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No. 70542-3
King County Superior Court # 12-2-18714-2 SEA
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

THE CITY OF KIRKLAND, a Washington municipal corporation,

Appellant,

vs.

POTALA VILLAGE KIRKLAND, LLC, a Washington limited liability company, and LOBSANG DARGEY and TAMARA AGASSI DARGEY, a married couple,

Respondents.

RESPONDENTS' OPENING BRIEF

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I. NATURE OF THE CASE

Since 1974 and affirmed as recently as January of this year, Washington courts have applied the common law vested rights doctrine to shoreline substantial development permits. There is only one vested rights doctrine, which is uniformly applied to all permits that are subject to it. Contrary to Kirkland's arguments, no Washington court has ever limited the vested rights doctrine to only certain land use regulations depending on the type of permit. Instead, once the Court has determined that the vested rights doctrine applies to an application, all zoning and land use regulations are frozen as of the time of that application. The vested rights doctrine is designed to protect applicants from exactly the situation presented in this case: where a jurisdiction would change the rules middle of the land development process, arbitrarily subjecting the developer to anonymous procedures and fluctuating zoning policy. Otherwise, as Washington courts have often observed, the vested rights doctrine would be an 'empty right'.[1]

Kirkland has improperly subjected Potala Village's project to fluctuating land use policy resulting from intense neighborhood opposition. Potala Village submitted a detailed, complete set of land development plans and studies to support its shoreline substantial development permit application. This project was fully compliant with the property's zoning at

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

the time of application. Even so, Kirkland began to receive intense, vocal pressure from select neighbors living near the project. Kirkland responded to that pressure first by changing its environmental review of the project from a standard approach used for this type of project to an extensive review of ever project detail using an Environmental Impact Statement.

Kirkland's City Council readily acceded to demands by neighborhood opponents of the project that Kirkland impose a moratorium that would stop Potala Village's project. For more than a year, Kirkland imposed a moratorium designed to only affect the Potala Village project. Under this moratorium, Kirkland refused to allow Potala Village to submit a building permit application, even though it continued to review, and issued the shoreline substantial development permit. Ultimately, Kirkland changed the property's zoning so extensively that Potala Village's project as proposed under the shoreline substantial development application could not be built if Kirkland prevails in its arguments.

Potala Village respectfully requests this Court to affirm the Superior Court's decision on summary judgment. Potala Village's Shoreline Substantial Development Permit vested its project in the BN-zoning in effect at the time that it submitted that application. Kirkland has inappropriately subjected Potala Village to fluctuating land use policy without legal justification.

II. STATEMENT OF THE CASE

This case involves a mixed-use development proposed by Potala Village for property located at 1006 and 1020 Lake Street South and 21 10th Avenue South (the "Potala Village Property").[2] While Potala Village and the City agree that this appeal raises issues of law and that the material facts are not in dispute, the City's Statement of the Case omitted crucial information. A complete factual context demonstrates how the important principles which underlie the vested rights doctrine, and its application to shoreline substantial development permits, are critical in cases such as the one at hand.

A. The Property's BN Zone Allowances and Requirements were Clearly Stated in Kirkland's Zoning Code For Years Before Potala Village Submitted its Shoreline Substantial Development Application.

Potala Village's Property is zoned Neighborhood Business ("BN"). At the time Potala Village submitted its Shoreline Substantial Development Application ("Shoreline Permit") the Kirkland Zoning Code regulated development in the BN zone through limits on building height, the comparative size of the building to the property, building bulk and scale, setbacks, parking requirements, and similar considerations.[3] As long as the building fits within the building 'envelope' created under the BN-zoning

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[2] CP 372, *Declaration of Lobsang Dargey*, page 2.
[3] CP 268-275, *Declaration of Diana Kolouskova*, Exhibit A.

(height, setbacks, parking and so forth), Potala Village was permitted to design the project for as many or few residential units as it saw fit, i.e. with its own preferred mix of studio, 1 bedroom, 2 bedroom units and so forth.[4]

Kirkland misleadingly argues that the original BN-zone afforded no cap on density, despite being 'surrounded' by property zoned for 12-units per acre.[5] As noted above, density was regulated through a number of parameters. Additionally, while the surrounding area is mostly now zoned at 12-units per acre, Kirkland did not adopt that zoning until almost all those properties were fully built-out at much higher densities. The existing development surrounding the Potala Village Property is primarily multi-family residential with building heights similar to that which the City originally allowed under the BN zone and approved in the Potala Village Shoreline Permit.[6] For example, a multifamily development one block away is built to a density of 177 units per acre.[7] Other property across the street from Potala Village is built to a density of 39 units per acre. The Potala Village Property is one of the last vacant properties in the area zoned for multi-family and mixed use, and hence, has received, and continues to receive, intense neighborhood opposition.

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[4] CP 372, *Dargey Declaration*, page 2.
[5] *Kirkland's Opening Brief*, page 6.
[6] CP 834-857, *Second Declaration of Duana T. Kolouskova*, Exhibit A.
[7] *Id.*

The BN-zone did not require Potala Village to obtain land use or design review approval before moving into the building permit stage.[8] Land use and design review were instead addressed under a Shoreline Permit process, since a portion of the Potala Village Property that fronts the main road (Lake Street) is within Kirkland's designated shoreline area. This process required Potala Village to obtain a Shoreline Permit before it could obtain ministerial grading and building permits.

The BN zone's allowances and requirements were no surprise to anyone involved, especially Kirkland, the jurisdiction with complete legislative control over the Property's zoning. Kirkland established the BN zoning based on its Growth Management Act-mandated public planning process many years ago.[9] Kirkland's attempt to now divorce itself from its own zoning decisions is disingenuous. Vesting its rights in this zoning was Potala Village's only way to ensure the City would not change the underlying zoning mid-way through the land development process. Of course, this is the crux of this appeal: whether the City's attempts to impose a change in zoning mid-way through Potala Village's development process violated the vested rights doctrine.

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[8] See e.g. CP 657, *Dargey Declaration*, Exhibit F, second page: *See also* CP 93, *Declaration of Swan*, page 3.
[9] CP 268-275, *Kolouskova Declaration*, Exhibit A.

B. Potala Village's Shoreline Permit Application Provided a Detailed Project Proposal For a Mixed-Use Building Fully Consistent with the Shoreline Regulations and BN Zone Parameters.

Potala Village's project is a mixed use, multistory structure with commercial on the ground floor and apartments or condominiums on the upper floors. On February 23, 2011, Potala Village submitted its Shoreline Permit application, which clearly disclosed the substance and details of the proposed mixed use building, consisting of 6200 square feet of commercial use, 143 residential units, and underground parking.[10] As a result of multiple meetings with Kirkland staff in 2009 and 2010, Potala Village revised the building design and reduced the density several times, from 181 units to 164 units, 150 units and ultimately 143 units.[11]

The Shoreline Permit process requires Kirkland to extensively review the proposed development with respect to design, aesthetics, environmental impacts, parking and the like.[12] Even development of property with only a small portion falling within a designated shoreline area is allowed "only as authorized in a Shoreline Permit...."[13] Further, the shoreline regulations, which are part of Kirkland's Zoning Code, require Kirkland to apply the

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[10] CP 392-643, *Dargey Declaration*, Exhibit B (Shoreline approval with background application materials, including multi-page plan set, attached).
[11] CP 372, *Dargey Declaration*, page 2.
[12] *State Dept. of Ecology v. City of Spokane Valley*, 167 Wash. App. 952, 963-965, 275 P.3d 367 (2012) *citing Buechel v. Dep't of Ecology*, 125 Wash.2d 196, 205, 884, P.2d 910 (1994); RCW 90.58.140(4), (7); RCW 90.58.180 (1), (2).
[13] CP 277, Kirkland Zoning Code ("KZC") 141.30(1) (emphasis added) (*Koloušková Declaration*, Exhibit B).

more environmentally protective regulation amongst all applicable zoning and land use regulations.[14]

As a result, Kirkland's application form, entitled 'substantial development', requires description of a number of elements including the proposed use of the property (mixed use building, 143 unit apartments with 6000 square feet of commercial), the estimated project cost ($28 million), and other permits necessary for the proposed development (building, clearing and grading, right of way use, notice from Washington State Department of Ecology).[15] Kirkland required complete project information, including but not limited to detailed site plan, detailed building design information, architectural plans, parking plans, building elevations, exterior building design and materials, lot coverage information, soil, groundwater, drainage, water quality, and stormwater plans.[16]

C. Kirkland's Planner, Teresa Swan, Submitted a Declaration that She Believed the Shoreline Permit Application Vested.

Kirkland issued a letter of completeness on May 11, 2011.[17] Cities and applicants alike rely on this notice of completeness to establish a project's vesting date, i.e. the date when zoning and land use regulations

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[14] CP 942, *Second Kolouskova Declaration*, Exhibit D, KZC 83.40.
[15] CP 381-391, *Dargey Declaration*, Exhibit A.
[16] CP 414-508, *Dargey Declaration*, Exhibit B, Attachments 2-23 (oversized plans reduced); *see also* CP 644-650, *Dargey Declaration*, Exhibit C (initial City comment letters).
[17] CP 569, 652, *Dargey Declaration*, Exhibit B, Attachment 26; Exhibit D.

