

No. 73558-6-I

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

(King County Superior Court #14-2-25112-2 SEA)

POTALA VILLAGE KIRKLAND, LLC, and LOBSANG
DARGEY and TAMARA AGASSI DARGEY,

Appellants,

vs.

CITY OF KIRKLAND,

Respondent.

APPELLANT'S OPENING BRIEF

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2015 SEP -8 PM 2:44

COURT OF APPEALS
STATE OF WASHINGTON

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ORIGINAL

I. NATURE OF THE CASE

Potala Village Kirkland, LLC, and Lobsang Dargey and Tamara Agassi Dargey, (collectively referred to herein as “Potala Village”) seek this court’s determination that, once the City of Kirkland (“City”) determined Potala Village’s building permit (“Permit”) was complete and ready to be picked up, the City could not revoke or withdraw the Permit but must issue the Permit.

The legal issue presented to this Court is straightforward. RCW 19.27.095, the building permit vested rights statute, gives an applicant the absolute right to have its Permit Application reviewed and issued based on the zoning and building regulations in effect on the day the application was filed. The zoning and building codes freeze in place on the day that a complete building permit application is filed. Later changes to the zoning or building codes are irrelevant: it does not matter if those changes come about as a result of legislation or subsequent case law. A city has no legal option but to issue the building permit and allow construction of the project once it finds that the permit meets those vested-to zoning and building regulations (the regulations in effect on the date of application).

In this case, Potala Village submitted its Permit application (“Permit Application”) based on zoning that applied to its property pursuant to a Superior Court order. The City had appealed that Superior Court order (“First Appeal”), but did not request a stay, thereby acquiescing to the effectiveness of that decision pending appeal. The City processed the Permit Application consistent with the zoning set forth in

that Superior Court order, stating repeatedly and unequivocally that the zoning for the property was that as set forth in the Superior Court order, because that is what the Permit Application vested to. Again, the zoning was frozen in time pursuant to RCW 19.27.095.

Upon finishing its review, the City advised Potala Village that the permit was ready to be picked up once final fees were paid and standard property documentation was recorded on title. Potala Village had the legal right to pick that building permit up at any time thereafter and was actively completing the financial work on its end in order to pay the final fees, record the property documentation and begin construction. By utter coincidence, the Court of Appeals issued a decision reversing the Superior Court order on the day before Potala Village was ready to pick up the building permit. The City claimed that the First Appeal decision allowed it to reverse course and refuse to allow Potala Village to pick up the permit.

The City's refusal to allow Potala Village to pick up its building permit violated RCW 19.27.095. The City had legal recourse that it chose not to take: the City could have stayed the Superior Court order while the City's appeal was pending, though it did not do so. The vested rights doctrine protects Potala Village from exactly what the City has attempted to do: improperly subject Potala Village to arbitrary rules and unpredictability in the land development process.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err when it granted the City's Motion for Summary Judgment?
2. Did the trial court err when it denied Potala Village's Motion for Partial Summary Judgment?
3. Did the trial court err when it dismissed Potala Village's lawsuit against the City with prejudice in its entirety?

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the City was required to process and issue Potala Village's Building Permit under the zoning in effect at the time of application, as ordered by the Superior Court, irrespective of the First Appeal decision.
2. Whether the City's ministerial review of the permit application allowed it the discretion to withhold the permit after the City had declared the permit complete and ready to be picked up.
3. Whether the City violated vesting laws when it retracted its final determination of completeness and issued a new letter of incompleteness after Potala Village's Building Permit Application had vested.
4. Whether the City violated vesting laws when it imposed a new condition of permit approval on Potala Village's Building Permit after it had vested.
5. Whether the City's failure to stay the Superior Court's decision allowed the permit to be processed and issued.
6. Whether the City's refusal to issue the Building Permit was a land use action subject to LUPA.
7. Whether the City's refusal to issuance of a determination of incompleteness was a land use action subject to LUPA.
8. Whether the City was required to challenge the validity of its determination of completeness under LUPA.

9. Whether Potala Village is entitled to a Writ of Mandamus.
10. Whether Potala Village is entitled to a Declaratory Judgment or Writ of Certiorari.

IV. STATEMENT OF THE CASE

A. Moratorium

Potala Village owns property located at the southeast corner of 10th Avenue South and Lake Street South in the City of Kirkland. The City had zoned Potala Village's property as BN (Neighborhood Business). On February 23, 2011, Potala Village submitted an application for a Shoreline Substantial Development permit for Potala Village.¹ On November 15, 2011, the City Council imposed a moratorium barring Potala Village from submitting a building permit application.² The City imposed this moratorium under the pressure of vociferous public opposition to Potala Village's proposed development of its property, even though that development was fully consistent with the BN zoning. The City Council extended the moratorium for more than a year in order to bar Potala Village from submitting a building permit application under RCW 19.27.095. In December 2012, the City adopted extensive changes to the BN zone to severely restrict the Potala Village project.³ Only then did the City lift the moratorium.

¹CP 109 – 211, *Dargey Declaration*.

²*Id.*

³*Id.*

B. Superior Court Order

The City's strategy left Potala Village no choice but to pursue judicial review of whether the shoreline application vested the project to the zoning in effect on February 23, 2011, the application date. Both Potala Village and the City filed partial motions for summary judgment before King County Superior Court. Despite the irony of its arguments in light of the moratorium, the City argued emphatically that Potala Village had to file a building permit application to vest, and asserted repeatedly that any building permit application would vest under RCW 19.27.095: "It makes perfect legal sense to restrict the vested rights doctrine to the filing of a building permit, because the building permit is the permit that triggers review of the entire zoning and building codes for a project."⁴ The City readily conceded that if Potala Village "wanted to vest his project in the land use laws, rules and regulations in effect at that time, all it had to do was file a complete building permit application, as set forth in RCW 19.27.095(1)."⁵

On May 9, 2013, the Superior Court issued a writ of mandamus and declaratory judgment in favor of Potala Village, ruling the following:

9. This Court hereby enters declaratory judgment in favor of Plaintiffs that Plaintiffs are entitled to apply for, and the City of Kirkland is required to issue a decision on, building and other land development permit applications based on the zoning and land use regulations in effect on the date of the shoreline substantial development permit application, i.e. February 23, 2011.

⁴CP 97, *Kolouskova Declaration*, Ex. B, p. 8.

⁵CP 84-85, *Kolouskova Declaration*, Ex. A, pp. 12-13.

10. In addition, this Court hereby enters a peremptory writ of mandamus commanding Defendant/Respondent City of Kirkland to accept and process an application for building permit by Plaintiffs based on the zoning and land use regulations in effect on the date of the shoreline substantial development permit application, i.e. February 23, 2011, if said application is otherwise complete as required by state law and local regulation.⁶

February 23, 2011 was a critical date because the Superior Court thereby allowed Potala Village to submit its Permit Application based on the original BN zoning, without being subject to the drastic changes that the City had adopted under cover of the moratorium in December, 2012. On June 3, 2013, the Superior Court denied the City's request for reconsideration.⁷

C. First Appeal

The City filed the First Appeal, appealing the Superior Court's order to the Court of Appeals, Division 1. However, the City did not file a request for stay of the Superior Court's order. As a result, the City acquiesced to the Superior Court order remaining effective and for Potala Village, the City and the public to rely on while the First Appeal was pending.⁸

⁶CP 102-106, *Kolouskova Declaration*, Ex. C. The Superior Court relied on the law as it was in effect in May 2013 under the Court of Appeals, Div.1 decision of *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, 291 P.3d 278 (2013). The Supreme Court's subsequent review *Town of Woodway* became significant because the later Supreme Court decision was critical to the subsequent First Appeal review. *Town of Woodway v. Snohomish County*, 180 Wn. 2d 165, 322 P.3d 1219 (2014). See footnote 20.

