

No. 70542-3-I

WASHINGTON STATE COURT OF APPEALS,
DIVISION I

POTALA VILLAGE KIRKLAND, LLC, *et al.*,

Plaintiffs/Respondents,

vs.

CITY OF KIRKLAND,

Defendant/Appellant.

**BRIEF OF *AMICI CURIAE* WASHINGTON STATE
ASSOCIATION OF MUNICIPAL ATTORNEYS
AND FUTUREWISE**

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*“While it originated at common law, the vested rights doctrine is now statutory.”*¹

*“[T]his Court will not extend the vested rights doctrine by judicial expansion.”*²

Washington’s common law vested rights doctrine is dead, replaced by a purely statutory doctrine. This case presents an opportunity to echo that message and manifest it by ruling that Washington’s vesting statutes supersede a forty-year-old case extending the common law doctrine to shoreline permit applications.³

I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amicus curiae Washington State Association of Municipal Attorneys represents attorneys who advise and defend local governments. *Amicus curiae* Futurewise is a statewide nonprofit organization working to ensure local governments manage growth responsibly. *Amici* seek to foster clarity in Washington’s often muddled vested rights doctrine.

II. STATEMENT OF THE CASE

Amici rely on the statement of the case in Appellant City of Kirkland’s Opening Brief.

¹ *Town of Woodway v. Snohomish County*, _ Wn.2d _, 2014 WL 1419187 *3 (2014).

² *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 280, 943 P.2d 1378 (1997).

³ *See Talbot v. Gray*, 11 Wn. App. 807, 811, 525 P.2d 801 (1974).

III. ARGUMENT

A. Washington's unique, developer-friendly approach to vested rights.

“Vesting” refers generally to a developer’s ability to freeze in time the law governing a particular land use project.⁴ The vested rights doctrine balances a developer’s interest in a predictable regulatory and construction process against the public’s interest in limiting uses and developments inconsistent with current law.⁵

Vesting rules vary across the nation.⁶ Washington rejects the majority rule and adopts a unique approach among “the most protective of developer’s rights.”⁷ Washington focuses early in the development process, speaking in terms of a vested right to freeze, on a “date certain,” the law applicable to a decision on a particular land use permit application.⁸ Coupled with Washington’s strong doctrine of finality, which

⁴ 4 Patricia E. Salkin, *American Law of Zoning*, § 32:2 (5th ed. 2013).

⁵ See *id.*; *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251, 218 P.3d 180 (2009).

⁶ See Salkin §§ 32:1 – 32.11. Most states employ an equitable test allowing government to impose new law on a project long after issuing a building permit: “[T]he general majority rule is that a vested right exists when a building permit has been issued by the municipality, substantial construction or expenditures in reliance on the building permit are in evidence, and the landowner acted in good faith.” *Id.* § 32:2.

⁷ *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 875, 872 P.2d 1090 (1994). See also *id.*, 123 Wn.2d at 868 (“Washington’s vesting rule runs counter to the overwhelming majority rule”); *Abbey Rd.*, 167 Wn.2d at 250-51 (“Washington’s rule is the minority rule, and it offers more protection of development rights than the rule generally applied in other jurisdictions.”).

⁸ See *Lauer v. Pierce County*, 173 Wn.2d 242, 258, 267 P.3d 988 (2011).

generally allows a developer to rely on a permit once opportunities to challenge it have passed,⁹ Washington's vested rights doctrine often enables developers to lock in the law governing both a particular permit decision and the development that permit authorizes.

B. The judicial-legislative dance over what permit applications trigger Washington's vested rights doctrine.

The details of Washington's vested rights doctrine have evolved through a dance between the courts and the Legislature. Courts led the dance through a halting three-step for thirty years. The Washington Supreme Court adopted the initial common law doctrine in 1954, creating a right to have a building permit considered under the law in effect on the date the developer submitted a complete building permit application.¹⁰ The Court chose the building permit application because it best demonstrated the developer's substantial change in position to commit to the project.¹¹

From 1968 through 1977, without much discussion or analysis and mostly through the Court of Appeals, the judiciary appeared to extend the doctrine to applications for four other types of applications that happened to come before the courts: conditional use,¹² grading,¹³ shoreline,¹⁴ and

⁹ See *Twin Bridge Marine Park, LLC v. Department of Ecology*, 162 Wn.2d 825, 843, 175 P.3d 1050 (2008).

¹⁰ *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 495-96, 275 P.2d 899 (1954).

¹¹ *Id.* See also *Erickson*, 123 Wn.2d at 874; *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958).

¹² *Beach v. Board of Adjustment of Snohomish County*, 73 Wn.2d 343, 347, 438 P.2d 617 (1968). The discussion of the vested rights doctrine in *Beach* was *dicta*. "The only question before this court is whether a verbatim record of proceedings before the Board

septic tank¹⁵ permits (“the Random Four”). The courts resolved each case as it arose without announcing a rule for all applications.

The judiciary then stopped the music. From 1982 through 1987, it apparently refused to extend the doctrine beyond building permits and the Random Four to applications for site-specific rezones, preliminary subdivisions, preliminary site plans, or binding site plans.¹⁶ Again, courts simply resolved the cases as they arose, offering different rationales or no rationale in each instance.¹⁷

was required” for a hearing on a conditional use permit application. *Id.*, 73 Wn.2d at 345. *Beach* held a transcript was required and remanded the matter for a rehearing. *Id.* at 347. Because the local government in oral argument stated the local law had changed during the judicial appeal, *Beach* added that on remand “the zoning code which was in force at the time of the filing of the application shall apply.” *Id.*

¹³ *Juanita Bay Valley Community Ass’n v. City of Kirkland*, 9 Wn. App. 59, 84, 510 P.2d 1140 (1973) (finding “no rational distinction between building or conditional use permits and a grading permit”).

¹⁴ *Talbot*, 11 Wn. App. at 811. *Talbot* quoted case law regarding vested rights for building permit applications and extended the doctrine to shoreline permit applications without acknowledging the extension. *Id.*

¹⁵ *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 715, 558 P.2d 821 (1977). *Ford* merely assumed the doctrine extended to septic tank permit applications. *Ford* held only that, to the extent the vested rights doctrine might apply to septic tank permit applications, it freezes the applicable law only as of the date a complete septic tank permit application is filed. *Id.*

¹⁶ *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 639, 733 P.2d 182 (1987); *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 649 P.2d 103 (1982); *Burley Lagoon Improvement Ass’n v. Pierce County*, 38 Wn. App. 534, 540, 686 P.2d 503 (1984); *Teed v. King County*, 36 Wn. App. 635, 643-44, 677 P.2d 179 (1984).

¹⁷ For an analysis of those decisions, see 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, 867-69 and nn. 47-55 (2001). The record includes the text of this article. See CP 871, 909-910 (relevant text).

The Washington Legislature joined this dance in 1987 with two provisions codifying the vested rights doctrine for building permit and subdivision applications only.¹⁸

C. The Legislature now clearly and exclusively leads the dance.

Where the Legislature has taken the lead on vested rights, the Washington Supreme Court follows. When dealing with subdivision applications, the Court limits itself to an interpretation of RCW 58.17.033.¹⁹ Likewise, when addressing questions surrounding building permit vesting, the Court simply interprets RCW 19.27.095.²⁰

¹⁸ Laws of 1987, ch. 104 §§ 1-2 (adding RCW 19.27.095 and RCW 58.17.033). Although not germane to the present dispute, the Legislature intervened in other aspects of vesting law as well. The Legislature authorized local jurisdictions to tailor vesting for a project through a development agreement. RCW 36.70B.170(1), (3)(i). The Legislature also adopted provisions dictating circumstances under which vested rights, once triggered, might expire. One discusses the effect on vested rights of a later ruling that the local law was invalid. RCW 36.70A.302(2)-(5); *Woodway*, 2014 WL 1419187 *2-5. The other affects vesting for subdivisions. RCW 58.17.170(2); *Noble Manor*, 133 Wn.2d at 281-82 n.8.