'freeze' in time for purposes of project review.[18] With this letter, Kirkland put notice out, not just to Potala Village, but in a publicly available document, that it had determined Potala Village's shoreline permit application was vested to the BN zoning and land use regulations in effect on February 23, 2011.

Kirkland fails to explain that its assigned project planner, Teresa Swan, readily admitted that Kirkland's letter of completeness was intended to indicate the Shoreline Permit vested.[19] However, Ms. Swan clearly did not understand or apparently did not receive correct instructions as to which rights vested with Shoreline permit. She incorrectly believed the project vested to only the shoreline regulations, when, in fact, vesting was to all applicable zoning and land use regulations in effect at that time.

> On May 11, 2011, petitioner's shoreline application was deemed complete and the City issued him a Notice of Completeness.... I considered Petitioner's shoreline permit vested under Chapters 83 and 141 of the Kirkland Zoning Code (KZC) ....[20]

D. Kirkland's Position is that it Can Change Potala Village's Vesting at any Time During the Process by Requiring Potala Village to Apply For a New Building Permit After the Shoreline Permit is Issued.

Kirkland omits pivotal facts in asserting that it advised Potala Village to submit a building permit application along with its Shoreline Permit.

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[18] *Schultz v. Snohomish County*, 101 Wash. App. 693, 698, 5 P.3d 767 (2000).
[19] CP 95, *Declaration of Teresa Swan*, page 5.
[20] CP 95, *Declaration of Teresa Swan*, page 5 (emphasis added).

Kirkland fails to disclose that it had also advised Potala Village that Kirkland could require submission of a new building permit application after Kirkland approved the Shoreline Permit, if Kirkland decided that any changes to the project were warranted.[21] In this way, Kirkland unilaterally reserved the right to change the project's vesting date even if Potala Village had submitted a building permit application at the same time as the Shoreline application. Therefore, Kirkland would not process any building permit application until after it made a decision on the Shoreline Permit: "we will place the application on hold pending approval of the Shoreline Permit."[22] Without vesting, Kirkland could unilaterally change the applicable zoning code at any time during this process.

During all of its meetings in 2009, 2010, and most of 2011, Kirkland never advised Potala Village or Mr. Dargey that Kirkland believed the project could only vest upon submittal of a building permit application. Kirkland certainly informed Potala Village that it could submit a building permit application early in the process, but did not explain until November 2011 that Kirkland believed that was the only way Potala Village could vest. Further, Kirkland has never explained its diametrically opposing arguments that (a) a building permit was the only way to vest the project

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[21] CP 953-956, *Declaration of Justin Stewart*, attached email with Tom Bradford, City of Kirkland Plans Examiner.
[22] CP 90, *Declaration of Desiree Goble*, Exhibit A.

with its position but (b) Kirkland could, none-the-less require Potala Village to submit a new building permit, i.e. lose its vesting, after issuance of the Shoreline Permit.

E. Kirkland Processed the Requisite Transportation Permit and Extensive Environmental Review all Necessary for the Potala Village Project as Set Forth in the Shoreline Permit.

Kirkland requires every proposed development to pass a transportation concurrency test before the developer can submit a complete development application.[23] This review analyzes critical traffic considerations such as the traffic the project is expected to generate and site access. Kirkland approved the project with respect to transportation concurrency on November 29, 2010, and updated its approval during the shoreline development review.[24] The same group of neighbors which submitted extensive comments regarding the shoreline application filed multiple administrative appeals of this approval. Kirkland's Hearing Examiner conducted an open-record hearing, accepting evidence and taking testimony on these appeals. Based on the evidence and testimony presented, the Examiner upheld Kirkland's transportation concurrency

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[23] CP 714-15, *Dargey Declaration*, Exhibit I, referencing KMC 25.10.010 (transportation concurrency requirement).
[24] CP 711-712, *Dargey Declaration*, Exhibit H.

approval for Potala Village in all respects.[25] The neighborhood group did not challenge that decision further.

Kirkland also reviewed Potala Village's proposed development under the State Environmental Policy Act (SEPA), RCW Ch. 43.21C. On June 15, 2011, Kirkland issued a Determination of Non Significance for the proposed development, meaning all the project's environmental impacts were addressed under the current land use regulations.[26] However, Kirkland City Council and staff then received significant and incessant neighborhood pressure for a more extensive environmental review of the proposed development.[27]

As a result, two months later, Kirkland rescinded the DNS and required Potala Village to complete an Environmental Impact Statement ("EIS"). Potala Village acquiesced to the EIS, understanding that such process at least would operate as a means for complete public review of the proposed mixed-use development.[28]

The EIS process was the most extensive environmental review that Kirkland could have undertaken. Kirkland's EIS review relied heavily on, and would have been impossible to complete without, the extensive project details provided in the Shoreline Permit application. The EIS addressed the

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[25] CP 714-722, *Dargey Declaration,* Exhibit I.
[26] CP 393, *Dargey Declaration*, Exhibit B, page 1.
[27] *See e.g.* CP 96-97, *Swan Declaration*, pages 6-7.
[28] CP 374, *Dargey Declaration* page 4.

comprehensive development topics of land use, aesthetics, construction impacts, transportation, wildlife, and site remediation. The EIS contained a separate volume of public comments Kirkland had received from neighbors demanding changes to virtually every aspect of the project. After months of review, several public meetings, extensive written public comment, and over a hundred thousand dollars in consultant fees for the EIS alone, Kirkland issued the EIS on November 2, 2012.[29]

At the time the City issued the EIS, Kirkland had reviewed every aspect of Potala Village's project through the Shoreline Permit application, transportation review, and environmental review. Once the City issued the Shoreline Permit, only ministerial permits would be necessary for Potala Village to start building.

F. Kirkland Unreasonably Argues that Potala Village Should Have Known the City Council Would Impose a Moratorium on its Project While Kirkland was Actively Reviewing the Shoreline Application.

In November, 2011, the City Council abruptly imposed a moratorium on Potala Village's property, despite Kirkland's active review of the Shoreline Permit and EIS.

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[29]CP 375, 660-708, *Dargey Declaration*, page 5, Exhibit G (excerpts from several hundred page document).

Kirkland's moratorium was sharply defined: prohibiting the submittal of any building permit application on BN-zoned property.[30] Potala Village's project was the only active land development proposal for BN-zoned property in Kirkland at the time Kirkland imposed its moratorium.[31]

Kirkland admits that the neighborhood group opposing the Potala Village project placed significant pressure on the City Council to impose a moratorium on the Potala Village Property.[32] However, Kirkland's planner, Teresa Swan, talked with Mr. Dargey only a few days before the City imposed a moratorium on Potala Village's Property. Ms. Swan indicated that there had been a neighborhood uproar over Kirkland's continued review of the Potala Village project at the City Council's November 1, 2011 meeting.[33] Neither Ms. Swan nor Mr. Dargey knew, or could have known, the City Council would impose a moratorium on the Potala Village's Project without public notice at its very next meeting. Certainly, there was no possibility for Potala Village to compile and submit a building permit application in the few days before the next City council meeting. The City Council adopted the November 2011 moratorium with absolutely no public notice, let alone notice to Potala Village, being the only property meaningfully affected by the moratorium.