⁷CP 107-108, *Kolouskova Declaration*, Ex. D.

⁸*Kelly v. Chelan County*, 167 Wn.2d 867, 871, 224 P.3d 769 (2010)

D. Permit Application

Under the fully effective Superior Court order, Potala Village worked diligently and expended significant resources to compile its Permit Application, which it submitted to the City on June 21, 2013.⁹ On July 18, 2013, consistent with RCW 36.70B.070, the City determined that the application submittal was complete but that Potala Village needed yet to pay certain fees (the “Determination of Completeness”).¹⁰

Over the course of the next year, Potala Village worked with the City as well as other Washington state agencies in extensive and detailed design and construction review. The City repeatedly advised Potala Village and the public at large that the City’s review was based on the Superior Court’s order and the zoning in effect on February 23, 2011:

- On November 19, 2013, the City Manager issued an open letter to interested neighbors via the City’s website, explaining the City’s position that Potala Village had submitted the Building Permit Application, that the building permit process is ministerial and that the City had no option but to apply the February 23, 2011 zoning

⁹CP 109- 211, *Dargey Declaration*.

¹⁰CP 118, *Dargey Declaration*, Ex. A. Between June 21 and July 18, Potala Village and City staff exchanged informational requests and information as to building permit application details to determine the application’s completeness. While this exchange may have resulted in a modified vesting date sometime between those dates, no changes to the zoning or building regulations were made during those weeks. It would make no difference for purposes of zoning and building regulations were the vesting date to have been July 18, 2013, or any date in between. Therefore, for simplicity, the application date used in this brief is July 18, 2013.

to the Building Permit Application based on the Superior Court's decision.¹¹

- On December 20, 2013, the City issued extensive environmental review comments wherein the City noted the vesting statue of the Building Permit Application and applied the February 23, 2011 zoning.¹²
- On January 8, 2014, upon receiving documents Potala Village submitted to address City comments and minor revisions, the City reconfirmed its Determination of Completeness in an email from City staff saying "Your application was previously deemed complete. . . The recent submittal is technically a revision to a complete application."¹³
- On February 5, 2014, the City provided an extensive list of comments on the Permit Application, with no indication that it would equivocate on vesting.¹⁴

The City never gave any indication that it planned to try to make an end run around the application's vesting and the Superior Court order.

In the spring of 2014, the City advised Potala Village that the City would require a lot consolidation agreement for the three parcels which

¹¹CP 152-56, *Dargey Declaration* Ex. C.

¹²CP 147, *Dargey Declaration*, Ex. B, p. 25.

¹³CP 157-58, *Dargey Declaration*, Ex. D.

¹⁴CP 160-80, *Dargey Declaration* Ex. E.

comprise the property on which the building would be constructed before Potala Village could pick up the Building Permit. At that time, Potala Village owned two of those parcels outright and held a long term ground lease over the third. Because the property owner of the third lot was not interested in signing the lot consolidation, Potala Village acceded to the City's requirement and began the process to purchase the third parcel so it could execute the lot consolidation document and pick up the building permit.¹⁵

On July 31, 2014, City staff notified Potala Village that the Building Permit was ready for pick up, i.e. was issued.¹⁶ The City's notice required Potala Village to record the lot consolidation once Potala Village completed its purchase of the third lot, to pay final permit fees, and agree to typical building permit construction conditions such as keeping a set of plans at the job site and committing to field inspections. The entire City review supporting the City's notice that the Building Permit was ready for pick up relied on the zoning in effect on the date of Permit Application, i.e. the February 23, 2011 zoning, ordered under the Superior Court order.

E. Revision Condition

Out of the blue, on July 31, 2014, the City advised Potala Village for the first time that the City also would impose a "condition of permit approval" on the Building Permit that any construction under the Building Permit would be subject to the December 2012 zoning, regardless of the

¹⁵CP 109- 211, *Dargey Declaration*.

¹⁶CP 181, *Dargey Declaration Ex. F*.

stage of construction, if the Court of Appeals were ever to rule in the City's favor (the "Revision Condition").

If the City of Kirkland prevails in its appeal, Potala Village Kirkland, LLC v. City of Kirkland, No 70542-3-I, Washington State Court of Appeals, Division 1, building permit No BMU 13-03290 will no longer be vested to the zoning and land use regulations in place when Potala Village Kirkland, LLC filed its application for a shoreline substantial development permit in February, 2011 the Potala Village project, Building Permit No BMU 13-03290 would have to be revised to conform to the current zoning requirements regardless of the stage in construction.¹⁷

While Potala Village had ongoing discussions about that Revision Condition with the City as to its legality and propriety, there was no way to know at that time what the First Appeal decision would be. Therefore, Potala Village also diligently worked to complete closing of its purchase of the third lot in order to record the City's requisite lot consolidation document and pick up the Building Permit.

On Monday, August 25, 2014, Potala Village closed its purchase of the third lot and advised the City that it would submit the lot consolidation document and collect the Building Permit on the following day, once the deed was recorded.¹⁸

F. Letter of Incompleteness

To the surprise of all, on that same day, August 25, 2014, this Court of Appeals issued the First Appeal decision, reversing the Superior

¹⁷*Id.*

¹⁸CP 193-94 and 196-202, *Dargey Declaration*, Exs. G and H.

Court and finding in favor of the City.¹⁹ Based on a Supreme Court decision issued just a few months prior, the Court of Appeals held that the shoreline application did not vest, but confirmed the statutory vested rights doctrine as set forth in RCW 19.27.095.²⁰

After close of business that day, the City advised Potala Village that the City would not issue the building permit and that all site preparation construction activities that the City had previously authorized had to be stopped.²¹ On September 2, 2014, the City sent Potala Village a letter admitting that the City had deemed the building permit complete as of July 18, 2013, but now wished to ‘correct’ that determination and planned to next issue a Letter of Incompleteness.²² On Friday, September 5, 2014, fourteen months after the City’s Determination of Completeness, the City attempted to retract that Determination and issue a new Determination of Incompleteness, requiring Potala Village for the first time to revise the Permit Application to meet the zoning the City adopted in December, 2012.²³ The City cited no lawful authority for its actions,

¹⁹CP2 204 *Dargey Declaration*, Ex. I; *Potala Village Kirkland LLC. v. City of Kirkland*, 183 Wn. App. 191, 334 P.3d 1143 (2014).

²⁰*Potala Village*, 183 Wn. App. at 202. The Court of Appeals relied heavily on the Washington Supreme Court’s new decision in *Town of Woodway*, issued April 10, 2014 (*supra*). Although the Supreme Court’s *Town of Woodway* decision affirmed the Court of Appeals, the Supreme Court addressed vesting beyond the *Town of Woodway* Court of Appeals decision. Not surprisingly, the First Appeal court found the new *Town of Woodway* Supreme Court decision to be highly instructive and dispositive on the issue of vesting.

²¹CP 206-08, *Dargey Declaration*, Ex. J.

²²CP 209-10, *Dargey Declaration*, Ex. K

²³CP 211, *Dargey Declaration*, Ex. L.

nor did it explain how it could take such actions in light of RCW 19.27.095 or 36.70B.070.