¹⁹ *Friends of the Law v. King County*, 123 Wn.2d 518, 522-26, 869 P.2d 1056 (1994); *Noble Manor*, 133 Wn.2d at 275; *Association of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 195, 4 P.3d 115 (2000) (applying the statute as interpreted by *Noble Manor*); *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 240-41, 110 P.3d 1132 (2005) (noting the implication of the statute as interpreted by *Noble Manor*).

²⁰ *Lauer*, 173 Wn.2d at 258-63. *Compare Valley View Indust. Park v. City of Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987) (no mention of the statute because the facts presumably arose before the statute was enacted). Since the Legislature adopted the key statutes in 1987, the Court has addressed vesting in two other decisions not relevant to this case. In one, the Court rejected an attempt to invoke the common law doctrine to vest statutory annexation provisions. Because that attempt lacked merit on its face, the Court did not need to address the vesting statutes. *Vashon Island Committee for Self-Government v. King County Boundary Review Bd.*, 127 Wn.2d 759, 766-69, 903 P.2d 953 (1995). In the other, the Court merely distinguished the vested rights doctrine from the law of nonconforming uses. The court deemed its vesting discussion *dicta*: “This situation is not before the court.” *Rhod-a-Zalea & 35th, Inc., v. Snohomish County*, 136 Wn.2d 1, 17, 959 P.2d 1024 (1998).

But what about the types of permits not mentioned in the statutes? Does the Legislature still lead the dance by precluding application of the common law doctrine? Or does the common law survive such that the judiciary must lead the dance when no subdivision or building permit is involved?

The answer from the Legislature and the Supreme Court is that the common law doctrine is dead. Washington's vested rights doctrine is purely statutory.

The Legislature meant what it said in 1987. It codified what it believed to be the common law—the doctrine applied only to building permits—and extended the doctrine only to subdivisions:

BACKGROUND

Washington State has adhered to **the current vested rights doctrine since** the Supreme Court case of *State ex rel. Ogden v. Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954). **The doctrine provides** that a party filing a timely and sufficiently complete **building permit** application obtains a vested right to have **that application** processed according to zoning, land use and building ordinances in effect at the time of the application....

The vesting of rights doctrine has not been applied to applications for preliminary or short plat approval.

SUMMARY

The vested rights doctrine established by case law is made statutory, with the additional requirement that a permit application be fully completed for the doctrine to

apply. **The vesting of rights doctrine is extended to applications for preliminary or short plat approval...**²¹

Whether the Legislature might have misjudged the extent of the then-current common law doctrine is of no consequence. True, courts—mostly the Court of Appeals—extended the doctrine to the Random Four from 1968 - 1977. But even if the Legislature overlooked the Random Four a decade later, its conclusion was clear: the doctrine “established by case law” extended only to building permit applications. The Legislature’s intent was equally clear: codify that common law and extend the doctrine only to subdivision applications. The Legislature intentionally superseded the common law, and courts must respect the plain statutory language.²²

In two key decisions, the Supreme Court deferred to the Legislature’s conversion of the doctrine from common law to a statute centered on the building permit application. The first was *Erickson*, where the Court opened its analysis by noting the Legislature codified a common law doctrine that had covered only building permit applications:

Washington’s doctrine of vested rights entitles developers to have a land development proposal processed under the regulations in effect at the time a complete **building permit application** is filed, regardless of subsequent changes in zoning or other land use regulations. The **building permit application** must (1) be sufficiently complete, (2) comply with existing zoning ordinances and building codes, and (3) be filed during the effective period

²¹ Final Bill Report, *SSB 5519* (Laws of 1987, ch. 104).

²² See *Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002) (rule of construction).

of the zoning ordinances under which the developer seeks to develop.

In 1987, the Legislature codified **these principles**....²³

Erickson rejected a developer's request to expand the doctrine beyond those codified principles to embrace permit applications other than a building permit application:

This court recognized the tension between public and private interests when it adopted Washington's vested rights doctrine. The court balanced the private property and due process 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.** In *Hull v. Hunt, supra*, this court explained, "the cost of preparing plans and meeting the requirements of most building departments is such that there will generally be a good faith expectation of acquiring title or possession for the purposes of building..." *Hull*, 53 Wn.2d at 130, 331 P.2d 856.²⁴

Because the developer pointed to "no cases from this state or any other jurisdiction that support expanding the vesting doctrine beyond its current limits"—limits then drawn by the Legislature around building permit and subdivision applications alone—the Court respected those limits.²⁵

The Court reasserted its fidelity to the statutory doctrine in *Abbey Road*. The issue before the Court was simple: does common or constitutional law support any deviation from the statutory vesting

²³ *Erickson*, 123 Wn.2d at 867-68 (emphasis added; citations omitted).

²⁴ *Id.* at 874 (emphasis added). *Erickson* involved no subdivision issue.

²⁵ *Id.* at 874-75.

doctrine?²⁶ The Court's direct answer to that question was "no." Using language nearly identical to *Erickson, Abbey Road* opened its analysis with the evolution of Washington's vested rights doctrine from common law to a particular balance struck by the Legislature and centered on building permit applications.²⁷ *Abbey Road* reaffirmed *Erickson's* deference to the statutory balance: "We have previously resolved many of the arguments in this case in *Erickson*, [where we] confirmed that in the absence of a local vesting ordinance specifying an earlier vesting date,...**RCW 19.27.095(1) is the applicable vesting rule.**"²⁸ The developer in *Abbey Road* pressed its arguments "[w]ithout addressing the statute...."²⁹ That mistake was fatal. *Abbey Road* followed the lead of the lower court in pointing the developer back to the statute as the sole source of Washington's vested rights doctrine:

[T]hat court stated, "RCW 19.27.095(1) is unequivocal and requires a 'valid and fully complete building permit application' be submitted for development rights to vest 'on the date of the application.'" As the Court of Appeals recognized, it is undisputed that *Abbey Road* did not file a building permit application. Further, *Abbey Road* points to no authority, either in its briefing to lower courts or to this court, allowing us to simply ignore the legislative directive set out in RCW 19.27.095(1).³⁰

²⁶ *Abbey Rd.*, 167 Wn.2d at 247.

²⁷ *Id.* at 250-51.

²⁸ *Id.* at 252 (emphasis added).

²⁹ *Id.*

³⁰ *Id.* at 253 (citation omitted).

Abbey Road proved the Court’s willingness to overrule case law if invoked to extend the doctrine to applications for permits other than a building permit. The developer in *Abbey Road* argued *Erickson* should have yielded to *Victoria Tower*, which the developer said extended the doctrine to a non-building-permit application. *Abbey Road* rejected that argument, holding that even if *Victoria Tower* had extended the doctrine, that decision “has been superseded” by the statute.³¹

The Supreme Court reaffirmed the death of the common law vested rights doctrine in its next two vested rights decisions. In each the Court explained that the doctrine, although originally judicial, is now statutory and covers only building permit and subdivision applications.³²

D. The Supreme Court summarized the statutory vested rights doctrine and insists any reform is the Legislature’s job.

As interpreted by the Supreme Court, Washington’s statutory vested rights doctrine consists of a default rule premised on a few caveats:

- Unless a subdivision application (or an application inextricably linked to a subdivision application) is involved,³³

³¹ *Id.* at 254 (discussing *Victoria Tower P’ship v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987)).

³² *Woodway*, 2014 WL 1419187 *2-3; *Lauer*, 173 Wn.2d at 258-59. Even in *dicta*, the Washington Supreme Court and the Ninth Circuit Court of Appeals now recognize the vested rights doctrine is limited to building permit applications. *E.g.*, *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1057-58 (2012); *Twin Bridge*, 162 Wn.2d at 843.

³³ RCW 58.17.033; RCW 58.17.170(2); *Noble Manor*, 133 Wn.2d at 281-82; *Rural Residents*, 141 Wn.2d at 195.

