150, 154-55, 298 P.3d 86 (2013) (see BOA, p. 13-15), but that case did not involve a party undertaking ongoing efforts to comply with a

stipulated dismissal order. Instead, the parties disagreed about the plaintiff's obligations under a CR 2A settlement agreement, specifically, whether she was required to sign a release.[6] Similarly, in *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (cited at BOA, p. 14), the parties also disagreed about the scope of their obligations: "the parties disagreed on petitioner's obligation to return certain files to respondent under the settlement agreement." Likewise, in *Blair v. Chalich*, 135 Wn. App. 1034 at *1. (2006) (unpublished; cited at BOA, p. 17), the parties failed to finalize the terms of an anticipated settlement agreement: "The parties agreed Lawrence was to receive an interest in the Liberty Lake property, but they could not agree as to development costs allocation and negotiations stalled." Again, similarly, in *In re Marriage of Thurston*, 92 Wn. App. 494, 503, 963 P.2d 947 (1998) (cited at BOA, p. 17), the parties disagreed regarding the parties' obligations under a decree of marital dissolution. The former husband disagreed with the former wife's position that he was required to convey certain partnership units promptly, instead stating that the transfer could occur at some unspecified "future time." Finally, *Keeling v. Sheet Metal Workers Int'l Ass'n, Local Union 162*, 937 F.2d 408, 410 (9th Cir. 1991)(cited at BOA, p. 17) is distinguishable because "extraordinary circumstances" warranting

[6] Additionally, the court's discussion of vacating a dismissal order prior to enforcing a settlement agreement was made in passing and did not form the basis for its decision: "Assuming, however, that the process that the trial court followed was adequate, we nevertheless find the court improperly implied additional terms into the agreement, as discussed below." *Id.* at 161.

vacation were present as a result of the Keelings' "bad faith noncompliance" with a settlement agreement. Here, there is no evidence of a disagreement regarding the County's obligations (as in *Condon*, *Kokkonen*, *Blair* or *Thurston*) or "bad faith noncompliance" (as in *Keeling*). Accordingly, the authorities cited by the Yakama Nation miss the mark and do not establish that "extraordinary" or "exceptional" circumstances (see BOA, p. 17) exist in this case warranting vacatur.

I. Considerations of Equity and Public Policy Do Not Favor the Yakama Nation.

The Yakama Nation's brief concludes with two short sections contending that the trial court's decision not to vacate the Stipulated Dismissal Order was inequitable and contrary to public policy. BOA, p. 19-21.

As an initial matter, the Yakama Nation again fails to acknowledge the justiciability rationale articulated by the trial court and instead focuses on a putative lack of "jurisdiction," claiming that the trial court "not only perpetuated an unfair result, it is, in effect, punishing the Yakama Nation for entering into the Stipulation in good faith, trusting Okanogan County to comply with a court orders, and agreeing to any dismissal of its actions." BOA, p. 19. This argument ignores the trial court's uncontested finding that the County's efforts to repeal and replace the Comprehensive Plan and Zone Code (1) were "serious," (2) had afforded the Yakama Nation and members of the public the opportunity to participate, and (3) were ongoing. See discussion *supra.* Accordingly, it is not evident how the Yakama

Nation was allegedly "punished" by the trial court's decision to allow this process to continue. The Yakama Nation argues that "the Superior Court should have exercised its jurisdiction to vindicate its authority and require compliance with its lawful order." BOA, p. 15. However, it is unclear what equitable principle or public policy objective would have been furthered by ordering the County to continue doing what it was already doing. It is also unclear how considerations of equity or public policy could render a non-justiciable controversy justiciable.

The Yakama Nation's only citations to authority with respect to equitable or public policy considerations are cases where vacation was sought under CR 60(b)(1) regarding "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." See BOA, p. 19, citing *Griggs v. Averbeck Realty,* 92 Wn.2d 576, 581-82, 599 P.2d 1289, 1292 (1979)(vacation of a default judgment); *Vaughn v. Chung*, 119 Wn.2d 273, 283-84, 830 P.2d 668, 673 (1992) (vacation of a dismissal entered pursuant to CR 41(b)(2) for want of prosecution). The Stipulated Dismissal Order at issue here was neither a default judgment (as in *Griggs*) nor a dismissal for want of prosecution (as in *Vaughn*). Moreover, the Yakama Nation originally sought vacation under CR 60(b)(6) or (11). See CP 261. Accordingly, these cases decided under CR 60(b)(1) miss the mark.

As explained above, the concept of justiciability already incorporates considerations of public policy, specifically the prevention of premature judicial intervention before a controversy is mature and the court

can provide effective, final relief. The trial court's decision not to vacate the Stipulated Dismissal Order while the County was still engaged in developing a new Comprehensive Plan and Zone Code was consistent with these principles.

J. Request for Award of Fees.

RAP 18.9(a) "permits an appellate court to award a party attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appellate action." *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 170 Wn.2d 577, 578, 245 P.3d 764 (2010). "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal." *Id.* For example, where a party's arguments "lack merit, rely on a misunderstanding of the record, require a consideration of evidence outside the record, or are not adequately briefed," the appeal was frivolous. *Stiles v. Kearney*, 168 Wn. App. 250, 268, 277 P.3d 9, 17 (2012).

Here, similarly, the Yakama Nation's arguments on appeal lack merit and are based on a willful "misunderstanding" of the record, specifically a selective and misleading representation of the trial court's oral rulings. The Yakama Nation has devoted its entire appeal to the proposition that the trial court based its decision on a putative lack of "jurisdiction to enforce its own orders after dismissal when the terms of the order are unquestionably violated." BOA, p. 5. But counsel for the Yakama Nation

conceded on the record that the basis for the court's decision was the lack of a justiciable controversy: "I believe you just indicated you found there is no justiciable issues as the County has not reached a final decision as to its ongoing process. That -- that's clear enough." RP 69:15-18. The trial court then expressly addressed the question of jurisdiction and explained that it did have "jurisdiction to consider your motions," but was denying because "you have not established a basis for which the Court can grant your motion." RP 71:14-20. The Yakama Nation's opening brief fails to assign error to the basis for the trial court's decision with respect to justicability. Because the legal basis of the trial court's ruling was made "clear enough," and the Yakama Nation unaccountably failed to challenge it, there is "no reasonable possibility of reversal." Accordingly, the Yakama Nation's appeal is frivolous and an award of fees is warranted pursuant to RAP 18.9(a).

V. CONCLUSION

For all of the foregoing reasons, the Yakama Nation has failed to establish that the trial court abused its discretion. The County respectfully requests that the Court affirm its orders denying the Yakama Nation's Motion to Vacate and Motion for Reconsideration and award the County its fees in responding to the instant appeal.

DATED this 13th day of April, 2020.

KARR TUTTLE CAMPBELL

/s/ J. Derek Little
J. Derek Little, WSBA #40560
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that on this day I caused to be served the foregoing document to:

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

DATED this 13th day of April, 2020, at Seattle, Washington.

s/Jan Likit
Jan Likit
Litigation Legal Assistant

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April 13, 2020 - 2:30 PM

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