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[30] CP 724-728, *Dargey Declaration,* Exhibit J; CP 137-140, *Swan Declaration,* Exhibit I.
[31] CP 376, *Dargey Declaration,* page 6. The other BN-zoned property was fully developed.
[32] *Kirkland's Opening Brief,* page 8.
[33] CP 98 *Swan Declaration,* page 8.

Only after Kirkland imposed the moratorium did the City Manager meet with Potala Village and Mr. Dargey to state Kirkland's position that the project was not vested. Only then did Kirkland explain its position that Potala Village could only vest upon submitting a building permit application.[34] Kirkland made this new argument despite Ms. Swan's position that the Shoreline Permit did vest (even considering her misunderstanding as to what regulations the Shoreline permit vested to). As noted above, Kirkland has never rectified its argument that Potala Village should have applied for a building permit at the outset to vest the project, when Kirkland felt it could simply require Potala Village to submit a new building permit later, i.e. re-vest to later adopted zoning.

By the fall of 2012, the Potala Village Property had been under moratorium for nearly a year. Potala Village had consistently worked with the City and the neighborhood opposition group to find a solution to various concerns. Potala Village went so far as putting together designs for a building that had another substantial reduction in residential units down to 110. At the request of Kirkland City Councilmembers, Potala Village also engaged in a mediation process with the City and the neighborhood opposition group. To demonstrate its commitment to the mediation process, Potala Village put together a complete building permit application

[34] CP 73 *Declaration of Kurt Triplett*, page 2.

prepared that reflected a 110 unit design. This 110-unit design involved the lowest number of units which could still be built consistent with the building design, development plans and project scope submitted for the Shoreline Permit.[35] On October 16, 2012, Potala Village attempted to submit a building permit application for the project with the lower unit count, along with the necessary application review fees. However, Kirkland rejected that application.[36] Instead, on October 16, the Kirkland City Council again extended the moratorium through the end of 2012.

The City Manager then recommended, on the public record, that the City Council approve a settlement reflecting the 110 unit design.[37] However, despite having asked for the mediation process, the City Council refused to even consider the mediated agreement.[38]

G. Kirkland Approved the Shoreline Permit Based on the Original Application Proposal.

Despite the City Council's actions blocking the Potala Village project, Teresa Swan advised Potala Village that Kirkland was continuing to work on the Shoreline Permit. In early December 2012, Ms. Swan expressly again recognized that the Shoreline Permit was based on a project

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[35] CP 377, *Dargey Declaration*, page 7.
[36] CP 730, *Dargey Declaration*, Exhibit K.
[37] CP 740-750, *Dargey Declaration*, Exhibit M.
[38] CP 752-760, *Dargey Declaration*, Exhibit N.

comprised of 143 dwelling units and 6000 square feet of commercial space.[39]

Under cover of the ongoing year-plus moratorium, on December 11, 2012, the City Council adopted extensive changes to the BN zone. Among many changes to the BN zone, Kirkland imposed a new and drastically lower density limitation on the BN zone. This new limit translates into a maximum development potential for the Potala Village Property of less than 60 residential units, less than half the number units proposed under the Shoreline Permit. Other significant legislative changes to the BN-zone included wider buffers, less commercial space, limits on the types of commercial uses, floor elevation height limits, and a newly imposed a design review process.[40] In sum, the new BN zone parameters would not allow for either the density or building design that is reflected in the Shoreline Permit.

Irrespective of the Council's changes to the BN zone, on January 17, 2013, Kirkland issued the Shoreline Permit application.[41] As recognized by Ms. Swan, that permit was based on, and provided for, a mixed-use development consisting of 143 dwelling units and 6000 square feet of commercial space. Kirkland did state therein that it believed that Shoreline

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[39] CP 761-762, *Dargey Declaration*, Exhibit O.
[40] CP 379, *Dargey Declaration*, pg. 9; CP 287-346, *Kolouskova Declaration*, Exhibits C, D, E.
[41] CP 393-412, *Dargey Declaration*, Exhibit B (shoreline decision, pages 1-11).

Permit did not vest. However, by this point the legal argument was well on the table, since Potala Village had filed this lawsuit and was pursuing its case in Superior Court. Without vesting, this Shoreline Permit has absolutely no meaning or utility; the 143-unit/6000 square foot commercial development that Kirkland approved under the shoreline permit can never be built.

Kirkland does not explain how it could issue a Shoreline Permit that was, in its own opinion, inconsistent with the BN zone. If Kirkland truly believed the Shoreline Permit did not vest, then it would not have issued the Shoreline Permit at all because it would have authorized activity not allowed under the BN zone. Kirkland will argue that it issued the Shoreline Permit because it believes that permit only vested to shoreline regulations. But this argument creates a Catch-22 since the shoreline regulations inherently incorporate the zoning and land use regulations by requiring the City to impose the most environmentally protective regulations within the zoning code, whether or not those are found in the shoreline regulations or elsewhere.

III. ARGUMENT

A. Writ of Mandamus and Declaratory Judgment are Each Legitimate Legal Vehicles for this Court to Reach the Merits.

Before Superior Court, the parties agreed that the matter could be reviewed under a Writ of Mandamus action.[42] The City only argues only that this Court should not decide the case under a declaratory judgment.

Declaratory judgment is an appropriate vehicle for this Court to determine the manner in which the vested rights doctrine applies to Potala Village's pending land development. As recently as January, 2013, the Washington Court of Appeals, Division 1, used declaratory judgment to decide the applicability of the vested rights doctrine to a pending land use application based on cross-motions for summary judgment.[43]

The elements necessary to support declaratory judgment are:

> (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.[44]

There can be no question that a dispute exists between Potala Village and Kirkland regarding what rights Potala Village's mixed use development

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[42] CP 48, *City's Motion for Summary Judgment*, page 11; CP 359-361, *Potala Village's Motion for Summary Judgment*, pages 13-15.
[43] *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, 291 P.3d 278 (2013).
[44] *Burman v. State*, 50 Wash. App. 433, 439, 749 P.2d 708 (1988).

vested to when Potala Village submitted a complete Shoreline Permit application. Potala Village and Kirkland have genuine and opposing interests which are both concrete and substantial. Finally, this Court's decision on the issues would be determinative, i.e. would terminate the pending controversy. As in *Town of Woodway v. Snohomish County*, declaratory judgment is appropriate here to determine Potala Village's vesting rights under its shoreline application.

A person whose rights are affected by a statute or municipal ordinance may ask a court to determine questions of construction or validity arising from the statute or ordinance and obtain a declaration of the person's rights thereunder.[45] Potala Village presents this Court with a justiciable controversy that should be resolved by declaratory judgment: which zoning and land use regulations (municipal ordinances) govern the Potala Village project, considering that Potala Village submitted a complete Shoreline Permit application? Potala Village submits that the vested rights doctrine requires Kirkland to apply the BN zoning and land use regulations in effect at the time Potala Village submitted the complete Shoreline Permit application to the project's building permit application, irrespective of when that building permit application is submitted.

[45] RCW 7.24.020.

