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COURT OF APPEALS DIVISION 1
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NO. 67878-7

COURT OF APPEALS FOR DIVISION 1
STATE OF WASHINGTON

LIND BROS. CONSTRUCTION, L.L.C.,
a Washington limited liability company,

Respondent,

v.

THE CITY OF BELLINGHAM,
a Washington municipal corporation, and
MARK QUENNEVILLE,
an individual,

Appellants.

REPLY BRIEF OF APPELLANT MARK QUENNEVILLE

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I. LIND HAS NOT PRESERVED HIS CLAIM
THAT QUENNEVILLE WAIVED HIS
CHALLENGE TO THE VESTING ISSUE

A party may not raise in the Court of Appeals an argument that was not adequately presented in the Superior Court. RAP 2.5(a). While Lind argues in this Court that Quenneville waived his challenge to the vesting issue by not filing his own Land Use Petition Act (LUPA) appeal in Superior Court, ironically, Lind is precluded from raising that issue here because Lind did not raise that defense below. Lind's only scant reference to the issue was during oral argument where the totality of his argument was provided in these three sentences:

The only LUPA [appeal] filed in this case was filed by Mr. Lind. So Mr. Quenneville is arguing a number of things that are legally not on appeal here. The Court has no jurisdiction to overturn the Hearing Examiner's ruling with respect to vesting.

TR 48.

This fleeting reference to the issue included no citation to authority. It was not supported by any part of Mr. Lind's written materials submitted to the trial court that we have been able to find. This fleeting reference to the argument was insufficient to preserve this issue for review.¹

¹ *Johnson v. Kittitas County*, 103 Wn. App. 212, 220, 11 P.3d 862 (2000) (fleeting reference with no citation to authority inadequate to present issue on appeal).

Lind may argue that because the issue is “jurisdictional,” that it can be raised at any time. *See* RAP 2.5(a). But the issue is not jurisdictional in the pure sense of that term. “The critical concept in determining whether a court has subject matter jurisdiction is the type of controversy. . . . Either a court has subject matter jurisdiction or it does not. If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.” *Williams v. Leone and Keeble, Inc.*, 171 Wn.2d 726, 728, 254 P.3d 818 (2011) (internal citations and quotations omitted).

Lind cannot seriously argue that the Superior Court did not have subject matter jurisdiction to determine the “type of controversy” at issue here, *i.e.*, whether the City used the correct version of its development regulations when it evaluated Lind’s wetland application. If Quenneville’s failure to file a separate LUPA appeal precluded the Court from hearing this type of claim, then that “defect[] or error[] go[es] to something other than subject matter jurisdiction.” Thus, Lind cannot raise this type of issue for the first time on appeal.

II. QUENNEVILLE HAS NOT WAIVED HIS CHALLENGE TO THE VESTING ISSUE

In our Opening Brief, we demonstrated that the City used the wrong substantive law to evaluate Lind's wetland application. City staff mistakenly employed the old Wetland Stream Ordinance (WSO) ordinance in the belief that Lind was vested to that ordinance. We demonstrated that Lind was not vested to the WSO because the application he filed the day before the new ordinance took effect was incomplete. We also demonstrated that the application was not vested because it was not consistent with the laws then in effect.

Lind argues that Quenneville had to file his own LUPA appeal to preserve that issue in Superior Court. Lind Br. at 12-15. Lind relies on *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 83 P.3d 433 (2004) to support his claim. Lind's argument fails to acknowledge the significant difference between *Lakeside*, which involved two distinct decisions, and this case, where the vesting issue inheres in the City's decision on the requested permit.

Lakeside dealt with two distinct decisions: the County's decision under the State Environmental Policy Act as to whether to prepare an environmental impact statement (EIS) and the County's decision under its

own regulations whether to issue a permit for an asphalt plant. In *Lakeside*, the SEPA decision was a decision distinct from the permit decision and subject to a separate appeal. Here, the issue of what law governs Lind's application (*i.e.*, the vesting issue) is integral to the permit decision and does not require (or allow for) a separate appeal. The *Lakeside* decision that the separate SEPA appeal needed to be separately filed (and in a timely manner) has no parallel to this case where the vesting issue is bound up within the permit decision appealed by Lind.