G. Appeal on the Permit Application

On April 10, 2015, Potala Village filed its Motion for Partial Summary Judgment (Potala Village’s Motion”) asking the Superior Court to “to declare or issue a writ ordering the City to issue and allow Potala Village to pick up Building Permit No BMU 13-03290 as it was ready for pick up on or about July 31, 2015 and without the Revision Condition.” That same day, the City filed its Motion to Dismiss on Summary Judgment (“City’s Motion”). Both motions were heard on May 8, 2015. On May 22, 2015, the Superior Court granted the City’s Motion, denying Potala Village’s Motion, and dismissing Potala Village’s lawsuit against the City in its entirety with prejudice.

V. ARGUMENT

A. Appellate Court Standard of Review.

When reviewing a summary judgment, this Court stands in the same position as the trial court,²⁴ and must consider all the facts submitted and view all the facts in the light most favorable to the nonmoving party.²⁵

Summary judgment is inappropriate unless the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show there are no genuine issues as to any material fact and that the

²⁴*Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995)

²⁵*Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

moving party is entitled to a judgment as a matter of law.²⁶ Summary judgment may not be granted unless, based on all the evidence, reasonable persons could reach but one conclusion.²⁷ The burden is on the moving party to demonstrate there is no issue of material fact. The moving party is held to a strict standard.²⁸

B. The City Was Required To Process And Issue Potala Village's Building Permit Under The Zoning In Effect At The Time Of Application, As Ordered By The Superior Court, and Irrespective Of The First Appeal Decision.

1. Vested Rights Doctrine Governs this Case.

Under RCW 19.27.095, an applicant has the absolute right to have its building permit processed under the zoning and building regulations in effect on the day a complete building permit application is filed.²⁹ This is the statutorily codified vested rights doctrine.

A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.³⁰

Any subsequent changes to the property's zoning or building regulations, irrespective of how those come about, are irrelevant. RCW 19.27.095 freezes zoning and land use regulations to a single point in time

²⁶CR 56(c); *Wilson*, 98 Wn.2d at 437.

²⁷*Wilson*, 98 Wn.2d at 437.

²⁸*Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992).

²⁹*Town of Woodway*, 180 Wash. 2d at 172-73, citing *Abbey Rd. Grp.*, 167 Wash. 2d 242, 250, 218 P.3d 180.

³⁰RCW 19.27.095.

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.³¹

This ‘date certain’ approach satisfies due process.³² Washington Courts have unequivocally upheld this statute and its protections:

[a] property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto. A building or use permit must issue as a matter of right upon compliance with the ordinance.... Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom.³³

As the City of Kirkland has conceded:

It makes perfect legal sense to restrict the vested rights doctrine to the filing of a building permit, because the building permit is the permit that triggers review of the entire zoning and building codes for a project.³⁴

Compliance with RCW 19.27.095, i.e. the vested rights statute, is mandatory.

The vested rights doctrine **guarantees** the applicant the right to have the project reviewed under the laws and regulations **in effect at the time of the application.**³⁵

³¹*Friends of the Law v. King County*, 123 Wash. 2d 518, 522, 869 P.2d 1056 (1994); *Abbey Road Group.*, 167 Wash. 2d at 250 (citing *Hull v. Hunt*, 53 Wash. 2d 125, 130, 331 P.2d 856 (1958)).

³²*Abbey Road*, 167 Wash. 2d at 251.

³³*Teed*, 36 Wn. App. 635, 643-644, 677 P.2d 179 (1984), citing *State ex rel. Ogden v. Bellevue*, 45 Wash. 2d 492, 495, 275 P.2d 899 (1954).

³⁴CP 97, *Kolouskova Declaration*, Ex. B, page 8.

³⁵*Deer Creek Developers, LLC v. Spokane County.*, 157 Wn. App. 1, 10, 236 P.3d 906, 909 (2010) citing *West Main Assocs. v. City of Bellevue*, 106 Wash. 2d 47, 53, 720 P.2d 782 (1986) (emphasis added).

2. The Permit Application Vested As Was Ordered By The Superior Court.

Once the City receives a building permit application, the City has 28 days to determine if the application is complete.³⁶ If the application is complete, RCW 19.27.095 kicks in and the zoning for the building permit and that proposed project is frozen. The City must process the application under the laws in effect at the time the application was submitted and issue the building permit. Subsequent changes to the zoning or building codes do not matter for that building permit application. For purposes of the building permit application, it is as if those later changes to zoning or building permit do not exist. The City's review is purely ministerial and the applicant has a legal right to pick up the building permit once the City completes its ministerial review.³⁷

The heart of the prior initial Potala Village case was the City's insistence that Potala Village must submit a building permit application in order to vest and freeze the law under which the permit was processed. As soon as it had the opportunity to do so, Potala Village did just that: it filed a Permit Application as soon as possible following the Superior Court's order that the City must accept and process the building permit. At that

³⁶RCW 36.70B.070.

³⁷*State ex rel. Craven v. City of Tacoma*, 63 Wash. 2d 23, 27, 385 P.2d 372 (1963).

point, the law pursuant to which the City was required to process the permit was frozen: no changes in law could affect that permit.

Now in this current case, the City wishes to disclaim its prior legal position and totally disregard statutory law. The City wishes to ignore the Permit Application's vesting and impose new zoning on that Permit Application, even though the City diligently processed the Permit Application under the original zoning and took no steps to stay the Superior Court's order pending appeal.

The Superior Court issued a clear and express order that any complete Potala Village Building Permit Application would vest to the BN zoning that was in effect on February 23, 2011. The City acceded to the Superior Court's order by choosing not to request a stay pending appeal. Therefore, Potala Village had the absolute right to rely on the Superior Court's order and submit a building permit application. Potala Village did so on June 20, 2013, and the City agreed the application was complete as of July 18, 2013. The zoning for the property that was in effect on July 18, 2013 was the zoning that the Superior Court had described in its order (i.e. the BN zoning as it existed on February 23, 2011).³⁸ In other words, the zoning that the Potala Village Building Permit Application vested to was that which the Superior Court had mandated, the zoning in effect on

³⁸The date Potala Village filed the shoreline application.

February 23, 2011. This frozen zoning is what governs the Potala Village Building Permit Application. Under RCW 19.27.095, any future actions that might otherwise have changed or affected the property's zoning simply do not matter or exist for the Potala Village Building Permit Application.

While the City pursued its First Appeal, doing so could not affect Potala Village's Building Permit Application under RCW 19.27.095. The City may well have had other reasons to pursue its appeal, but **nothing about any later Court of Appeals decision could affect Potala Village's pending Building Permit Application: the zoning was frozen.**

The building department of the city has no discretion to refuse a permit save to ascertain if the proposed structure complies with the zoning regulations. Once that is done and the appropriate fee tendered by the applicant, the building department must issue the building permit.³⁹

The City could not add conditions imposing laws other than those in effect on the Effective Date nor could the City retract its Determination of Completeness or issue a new Determination of Incompleteness. In sum, the City could not lawfully prevent Potala Village from picking up the Building Permit once the City's ministerial review was complete; the Court of Appeals decision is inapposite.

³⁹*Craven*, 63 Wash. 2d at 27.