- unless a local jurisdiction allows an earlier vesting point by ordinance or through a development agreement,³⁴
- and unless the local jurisdiction precludes a developer from filing a building permit application at any time,³⁵
- the only act triggering vested rights is the filing of a building permit application.³⁶

The Court offers a blunt retort to anyone dissatisfied with this rule: tell it to the Legislature. “[T]his Court will not extend the vested rights doctrine by judicial expansion.”³⁷ The Court refuses to tinker with the doctrine not only because the statutes control, but also because courts are ill-suited to the task of reform:

[The developer] argues that as a matter of fundamental fairness this court should expand the vesting rights doctrine to all land use applications....to harmonize a haphazard common law vesting doctrine, provide certainty to developers, protect developers’ expectations against fluctuating land use policies, and update a doctrine that has failed to keep pace with increasingly complex changes in land development processes.... We find that such a rule **would eviscerate the balance struck in the vesting statute**. While some of Abbey Road’s arguments could support a change in the law, instituting such **broad reforms in land use law is a job better suited to the legislature**. See Wynne, *supra*, at 916-17 (“[r]eform [of the vesting rights doctrine] should not be left to the judiciary, which must focus on one narrow fact pattern at a time”; advocating legislative reform).³⁸

³⁴ RCW 36.70B.170(1), (3)(i); *Abbey Rd.*, 167 Wn.2d at 254-60.

³⁵ *Abbey Rd.*, 167 Wn.2d at 251, 254-60.

³⁶ RCW 19.27.095(1); *Abbey Rd.*, 167 Wn.2d at 250-53; *Erickson*, 123 Wn.2d at 874-75.

³⁷ *Noble Manor*, 133 Wn.2d at 280.

³⁸ *Abbey Rd.*, 167 Wn.2d at 260-61 (emphasis added; citing Wynne, 24 Seattle U.L.Rev. at 916-17 (see CP 893-94)).

E. Potala Village cannot revive the common law doctrine.

Even though the Court reports that “[w]hile it originated at common law, the vested rights doctrine is now statutory,”³⁹ Plaintiff/Respondent Potala Village proffers an alternative history: “The vested rights doctrine was originally established through common law, but now is based on both common law and statutory authority, depending on the type of permit application involved.” Resp. at 29. Moreover, Potala Village insists that for any project involving one of the Random Four (shoreline, conditional use, grading, or septic tank permits), the application for that permit freezes the law for the decisions on not only that application, but also every other application for the same project—even a future building permit application submitted years later. Resp. at 43-45. Potala Village fails to support its view of the law.

1. *Erickson* and *Abbey Road* do not preserve common law vesting.

According to Potala Village, *Erickson* and *Abbey Road* held that “RCW 19.27.095 supplemented common law vesting” and “nothing in that statute in any way changes the pre-existing common law...vesting.” Resp. at 35. Potala Village misreads *Erickson* and *Abbey Road*.

First, Potala Village points to a sentence from *Erickson*: “Within the parameters of the doctrine established by **statutory and case law**, municipalities are free to develop vesting schemes best suited to the needs

³⁹ *Woodway*, 2014 WL 1419187 *3.

of a particular locality.”⁴⁰ Potala Village mistakenly casts “case law” as a reference to the pre-statute case law extending the doctrine to the Random Four, and suggests *Erickson* obligates local jurisdictions to respect that law. Resp. at 36. To the contrary, “case law” refers to *Erickson*’s discussion of decisions requiring government to apply the doctrine in a manner consistent with due process by not frustrating developers’ ability to file a building permit application to trigger the vested rights doctrine.⁴¹

Erickson actually disproves any suggestion that pre-statute “case law” sets a requirement to extend the vested rights doctrine to the Random Four. *Erickson* considered Seattle’s treatment of master use permits (“MUPs”), which comprise at least two of the Random Four: **shoreline and conditional use permits are MUPs in Seattle.**⁴² Contrary to the Random Four case law, a MUP application unaccompanied by a building permit application is not considered under the law in effect at the time of the MUP application.⁴³ *Erickson* nevertheless approved Seattle’s approach because it is consistent with the statute allowing developers to trigger

⁴⁰ *Erickson*, 123 Wn.2d at 873 (emphasis added).

⁴¹ *Id.* at 870 (discussing *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 636-39, 642, 733 P.2d 182 (1987); *West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 50-54, 720 P.2d 782 (1986)).

⁴² That was true at the time of the *Erickson* MUP application on July 5, 1990, and remains true today. See *Erickson*, 123 Wn.2d at 866; SMC 23.42.042.A and Ord. 112522 § 8 (conditional use permits; see **App. 1**); SMC 23.60.064.A and Ord. 113466 § 2 at page 9 (shoreline permits; see **App. 2**); SMC 23.76.006.A & C.2.f - .g, Ord. 112522 § 2 at page 5, and Ord. 112840 § 3 (both are Type II MUPs; see **App. 3**).

⁴³ *Erickson*, 123 Wn.2d at 865-67.

vested rights by filing a building permit application, and the “case law” establishing the constitutional requirement not to thwart a developer’s ability to file a building permit application at any time.⁴⁴ The Random Four case law was irrelevant to *Erickson*’s rationale. All that mattered was that a MUP is not a building permit subject to statutory vesting, and that Seattle otherwise respects the statutory and constitutional commands regarding building permit vesting.

Second, Potala Village inserts language into *Erickson* and *Abbey Road*. Without citation to either case, Potala Village maintains that “[b]oth *Abbey Road* and *Erickson* emphasize that [permits like Seattle’s MUP] are purely creatures of local construct, and as such should not benefit from a state-wide extension of common law vesting.” Resp. at 41. No support for that assertion exists. It is fiction.

Finally, Potala Village insists *Erickson* and *Abbey Road* retained the existing common law vested rights doctrine despite the adoption of the vesting statutes. Resp. at 36. *Erickson* and *Abbey Road* said no such thing. Both merely conceded the existence of the Random Four in string cites illustrating the basis for the developers’ complaints that a building-permit-only rule conflicts with the earlier common law.⁴⁵ Neither *Erickson* nor *Abbey Road* analyzed those cases, let alone approved them. *Erickson* just

⁴⁴ *Id.* at 870-71.

⁴⁵ *Erickson*, 123 Wn.2d at 871-72; *Abbey Rd.*, 167 Wn.2d at 253 n.8.

factually distinguished two other cases the developer actually invoked.⁴⁶ *Abbey Road* analyzed the one pre-statute case invoked by the developer, and ruled that if it had extended the vested rights doctrine, “it has been superseded” by the statute.⁴⁷ Acknowledging the Random Four was crucial to the very point hammered by *Abbey Road*: the Legislature superseded such case law by limiting the doctrine to building permit applications; the Court will respect “the balance struck in the vesting statute;” the Court will not attempt to revive or repair “a haphazard common law vesting doctrine;” and anyone disappointed by that should suggest reforms to the Legislature, not the judiciary.⁴⁸

2. No basis exists for resuscitating the vesting of shoreline permit applications.

Just one, forty-year-old Court of Appeals decision, *Talbot*, extended the common law vested rights doctrine to shoreline permit applications.⁴⁹ Consistent with the rationale of *Abbey Road*, *Talbot* has been superseded by statute. No authority supports Potala Village’s attempts to resuscitate *Talbot*. First, Potala Village tries to duck *Erickson* and *Abbey Road* by claiming “[a] Shoreline Permit is very different from Seattle’s master use permit process addressed in *Erickson*.” Resp. at 40.

⁴⁶ *Erickson*, 123 Wn.2d at 872.

⁴⁷ *Abbey Rd.*, 167 Wn.2d at 254 (discussing *Victoria Tower*, 49 Wn. App. 755).

⁴⁸ *Id.* at 260-61.

⁴⁹ *Talbot v. Gray*, 11 Wn. App. 807, 811, 525 P.2d 801 (1974).

Again, shoreline permits in Seattle have been MUPs since before *Erickson*.⁵⁰ A shoreline application filed in Seattle must be treated as a MUP subject to the vesting rule announced in *Erickson* and *Abbey Road*.

Second, Potala Village invokes a footnote from *Buechel*, which involved a shoreline permit.⁵¹ Resp. at 27. But vesting was not at issue in *Buechel*.⁵² Even if vesting had been an issue, the relevant application was filed in 1984, so would have been subject to the pre-statute common law.⁵³

Third, Potala Village mistakenly claims courts have “ruled repeatedly” after 1974 that the vested rights doctrine applies to shoreline permit applications. Resp. at 27. This brief already explains Potala Village’s misuse of three of the decisions Potala Village cites in support of that claim.⁵⁴ Three others involved no shoreline permit application, so none “ruled” on the reach of the vested rights doctrine to such applications—all merely summarized the doctrine with citations to the Random Four.⁵⁵ Although *Woodway* involved a shoreline application,

⁵⁰ See **Apps. 1-3**. *Abbey Road* treated the Bonney Lake permit at issue there as “substantially the same” as Seattle’s MUPs. *Abbey Rd.*, 167 Wn.2d at 252 n.7.