The State Environmental Policy Act creates a State mandate which requires local governments to consider environmental factors before making decisions. This State mandate is *in addition to* the substantive land use regulations adopted by counties and cities throughout the State. Thus, SEPA is said to be an "overlay" statute,² providing cities and counties authority to impose conditions beyond those authorized by local regulations. *See, e.g., Donwood, Inc. v. Spokane Cy.*, 90 Wn. App. 389, 398-99, 957 P.2d 775 (1998). SEPA creates responsibilities separate from and in addition to those created by local land use regulations. *Id.*

² *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 66, 578 P.2d 1309 (1978).

If a person believes that a county or city has violated its SEPA requirements, a lawsuit may be filed. SEPA provides a separate, statutory cause of action for such appeals. RCW 43.21C.075(1); *Harris v. Pierce Cy.*, 84 Wn. App. 222, 232, 928 P.2d 1111 (1996). But the SEPA challenge must be brought in conjunction with a challenge to the jurisdiction's underlying permit. RCW 43.21C.075(2)(a); *Lakeside Industries v. Thurston County*, *supra*, 119 Wn. App. at 900 (citing *State ex rel. Friend Rikalo Contractor v. Grays Harbor County*, 122 Wn.2d 244, 249, 857 P.2d 1039 (1993)). Further, the statute of limitations for the SEPA claim is the same as the statute of limitations for the underlying permit. RCW 43.21C.075(5)(a).

In *Lakeside*, a party dissatisfied with the County's SEPA decision failed to file an appeal of that SEPA decision within 21 days of the decision on the underlying permit (as required by SEPA and LUPA). The Court of Appeals held that the failure to file the SEPA appeal within 21 days was fatal. It did not matter that the party had prevailed at the County level with regard to the underlying permit decision. *Id.*

Thus, *Lakeside* stands for the unremarkable proposition that LUPA's 21 day appeal deadline applies to a SEPA cause of action, regardless of

whether the party filing the appeal was prejudiced by the jurisdiction's separate decision on the underlying local permit.

The case before this Court is factually distinct from *Lakeside*. The vesting issue is not a separate cause of action, the way SEPA is. The vesting issue is an integral part of the City's determination of whether to approve or reject Lind's application for a wetlands permit. The first step in assessing Lind's application is to determine which set of rules apply. Quenneville contends that the Hearing Examiner correctly reversed the staff's issuance of the permit, but contends that there are additional grounds to support that ruling and that this Court's order should clarify which set of rules apply on remand. That is, in addition to vacating the permit because the requisite wetland studies were not completed, the permit also should have been vacated because it was based on the old wetlands ordinance – to which Lind was not vested.

Thus, this is not a case (as was presented in *Lakeside*) where plaintiff is seeking to pursue a cause of action separate and apart from the cause of action raised by the primary appeal. Quenneville seeks review of an issue which inheres in the permit decision under review. *Lakeside's* rule that

appeals arising under separate statutes and causes of action must be independently filed has no bearing on this case.

III. LIND PROVIDES NO RESPONSE TO OUR EVIDENCE THAT HIS APPLICATION WAS INCOMPLETE BECAUSE IT LACKED THE REQUIRED SUBDIVISION GUARANTEE AND WAS NOT SIGNED

In our Opening Brief, we demonstrated that the application filed by Lind on December 5, 2005 (the day before the new wetlands ordinance took effect), was incomplete in four respects.³ We demonstrated that the application was inadequate in the following respects:

- The required environmental checklist was not completed.
- The SEPA filing fee was not submitted.
- The required subdivision guarantee was not included.
- The application was not signed by the property owner or designated representative.

Lind does not challenge our evidence that the application lacked the subdivision guarantee and was not signed. These two deficiencies above are sufficient to find that the application was incomplete.