3. The First Appeal Decision Could Not Alter or Affect the Vested Permit Application.

Even though Court of Appeals did ultimately overturn the Superior Court order, nothing about that First Appeal decision addressed or retroactively changed the vesting date of Potala Village's Building Permit Application. In fact, the Court of Appeals did not even know that Potala Village had submitted a Building Permit Application based on the Superior Court order because that was beyond the record on appellate review. It is important to note that Potala Village is not disregarding the Court's First Appeal decision; however, it is inapplicable under the vested rights doctrine. While both cases involved the vested rights doctrine, the First Appeal involved a situation where the court found that the vested rights doctrine did not apply; in this case, the vested rights doctrine applies because Potala Village *did* file a building permit application. Again, the First Appeal review became irrelevant for purposes of Potala Village's Permit Application under RCW 19.27.095 once the City agreed that application was complete.

The outcome of a subsequent appeal does not affect any rights that vested by statute before that appeal decision is issued.⁴⁰ In *Town of Woodway*, the Supreme Court definitively held that a subsequent order invalidating zoning and land use regulations could not alter the rights of any applications that vested by operation of statute during the pendency of the appeal, irrespective of the appeal outcome.⁴¹ Likewise, in *Miotke v.*

⁴⁰*Town of Woodway*, 180 Wn. 2d at 175.

⁴¹*Id.*

Spokane County, the Court held that permit applications that were submitted during the pendency of an appeal had validly vested to the regulations in effect at the date the applications were submitted, irrespective of whether those regulations were later found invalid.⁴² The *Miotke* Court reiterated that “[t]he vested rights doctrine exists in part to ensure fairness to *landowners* and *developers* who would otherwise be subject to unforeseeable rule changes.”⁴³ Therefore, “[o]nce these rights vested, the County could not extinguish developers’ rights to complete projects in the now invalid UGA.”⁴⁴

The City could not lawfully use the First Appeal decision as a basis for refusing Potala Village’s attempt to pick up the building permit. As even the Court of Appeals recognized in the First Appeal:

Washington’s vested rights doctrine strongly protects the right to develop property.” This doctrine uses a “date certain” standard. “Under the date certain standard, developers are **entitled** ‘to have a land development proposal processed under the regulations **in effect at the time a complete building permit application is filed**, regardless of subsequent changes in zoning or other land use regulations.’⁴⁵

The City has no legal support for its bait-and-switch maneuver. Without lawful excuse, the City violated the mandate of RCW 19.27.095 that Potala Village’s Building Permit Application be considered under the

⁴²*Miotke v. Spokane County*, 181 Wn. App. 369, 373, 325 P.2d 434, 437 (2014).

⁴³*Id.*, 181 Wn. App. at 379.

⁴⁴*Id.*

⁴⁵*Potala Village*, 183 Wn. App. at 197, *citing Town of Woodway*, 180 Wash. 2d at 172 (emphasis added).

zoning and laws in effect at the time of application, i.e. as the law stood with the Superior Court order in effect.

In its Opposition to Potala Village's Motion for Partial Summary Judgment, the City interjects irrelevant arguments of common law waiver and equitable estoppel.⁴⁶ These arguments are inapplicable. Potala Village's application is protected by statute, RCW 19.27.095, which directly and legally entitles Potala Village to issuance of the building permit and development of the property in accordance with the February 23, 2011, i.e. 'pre-moratorium', zoning. No subsequent change in law can extinguish the vested right given by statute.⁴⁷

The City's claim that Potala Village is "attempting an end-run" around the First Appeal decision is equally without merit. As the City itself notes, the First Appeal decision states *unequivocally* that the vested rights doctrine is statutory and "applies only upon the filing of a complete building permit."⁴⁸ The only "end run" in this case is the City's attempt to avoid the consequences of its failure to obtain a stay.

C. The City's Ministerial Review of the Permit Application Gave the City No Discretion to Withhold the Permit.

The issuance of a building permit is a ministerial act: the City must issue the building permit as a matter of right once compliance with all building code requirements is determined.⁴⁹ Ministerial review involves

⁴⁶CP 317-81, *City's Opposition to Potala Village's Motion*, pp. 9-10.

⁴⁷*Id.*

⁴⁸CP 313, *City's Opposition to Potala Village's Motion*, p. 5

⁴⁹ *Craven*, 63 Wash. 2d at 27; *Chelan County v. Nykreim*, 146 Wash. 2d 904, 929, 52 P.3d 1 (2002).

no discretion: “where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial.”⁵⁰

Processing of permits is under the direction of the City’s building official, and is governed by the International Building Code:

Action on application. . . . If the building official **is satisfied that the proposed work conforms to the requirements of this code and laws and ordinances applicable thereto**, the building official **shall issue a permit** therefor as soon as practicable.⁵¹

Once the building official determined whether the project complies with the laws as of the Effective Date, the building official must issue the Building Permit:

A building or use permit **must issue as a matter of right** upon compliance with the ordinance. Once the application for a building permit and the plans and specifications filed with it show that the proposed building will conform to the zoning regulations and meet the structural requirements of the building code of the city, the permit shall issue as a matter of right, and the ordinances **vest no discretion** in the building department of the city to refuse either the application for or to deny the issuance of the building permit.⁵²

A City has no discretion

to refuse a permit save to ascertain if the proposed structure complies with the zoning regulations. Once that is done and the appropriate fee tendered by the applicant, **the building department must issue the building permit.**⁵³

⁵⁰*State ex rel. Clark v. Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926); *Burg v. City of Seattle*, 32 Wn. App. 286, 290-91, 647 P.2d 517 (1982).

⁵¹International Building Code 105.3.1, adopted by reference by KMC 21.08.010 (emphasis added).

⁵²*Craven*, 63 Wash. 2d at 27- 28 (internal citations omitted, emphasis added).

⁵³*Id.* at 27 (emphasis added).

As discussed above, the zoning regulations applied to the building permit review are those in effect at the time a complete building permit application is submitted.

The City had no discretion to choose not to issue the building permit or impose discretionary conditions. Once the City determined that Potala Village's Building Permit Application conformed to the zoning regulations and met the structural requirements of the City's building code, as those were frozen on July 18, 2013 (i.e. applying the February 23, 2011 zoning per the Superior Court order), the City was required to issue the Building Permit as a ministerial matter.

D. The City Violated RCW 19.27.095 and RCW 36.70B.070 by Retracting its Final Determination of Completeness and Issuing a Letter of Incompleteness Over a Year after Potala Village Filed its Permit Application.

The City violated both RCW 19.27.095 and RCW 36.70B.070 when it withdrew its Determination of Completeness and attempted to issue a new Determination of Incompleteness well over a year later. As discussed above, once the City issued the Determination of Completeness, it was bound to process the Building Permit Application in accordance with, and only with, the laws and zoning which that application vested to. That law included the Superior Court's decision; it did not include the much later First Appeal decision which was issued *after* the City had issued its Determination of Completion and had announced that the Building Permit was complete and ready to be picked up.

A municipality may not withhold a ministerial land use permit for reasons extraneous to the satisfaction of lawful ordinance or statutory criteria.⁵⁴ *Mission Springs* is a case with facts similar to those in the case at hand: in response to public opposition to a project, the city withheld a permit from a developer, after the building official had determined the permit was ready to be issued, for reasons outside of the scope of the law under which the permit had vested. In that case, the city's reason for withholding the permit was to conduct additional studies. The court held that the constitutional rights of Mission Springs were violated when the city refused to issue the permit upon satisfaction of ordinance criteria.⁵⁵

The same conclusion is appropriate here: the City may not withhold the ministerial Building Permit for reasons extraneous to Potala Village's satisfaction of the laws and criteria under which it had vested.