B. Washington Law Strongly Favors Private Property Rights and Certainty in the Land Development Process.

The ability to develop one's land is "beyond question, a valuable right in property."[46] The fundamental principle underlying land use law provides that "absent more, an individual should be able to utilize his own land as he sees fit."[47] Although zoning is certainly a legitimate exercise of police power "which can permissibly limit an individual's property rights, it goes without saying that the use of police power cannot be unreasonable."[48] Due process limits how cities may use that police power.[49]

> ...exercise of this authority must be reasonable and rationally related to a legitimate purpose of government such as avoiding harm or protecting health, safety and general, not local or parochially conceived, welfare.[50]

In this case, Kirkland's responsibility was to ensure compliance with codes and ordinances, "not to devise anonymous procedures available to the citizenry in an arbitrary and capricious fashion."[51] Kirkland cannot interfere with a land development project, such as Potala Village, by

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[46] *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 50, 720 P.2d 782 (1986).
[47] *West Main*, 106 Wn.2d 47, 50, (*citing* U.S. Const. amends. 5, 14; *Norco v. King County*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982)).
[48] *Norco Construction Inc. v. King County*, 97 Wn.2d, 680, 684-685, 649 P.2d 103 (1982) (*citing State ex rel. Randall v. Snohomish County*, 79 Wash.2d 619, 488 P.2d 511 (1971); *In re Girsh*, 437 Pa. 237, 263 A.2d 395 (1970)).
[49] *West Main*, 106 Wn.2d at 52; *Valley View Ind. Park v. City of Redmond*, 107 Wn.2d 621, 636, 733 P.2d 182 (1987).
[50] *Norco*, 97 Wn.2d at 685; *see also West Main*, 106 Wn.2d at 52.
[51] *Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wn.2d 475, 482, 513 P.2d 36 (1973)

applying its regulations and using its legislative powers in such a manner as to block that development and thereby curry favor with its voters.[52]

C. Washington's Vested Rights Doctrine Entitles a Developer to Have a Land Development Proposal Decided under the Regulations in Effect at the Time the Application was Filed.

The vested rights doctrine is intended to prevent "tactical maneuvering" mid-way through the land development process.[53] The vested rights doctrine is a guarantee that the rules will not change in the middle of the land development process such that the developer becomes subject to a City's fluctuating zoning policy.

> The doctrine is supported by notions of fundamental fairness. As James Madison stressed, citizens should be protected from the "fluctuating policy" of the legislature. *The Federalist No. 44,* at 301 (J. Madison) (J. Cooke ed. 1961). Persons should be able to plan their conduct with reasonable certainty of the legal consequences. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv.L.Rev. 692 (1960). Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.[54]

The vested rights doctrine is a way in which Washington defends private property rights and ensures certainty for all interested parties.[55] The vesting doctrine emphasizes certainty and predictability in the land

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[52] *Pleas v. City of Seattle*, 112 Wn.2d 794, 806, 774 P.2d 1158 (1989).
[53] *Norco*, 97 Wn.2d at 684.
[54] *West Main*, 106 Wn.2d at 51.
[55] *West Main*, 106 Wn.2d at 50; *see also East County Reclamation Company v. Bjornsen*, 125 Wn. App. 423, 437, 105 P.3d 94 (2005).

development process.[56] The vested rights doctrine freezes zoning and land use regulations to a single point in time for purposes of reviewing proposed development of a specific piece of property; once a project is 'vested', subsequent changes in zoning and land use regulations do not apply.[57]

> In Washington, "vesting" refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission.[58]

Vesting is neutral in its application and effect. A project's vesting is binding, even if a developer would otherwise have liked to opt into later changes to zoning or land use regulations.[59] A developer such as Potala Village cannot 'mix and match' vested-to and later-adopted regulations: the project vests completely. Conversely, Kirkland must respect Potala Village's vested rights and not administer them in such a fashion as to eviscerate the certainty of which zoning and land use regulations apply to the project.

D. The Vested Rights Doctrine Applies to Shoreline Permits.

In 1971, Washington State enacted both the Shoreline Management Act ("SMA") and the State Environmental Policy Act. Those

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[56] *Valley View Indus. Park v. City of Redmond*, 107 Wash.2d 621, 637, 733 P. 2d 182 (1987).
[57] *Friends of the Law v. King County*, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994); *Abbey Road Group., LLC v. City of Bonney Lake*, 167 Wash.2d 242, 250, 218 P.3d 180 (2009) (*citing Hull v. Hunt*, 53 Wash .2d 125, 130, 331 P.2d 856 (1958)).
[58] *Noble Manor*, 133 Wash.2d 269, 275.
[59] *East County Reclamation*, 125 Wn. App. 432, 437.

environmental laws were innovative and imposed vigorous obligations on local governments in regulating both shorelines and areas adjacent to shorelines.[60]

i. The Shoreline Management Act imposed comprehensive land use review requirements on any land development that may affect a shoreline of statewide significance.

Under the SMA, the State mandated a permit system to be administered by local governments based on master plans prepared and adopted jointly by local governments and the Washington State Department of Ecology.[61] The SMA requires a developer to obtain a Shoreline Permit before it can undertake any land development on or near a shoreline of statewide significance.[62]

> At the very least, the legislative scheme of SMA contemplates a systematic and intelligent management of our shorelines. ...It is also clear that lands adjacent to shorelines must also be taken into consideration if the consistency stressed in the act is to be achieved.[63]

From the outset, judicial review made it clear that the SMA had significant 'teeth' and would require detailed and meaningful review of land development in shorelines and adjacent properties.[64]

The Shoreline Permit was born out of this requirement for comprehensive review of land development projects potentially affecting

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[60] *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 509 P.2d 390 (1973).
[61] RCW 90.58.340.
[62] RCW 90.58.140.
[63] *Merkel*, 8 Wn. App. 844, 849-850.
[64] *Weyerhaeuser v. King County*, 91 Wn.2d 721, 592 P.2d 1108 (1979).

the shoreline. The Shoreline Permit process involves a detailed review of the proposed land development, leaving nothing to future speculation. All aspects of a proposed development, including setbacks, building height, bulk and scale, driveway access, parking, aesthetics and a broad range of other considerations, are subject to review under a Shoreline Permit application.[65] Many of these considerations would be reviewed as part of a building permit application if a Shoreline Permit was not first required. Extensive public process is required before the Shoreline Permit can be approved.[66]

Kirkland incorrectly describes the Shoreline Permit as being limited to only the portion of Potala Village's project within the designed shoreline area.[67] In fact, as can be seen in the approved Shoreline Permit, Kirkland reviewed the entire proposed mixed-use project an all respects.[68] Washington State law required Kirkland to review and issue the Shoreline Permit for the entire project, even if only a portion of the project falls within the designated shoreline area and the rest is upland, and even if only

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[65] *Allegra Development Company v. Port of Seattle et al.*, Shoreline Hearings Board Case No. 99-08 & 99-09 (1999).
[66] *State Dept. of Ecology v. City of Spokane Valley*, 167 Wash. App. 952, 963-965, 275 P.3d 367 (2012) *citing Buechel*, 125 Wash.2d 196, 205; RCW 90.58.140(4), (7); RCW 90.58.180 (1), (2).
[67] *Kirkland's Opening Brief*, page 23.
[68] CP 393-412, *Dargey Declaration*, Exhibit B (shoreline decision, pages 1-11).

a small part is within a designated shoreline area.[69] The SMA and Shoreline Hearings Board would have prohibited Kirkland from isolating its review to only that portion of Potala Village's development in the shoreline area.[70]

The SMA required the Shoreline Permit application to include comprehensive and technical specifics regarding the proposed project, property and vicinity. Many of these project specifics would have otherwise only been addressed through the building permit process if a Shoreline Permit had not been required. Additionally, much of the Shoreline Permit information covered considerations well beyond the building permit review. The SMA itself required Potala Village to disclose in the Shoreline permit application the following elements:

- A description of the proposed project including the proposed use and activities necessary to accomplish the project. Under both Shoreline Board and judicial case law the project includes both shoreline and upland areas. This was reflected in Potala Village's application materials.
- Detailed development plans for the project, again in both the shoreline and upland areas for a unified project such as Potala Village. These plans must include detailed project information, elevation drawings, physical site information, sensitive area locations and landscaping plans, all existing and proposed structures, depiction of views and many

[69] RCW 90.58.140(2); WAC 173-27-180; *Merkel*, 8 Wn. App. at 851-852; *Twin Bridge Marina Park v. Department of Ecology*, SNB 01-016 & 01-017, Sections VI, X (2002); *Allegra*, SHB 99-08 & 99-09, Sections XIX and XX, *citing to Weyerhaeuser v. King County*, 91 Wn.2d 721 (a unified structure partially within shoreline and partially upland is considered "within" the shoreline under SMA and requires a Shoreline Permit for the entire structure).

[70] RCW 90.58.140; *Merkel*, 8 Wn. App. at 850-851.

other similar considerations.