³ Our Opening Brief quotes the transcript which states that “the City received numerous wetland stream permit applications” on “December 6, 2005.” Quenneville Op. Br. at 4-5. Later in the quoted passage the witness corrected the date to December 5, 2005. TR 480/CP 564.

Lind also fails to contest our argument that the application was not consistent with all of the City's regulations in effect on December 5, 2005. *See* Quenneville Op. Br. at 18-23. This unchallenged deficiency provides an independent basis for the conclusion that the application was not vested and should have been reviewed for compliance with the new ordinance.

IV. LIND DOES NOT DISPUTE THAT HIS
PROJECT REQUIRES COMPLIANCE WITH
SEPA AND THAT HIS APPLICATION LACKED
THE REQUISITE SEPA COMPONENTS

In our Opening Brief, we demonstrated that Lind's application also was incomplete because it failed to include a completed SEPA checklist and the SEPA filing fee. Lind does not dispute these facts. Nor does he dispute that his project is subject to SEPA review. (Indeed, Lind's primary argument is with how the City applied SEPA, not whether it had the authority to do so.)

Rather than dispute that compliance with SEPA was required or dispute that the application did not include the requisite SEPA components,⁴ Lind argues that his failure to provide a complete application can be excused. We address those excuses in the following section of this brief.

⁴ *See, e.g.*, Lind Br. at 19, n. 30 (acknowledging SEPA fee was not paid on December 5, 2005).

V. LIND'S EXCUSES FOR NOT FILING A
COMPLETE APPLICATION ARE FACTUALLY
AND LEGALLY INSUFFICIENT

Lind advances two primary arguments to justify his claim that the filing of an incomplete application on December 5, 2005 provided him with vested rights. We address each of those arguments in the subsections below.

A. Lind's Submittal of an Incomplete Description of the Project Which Obscured the Need for SEPA Compliance Cannot Be Used to Avoid the "Complete Application" Rule

Lind acknowledges that his project involves filling wetlands and building a new road which requires compliance with SEPA. He argues, however, that because he did not reveal those components of the project to the City in his application on December 5, 2005, that his (half-described) project did not require SEPA compliance on that date. This gamesmanship should be rejected by the Court. Whether an application is complete should be determined by looking at the entire project, not at only that part of it which the applicant chooses to reveal in his initial submission.

While Lind contends that a SEPA checklist and fee were not required on December 5, 2005 when he only partially disclosed his project, he provides no argument regarding this contention in his brief. Instead, he

references the City staff's assessment of the issue during the administrative process. Lind Br. at 23 (*citing* CP 1151-1157).⁵

The staff response to our motion for reconsideration acknowledges that the application filed by Lind on December 5, 2005 lacked a SEPA checklist or SEPA filing fee. Staff states that it was not clear at the outset whether the project was exempt from SEPA or not. As explained by the staff, the project was so vaguely described in the original application that staff could not determine whether the project included any development that would trigger SEPA. Staff repeatedly requested more information from the applicant. When, ultimately, the staff received that information and saw that the project included the filling of wetlands and construction of a new road, staff immediately recognized the project was not exempt from SEPA and required submission of the environmental checklist and filing fee. As explained by the City staff:

On December 5, 2008, three years after submitting his lot line adjustment and wetland stream permit applications, Lind finally responded to the City's requests for additional information. Lind's response included a site plan which showed construction of Wilken Street and a wetland

⁵ Lind also references the Hearing Examiner's ruling on the motion for reconsideration (CP 1163-1165), but the Examiner merely decided she lacked authority to review the staff decision as to whether the project in its original form was exempt from SEPA requirements. To assess the substance of Lind's response, reference must be made to the staff's response to our motion for reconsideration (CP 1151-1157).

delineation and mitigation plan which identified two wetlands in the Wilken Street right-of-way which would be filled to construct Wilken Street. (Exhibit P and Exhibit S, Figure 3/6.)