The City may argue that Potala Village brought this fate on itself by not picking up the permit before the pending Court of Appeals decision was issued. However, as the court clearly held in *Mission Springs*, the time it took Potala Village to complete its requisite steps is irrelevant:

This question of lawful entitlement is in no way dependent upon the actual length of time that the permit was withheld. Whether the delay was short or long the question remains, "Was the delay lawful, or was it unlawful?"⁵⁶

⁵⁴*Mission Springs, Inc. v. City of Spokane*, 134 Wash. 2d 947, 952, 954 P.2d 250, 252 (1998).

⁵⁵*Id.*, 134 Wash. 2d at 952.

⁵⁶*Id.*, 134 Wash. 2d at 959.

The City notified Potala Village on July 31, 2014, that the Building Permit was ready to be picked up, and Potala Village worked diligently to complete the final step to commence the project. On August 25, 2014, Potala Village completed the final step, its purchase of the subject property, and notified the City that it planned to pick up the Building Permit the following day. Not without irony, that was the date the Court of Appeals decision was issued, well over a year after the Superior Court's order. Nonetheless, under the holding of *Mission Springs*, the City had no discretion to withhold the Building Permit; regardless of the actual length of time it took Potala Village to pick the building permit up. In the eyes of the law, Potala Village was entitled to the issuance of the Building Permit upon satisfaction of relevant ordinance criteria without any additional discretionary conditions by the City.⁵⁷

E. The City Violated RCW 19.27.095 by Imposing the Revision Condition After the Building Permit had Vested.

Without lawful excuse, the City attempted to impose the Revision Condition on the Building Permit, i.e. that “the Potala Village project, Building Permit No BMU 13-03290 would have to be revised to conform to the current zoning requirements regardless of the stage in construction.”⁵⁸ This was a discretionary condition barred by law. As noted above, the City's role in reviewing the Building Permit Application

⁵⁷*Id.* at 960.

⁵⁸CP 181, *Dargey Declaration* Ex. F.

was purely ministerial; the City had no right to exercise discretion or subjective judgment.⁵⁹

The City had no authority to impose this Revision Condition, requiring Potala Village to comply with a law that *may* come into effect in the *future* (i.e. a new ruling from the Court of Appeals). The whole purpose behind RCW 19.27.095 is to ensure that building permit applications are subject only to the zoning and building regulations in effect at the time the complete application is filed. Conditioning the Permit Application on a law that may come into effect at some later date, unknown at the time, abrogates RCW 19.27.095. The Revision Condition is akin to a building permit condition stating “although you have vested, you must comply with any changes to the property’s zoning that might come about in the future.” The whole purpose of RCW 19.27.095 is 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.⁶⁰ Waiting more than a year after Potala Village submitted its Building Permit Application makes the Revision Condition all the more egregious.

The City’s Revision Condition is the very behavior the Washington Supreme Court found unlawful in *West Main v. City of Bellevue*.⁶¹ In *West Main*, the city passed an ordinance restricting vesting

⁵⁹*Clark*, 137 Wash. at 461; *Burg*, 32 Wn. App. at 290-91.

⁶⁰*West Main*, 106 Wash. 2d at 53.

⁶¹*Id.*

of building permit applications until several hurdles were met, including resolution of any final appeals on the project. The Court held that a city acts unlawfully when it “reserves for itself the 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.”⁶²

In *West Main*, Bellevue attached conditions eerily similar those that the City of Kirkland imposed on Potala Village’s Building Permit, including a condition pertaining to final appeals on the project. By attaching the Revision Condition to Potala Village’s Building Permit Application, the City has done just what the City of Bellevue did in *West Main*: it attempted to frustrate Potala Village’s ability to vest by reserving for itself an “almost unfettered ability to change its ordinances.”

Potala Village is not disputing the City’s authority to impose ministerial conditions on the Building Permit based on the vested-to building regulations. A building permit commonly contains a list of conditions such as requiring that a set of plans be kept at the job site; that all work would be subject to field inspections; and that egress could not be blocked. These are the type of ministerial conditions permissible under a building permit: these conditions relate directly to the building regulations which govern the Building Permit (again, as those were in effect on the date the application was submitted). However, the City had no authority to

⁶²*Id.*

impose the discretionary Revision Condition on the Building Permit requiring Potala Village to comply with *future zoning decisions*. This is the very danger that RCW 19.27.095 protects against: the possibility that a jurisdiction may try to change the rules in the middle of the land development process, subjecting the applicant to fluctuating law. The fairness principles that govern RCW 19.27.095 mandate that an application be able to plan its conduct with reasonable certainty of the legal consequences. The Revision Condition violates RCW 19.27.095 and the City's ministerial duties in reviewing and issuing building permits.

F. The City Failed to Exercise Its Legal Options to Stay the Superior Court Order or Challenge the Building Permit Application.

The irony of the situation is that the City had at least two ready legal remedies available to halt processing the Permit Application pending the First Appeal decision. It could have filed a supersedeas stay of the Superior Court decision pending the First Appeal. The City also could have filed an appeal under Chapter 36.70C RCW, the Land Use Petition Act (LUPA), to reverse its land use decisions. The City's decision not to exercise either of these options meant the City was bound to ministerially process the Permit Application based on the frozen zoning, and allow Potala Village to pick it up and construct the project irrespective of the later First Appeal decision.

1. The City Chose Not To Stay The Superior Court Order Pending Appellate Review.

The City could have stayed the trial court's writ of mandamus and order pending the First Appeal. RAP 8.1 provides a means of delaying the enforcement of a trial court decision in a civil case pending appeal: "A trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule."⁶³

Decision Affecting Property. Except where prohibited by statute, a party may obtain a stay of enforcement of a decision affecting rights to possession, ownership or use of real property. . . by filing in the trial court a supersedeas bond or cash, or alternate security approved by the trial court pursuant to subsection (b)(4).⁶⁴

A party signals its intent to stay or supersede a judgment by filing a motion and posting bond⁶⁵ pursuant to RAP 8.1. This allows the other party to object to the terms of the stay.⁶⁶ Without a stay, the trial court decision is presumed valid and may be enforced regardless of whether a party appeals.⁶⁷ Absent a stay, Washington Courts are clear that a Superior Court order has full force and effect: "If no stay is filed, the decision being appealed is effective pending review."⁶⁸

⁶³RAP 8.1(b).

⁶⁴RAP 8.1(b)(2).

⁶⁵If applicable.

⁶⁶*Interstate Prod. Credit Ass'n v. MacHugh*, 90 Wn. App. 650, 655, 953 P.2d 812 (1998).

⁶⁷*Spahi v. Hughes-Nw., Inc.* 107 Wn. App. 763, 27 P.3d 1233 (2001), *modified*, 33 P.3d 84 (2001).

⁶⁸*Kelly*, 167 Wash. 2d at 871, citing *Pinecrest Homeowners Association v. Cloninger & Assoc.*, 151 Wash. 2d 279, 287-288, 87 P.3d 1176 (2004) (addressing separate legal authority for issuance of a stay).

a. A Supersedeas Stay Is Required To Maintain The Pre-Litigation Status Quo.

The City and Potala Village agree that RAP 8.1 is not mandatory, but rather permissive. However, the City claims that RAP 8.1 “does not require a party to seek a stay *to preserve its rights* on appeal.”⁶⁹ This statement is patently false: the very purpose of a stay is to preserve one’s rights on appeal. The City cites *Kelly*⁷⁰ and *Pinecrest*⁷¹ for its position. However, neither of those cases held that a jurisdiction’s rights are preserved absent a stay.