⁵¹ See *Buechel v. Department of Ecology*, 125 Wn.2d 196, 206-07 n.35, 884 P.2d 910 (1994).

⁵² The tangential vesting issue was “not before this court.” *Id.*, 125 Wn.2d at 207 n.35. *Cf. id.* at 201 (stating the “[o]ne issue before this court”).

⁵³ See *id.* at 199-200, 206.

⁵⁴ See *supra* (discussing *Abbey Rd.*, *Erickson*, and *Buechel*).

⁵⁵ *Norco*, 97 Wn.2d at 684; *Westside Bus. Park LLC v. Pierce County*, 100 Wn. App. 599, 603, 5 P.3d 713 (2000) (casting the shoreline decision among cases that “are not helpful”); *Carlson v. Town of Beaux Arts Village*, 41 Wn. App. 402, 405-06, 704 P.2d

whether that application triggered vesting was not an issue.⁵⁶ Because the shoreline permit application in *Woodway* was filed along with a building permit application,⁵⁷ and given the rule solidified in *Abbey Road*, no party had reason to question whether the developer had frozen the law for making a decision on that permit.

Finally, Potala Village misuses a 2001 article to assert the vested rights doctrine still extends to shoreline permit applications. Resp. at 37-38. That article explained how the details of Washington’s vested rights doctrine “have been muddled irrevocably,” which involved explaining how, at that time, the doctrine “seems to be” extended by both common and statutory law without any “discernible pattern.”⁵⁸ *Abbey Road* later clarified the law, which the same author noted in a separate article.⁵⁹

3. No valid authority supports the contention that every permit application freezes the law for every future permit required for the project.

Potala Village attempts to prove too much. It claims not only that the common law doctrine still covers the Random Four, but also that filing

663 (1985). Moreover, *Norco* and *Carlson* involved facts arising before the Legislature intervened in 1987, when the common law still controlled.

⁵⁶ At issue was the effect on already-vested rights of a later ruling that the local law was invalid. *Woodway*, 2014 WL 1419187 *2-5.

⁵⁷ See **App. 4** at 6-7 (copy of relevant pages from appellant’s brief in *Woodway*).

⁵⁸ Wynne, 24 Seattle U.L.Rev. at 856, 872-73 (CP 866, 873).

⁵⁹ Roger Wynne, *Abbey Road: Not a Road Out of Our Vested Rights Thicket*, 36(3) *ENVTL. & LAND USE LAW NEWSLETTER* 7 (WSBA, Dec. 2009).

any of the Random Four freezes the law for considering all future permit applications for the project. That was never the common law. It is a concept lifted out of context from the subdivision statute.

Potala Village starts with *Noble Manor*, which interpreted the subdivision vesting statute and concluded: “If all that the Legislature was vesting under the statute was the right to divide land into smaller parcels with no assurance that the land could be developed, no protection would be afforded the landowner.”⁶⁰ *Noble Manor* therefore held that, under the statute, the filing of a preliminary subdivision application freezes some laws applicable to some later applications for permits for that land.⁶¹ Grounds exist to question both the reasoning and clarity of *Noble Manor*, including that it puts two statutes in tension.⁶² But *Noble Manor* remains consistent with the Supreme Court’s intent to limit itself to statutory interpretation in the realm of vested rights: “The *Erickson* decision stands for the proposition that this Court will not extend the vested rights doctrine by judicial expansion.”⁶³

Potala Village then invokes *Weyerhaeuser*, where Division II unhitched *Noble Manor* from its statutory moorings, extending its “no assurance” reasoning to the vesting of a conditional use permit

⁶⁰ *Noble Manor*, 133 Wn.2d at 278.

⁶¹ *Id.* at 283-84.

⁶² *See, e.g.*, Wynne, 24 Seattle U.L.Rev. at 907-12 (CP 889-91).

⁶³ *Noble Manor*, 133 Wn.2d at 280.

application.⁶⁴ Because it ran beyond the statutory confines of *Noble Manor*, *Weyerhaeuser* was wrong then and remains wrong today.⁶⁵

Deer Creek, a more recent decision from Division III, offers the proper response to an attempt like Potala Village's to invoke *Noble Manor* out of context: "This argument is unpersuasive. First, *Noble Manor* considered an application for a plat. Second, [the] argument was recently rejected in *Abbey Road*."⁶⁶ The same is true here: *Noble Manor* is limited to application of the subdivision statute, and *Abbey Road* summarizes the rest of Washington's statutory vested rights doctrine.

There is no way to simultaneously obey an alleged common law rule that the first permit application freezes the law for all future permit applications for a project, and the clear statute commanding that the future building permit application "shall be" considered under the law in effect on the date of that future application. If such a common law rule existed, it would have to yield. Just like the developer in *Abbey Road*, Potala Village "points to no authority. . . allowing us to simply ignore the legislative directive set out in RCW 19.27.095(1)."⁶⁷

⁶⁴ *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 894-95, 976 P.2d 1279 (1999).

⁶⁵ See Wynne, 24 Seattle U.L.Rev. at 913-14 (CP 892) ("Developers will likely invoke [*Weyerhaeuser*] in the future to assert that any application has the same lasting effect on other permit applications as did the subdivision application in *Noble Manor*.")

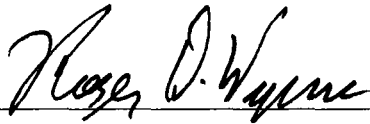
⁶⁶ *Deer Creek Developers LLC v. Spokane County*, 157 Wn. App. 1, 11, 236 P.3d 906 (2010). See generally *id.*, 157 Wn. App. at 9-12.

⁶⁷ *Abbey Rd.*, 167 Wn.2d at 253.

IV. CONCLUSION

Washington's vested rights doctrine remains muddled in many crucial respects. Only the Legislature can fix it. That will occur only if the judiciary consistently holds that the statutory doctrine controls, repeats the statutory rule clearly, and reminds the Legislature it has the sole power to reform the rule. Consistency has been hampered by sloppy summaries of Washington's vested rights doctrine⁶⁸ and the understandable reluctance of *Erickson* and *Abbey Road* to overrule pre-statute case law in situations not involving one of the Random Four. This Court will enhance consistency by carefully restating the rule articulated in *Abbey Road* and taking this opportunity to hold at least one of the Random Four cases, *Talbot*, was superseded by statute.⁶⁹

Respectfully submitted May 7, 2014.



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⁶⁸ See, e.g., *Woodway*, 2014 WL 1419187 *1; *Quadrant*, 154 Wn.2d at 240; *Noble Manor*, 133 Wn.2d at 275.

⁶⁹ See *Talbot v. Gray*, 11 Wn. App. 807, 811, 525 P.2d 801 (1974).

CERTIFICATE OF SERVICE

I certify that on the May 7, 2014, I sent a copy of this document to the following parties via email & U.S. Mail:

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Title 23 - LAND USE CODE
Subtitle III - Land Use Regulations
Division 2 - Authorized Uses and Development Standards
Chapter 23.42 - GENERAL USE PROVISIONS

23.42.042 Conditional uses

- A. Administrative conditional uses and uses requiring Council approval as provided in the respective zones of Subtitle III, Part 2, of this Land Use Code, and applicable provisions of SMC Chapter 25.09, Regulations for Environmentally Critical Areas, may be authorized according to the procedures set forth in Chapter 23.76, Procedures for Master Use Permits and Council Land Use Decisions.
- B. In authorizing a conditional use, the Director or City Council may impose conditions to mitigate adverse impacts on the public interest and other properties in the zone or vicinity.
- C. The Director may deny or recommend denial of a conditional use if the Director determines that adverse impacts cannot be mitigated satisfactorily, or that the proposed use is materially detrimental to the public welfare or injurious to property in the zone or vicinity in which the property is located.
- D. A use that was legally established but that is now permitted only as a conditional use is not a nonconforming use and will be regulated as if a conditional use approval had earlier been granted.
- E. Any authorized conditional use that has been discontinued may not be re-established or recommenced except pursuant to a new conditional use permit. The following will constitute conclusive evidence that the conditional use has been discontinued:
 1. A permit to change the use of the lot has been issued and the new use has been established; or
 2. The lot has not been used for the purpose authorized by the conditional use for more than 24 consecutive months. Lots that are vacant, or that are used only for storage of materials or equipment, will not be considered as being used for the purpose authorized by the conditional use. The expiration or revocation of business or other licenses necessary for the conditional use will suffice as evidence that the lot is not being used as authorized by the conditional use. A conditional use in a multifamily structure or a multi-tenant commercial structure will not be considered discontinued unless all portions of the structure are either vacant or committed to another use.