The initial application submitted by Lind on December 5, 2005 lacked the detail showing how the lots proposed and the lot line adjustment would be accessed. Once Lind submitted information showing that access would be provided by constructing Wilken Street and filling two wetlands in the right-of-way, the City determined that the project was subject to SEPA. On February 27, 2009, the City notified Lind that he needed to pay the SEPA fee (Exhibit F).

CP 1152-53.

Thus, according to the City staff (and as adopted by Lind), a developer can obtain vested rights to an outmoded ordinance by filing an incomplete application which does not provide all the information the jurisdiction needs to assess whether additional materials are needed for the complete application (*e.g.*, an environmental checklist and filing fee). By leaving the jurisdiction in the dark, the developer can avoid a determination that more is required for his initial application and thereby, seemingly, obtain vested rights by filing an application which only later is acknowledged to be incomplete.

Shell games of this sort should not be countenanced. If an applicant fails to provide sufficient information in the original application to even

determine the project's most basic elements (here, how the residential lots would be accessed) and what additional information is necessary to make the original application complete, the application obviously is not sufficiently complete to justify the granting of vested rights:

The practical effect of recognizing a vested right is to sanction the creation of a new non-conforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

Erickson & Associates, Inc. v. McLerran, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994) (emphasis supplied).

In effect, Lind argues that a developer may withhold information from a jurisdiction that precludes a jurisdiction from even determining what application materials are required for the project and thereby extend the vesting period (here by three years). An application is not sufficiently complete to create vested rights if it is not even complete enough to determine what materials are necessary for the application to be complete. The staff opinion to the contrary was an obvious error of law.

B. The City's Failure to Determine That the Application Was Incomplete Is Not Binding On Citizens

Lind also argues that even if the application was incomplete, this Court is powerless to right that wrong because the City staff did not notify Lind that the application was incomplete within 28 days. *See* Lind Br. at 16-21. We addressed this issue in our Opening Brief (at 14-17) and Lind provides virtually no response to the points we made there. For instance, we pointed out that allowing an incomplete application to vest simply because staff does nothing for 28 days would be inconsistent with Supreme Court decisions frowning on any expansion of the vesting rule. *Quenneville Br.* at 14-15. Lind also ignores the Supreme Court's admonition that the complete application requirement is to assure that the developer has made a "substantial commitment" to the project – not that developers should be able to throw together incomplete applications to beat the vesting clock and then say "gotcha" when staff fails to quickly review the flood of applications filed at the deadline. *Id., citing Erickson, supra.*

Lind also refuses to address the Supreme Court statement that "the duty to comply with building and land use codes lies with individual permit applicants, builders, and developers, rather than local governments." *Heller*

Building, LLC v. City of Bellevue, 147 Wn. App. 46, 61, 194 P.3d 264 (2008).

Perhaps most tellingly, Lind avoids addressing the issue that the 28 day rule comes from the Local Project Review statute (ch. 36.70B RCW) and has nothing to do with vesting, but rather sets a clock running to assure timely processing of applications by local governments. *See Op. Br.* at 16-17.

About the only issue addressed by Lind is our statement that even if BMC 21.10.190.B.2 was intended to vest an incomplete application simply because the staff did not act, the vesting provided by that ordinance attaches 28 days after the application is filed, not the date that the application is filed. Lind responds that this is an absurd reading which would undermine the vesting rule. Hardly. There is nothing in the vesting rule that suggests that incomplete applications should be vested at all, let alone as of the date the incomplete application is filed. If a developer is fortunate enough to obtain vesting even with the filing of an incomplete application, there is nothing in the statutes or case law that says that the incomplete application should be deemed vested as of the date it was filed. The code on which Lind relies does not provide for an incomplete application to vest on the date the incomplete application is filed. If that section of the code truly was intended to establish

vesting (and not just start a clock running for permit processing purposes), then it must be taken at face value and construed simply to allow an incomplete application to be deemed vested 28 days after it is filed (if staff takes no action on it).