- A description of the property as it currently exists including physical characteristics and current improvements and structures and of the vicinity, including adjacent uses, structures and improvements, intensity of development and physical characteristics.[71]

As reflected in Potala Village's application materials and the approved Shoreline Permit, Kirkland reviewed the Potala Village mixed-use land development project in its entirety.[72] Consistent with SMA mandates, Kirkland eventually issued a Shoreline Permit for the Potala Village project as a whole because the development is a single, unified project.

ii. Courts have consistently applied the vested rights doctrine to Shoreline Permits in order to substantiate the Shoreline Management Act's interest in balancing the protection of private property rights.

The SMA requires protection of both Washington State shoreline priorities and private property rights:

> The Shoreline Management Act does not prohibit development of the state's shorelines. Rather, it calls for "coordinated planning" that recognizes and protects private property rights consistent with the public interest.[73]

As required by this mandate to protect private property rights during shoreline review, Washington Courts have consistently applied the vested

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[71] WAC 173-27-180.

[72] CP 392-643 *Dargey Declaration*, Exhibit B (application materials).

[73] *May v. Robertson*, 153 Wash. App. 57, 92, 218 P.3d 211, 228 (2009), citing to *Nisqually Delta Ass'n v. City of Dupont*, 103 Wash.2d 720, 726, 696 P.2d 1222 (1985) (citing RCW 90.58.020) (emphasis added).

rights doctrine to Shoreline Permit applications. [74] In fact, Washington Courts extended the vested rights doctrine to Shoreline Permits soon after the SMA was adopted.[75] In *Talbot v. Gray*, the Court ruled that the applicant's "obligations and rights to develop vested on November 18, 1971, when they applied for a Shoreline Permit."[76] Based on its conclusion that the vested rights doctrine applies to the Shoreline Permit, the *Talbot* Court ruled that the use of the parcel in dispute "as permitted by the zoning ordinance" was legal.[77]

For almost 40 years, Washington Courts have ruled repeatedly that the vested rights doctrine applies to Shoreline Permits: the Washington Supreme Court in *Norco Construction Inc. v. King County*, *Buechel v. State Dept. of Ecology*, *Erickson v. McLerran,* and *Abbey Road v. Bonney Lake,* and Courts of Appeals in *Carlson v. Town of Beaux Arts*, *Weyerhaeuser v. Pierce County*, *Westside Business Park v. Pierce County*, and, most recently, this Court in *Town of Woodway v. Snohomish County.*[78]

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[74] *Talbot v. Gray*, 11 Wash. App. 807, 811, 525 P.2d 801 (1974); *Woodway*, 172 Wn. App. 643, 652; *Abbey Road Group v. City of Bonney Lake*, 167 Wn.2d 242, 253, ftnt. 8, 218 P.3d 180 (2009); *Westside Business Park v. Pierce County*, 100 Wn. App. 599, 603, 5 P.3d 713 (2000); *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 893, ftnt. 12, 976 P.2d 1279 (1999); *Erickson v. McLerran*, 123 Wn.2d 864, 871, 872 P.2d 1090 (1994); *Carlson v. Town of Beaux Arts Village*, 41 Wn. App. 402, 704 P.2d 663 (1985); *Norco,* 97 Wash.2d 680, 684.

[75] *Talbot*, 11 Wn. App. 807, 811.

[76] *Talbot*, 11 Wn. App. at 811 (emphasis added).

[77] *Talbot*, 11 Wn. App. at 812.

[78] *Norco*, 97 Wash.2d at 684; *Buechel*, 125 Wash.2d at 207; *Erickson*, 123 Wn.2d 864, 871; *Abbey Road*, 167 Wn.2d 242, 253, ftnt. 8; *Carlson*, 41 Wn. App. 402, 405;

This past January, 2013, this Court unequivocally held that: "The vested rights doctrine also applies to subdivision applications and shoreline substantial development permit applications."[79]

Kirkland improperly diminishes both the importance of *Talbot* and the extensive progeny of cases which have since upheld *Talbot*, including *Woodway*. Kirkland asks this Court to disregard this lengthy history of extending the vested rights doctrine to Shoreline Permits. Instead, Kirkland asks this Court to overrule this case law history in one stroke of the pen because Kirkland feels the *Talbot* facts did not establish enough of a case and that the *Talbot* Court holdings did not go far enough. This Court is, rightfully, bound to the Supreme Court's line of cases cited above, and should rule consistently with its own holding just this year in *Woodway*. The caselaw subjecting Shoreline Permits to the vested rights doctrine has been long in existence without any comment or state legislation. Had the Washington legislature disagreed with this common law, it would have long ago legislated a different rule. There is no reason for the Washington legislature to step in now, and adopt new legislation, on a topic that has for so long been enshrined in Washington common law.

Weyerhaeuser, 95 Wn. App. 883, 893, ftnt. 12; *Westside*, 100 Wn. App. 599, 603; *Woodway*, 172 Wn. App. 643, 652.

[79] *Woodway*, 172 Wn. App. 643, 652 (*citing to Talbot*, 11 Wn. App. 807, 811) (emphasis added).

E. The Vested Rights Doctrine is Designed to Assure the Land can be Developed in the Manner Applied for if Consistent with the Vested-To Zoning and Land Use Ordinances.

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.[80] The vested rights doctrine, and the protections it affords, are the same protections irrespective of whether the doctrine applies as a result of common law or statute.[81]

Kirkland asks this Court to ignore case law explaining the vested rights doctrine because that case law dealt with a different type of permit application. However, Kirkland provides no authority for its novel proposition that this Court should apply a different vested rights doctrine depending on the type of application under review. Washington has never applied a different vested rights doctrine depending on the type of permit application under review, and in fact rejected this approach in *Noble Manor v. Pierce County.*

Noble Manor is a seminal Washington Supreme Court case that explained how the vested rights doctrine works for all vesting, whether as a result of common law or statute.[82] Kirkland asks this Court to disregard

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[80] *Noble Manor*, 133 Wn.2d 269, 275.
[81] *See e.g. Weyerhaeuser*, 95 Wn. App. 883, 894 (Court applied Supreme Court reasoning in *Noble Manor* to a conditional use permit, despite *Noble Manor's* vesting being based on statute but *Weyerhaeuser* vesting based on common law: rationale and analysis applied identically).
[82] *Id.*

Noble Manor because that case dealt with a subdivision. Again, the vested rights doctrine does not change from permit to permit. *Noble Manor's* discussion of vesting and the need for it applies equally in this case.

Kirkland wishes to avoid *Noble Manor* because, when its arguments are scrutinized under that case, Kirkland's actions are readily comparable to those of Pierce County, both equally violating the vested rights doctrine. In *Noble Manor*, Pierce County acknowledged that a short subdivision application vested when the complete application was submitted. However, Pierce County argued that only the right to subdivide vested, not the right to build anything on those lots.[83] The County argued that all other land use and development rights should vest at the time a building permit application is submitted. *Id.*

Kirkland's argument is virtually identical to Pierce County's in *Noble Manor* in acceding that the Shoreline Permit vests, but only to shoreline regulations, nothing else.[84] Even if Potala Village submitted a building permit application along with its Shoreline Permit, Kirkland took the position that it could put that building permit application on hold, later reject it and require a new after it issued the Shoreline Permit.[85] In the meantime, Kirkland could proceed to change the underlying zoning it

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[83] *Noble Manor*, 133 Wn.2d at 277.
[84] *Kirkland's Opening Brief*, pages 22-23.
[85] CP 955-956, *Stewart Declaration*, attached email from Tom Bradford, City of Kirkland Plans Examiner.; CP 89-90, *Declaration of Desiree Goble*, Exhibit A.

would apply to the building permit, making the project impossible to build even once Kirkland approved the Shoreline Permit. Under this approach, Kirkland could force Potala Village to lose its vesting even if Potala Village had submitted a building permit application at the same time it applied for the Shoreline Permit.

Under Pierce County's arguments in *Noble Manor*, and Kirkland's arguments in the instant case, a developer could obtain a subdivision or Shoreline Permit, but could not build anything as a result of either of those permits because of changes to zoning and land use regulations that Pierce County (or, in this case, Kirkland) adopted after the developer submitted the subdivision (here the Shoreline application) but before submitting the building permit application. Kirkland's approach to Potala Village, and Pierce County's in *Noble Manor*, are strong examples for why Washington maintains its vested rights doctrine: to protect applicants from fluctuating land use policies and to bar cities from unlawfully devising anonymous procedures as a means to frustrate a developer's ability to vest.[86] The vested rights case law discussed herein protects Potala Village from Kirkland's unlawful and unfair approach to land development in this case.