The question in *Kelly* was whether a permit’s processing and time limits continue after a trial court *revokes* a permit, and the developer does not seek a stay of the trial court decision pending appeal. *Kelly* presents the opposite of the circumstances in the instant case. In *Kelly*, the Supreme Court held that, when the superior court revoked the conditional use permit, the two-year time limit of the permit was terminated along with the permit, pending appellate review.⁷² Because the *Kelly* trial court had *revoked* the developer’s permit, the Supreme Court held that a stay could not have changed the developer’s right because, upon the trial court’s revocation, the permit

effectively stopped existing the moment the superior court denied the permit. No rights legally existed that could be affected by a stay. Logically, the developers were not permitted to develop their property after the

⁶⁹CP 287, *City’s Motion*, p. 11 (emphasis added).

⁷⁰167 Wn. 2d 867.

⁷¹151 Wn. 2d at 288.

⁷²*Kelly*, 167 Wn.2d at 873.

permit was subsequently denied by the superior court.⁷³

For Potala Village, the Superior Court validated the Building Permit, and the City failed to obtain a stay to keep that Building Permit from being processed. Here, the trial court ruled in Potala Village's favor, ordering the City to accept and process Potala Village's Permit Application. Without a stay, Potala Village *did* have the right to proceed with their project based on the superior court's ruling, and, because no stay was filed, the trial court's decision was effective pending review. *Kelly* actually supports Potala Village: "If no stay is filed, the decision being appealed is effective pending review."⁷⁴ Pursuant to *Kelly*, the only way the City could avoid the zoning as ordered by the Superior Court was by seeking a stay of that Superior Court order. If a party does not request a stay, the trial court decision remains in effect and valid, and may be enforced irrespective of any appeal.⁷⁵

b. The City's Failure To Stay The Superior Court's Decision Allowed The Permit To Be Processed And Issued.

In its Summary Judgment Motion, the City claimed that requiring it to seek a stay pending appeal to protect the status quo would "require appellants to seek a stay of trial court proceedings for every land use appeal."⁷⁶ Potala Village agrees with this statement, and would extend it even further: *Any litigant* that seeks to preserve the status quo in any case

⁷³*Id.*, 167 Wn.2d at 872.

⁷⁴*Id.* 167 Wn.2d at 871 citing *Pinecrest*, 151 Wash. 2d at 287-288.

⁷⁵*Spahi*, 107 Wn. App. 763.

⁷⁶CP 285, *City's Motion*, p. 9.

pending appeal must seek a stay, whether under RAP 8.1, RCW 36.70C.100(1), or some other stay provision. A party that does not obtain a stay cannot be heard to complain that the opposing party moved forward under the court order in effect at the time. This is not new law or new information; the rules regarding the opportunity for a stay, and the otherwise effectiveness of the Superior Court decision pending further review are long-standing and unequivocal.

The City further argued that upholding Potala Village's right to proceed under RCW 19.27.095 would render its appeal meaningless. However, the City fails to recognize that the effect of the vested rights law in Washington renders *all subsequent changes in law meaningless* for purposes of that single permit application so long as it remains active. This is the very crux of the vested rights doctrine as set forth in RCW 19.27.095:

The vested rights doctrine **guarantees** the applicant the right to have the project reviewed under the laws and regulations **in effect at the time of the application.**⁷⁷

Under RCW 19.27.095, any future actions – whether by the city council, the state legislature, or a court – that might otherwise have changed or affected the property's zoning simply do not matter or exist for the Potala Village Permit Application. Neither the Court of Appeals nor Supreme Court decisions could retroactively change the vesting date of Potala Village's Permit Application; the First Appeal court did not even know whether Potala Village had submitted or vested a Permit Application because that

⁷⁷*Deer Creek Developers*, 157 Wn. App. at 10, citing *West Main Assocs.*, 106 Wash. 2d at 53 (emphasis added).

was beyond the record on appellate review. RCW 19.27.095 mandates that, once the Permit Application was deemed complete by the City, all law, including the appellate court reviews, became completely irrelevant for purposes of Potala Village's application.

Had the City applied for a stay, Potala Village would have known any risks it may have faced. The City now wishes to belatedly achieve the same result as a stay and deny Potala Village the opportunity to make an informed decision. But because the City failed to seek a stay, RCW 19.27.095 eliminated any risk that Potala Village might otherwise have been subject to during the pendency of the City's appeal once Potala Village submitted that complete Permit Application.

The City argues that, even if it had issued the building permit prior to the Court of Appeals decision, the City would have revoked the permit thereafter. Such argument relies on flawed logic. If the Supreme Court had accepted review of the Court of Appeals decision, and Potala Village meanwhile built the condominium building, would the City next argue that Potala Village has to tear down the building? What if it was already occupied? The stay process is designed specifically to avoid this type of conundrum. If a stay is requested, the parties have had the opportunity to assess their respective risks. If a stay is not issued, the parties have the right and obligation to act in accordance with the Superior Court order. The City gives no excuse for its failure to comply with this process.

The same argument holds true with respect to the Revision Condition, which was, further, a discretionary condition barred by law. The City's

duties to review the Permit Application were purely ministerial; the City had no right to exercise discretion.⁷⁸

This case is more analogous to the case the *Kelly* court distinguished, *Gold v. Kami*.⁷⁹ In *Gold*, neighbors challenged a developer's permit. The trial court affirmed the permit, but the developer failed to seek a stay during the neighbors' appeal. The permit was therefore valid during the appeal, and thus its time limit continued to run and finally expired. In distinguishing *Gold*, the *Kelly* court said,

[W]e can contrast a case like *Gold*, where a developer is permitted to develop his property on appeal (after the superior court affirmed the granting of the permit), with the present case, where the developers were not permitted to develop their property on appeal (after the superior court denied the granting of the permit). In the latter case, no development can occur where no permit exists.⁸⁰

This is precisely the outcome of this case: the City failed to stay a permit that had been deemed valid, allowing Potala Village to move forward with the permit.

The City also argues that, under *Kelly*, Potala Village assumed the risk of moving forward with a project pending litigation. What the *Kelly* court actually said was, “the fact the developers did not take steps to satisfy the permit’s conditions is immaterial . . . when no permit exists.”⁸¹ *Applying this analysis to the case at hand, the risk was on the City that the*

⁷⁸*Clark*, 137 Wash. At 461; *Burg*, 32 Wn. App. at 290-91.

⁷⁹170 Ill.App.3d 312, 120 Ill.Dec. 595, 524 N.E.2d 625 (1988).

⁸⁰*Kelly*, 167 Wn.2d at 872-73.

⁸¹*Id.*, 167 Wn.2d at 871.

project would move forward – and did – without a supersedeas stay. And, as noted above, because Potala Village’s application vested and was deemed complete, the City was required to complete its ministerial duties and issue the permit.

The City also cited,⁸² but did not discuss, *Pinecrest*, a case which is also analogous to this situation. In *Pinecrest*, the superior court upheld the city council’s decision to issue a permit; neighbors appealed, but failed to obtain a stay. The appellants’ failure to obtain a stay allowed the processing of the permit to go forward:

While Pinecrest’s failure to seek a stay did not compromise its right to appeal the superior court decision, *the failure permitted [the developer] to act on the superior court decision; the hearing examiner’s subsequent approval of the rezone and the city’s granting of a building permit were thus legal actions.*⁸³

That is precisely the situation here: the City failed to seek a stay pending the appeal, thereby allowing the processing of the permit to go forward. Once the City deemed the Building Permit complete, the City was required to issue the Building Permit.

c. The City’s Motivations for not Staying the Superior Court Decision are Immaterial.