Rather than creating an “absurd result” that “violate[s] the principles behind vested rights,” Lind Br. at 19, if anything is absurd it is a rule that allows an incomplete application to vest simply because staff does not have time to address it. No vested right principles are abridged either by not allowing staff’s inaction to tie the hands of citizens or by concluding that if the citizens’ hands be tied, that the gift of vested rights for an incomplete application occurs when the 28 day period expires.⁶

Lind also argues that construing the ordinance to mean (as it says) that applications vest 28 days after filed if staff does not determine them to be incomplete would allow staff to “unvest” applications (or at least delay their vesting) by 28 days simply by taking no action. Lind Br. at 20. If an

⁶ Lind also makes the claim that Quenneville was aware of the incomplete application in January, 2006 and “could have appealed the ‘completeness’ determination back then had he chosen to.” Lind Br. at 19, n. 31. Notably, this assertion is not followed by any citation to any Bellingham Municipal Code that would have authorized an appeal of a “completeness” determination – let alone an appeal of a completeness determination that was not made. Truth be known, no appeal was available. The code provides for administrative appeals of certain final “land use decisions.” RCW 21.10.100.F, -.110.J; -.120.O. But a determination that an application is complete is not a final “land use decision,” BMC 21.10.040, and, therefore, is not subject to any administrative appeal. *See also* BMC

application is complete when filed, it vests when filed. The issue presented here is simply how to deal with incomplete applications. A diligent developer who files a complete application has nothing to fear, but rather can rely on the actual vesting upon filing a complete application instead of needing to resort to inferred vesting that is allowed for incomplete applications if staff does not act.

Finally, Lind cites the statutory vesting rules in RCW 58.17.033 and RCW 19.27.095. Lind Br. at 22. Neither of these are applicable here. The former applies to subdivisions and the latter to building permits. Lind's application sought a lot line adjustment and a wetland permit.

Lind notes that municipalities are free to develop vesting schemes, such as defining the contents of a complete application. Lind Br. at 22-23 (*quoting Erickson, supra*). But a local government's vesting rules must be "[w]ithin the parameters of the doctrine established by statutory and case law." *Erickson, supra*, 123 Wn.2d at 872-73. There is no statute or case law which authorizes local governments to reward developers who file incomplete applications simply by having staff take no action on the application for 28 days.

21.10.190 (process by which staff determines "completeness;" no provision for an appeal).

In sum, Lind's brief is more notable for what it does not address than what it does address. Nowhere in Lind's response does he address the inequity of allowing staff inaction to bind third parties, including citizens. Nowhere does Lind explain how inaction by City staff can cause an expansion of vested rights or how that serves the State's policy of reserving vested rights for those diligent developers who file complete applications indicative of the "substantial commitment" called for by *Erickson*. Lind's vesting arguments should be rejected.

VI. CONCLUSION

For the foregoing reasons, and for those set forth in our Opening Brief and in the briefs of the City of Bellingham, Lind's appeal should be denied in all respects and the matter remanded with instructions that because the application was incomplete, inaccurate, and not consistent with the laws in effect on December 5, 2005, the application did not vest at that time.⁷

⁷ While in general we adopt the City's brief, we supplement it with one citation. Of particular relevance to Lind's claim that the City lacked authority to impose conditions pursuant to SEPA in addition to those authorized by the City's own regulations, see *Levine v. Jefferson Cy.*, 116 Wn.2d 575, 579, 807 P.2d 363 (1991) (county has SEPA authority to impose conditions based on public comments both before and after issuance of DNS).

Dated this 5 day of July, 2012.

Respectfully submitted,

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Quenneville/Appeals/Reply Brief

COURT OF APPEALS, FIVE
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NO. 67878-7

DECLARATION
OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, PEGGY S. CAHILL, under penalty of perjury under the laws of
the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for Mark Quenneville herein. On the date and in the manner indicated below, I caused the Reply Brief of Appellant Mark Quenneville to be served on:

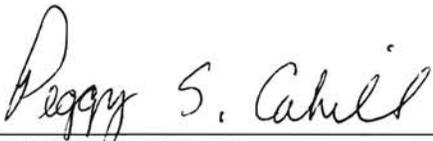
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PEGGY S. CAHILL