The Supreme Court rejected this very approach argument as resulting in an "empty right" that would conflict with purpose of the vested rights

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[86] *Eastlake Community Council*, 82 Wn.2d 475, 482; *Pleas*, 112 Wn.2d 794, 806.

doctrine.[87] Limiting the vested right to only the division of land into smaller lots, but not to actual use and development of the property based on what was set forth in that subdivision application, would render the vested rights doctrine virtually meaningless.[88] Likewise, limiting the vested right to the Shoreline Permit, but not to actual use and development of the property based on what is provided for in that Permit, renders the vested rights doctrine meaningless.

> Not all conceivable uses allowed by the laws in effect at the time of a short plat application are vested development rights of the applicant. However, when a developer makes an application for a specific use, then the applicant has a right to have that application considered under the zoning and land use laws existing at the time the completed plat application is submitted.[89]

Courts apply the vested rights doctrine as articulated in *Noble Manor* to applications which vest as a result of common law, such as Shoreline Permits. For example, the vested rights doctrine exactly and expressly as articulated in *Noble Manor* has been extended to conditional use permits, which vest solely as a result of common law (same as a shoreline development permit, *supra*).[90] The *Weyerhaeuser* Court held that a vested

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[87] *Noble Manor*, 133 Wn.2d at 280.
[88] *Id.*
[89] *Noble Manor*, 133 Wash.2d at 285 (emphasis added).
[90] *Weyerhaeuser*, 95 Wn. App. 883, 893-894; *Beach v. Board of Adjustment*, 73 Wn.2d 343, 438, P.2d 617 (1968).

right to the conditional use permit "but not for land use and development, would be an 'empty right'...."[91]

F. The Shoreline Permit Entitles Potala Village to Have the Mixed-Use Project, Including Building Permit, Reviewed Under the Zoning and Land Use Regulations in Effect as of the Date the Shoreline Application Vested.

Following *Noble Manor*, were the Court to limit Potala Village's vested right only to shoreline regulations and the shoreline permit, but not to the actual use and development of the property based on what was set forth in the application, this Court would render the vested rights doctrine meaningless.[92] As well-stated in *Weyerhaeuser*, declining to recognize vesting for the Potala Village development all the way through the permitting process "would fundamentally and necessarily defeat the project."[93]

Like Pierce County in *Noble Manor*, Kirkland required Potala Village to state up front in its Shoreline Permit application what the proposed land development would consist of: 143 dwelling units and 6000 square feet of commercial space. Kirkland required Potala Village to submit complete site and architectural plans, transportation analysis, parking layout, and environmental review.

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[91] *Id.*, 895.
[92] *Noble Manor*, 133 Wn.2d at 280; *Weyerhaeuser*, 95 Wn. App. at 894.
[93] *Weyerhaeuser*, 95 Wn. App. at 895.

This case demonstrates the hierarchical distinction between zoning regulations and ministerial codes such as building and grading. As noted above, the Shoreline Permit addresses some aspects of the project that otherwise would only be reviewed under the building permit (for example setbacks, building height, size, scale, exterior modulation, materials). These elements then must be reflected in the building permit application. The building permit application itself must comply with the City's current building codes, addressing such considerations as, for example insulation, fire safety systems, and construction techniques. However, the vested rights doctrine provides that, at no point during this permitting process do the BN zoning regulations change once Potala Village submitted the shoreline development application: otherwise it would be an 'empty right'.

The collective common law, statutory purposes and regulatory requirements do not allow Kirkland to change the rules on Potala Village in the manner that Kirkland attempts. That approach violates fundamental fairness and Potala Village's rights due process, which concepts underlie the vested rights doctrine. Kirkland's approach of processing the Potala Village Shoreline Permit application and environmental review at an expense of hundreds of thousands of dollars, but simultaneously imposing a moratorium on the Potala Village Property for more than a year, exposed Potala Village to significant uncertainty and arbitrary conduct at an

extremely high cost and without any rational basis. The vested rights doctrine is designed expressly to protect private property owners and developers from unfair municipal conduct. Because the vested rights doctrine applied to the Shoreline Permit application, Potala Village's project is protected from Kirkland's subsequent fluctuating legislative policy with respect to the BN zone.

G. RCW 19.27.095 does not Supersede the Common Law Vested Rights Doctrine as it Applies to Shoreline Permits.

Kirkland's argument that RCW 19.27.095 overrides the long-standing common law vested rights doctrine does not stand up to scrutiny. Kirkland relies on the text of RCW 19.27.095 and on *Abbey Road* and *Erickson* for this proposition. None of these authorities support Kirkland's assertion.

RCW 19.27.095 supplemented common law vesting. This statute simply and exclusively codifies vested rights for a building permit application. However, nothing in that statute in any way changes the pre-existing common law or statutory vesting. RCW 19.27.095 requires Kirkland to allow a building permit to vest but does not impact other types of land development applications.

As explained in *Abbey Road* and *Erickson*, the vested rights doctrine applies to several different types of permit applications, not only building

permits, even after adoption of RCW 19.27.095.[94] Both *Abbey Road* and *Erickson*, along with a range of other vested rights cases, recognize and maintain the common law vested rights doctrine in the decades since RCW 19.27.095 was enacted.

> We agree with Erickson that our prior cases apply the vested rights doctrine in other contexts besides building permits. ... Within the parameters of the doctrine established by statutory and case law, municipalities are free to develop vesting schemes best suited to the needs of a particular locality.[95]

Both *Abbey Road* and *Erickson,* along with a line of vesting cases, maintain that the vested rights doctrine applies to Shoreline Permits.[96]

H. Kirkland's Cited Authorities, Including *Abbey Road* and *Erickson*, Expressly Recognize that the Vested Rights Doctrine Extends to Shoreline Permits.

Kirkland would have this Court completely disregard the Washington State Supreme Court's express recognition that the vested rights doctrine applies to Shoreline Permits, as stated in both *Abbey Road* and *Erickson*. *Erickson* and *Abbey Road* retained the existing common law vested rights doctrine without any change.[97]

Kirkland cannot change the parameters of the vested rights doctrine established by case law, namely that a shoreline permit is accorded the protections and certainty of the vested rights doctrine. The *Abbey Road*

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[94] *Abbey Road*, 167 Wash.2d 242, 252, ftnt. 8.
[95] *Erickson*, 123 Wn.2d 864, 873 (emphasis added).
[96] *Abbey Road*, 167 Wash.2d 242, 252, ftnt. 8; *Erickson*, 123 Wn.2d 864, 871.
[97] *Id; Id.*

Court followed *Erickson* and expressly recognized that the vested rights doctrine applies to Shoreline Permits.[98]

Kirkland also asks this this Court to rely on a casual, Bar Association newsletter opinion regarding the *Abbey Road* decision, written by Roger Wynne.[99] The *Abbey Road* Court relied on an earlier, very involved law review that Mr. Wynne had authored: "*Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It.*".[100] Mr. Wynne's law review article goes into significant detail as to the vested rights doctrine, history and analysis.[101] In contrast, Kirkland relies on Mr. Wynne's far more opinionated and personalized Bar Association newsletter article commenting on the *Abbey Road* decision itself.

Kirkland fails to disclose Mr. Wynne's analysis that case law clearly applies the vested rights doctrine to Shoreline Permits:

> ...the rule in Washington seems to be that the vested rights doctrine applies to applications for building permits, preliminary subdivisions, conditional use permits, shoreline substantial development permits, grading permits, and septic permits, but not to applications for site-

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[98] *Abbey Road*, 167 Wn.2d 242, 253, ftnt. 8.
[99] *Kirkland's Opening Brief*, page 19.
[100] *Abbey Road*, 167 Wn.2d 242, 258, 261, *citing to* 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, 928-29 (2001). The *Abbey Road* Court relied on this law review article for two isolated comments, (1) that it is a developer's choice to approach the development permit process in a sequential fashion and (2) that reform of the vested rights doctrine should be made by the Washington State legislature.
[101] CP 858-935, *Second Declaration of Kolouskova*, Exhibit B.

specific rezones, preliminary or binding site plans, or master use permits.[102]

The *Abbey Road* court relied on this very article and, as noted above, expressly recognized that the vested rights doctrine applies to Shoreline Permits.[103] The common law mandate is unavoidable: the vested rights doctrine applies to Shoreline Permits.