Ord. No. 123209 , § 4, 2009; Ord. 122311 , § 21, 2006; Ord. 117570 § 13, 1995; Ord. 116262 § 5, 1992; Ord. 112522 § 8, 1985.

Appendix 1

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VIII:Ord1.1

ORDINANCE 112522

AN ORDINANCE relating to land use and zoning; adding a new Chapter 23.76 to Title 23 (Land Use Code) of the Seattle Municipal Code to establish standard procedures for land use decisions made by The City of Seattle; repealing Chapters 23.76 (Master Use Permit Process), 23.80 (Decisions Requiring Council Approval) and 23.94 (Amendments to the Land Use Code), Sections 23.22.28 through 23.22.36, 23.22.44, 23.28.40, 23.34.02 through 23.34.18, 23.82.20 through 23.82.60; adding a new Chapter 23.06 and new Sections 23.34.02 and 23.42.42; amending Sections 23.04.10, 23.22.16, 23.22.40, 23.22.48, 23.34.20 through 23.34.44, 23.40.02, 23.40.10, 23.40.20, 23.44.18, 23.44.34, 23.45.106, 23.49.34, 23.49.36, 23.70.50, 23.70.60, 23.80.50; 23.82.16, 23.82.70, 23.82.80, 23.84.06, 23.84.10, 23.84.30, 23.88.10 and 23.88.20; and amending Sections 15.04.020, 15.04.070, 24.66.100, 25.05.510 and 25.05.680 of the Seattle Municipal Code to conform with new Chapter 23.76.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Chapters 23.76 (Master Use Permit Process), 23.80 (Decisions Requiring Council Approval) and 23.94 (Amendments to the Land Use Code) and Sections 23.22.28 through 23.22.36, 23.22.44, 23.28.40, 23.34.02 through 23.34.18, and 23.82.20 through 23.82.60 of the Seattle Municipal (Land Use) Code are hereby repealed.

Section 2. A new Chapter 23.76 is hereby added to Title 23, Subtitle V, of the Seattle Municipal Code to read as follows:

CHAPTER 23.76

PROCEDURES FOR MASTER USE PERMITS AND COUNCIL LAND USE DECISIONS

SUBCHAPTER ONE: GENERAL PROVISIONS

23.76.02 Purpose

The purpose of this chapter is to establish standard procedures for land use decisions made by The City of Seattle. The procedures are designed to promote informed public participa-

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1 Chapter 23.76, Procedures for Master Use Permits and
2 Council Land Use Decisions.

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5 ((E. Upon authorization variances shall remain in effect
6 as follows:

7	<u>Approval Granted</u>	<u>Expiration Date</u>
8	1. Access, yard, setback, 9 open space or lot area 10 minimums modified as part 11 of short plat or lot 12 boundary adjustment 13 approval.	Permit to run with 14 land in perpetuity 15 as recorded with 16 King County
17	2. Development Standards 18 Modified in Separate 19 Master Use Permit pursuant 20 to Section 23.76.10(B) 21 or as part of a rezone 22 procedure	Two years from 23 date of permit 24 issuance or until 25 the development 26 standard from 27 which the variance 28 was granted is amended to be more stringent, whichever is sooner. If a use approval is granted within this two year period, the variances' expira- tion date shall be extended until the expiration date established for the use approval.
	3. Development standards modified in Master Use Permit granting both variance and use approval or as part of a Council conditional use.	Section 23.76.40 pertains (construction or substantial progress toward construction must be undertaken within two years after issuance of the permit.)

29 Section 8. A new Section 23.42.42 is added to the Seattle
30 Municipal Code to read as follows:

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23.42.42 Conditional Uses

Administrative conditional uses and uses requiring Council approval as provided in the respective zones of Subtitle IV, Part 2, of this Land Use Code or of Title 24 may be authorized according to the procedures set forth in Chapter 23.76, Procedures for Master Use Permits and Council Land Use Decisions.

Section 9. Section 23.44.18 is amended to read as follows:

23.44.18 General Provisions

A. Only those conditional uses identified in this Part of ~~((s))~~ Subchapter II ~~((as conditional uses))~~ may be authorized as administrative conditional uses in Single Family zones. The Master Use Permit process ~~(r)~~ set forth in Chapter 23.76, Procedures for Master Use Permits and Council Land Use Decisions, shall be used to authorize ~~((these))~~ administrative conditional uses.

* * *

Section 10. Part 2 of Chapter 23.44 and Section 23.44.34 of the Seattle Municipal Code are amended to read as follows:

Chapter 23.44, Part 2: ~~((Council Conditional Uses))~~ Public Projects and City Facilities

23.44.34 Council Approval of Public Projects and City Facilities

A. ~~((Identification of))~~ Permitted Public Projects and City Facilities

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Section 22. This ordinance shall take effect and be in force sixty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 28th day of October, 1985, and signed by me in open session in authentication of its passage this 28th day of October, 1985.

Thomas B. Rice
President of the City Council

Approved by me this 30th day of October, 1985.

Clark Porter
Mayor

Filed by me this 30th day of October, 1985.

ATTEST: Gin Hill
City Comptroller and City Clerk

(SEAL) By: Theresa Dunbar
Deputy Clerk

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Title 23 - LAND USE CODE
Subtitle III - Land Use Regulations
Division 3 - Overlay Districts
Chapter 23.60 - SHORELINE DISTRICT
SubChapter II - Administration
Part 3 Procedures

23.60.064 Procedures for obtaining substantial development permits, shoreline variance permits, shoreline conditional use permits and special use authorizations.

- A. Procedures for application, notice of application and notice of decision for a shoreline substantial development permit, shoreline variance permit or shoreline conditional use permit shall be as required for a Master Use Permit in Chapter 23.76.
- B. The burden of proving that a substantial development, conditional use, special use, or variance meets the applicable criteria shall be on the applicant. The applicant may be required to submit information or data, in addition to that routinely required with permit applications, sufficient to enable the Director to evaluate the proposed development or use or to prepare any necessary environmental documents.
- C. In evaluating whether a development which requires a substantial development permit, conditional use permit, variance permit or special use authorization meets the applicable criteria, the Director shall determine that:
 1. The proposed use is not prohibited in the shoreline environment(s) and underlying zone(s) in which it would be located;
 2. The development meets the general development standards and any applicable specific development standards set forth in Subchapter III, the development standards for the shoreline environment in which it is located, and any applicable development standards of the underlying zoning, except where a variance from a specific standard has been applied for; and
 3. If the development or use requires a conditional use, variance, or special use approval, the project meets the criteria for the same established in Sections 23.60.034, 23.60.036 or 23.60.032, respectively.
- D. If the development or use is a permitted use and meets all the applicable criteria and standards, or if it can be conditioned to meet the applicable criteria and standards, the Director shall grant the permit or authorization. If the development or use is not a permitted use or cannot be conditioned to meet the applicable criteria and standards, then the Director shall deny the permit.
- E. In addition to other requirements provided in this chapter, the Director may attach to the permit or authorization any conditions necessary to carry out the spirit and purpose of and assure compliance with this chapter and RCW 90.58.020. Such conditions may include changes in the location, design, and operating characteristics of the development or use. Performance bonds not to exceed a term of five years may be required to ensure compliance with the conditions.

Appendix 2

F. Nothing in this section shall be construed to limit the Director's authority to condition or deny a project pursuant to the State Environmental Policy Act.