The City notes that there may be good reason for not seeking a stay pending appeal.⁸⁴ In the case at hand, the City may well want a

⁸²CP 285, *City’s Motion*, p. 9.

⁸³*Pinecrest*, 151 Wn.2d at 288 (emphasis added).

⁸⁴The City also discussed bonding requirements under supersedeas stays, but as the City notes, it may be exempt from bonding under RCW 4.92.080. Moreover, the City never sought a stay, so the question of bonding is irrelevant. The issue of whether a bond should

determination not just on the Potala Village case particulars, but to settle the general issue of what permits vest upon filing of a shoreline substantial development permit, a question that was as yet undetermined (as demonstrated by the City's vigorous appeal and the many amicus briefs filed therein). The appellate courts are well-aware of multifaceted reasons to issue a decision that may have an actual limited effect on a case; this case is an excellent example of their desire to clarify the law on this question in a published decision.

However, nothing about the strategy and policy decisions for pursuing an appeal can affect the clear law that the Superior Court's order was the law of the case in effect with regard to the Permit Application because the City failed to obtain a stay of that ruling.

The effect of not seeking a stay is the same, regardless of the motivation behind it: *the pre-litigation status quo is not preserved without the stay*. The City claims that it would be in a "Catch-22" if it was forced to seek a stay. In every legal action, there are myriad legal strategies that parties must decide between. This is not a "Catch-22" situation, but rather a strategic decision the appealing party must make: what are the risks and benefits to seeking a stay. Once it has made its determination, that party will have to live with the consequences. As the City itself notes, "there will be instances where a local jurisdiction may seek a stay of a trial court

have been posted and in what amount was never before the court due to the City's own inaction.

decision pending appeal, even given the potential exposure to damages it may face.”⁸⁵

The City argues that under *Norco Const., Inc. v. King Cnty.*,⁸⁶ it is in a “damned if you do, damned if you don’t situation.”⁸⁷ In *Norco*, the County violated state law by failing to timely process a permit. The County took a chance and appealed the rulings of the trial court and court of appeals. The County lost, and was of course liable for damages. This is not a “damned if you do, damned if you don’t situation” as City claims. Rather, it is the nature of litigation: each party must weigh its strategies and likelihood of success, and one party wins and the other does not. The losing party cannot then demand to abolish the system simply because it lost or failed to make the correct strategic decision pending appellate review.

The City failed to file a stay to preserve the status quo pending appellate review of the Superior Court’s decision. As a result, the City had the legal obligation under RCW 19.27.095 to issue and allow Potala Village to pick up the Building Permit irrespective of the Court of Appeals later decision since the Permit Application had vested more than a year earlier.

2. The City Could Also Have Challenged The Validity Of Its Determination Of Completeness Under LUPA.

The City also could have filed a LUPA petition challenging its decision that the Permit Application was complete or issued in error, or

⁸⁵CP 291, *City’s Motion*, p. 15.

⁸⁶97 Wn. 2d 680, 649 P.2d 103 (1982).

⁸⁷CP 291, *City’s Motion*, p. 15.

that the Permit Application should not have vested. As the Supreme Court explained in *Chelan County v. Nykreim*, if a city feels it has issued a building permit or taken some other ministerial action in error, the city has the duty to appeal its own land use decision.⁸⁸ In *Nykreim*, Chelan County brought an action for declaratory judgment on the question of propriety of a boundary line adjustment fourteen months after it was issued. The Court held that the LUPA appeal time limits applied even though the county itself issued the permit. The county was therefore foreclosed from later challenging the permit beyond the LUPA statute of limitations.

[I]f this court allows local government to rescind a previous land use approval without concern of finality, innocent property owners relying on a county's land use decision will be subject to change in policy whenever a new County Planning Director disagrees with a decision of the predecessor director.⁸⁹

The City's land use decision was its July 18, 2013 Determination of Completeness. The City could have brought a LUPA challenge within 21 days of that decision. The City did not do so, and has never since brought its own action to dispute the binding Determination of Completeness. Failing to do so, the City has no authority now to withhold the Building Permit. Because issuance of a building permit is strictly ministerial, the City had no discretion in whether to issue it once the applicable requirements are met.

Had the City exercised its rights under LUPA, the City could also have utilized LUPA's stay authority, putting the Building Permit on hold

⁸⁸*Nykreim*, 146 Wash. 2d at 933.

⁸⁹*Id.*

pending outcome of the LUPA action.⁹⁰ The City chose not to pursue that option.

As the Supreme Court said in *Craven*, “We think that the city has mistaken its remedy.”⁹¹ Had the City wished not to issue the Building Permit, it had to stay the Superior Court order or appeal the Determination of Completeness. Because it did not, the City was bound by its role in reviewing and approving a ministerial permit based on the final and binding Determination of Completeness, to issue the Building Permit without the Revision Condition.

a. The City’s Refusal To Issue The Building Permit And Its Issuance Of A Determination Of Incompleteness Were Land Use Actions Subject To LUPA.

In its Motion, the City argued that its August 25, 2014, email refusing to issue the Building Permit was not “land use decision” under LUPA.⁹² The City’s analysis is simply incorrect. Moreover, by addressing only the August 25, 2014, land use decision and omitting any reference to the other land use decision that Potala Village appealed in its LUPA petition – namely the City’s September 5, 2014, issuance of a Determination of Incompleteness – the City appears to concede the

⁹⁰RCW 36.70C.100.

⁹¹*Craven*, 63 Wash. 2d at 26.

⁹²CP 284, *City Motion to Dismiss*, p. 8. LUPA was not the only vehicle pursuant to which Potala Village challenged the City’s actions, including declaratory judgment, writ of mandamus, constitutional writ, and injunction. The City has not addressed these in its motion. Should the Court determine that relief is not available under LUPA, Potala Village’s remaining causes remain.

effectiveness of Potala Village's challenge of the City's subsequent and untimely Determination of Incompleteness.

i. August 25, 2014, Refusal to Issue Building Permit was a Land Use Decision.

The City also claimed that its August 25, 2014 email was not a land use decision as that term is defined under LUPA. The City characterizes the email as merely "indicating it would follow the published ruling" of the Court of Appeals.⁹³ The City fails to mention that the City's email states that *it will not issue the Building Permit* it had previously deemed complete and ready for pick up. The City's email also revokes Potala Village's outstanding permits for "grubbing (including tree removal), shoring or construction activity."⁹⁴

A Land use decision "means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination" on the following:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

⁹³*Id.*

⁹⁴CP 206-08, *Dargey Declaration*, Ex. J.

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.⁹⁵

A land use decision is a final determination that “leaves nothing open to further dispute.” *Samuel's Furniture, Inc. v. State, Dep't of Ecology*, 147 Wash.2d 440, 452, 54 P.3d 1194 (2002). A land use decision “concludes the action by resolving the plaintiff's entitlement to the requested relief.” *Id.* (citing *Purse Seine Vessel Owners v. State*, 92 Wash. App. 381, 387, 966 P.2d 928 (1998)). This can be compared to an interlocutory decision that intervenes between the commencement and the end of review but is not a final decision of the whole matter. *Id.*

It is well-established law that building permits are subject to LUPA.