I. This Court Most Recently Affirmed that the Vested Rights Doctrine Applies to Shoreline Permits in *Town Of Woodway v. Snohomish County*.

In January 2013, Division One again recognized the common law vested rights doctrine in *Town of Woodway v. Snohomish County*. In *Woodway*, this Court provided a useful summary of the vested rights doctrine. As part of that summary, this Court again clearly recognized Shoreline Permit applications vest: "The vested rights doctrine also applies to ... shoreline substantial development applications."[104]

Kirkland's purported confusion as to why Judge Benton referenced the *Woodway* case is only the result of Kirkland's refusal to recognize this Court's discussion of vested rights caselaw therein.[105] While the factual context of *Woodway* is different, *Woodway* is highly relevant to this Court's

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[102] CP 873, *Second Kolouskova Declaration*, Exhibit B (footnotes omitted; emphasis added).
[103] Kirkland also fails to note that Mr. Wynne recognizes this same vesting applicability in his the Environment and Land Use Law Bar Section newsletter article.
[104] *Woodway*, 172 Wn. App. 643, 652 (emphasis added), *citing to*: RCW 19.27.095; *Abbey Road*, 167 Wn.2d 242, 246; *Graham Neighborhood Ass'n v. F.G. Assocs.*, 162 Wn. App. 98, 115, 252 P.3d 898 (2011); *Talbot*, 11 Wn. App. 807, 811.
[105] *Kirkland's Opening Brief*, page 14.

review as being the most recent of a long line of cases explicitly recognizing that the vested rights doctrine applies to Shoreline Permits. Kirkland's inability to overcome this case law forms a fatal flaw to its case.

J. *Abbey Road* and *Erickson* are Substantively Irrelevant Because Both Cases Addressed Permits which were Exclusively Created by Cities, Unlike the State's Shoreline Permit Requirement.

Erickson and *Abbey Road* deal with permitting schemes that have no relationship to the instant case. Both cases addressed applications that were creatures of entirely local origin used by some cities but irrelevant to the instant case. Those local application requirements were flexible, requiring little in the way of project specificity. In contrast, the instant case involves a state-mandated Shoreline Permit application that requires extensive and complete project plans and studies. Conversely, Kirkland did not require Potala Village to undergo any sort of site plan process such as that involved in *Erickson* and *Abbey Road.*

In *Erickson*, the Supreme Court recognized the current scope of both statutory and common law vesting, which includes shoreline permit applications, as valid. The Court refused to expand the common law vested rights doctrine to cover the City of Seattle's master use permit, a review process created entirely by Seattle.[106] The master use permit application involved a very conceptual review without requiring specific plans. Only

[106] *Erickson*, 123 Wn.2d 864, 873.

later in the process would an applicant need to incur the costs and design the project specifics that would give substance to the project.[107] The Court held that this process did not warrant a judicial grant of vested rights protection to the Seattle master use permit process.

As a result, the *Ericson* Court ruled that cities can develop vesting schemes for their locally created review processes that are best suited to their locality "[w]ithin the parameters of the doctrine established by statutory and case law."[108]

A Shoreline Permit is very different from Seattle's master use permit process addressed in *Erickson.* Shoreline Permits are mandated state-wide under the Shoreline Management Act. The process, including administrative appeals to the Washington State Shoreline Hearings Board, is governed by the state and modified by cities only in very limited ways. As discussed previously, Shoreline Permit application requirements are extensive and detailed so that complete project design and parameters are reviewed by a city, the public and the Shoreline Hearings Board, if their jurisdiction is engaged by administrative appeal (as was the case for Potala Village).

As in *Erickson,* the *Abbey Road* Court expressly recognized that the common law vested rights doctrine continues to protect specific

[107] *Erickson*, 123 Wn.2d 864, 874-875.
[108] *Erickson*, 123 Wn.2d at 873.

applications, including shoreline permit applications.[109] *Abbey Road* was based on the *Erickson* Court's decision not to judicially expand the common law vested rights doctrine to locally-legislated site plan applications. The *Abbey Road* Court found the Bonney Lake site plan process was substantially the same as Seattle's master use permit.[110] Both *Abbey Road* and *Erickson* emphasize that such site plan permits are purely creatures of local construct, and as such should not benefit from a state-wide extension of common law vesting. Consistent with the purely local nature of these permits, the Supreme Court left it to the same cities that decide to create such approvals to also determine at a local level how vesting will pertain.[111]

In contrast, the Shoreline Management Act absolutely mandates at a state level that a proposed project like Potala Village's cannot be undertaken without a Shoreline Permit. Kirkland has no discretion in this requirement: it must review and approve such a permit before the Potala Village project can proceed. Unlike the applications in *Erickson* and *Abbey Road*, the Shoreline Permit process is not a creature of local creation, but instead is a state mandated permit required for shorelines across the state.

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[109] *Abbey Road*, 167 Wash.2d 242, 253 ftnt. 8.
[110] *Abbey Road*, 167 Wash.2d 242, 252 ftnt. 7.
[111] *Erickson*, at 873.

As such, *Abby Road* properly recognized the ongoing application of the vested rights doctrine to Shoreline Permits.

As in *Erickson*, the *Abbey Road* Court found it significant that locally created site plan permits processes can involve the infancy of a project, before significant information is known or meaningful plans developed.[112] Costs and details of such permits vary significantly from project to project.[113] This is very different from a Shoreline Permit, which has strict criteria and application requirements that delve into all aspects of the proposal as mandated by the SMA. For the Shoreline Permit, the SMA required Kirkland to reviewed project specifics such as the commercial space, building design, setbacks, landscaping and buffers, parking, landscaping, views, tree retention, building access, relationship between project impacts and existing roadways and sidewalks, aesthetics and many other considerations.[114]

Because of these pivotal distinctions and both the *Erickson* and *Abbey Road* Court's express recognition of common law vested rights, *Erickson* and *Abbey Road* support Potala Village's case and are otherwise inapplicable.

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[112] *Abbey Road*, 167 Wn.2d 242, 184.
[113] *Abbey Road* at 253; *Erickson* at 874-875.
[114] WAC 173-27-180; CP 393-643, *Dargey Declaration*, Exhibit B.

K. The Vested Rights Doctrine is Uniform in Application: It Freezes all Zoning and Land Use Regulations Pertaining to the Project.

Kirkland's arguments are internally inconsistent. On the one hand, Kirkland argues that the vested rights doctrine should not apply to Shoreline Permits. On the other hand, Kirkland concedes that the vested rights doctrine does apply, but that it should be uniquely limited for Shoreline Permits. This argument too is inconsistent with established law.

There is only one vested rights doctrine. When the law recognizes that a land use application is governed by the vested rights doctrine, that applicant has a right to have its project reviewed under the zoning and land use laws in effect at the time of the application.[115]

> Vesting 'fixes' the rules that will govern the land development regardless of later changes in zoning or other land use regulations.[116]

Courts have been consistent as to what regulations are frozen by the vested rights doctrine: "'[t]he vested rights rule is generally limited to those laws which can loosely be considered zoning laws.'"[117] Mr. Wynne even explains that "Courts have generally agreed that the vested rights doctrine freezes in time 'zoning ordinances' and most ordinances requiring a host of other land use authorizations."[118] According to Mr. Wynne, the vested rights doctrine is best described as freezing "those development regulations

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[115] *Noble Manor*, 133 Wn.2d at 285.
[116] *Weyerhaeuser*, 95 Wn. App. at 891.
[117] *Graham*, 162 Wn. App. 98, 115 (citations omitted).
[118] CP 897, *Second Kolouskova Declaration*, Exhibit B (footnotes omitted).

that affect the type, degree, or physical attributes of a development or use."[119]

Washington Courts have never varied as to the scope of the vested rights doctrine, nor have the Courts applied a different doctrine depending on the type of application at issue, e.g. an application which vests by statute (e.g. subdivisions) versus by common law (e.g. conditional use permits and Shoreline Permits).[120] Unlike what Kirkland would have this Court believe, the vested rights doctrine does not only freeze subdivision rules for subdivisions, conditional use permit criteria for conditional use permits, or shoreline regulations for Shoreline Permits, it freezes all zoning and land use regulations once vesting is triggered. Otherwise, vesting would be an empty right.