Ord. 113466 § 2(part), 1987.

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ORDINANCE 113466

AN ORDINANCE relating to land use and zoning; adding a new Chapter 23.60 to the Seattle Municipal (Land Use) Code to establish the shoreline environments, land use regulations and development standards of the new Seattle Shoreline Master Program; amending the Official Land Use Map to implement the new Program; repealing Chapter 24.60; and amending Chapter 23.04 by adding a new section 23.04.030.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Chapter 24.60 of the Seattle Municipal (Zoning Ordinance) Code is hereby repealed.

Section 2. There is added to Title 23 of the Seattle Municipal Code the following chapter:

CHAPTER 23.60
SHORELINE DISTRICT

SUBCHAPTER I: Purpose and Policies

23.60.002 Title and Purpose

A. Title

This Chapter shall be known as the Seattle Shoreline Master Program.

B. Purpose

It is the purpose of this chapter to implement the policy and provisions of the Shoreline Management Act of 1971, the Shoreline Goals and Policies of Resolution 25173 and the Shoreline Implementation Guidelines of Resolution 2618 by regulating development of the shorelines of the City in order to: (1) protect the ecosystems of the shoreline areas, (2) encourage water-dependent uses, (3) provide for maximum public use and enjoyment of the shorelines of the City and (4) preserve, enhance and increase views of the water and access to the water.

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B. A request for a shoreline environment redesignation shall be evaluated against the criteria in Implementation Guideline A5: Shoreline Environment Redesignations.

23.60.062 Procedures for Obtaining Exemptions from Substantial Development Permit Requirements

A determination that a development exempt from the requirement for a substantial development permit is consistent with the regulations of this Chapter, as required by Section 23.60.016, shall be made by the Director as follows:

- A. If the development requires other authorization from the Director, the determination as to consistency shall be made with the submitted application for that authorization.
- B. If the development requires a Section 10 Permit under the Rivers and Harbors Act of 1899 or a Section 404 permit under the Federal Water Pollution Control Act of 1972, the determination of consistency shall be made at the time of review of the Public Notice from the Corps of Engineers, and a Letter of Exemption as specified in WAC 173-14-115 shall be issued if the development is consistent.
- C. If the development does not require other authorizations, information of sufficient detail for a determination of consistency shall be submitted to the Department and the determination of consistency shall be made prior to any construction.

23.60.064 Procedures for Obtaining Substantial Development Permits, Shoreline Variance Permits, Shoreline Conditional Use Permits and Special Use Authorizations

- A. Procedures for application, notice of application and notice of decision for a shoreline substantial development permit, shoreline variance permit or shoreline conditional

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use permit shall be as required for a Master Use Permit in Chapter 23.76.

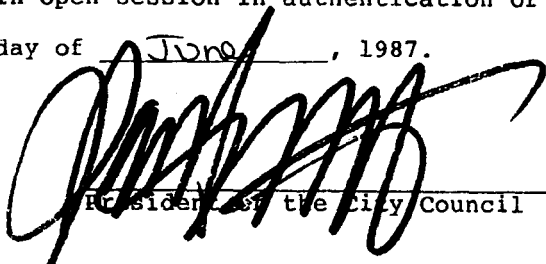
- B. The burden of proving that a substantial development, conditional use, special use, or variance meets the applicable criteria shall be on the applicant. The applicant may be required to submit information or data, in addition to that routinely required with permit applications, sufficient to enable the Director to evaluate the proposed development or use or to prepare any necessary environmental documents.
- C. In evaluating whether a development which requires a substantial development permit, conditional use permit, variance permit or special use authorization meets the applicable criteria, the Director shall determine that:
 - 1. The proposed use is not prohibited in the shoreline environment(s) and underlying zone(s) in which it would be located;
 - 2. The development meets the general development standards and any applicable specific development standards set forth in Subchapter III, the development standards for the shoreline environment in which it is located, and any applicable development standards of the underlying zoning, except where a variance from a specific standard has been applied for; and
 - 3. If the development or use requires a conditional use, variance, or special use approval, the project meets the criteria for the same established in Sections 23.60.034, 23.60.036 or 23.60.032, respectively.
- D. If the development or use is a permitted use and meets all the applicable criteria and standards, or if it can be

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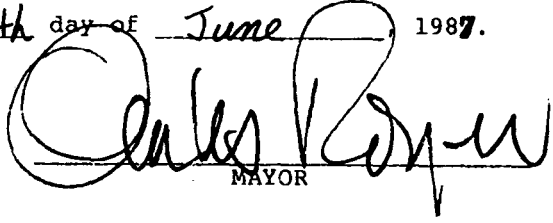
Thirty days from and after passage and approval if approved by the Mayor, or, if not approved, at the time it shall have become a law under the provisions of the City Charter.

Passed by the City Council the 15th day of June, 1987, and signed by me in open session in authentication of its passage this 15th day of June, 1987.



President of the City Council

Approved by me this 19th day of June, 1987.



MAYOR

Filed by me this 9th day of June, 1987.

ATTEST: Norward J. Brooks
City Comptroller and
City Clerk

By: Michael Saunders
Deputy Clerk

(SEAL)



Seattle Municipal Code

Information retrieved April 29, 2014 12:45 PM

Title 23 - LAND USE CODE

Subtitle IV - Administration

Division 1 - Land Use Approval Procedures

Chapter 23.76 - PROCEDURES FOR MASTER USE PERMITS AND COUNCIL LAND USE DECISIONS

SubChapter II - Master Use Permits

23.76.006 Master Use Permits required

- A. Type I, II and III decisions are components of Master Use Permits. Master Use Permits are required for all projects requiring one or more of these decisions.
- B. The following decisions are Type I:
 1. Determination that a proposal complies with development standards;
 2. Establishment or change of use for uses permitted outright, interim use parking under subsection 23.42.040.G, uses allowed under Section 23.42.038, temporary relocation of police and fire stations for 24 months or less, and temporary uses for four weeks or less not otherwise permitted in the zone, and renewals of temporary uses for up to six months, except temporary uses and facilities for light rail transit facility construction and transitional encampments;
 3. The following street use approvals:
 - a. Curb cut for access to parking whether associated with a development proposal or not;
 - b. Concept approval of street improvements associated with a development proposal, such as additional on-street parking, street landscaping, curbs and gutters, street drainage, sidewalks, and paving;
 - c. Structural building overhangs associated with a development proposal;
 - d. Areaways associated with a development proposal;
 4. Lot boundary adjustments;
 5. Modification of the following features bonused under Title 24:
 - a. Plazas;
 - b. Shopping plazas;
 - c. Arcades;
 - d. Shopping arcades;
 - e. Voluntary building setbacks;
 6. Determinations of Significance (determination that an environmental impact statement is required) for Master Use Permits and for building, demolition, grading and other construction permits (supplemental procedures for environmental review are established in Chapter 25.05, Environmental Policies and Procedures), except for Determinations of Significance based solely on historic and cultural preservation;

Appendix 3

7. Discretionary exceptions for certain business signs authorized by subsection 23.55.042.D;
 8. Waiver or modification of required right-of-way improvements;
 9. Special accommodation pursuant to Section 23.44.015;
 10. Reasonable accommodation;
 11. Minor amendment to Major Phased Development Permit;
 12. Determination of public benefit for combined lot development;
 13. Streamlined design review decisions pursuant to Section 23.41.018 if no development standard departures are requested pursuant to Section 23.41.012, and design review decisions in an MPC zone if no development standard departures are requested pursuant to Section 23.41.012;
 14. Shoreline special use approvals that are not part of a shoreline substantial development permit;
 15. Determination that a project is consistent with a planned action ordinance, except as provided in subsection 23.76.006.C;
 16. Decision to approve, condition, or deny, based on SEPA policies, a permit for a project determined to be consistent with a planned action ordinance; and
 17. Other Type I decisions.
- C. The following are Type II decisions:
1. The following procedural environmental decisions for Master Use Permits and for building, demolition, grading and other construction permits are subject to appeal to the Hearing Examiner and are not subject to further appeal to the City Council (supplemental procedures for environmental review are established in Chapter 25.05, Environmental Policies and Procedures):
 - a. Determination of Non-significance (DNS), including mitigated DNS;
 - b. Determination that a final environmental impact statement (EIS) is adequate; and
 - c. Determination of Significance based solely on historic and cultural preservation.
 2. The following decisions are subject to appeal to the Hearing Examiner (except shoreline decisions and related environmental determinations that are appealable to the Shorelines Hearings Board):
 - a. Establishment or change of use for temporary uses more than four weeks not otherwise permitted in the zone or not meeting development standards, including the establishment of temporary uses and facilities to construct a light rail transit system for so long as is necessary to construct the system as provided in subsection 23.42.040.F, but excepting temporary relocation of police and fire stations for 24 months or less;
 - b. Short subdivisions;
 - c. Variances; provided that the decision on variances sought as part of a Council land use decision shall be made by the Council pursuant to Section 23.76.036;
 - d. Special exceptions; provided that the decision on special exceptions sought as part of a Council land use decision shall be made by the Council pursuant to Section 23.76.036;

- e. Design review decisions, except for streamlined design review decisions pursuant to Section 23.41.018 if no development standard departures are requested pursuant to Section 23.41.012, and except for design review decisions in an MPC zone pursuant to Section 23.41.020 if no development standard departures are requested pursuant to Section 23.41.012;
 - f. Administrative conditional uses, provided that the decision on administrative conditional uses sought as part of a Council land use decision shall be made by the Council pursuant to Section 23.76.036;
 - g. The following shoreline decisions; provided that these decisions shall be made by the Council pursuant to Section 23.76.036 when they are sought as part of a Council land use decision (supplemental procedures for shoreline decisions are established in Chapter 23.60):
 - 1) Shoreline substantial development permits;
 - 2) Shoreline variances; and
 - 3) Shoreline conditional uses;
 - h. Major Phased Developments;
 - i. Determination of project consistency with a planned action ordinance, only if the project requires another Type II decision;
 - j. Establishment of light rail transit facilities necessary to operate and maintain a light rail transit system, in accordance with the provisions of Section 23.80.004;
 - k. Downtown planned community developments;
 - l. Establishment of temporary uses for transitional encampments; and
 - m. Except for projects determined to be consistent with a planned action ordinance, decisions to approve, condition, or deny based on SEPA policies if such decisions are integrated with the decisions listed in subsections 23.76.006.C.2.a. through l; provided that, for decisions listed in subsections 23.76.006.C.2.c, d, f, and g that are made by the Council, integrated decisions to approve, condition, or deny based on SEPA policies are made by the Council pursuant to Section 23.76.036.
- D. The following decision, including any integrated decision to approve, condition or deny based on SEPA policies, is a Type III decision made by the Hearing Examiner: subdivisions (preliminary plats).
- E. The requirement for the Council to make the shoreline decisions listed in subsection 23.76.006.C.2.g if they are sought as part of a Council land use decision shall also apply for purposes of Chapter 23.60.

Ord. 123963 , § 28, 2012; Ord. 123939 , § 18, 2012; Ord. 123913 , § 6, 2012; Ord. 123649 , § 52, 2011; Ord. 123566 , § 6, 2011; Ord. 123565 , § 3, 2011; Ord. 123495 , § 76, 2011; Ord. 122824 , § 11, 2008; Ord. 122816 , § 7, 2008; Ord. 122054 § 81, 2006; Ord. 121828 § 14, 2005; Ord. 121476 § 17, 2004; Ord. 121362 § 12, 2003; Ord. 121278 § 8, 2003; Ord. 120611 § 18, 2001; Ord. 119974 § 2, 2000; Ord. 119904 § 2, 2000; Ord. 119618 § 8, 1999; Ord. 119096 § 5, 1998; Ord. 118012 § 25, 1996; Ord. 117598 § 4, 1995; Ord. 117263 § 54, 1994; Ord. 117202 § 12, 1994; Ord. 116909 § 6, 1993; Ord. 115326 § 29, 1990; Ord. 113079 § 4, 1986; Ord. 112840 § 3, 1986; Ord. 112830 § 53, 1986; Ord. 112522 § 2(part), 1985.

JB:hh
10/17/85
VIII:Ord1.1

ORDINANCE 112522

AN ORDINANCE relating to land use and zoning; adding a new Chapter 23.76 to Title 23 (Land Use Code) of the Seattle Municipal Code to establish standard procedures for land use decisions made by The City of Seattle; repealing Chapters 23.76 (Master Use Permit Process), 23.80 (Decisions Requiring Council Approval) and 23.94 (Amendments to the Land Use Code), Sections 23.22.28 through 23.22.36, 23.22.44, 23.28.40, 23.34.02 through 23.34.18, 23.82.20 through 23.82.60; adding a new Chapter 23.06 and new Sections 23.34.02 and 23.42.42; amending Sections 23.04.10, 23.22.16, 23.22.40, 23.22.48, 23.34.20 through 23.34.44, 23.40.02, 23.40.10, 23.40.20, 23.44.18, 23.44.34, 23.45.106, 23.49.34, 23.49.36, 23.70.50, 23.70.60, 23.80.50; 23.82.16, 23.82.70, 23.82.80, 23.84.06, 23.84.10, 23.84.30, 23.88.10 and 23.88.20; and amending Sections 15.04.020, 15.04.070, 24.66.100, 25.05.510 and 25.05.680 of the Seattle Municipal Code to conform with new Chapter 23.76.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Chapters 23.76 (Master Use Permit Process), 23.80 (Decisions Requiring Council Approval) and 23.94 (Amendments to the Land Use Code) and Sections 23.22.28 through 23.22.36, 23.22.44, 23.28.40, 23.34.02 through 23.34.18, and 23.82.20 through 23.82.60 of the Seattle Municipal (Land Use) Code are hereby repealed.

Section 2. A new Chapter 23.76 is hereby added to Title 23, Subtitle V, of the Seattle Municipal Code to read as follows:

CHAPTER 23.76

PROCEDURES FOR MASTER USE PERMITS AND COUNCIL LAND USE DECISIONS

SUBCHAPTER ONE: GENERAL PROVISIONS

23.76.02 Purpose

The purpose of this chapter is to establish standard procedures for land use decisions made by The City of Seattle. The procedures are designed to promote informed public participa-

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- Major Institution Master Plans
- Major Institution Designations
- Council Conditional Uses
- Downtown Planned Community Developments
- Planned Unit Developments

SUBCHAPTER TWO: MASTER USE PERMITS

23.76.05 Master Use Permits Required

- A. Type I, II and III decisions are components of Master Use Permits. Master Use Permits shall be required for all projects requiring one or more of these decisions.
- B. The following decisions are Type I decisions which are non-appealable:
1. Establishment or change of use for uses permitted outright and temporary uses for three weeks or less not otherwise permitted in the zone;
 2. The following street use approvals associated with a development proposal:
 - a. Curb cut for access to parking.
 - b. Concept approval of street improvements, such as additional on-street parking, street landscaping, curbs and gutters, street drainage, sidewalks, and paving.
 3. Lot boundary adjustments;

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- 4. Designation of greenbelt preserves and restored preserves;
 - 5. Modification of the following features bonused under Title 24.
 - a. Plazas.
 - b. Shopping plazas.
 - c. Arcades.
 - d. Shopping arcades.
 - e. Voluntary building setbacks; and
 - 6. Declarations of Significance (determination that an Environmental Impact Statement is required) for Master Use Permits and for building, demolition, grading and other construction permits (supplemental procedures for environmental review are established in Chapter 25.05, SEPA Rules).
- C. The following are Type II decisions, which are subject to appeal to the Hearing Examiner (except shoreline decisions and related environmental determinations which are appealable to the Shorelines Hearing Board):
- 1. Establishment or change of use for temporary uses more than three weeks not otherwise permitted in the zone;
 - 2. Short subdivisions;
 - 3. Variances, provided that variances sought as part of a Type IV decision may be granted by the Council pursuant to Section 23.76.36;

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4. Special exceptions, provided that special exceptions sought as part of a Type IV decision may be granted by the Council pursuant to Section 23.76.36;
5. Design departures;
6. The following street use decisions:
 - a. Sidewalk cafes.
 - b. Structural building overhangs.
 - c. Areaways.
7. Administrative conditional uses, provided administrative conditional uses sought as part of a Type IV decision may be approved by the Council pursuant to Section 23.76.36.
8. The following shoreline decisions (supplemental procedures for shoreline decisions are established in SMC Sections 24.60.425 - 24.60.485):
 - a. Shoreline substantial development permits.
 - b. Shoreline variances.
 - c. Shoreline conditional uses.
9. The following environmental decisions for Master Use Permits and for building, demolition, grading and other construction permits (supplemental procedures for environmental review are established in SMC Chapter 25.05, SEPA Rules):
 - a. Declarations of Nonsignificance (DNSs), including mitigated DNS's;

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b. Determination that a final Environmental Impact Statement (EIS) is adequate.