Following Kirkland's line of reasoning, the Shoreline Permit would be reviewed under the shoreline regulations. In the meantime Kirkland could, as it did in the instant case, change the zoning so that Potala Village could not build the project approved under the Shoreline Permit. Under Kirkland's approach, the Shoreline Permit itself is rendered useless because Potala Village could not actually use that permit to develop its property. This would have been the case with the subdivision application in *Noble Manor* or the conditional use permit application in *Weyerhaeuser*, or the

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[119] *Id.*
[120] *Weyerhaeuser*, 95 Wn. App. 883, 894.

planned unit development in *Rural Residents v. Kitsap County*.[121] Each of those courts rejected arguments similar to Kirkland's. The right to obtain a Shoreline Permit, without the ability to use it, is meaningless. The existing case law provides that Potala Village's Shoreline Permit vested the project to that BN zoning in effect at the time Potala Village's Shoreline Permit application was deemed complete.

When the vested rights doctrine applies, as it does here, it applies to ensure certainty as to the regulations that will govern the project's review. Kirkland cannot change the applicable zoning for the property part way through the process.

L. Kirkland's Shoreline Regulations are Integrated into Kirkland's Zoning Code.

Kirkland cannot escape the intertwined nature of the shoreline regulations as part of the Kirkland's zoning code. Although Kirkland protests that its shoreline regulations should be viewed separately from zoning and other land use regulations, its shoreline regulations are adopted as part of the Kirkland Zoning Code, under chapters 83 and 141.[122]

Kirkland argues the shoreline regulations are not part of the zoning code because they are an 'overlay'.[123] Would Kirkland also argue that the

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[121] *Noble Manor*, 133 Wn.2d at 280; *Weyerhaeuser*, 95 Wn. App. 883, 894 (emphasis added); *Association of Rural Residents v. Kitsap County*, 141 Wash. 2d 185, 193-95, 4 P.3d 115 (2000).
[122] CP 936-940, *Second Kolouskova Declaration*, Exhibit C.
[123] *Kirkland's Opening Brief*, page 24.

"Equestrian Overlay Zone", chapter 80 of the zoning code (the chapter just before "Shoreline Management"), is not part of its zoning code?[124] Kirkland has many 'overlays' to its zoning code: historic landmark, drainage basins, secure community transitions, adult activities, and overlays for particular neighborhoods like Holmes Point.[125] The identification of regulations as overlays does not mean they are separate from the zoning code, but instead are overlay regulations that add to the zoning requirements where they are overlaid on certain properties.

Further, the Shoreline Management Chapter explains, in the event of conflicts between a zoning, land use regulations and the specific shoreline sections, the more environmentally protective will control.[126] As a result, in reviewing a Shoreline Permit, Kirkland must take into account the full range of applicable zoning and land use requirements so that the most environmentally protective regulations prevail. If, for example, a critical area buffer has more protections than the applicable shoreline protection, then the City would have to impose the critical area buffer as part of its shoreline permitting.

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[124] CP 936-940, *Second Kolouskova Declaration*, Exhibit C.
[125] *Id.*, chapters 70-92 of Kirkland Zoning Code.
[126] CP 941-942, *Second Kolouskova Declaration*, Exhibit D.

As discussed in Potala Village's Motion, Kirkland's Zoning Code states that "development shall be allowed only as authorized in a Shoreline Permit...."[127]

> ... a shoreline substantial development permit or other required permit must be obtained before any part of the development, even the portion of the development activity that is entirely confined to the upland areas, can proceed.[128]

Kirkland's attempt to distance itself from this limitation inherently admits the interconnected nature of shoreline regulations to zoning. As a way to minimize the import of this limitation, Kirkland relies on Title 5 of its zoning regulations to explain what constitutes a 'development activity'.[129] But Kirkland's very recourse to its zoning code to explain requirements of the shoreline regulations makes the point: Kirkland's own zoning code expressly and structurally ties a property's zoning and land development to the Shoreline Permit.

M. Kirkland Improperly Frustrated the Building Permit Application Process by Asserting it Could Require a New Building Permit Application in the Event it Required any Changes to the Project After Shoreline Review.

Kirkland's position is that it could require a new building permit application after the Shoreline Permit, at its discretion, if the Shoreline

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[127] CP 277, *Kolouskova Declaration*, KZC 141.30 (1).
[128] CP 277, *Kolouskova Declaration*, KZC 141.30 (3) (emphasis added).
[129] *Kirkland's Opening Brief*, page 28; Appendix 6.

decision involved any changes to the project.[130] Kirkland asserted it could do this even if Potala Village submitted a building permit application with its Shoreline Permit application. In such event, Potala Village would have to submit a new building permit application subject to the new zoning that Kirkland adopted subsequent to the Shoreline Permit application, even if Potala Village had earlier submitted a building permit application. In this way, Kirkland reserved the right to change the project's vesting date even if Potala Village had submitted a building permit application at the same time as the Shoreline application. Without vesting at the Shoreline Permit level, Kirkland can unilaterally change the project's vesting by changing the zoning, then requiring project changes as part of the Shoreline Permit, and thereby require a new building permit application.

Now Kirkland asserts it would have considered not altering the project's vesting date in the event Kirkland ultimate required Potala Village to submit a new building permit application after Shoreline Permit approval, if Potala Village had originally submitted a building permit application along with the Shoreline Permit application. There is nothing in the record, and certainly nothing in City Code or state law that would support Kirkland's inconsistent approach to vesting. If Kirkland's position

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[130] CP 955-956, *Stewart Declaration*, email attachment (Kirkland Building Official could require a new building permit application under KMC 21.06.240 if substantial changes result from the Shoreline Permit).

is that a building permit could have vested the project, then Kirkland never could have advised Potala Village that it had the ability to require a new building permit application in the event project changes were required as a result of the Shoreline Permit. Kirkland changes its vesting rules depending on how the Potala Village project unfolds. This is precisely the fluctuating land use policy pitfall that the vested rights doctrine was designed to prevent.

Kirkland's frustration of Potala Village's right to vest is reminiscent of the City of Bellevue's actions in *West Main*. The Washington Supreme Court found that a city acts unlawfully when it frustrates a developer's ability to vest by reserving for itself an "almost unfettered ability to change its ordinances in response to our vesting doctrine's protection of a citizen's constitutional right to develop property free of the 'fluctuating policy' of legislative bodies."[131]

Ironically, Kirkland discusses *West Main* in its briefing, but fails to see that its own changing approach to vesting is exactly what the *West Main* Court prohibited.[132] Although there is no overt bar to submitting a building permit application, Kirkland's reservation of a right to require a new building permit application after the Shoreline Permit rendered any earlier building permit application useless and implicitly prohibited Potala Village

[131] *West Main*, 106 Wn.2d at 53.
[132] *Kirkland's Opening Brief*, page 26.

from vesting until after the Shoreline Permit was issued. Kirkland would have merely required changes under the Shoreline Permit, insisted that Potala Village submit a new building permit application, and thereby, imposed the new BN-zoning. Simply, Kirkland reserved the ability to eviscerate Potala Village's vesting until after Kirkland completed its review of the Shoreline Permit. Just as in *West Main*, the City delayed the vesting point until well after Potala Village first applied for City approval of its project, and reserved for itself the almost unfettered ability to change its ordinances in response to Potala Village's proposals.

IV. CONCLUSION

Based on the foregoing analysis, Potala Village respectfully requests this Court to determine that the Shoreline Permit vested to the zoning and land use regulations in effect at the time that permit was complete, and to affirm the Superior Court decision on summary judgment.

DATED this 6th day of December, 2013.

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