D. The following is a Type III decision, which is subject to appeal to the Hearing Examiner and may be further appealed to the Council: the decision to approve, condition or deny any Master Use Permit (other than for Shoreline decisions) based on the City's SEPA policies pursuant to SMC Section 25.05.660.

23.76.08 Pre-application Conferences

Prior to official filing with the Director of an application for a Master Use Permit requiring a Type II or III decision, the Director may require a pre-application conference. The conference shall be held in a timely manner between a Department representative(s) and the applicant to determine the appropriate procedures and review criteria for the proposed project. Pre-application conferences may be subject to fees as established in SMC Chapter 22.900, Permit Fee Ordinance, of the Seattle Municipal Code.

23.76.10 Applications

- A. Applications for Master Use Permits shall be made by the property owner, lessee, contract purchaser, or a City agency, or by an authorized agent thereof.
- B. All applications for Master Use Permits shall be made to the Director on a form provided by the Department.
- C. Applications shall be accompanied by payment of the applicable filing fees, if any, as established in SMC Chapter 22.900, Permit Fee Ordinance.

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Section 22. This ordinance shall take effect and be in force sixty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 28th day of October, 1985, and signed by me in open session in authentication of its passage this 28th day of October, 1985.

Arman B. Rice
President of the City Council

Approved by me this 30th day of October, 1985.

Charles Poyner
Mayor

Filed by me this 30th day of October, 1985.

ATTEST: Jim Hill
City Comptroller and City Clerk

(SEAL) By: Theresa Dunbar
Deputy Clerk

Published _____

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ORDINANCE 112840

AN ORDINANCE relating to land use and zoning, amending Sections 23.42.040, 23.76.004, 23.76.006 and 24.74.015 of the Seattle Municipal Code to authorize temporary use permits for the relocation of police and fire stations.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Section 23.42.040 of the Seattle Municipal Code is amended by adding thereto a new subsection D to read as follows:

23.42.040 Temporary Uses

* * *

D. Temporary Uses, Twelve Months or Less

A Master Use Permit, issued for a period of twelve months or less not involving the construction of any permanent structure, may be authorized subject to the conditions of subsection 23.42.040A. Such permits shall not be renewable.

Section 2. Exhibit A of Section 23.76.004 of the Seattle Municipal Code, as last amended by Ordinance 112522, is further amended to read as follows:

Exhibit 76.004A
LAND USE DECISION FRAMEWORK

DIRECTOR'S DECISIONS REQUIRING MASTER USE PERMITS

<u>TYPE I</u> (Non-Appealable)	<u>TYPE II</u> (Appealable to Hearing Examiner*)	<u>TYPE III</u> (Appealable to Council)
° Uses permitted outright	° Temporary uses, more than three weeks	The decision to approve, condition or deny a project based on the SEPA Policies pursuant to SMC 25.05.660.
° Temporary uses, three weeks or less	° Certain street uses	
	° Variances	

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Section 3. Section 23.76.006 of the Seattle Municipal Code as last amended by Ordinance 112522, is further amended to read as follows:

23.76.006 Master Use Permits Required

* * *

B. The following decisions are Type 1 decisions which are non-appealable:

1. Establishment or change of use for uses permitted outright, ~~((and))~~ temporary uses for three weeks or less not otherwise permitted in the zone, and temporary relocation of police and fire stations for twelve months or less;

2. The following street use approvals associated with a development proposal:

- a. Curb cut for access to parking.
- b. Concept approval of street improvements, such as additional on-street parking, street landscaping, curbs and gutters, street drainage, sidewalks, and paving.

3. Lot boundary adjustments;

4. Designation of greenbelt preserves and restored preserves;

5. Modification of the following features bonused under Title 24:

- a. Plazas.
- b. Shopping plazas.
- c. Arcades.
- d. Shopping arcades.
- e. Voluntary building setbacks; and

6. Declarations of Significance (determination that an Environmental Impact Statement is required) for Master Use Permits and for building, demolition, grading and other construction permits (supplemental procedures for environmental review are established in Chapter 25.05, SEPA Rules).

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C. The following are Type II decisions, which are subject to appeal to the Hearing Examiner (except shoreline decisions and related environmental determinations which are appealable to the Shorelines Hearing Board):

1. Establishment or change of use for temporary uses more than three weeks not otherwise permitted in the zone; except temporary relocation of police and fire stations for twelve months or less;

2. Short subdivisions;

3. Variances, provided that variances sought as part of a Type IV decision may be granted by the Council pursuant to Section 23.76.036;

4. Special exceptions, provided that special exceptions sought as part of a Type IV decision may be granted by the Council pursuant to Section 23.76.036;

5. Design departures;

6. The following street use decisions:

- a. Sidewalk cafes.
- b. Structural building overhangs.
- c. Areaways.

7. Administrative conditional uses, provided administrative conditional uses sought as part of a Type IV decision may be approved by the Council pursuant to Section 23.76.036.

8. The following shoreline decisions (supplemental procedures for shoreline decisions are established in SMC Sections 24.60.425 - 24.60.485):

- a. Shoreline substantial development permits.
- b. Shoreline variances.
- c. Shoreline conditional uses.

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9. The following environmental decisions for Master Use Permits and for building, demolition, grading and other construction permits (supplemental procedures for environmental review are established in SMC Chapter 25.05, SEPA Rules):

- a. Declarations of Nonsignificance (DNS's), including mitigated DNS's;
- b. Determination that a final Environmental Impact Statement (EIS) is adequate.

* * *

Section 4. Section 24.74.015 of the Seattle Municipal Code is hereby amended to read as follows:

24.74.015 Temporary Uses

A. The Director may authorize a temporary use in any zone regulated by Title 24 for a period not to exceed three weeks if the use is not materially detrimental to the public welfare or injurious to property in the vicinity of the use and is in keeping with the spirit of purpose of the Zoning Ordinance (Title 24). The Director may impose conditions upon the use to ensure its compatibility with adjacent uses and structures or to mitigate adverse impacts of the use.

B. The temporary use of property for the relocation of police and stations in any zone, not involving the construction of any permanent structure, may be authorized by the Director by a revocable, nonrenewable permit for a period of not more than twelve months.

Section 5. Any act done pursuant to the authority of, but prior to the effective date of this ordinance is hereby ratified and confirmed.

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(To be used for all Ordinances except Emergency.)

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE IT IS DUE TO THE QUALITY OF THE DOCUMENT.

Section...6... This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 19th day of May, 1986, and signed by me in open session in authentication of its passage this 19th day of May, 1986. *[Signature]* President of the City Council.

Approved by me this 22nd day of May, 1986. *[Signature]* Mayor.

Filed by me this 22nd day of May, 1986.

Attest: *Norwood J. Brooks* City Comptroller and City Clerk.

By: *Theresa Dunbar* Deputy Clerk.

(SEAL)

Published.....

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

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

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

Respondents,

v.

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Appellants.

OPENING BRIEF OF APPELLANT BSRE

Mark R. Johnsen, WSBA #11080
Douglas A. Luetjen, WSBA #15334
Gary D. Huff, WSBA #06185
Of Karr Tuttle Campbell
Attorneys for Appellant BSRE

1201 Third Ave., Suite 2900
Seattle, WA 98101
(206) 223-1313

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~~COURT OF APPEALS DIV I~~
STATE OF WASHINGTON

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

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

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

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

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

IV. STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. ARGUMENT

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

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

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