Building permits are subject to judicial review under LUPA. Historically, actions on *building permits* have been characterized by this court as ministerial determinations, which answer the question whether LUPA applies to ministerial land use decisions.⁹⁶

In *Heller Bldg., LLC v. City of Bellevue*, a letter sent by Bellevue to a property owner explaining its decision to issue stop work order on building remodeling project for which property owner had obtained permit from city was a “final determination” for purposes of LUPA.⁹⁷ Clearly, the City's refusal to issue the Building Permit, as well as its revocation of

⁹⁵RCW 36.70C.020(2).

⁹⁶*Nykreim*, 146 Wn. 2d at 929.

⁹⁷147 Wn. App. 46, 194 P.3d 264 (2008).

previously approved permits fall within the ambit of decisions that are subject to LUPA.

The City's August 25, 2014, refusal to issue the Building Permit is thus a land use decision subject to appeal under LUPA. The City's revocation of the outstanding permits is also a land use decision subject to appeal under LUPA. These were final determination by the City's building plans examiner who was charged with reviewing and making decisions on the Permit Application. Potala Village only had two alternatives: either (a) file a LUPA, Writ of Mandamus, et cetera, challenging the City's refusal to issue the building permit and stop work under the other permits, or (b) comply with the email and following City instructions. There was nothing further to dispute or review with the City: either Potala Village had to challenge the City's decision or else it had to go back to the literal drawing board and develop new building permit application plans based on the new zoning.

ii. Issuance of Determination of Incompleteness Was a Land Use Decision.

In accordance with RCW 36.70B.070, the City issued a Determination of Completeness on July 18, 2013, thereby vesting the Permit Application. As noted in Potala Village's Motion for Summary Judgment, this was a land use decision that the City *could have* appealed under LUPA had the City decided it had been issued in error. The City did not appeal that land use decision. On September 5, 2014, fourteen months after the City's Determination of Completeness, the City issued a new

Determination of Incompleteness.⁹⁸ The Determination of Incompleteness was also a land use decision which was appealable – and which Potala Village did appeal – under LUPA.⁹⁹ As discussed above, Potala Village had to either file this action or develop new building permit application plans based on the new zoning. Because this letter fully resolved any discussion as to whether the City would issue the otherwise final building permit, Potala Village had no choice but to file this legal action.

G. Potala Village is Entitled to a Writ of Mandamus.

As fully briefed above, the City was required to issue the Permit. Potala Village is entitled to a writ of mandamus compelling the City to allow Potala Village to pick up and complete construction under Building Permit No. BMU 13-03290 as it was ready for issuance on July 31, 2014, without imposition of the Revision Condition. A writ is appropriate as there would be no other plain, speedy and adequate remedy available to Potala Village.¹⁰⁰

The elements necessary for this Court to issue a writ of mandamus are:

(1) the party subject to the writ is under a clear duty to act, RCW 7.16.160; (2) the applicant has no “plain, speedy and adequate remedy in the ordinary course of law,” RCW 7.16.170; and (3) the applicant is “beneficially interested.”¹⁰¹

⁹⁸CP 211, *Dargey Declaration*, Ex. L.

⁹⁹ See, e.g., *Abbey Rd. Grp., LLC*, 167 Wn. 2d 242.

¹⁰⁰RCW 7.16.160; 7.16.170.

¹⁰¹*Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003).

“Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance.”¹⁰² Moreover, mandamus is appropriate to compel a ministerial act.¹⁰³ The issuance of a building permit is a ministerial act for which issuance of a writ of mandamus is proper.¹⁰⁴ When a city refuses to act on an application based on a dispute over vested rights, courts have used writs of mandamus to require action.¹⁰⁵

Under the “vested rights” doctrine, issuance of a building permit is a ministerial act for which mandamus will lie where compliance with the then existing zoning regulations is shown.¹⁰⁶

The City had a ministerial duty to issue Potala Village’s building permit based on the zoning in effect on the date Potala Village submitted its Permit Application, i.e. that zoning effective on February 23, 2011, as described in the Superior Court’s decision.

There is no other plain and speedy remedy available at law which the Court might rely upon to decide this matter and order the City to act. Further, there can be no serious dispute that Potala Village is the beneficially interested party, being the property owner and building permit

¹⁰²*Id.*, 118 Wn. App. at 404-405 (citing *Clark County Sheriff v. Dep't of Social & Health Servs.*, 95 Wash. 2d 445, 450, 626 P.2d 6 (1981)).

¹⁰³*Eugster*, 118 Wn. App. at 404-408 (citing, e.g., *Smith v. County of Missoula*, 297 Mont. 368, 992 P.2d 834, 839 (1999); *Hart v. City of Albuquerque*, 126 N.M. 753, 975 P.2d 366, 371 (N.M.App.1999)).

¹⁰⁴*Craven*, 63 Wash. 2d at 27.

¹⁰⁵*WCHS v. City of Lynnwood*, 120 Wn. App. 668, 86 P.3d 1169 (2004); *Norco Constr.*, 97 Wash. 2d 680; *Teed*, 36 Wn. App. at 643; *City of Federal Way v. King County*, 62 Wn. App. 530, 534, 815 P.2d 790, 793 (1991).

¹⁰⁶*Teed*, 36 Wn. App. at 643-644, citing *Craven*, 63 Wash. 2d at 27; see *Parkridge v. Seattle*, 89 Wash. 2d 454, 465, 573 P.2d 359 (1978).

applicant. The City would otherwise deprive Potala Village of its rights, benefits, and entitlements by refusing to allow Potala Village to pick up its building permit.

H. In the Alternative, Declaratory Judgment or Writ of Certiorari is Proper.

Potala Village is also entitled to a declaratory judgment. 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.¹⁰⁷ 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. 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.¹⁰⁸

Potala Village presents this Court with a justiciable controversy based on its rights affected by statute: whether the City's refusal to allow Plaintiff to pick up the building permit, the City's imposition of the Revision Condition and the City's issuance of a new Letter of

¹⁰⁷RCW 7.24.020.

¹⁰⁸*Burman v. State*, 50 Wn. App. 433, 439, 749 P.2d 708 (1988).

Incompleteness violated RCW 19.27.095 and RCW 36.70B.070. There can be no question that a dispute exists between Potala Village and the City regarding the Building Permit. Potala Village and the City have genuine and opposing interests which are both concrete and substantial. The Court's determination as to this issue would be determinative.

Potala Village is also entitled to a writ of certiorari, pursuant to RCW 7.16.030 et seq., declaring the City's actions to be unlawful, namely that Defendant lacked legal basis to impose the Revision Condition, to issue the Letter of Incompleteness, and to generally refuse to allow Plaintiff to pick up the Building Permit and construct the building pursuant thereto. Further, Potala Village requests the Court issue a Writ of Certiorari declaring that the City's Revision Condition and refusal to issue the Building Permit is in violation of the City's obligation to file a request for stay under Rule of Appellate Procedure 8.1 or to otherwise file an appeal under the Land Use Petition Act.

VI. CONCLUSION

Based on the foregoing, Potala Village respectfully requests this Court to reverse the trial court's decision on summary judgment and to declare that the City must, or issue a writ ordering the City to, issue and allow Potala Village to pick up Building Permit No BMU 13-03290 as it was ready for pick up on or about July 31, 2015 and without the Revision Condition.

DATED this 8th day of September, 2015.

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No. 73558-6-I

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

(King County Superior Court #14-2-25112-2 SEA)

POTALA VILLAGE KIRKLAND, LLC, and LOBSANG
DARGEY and TAMARA AGASSI DARGEY,

Appellants,

vs.

CITY OF KIRKLAND,

Respondent.

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2015 SEP -8 PM 2:44
COURT OF APPEALS
STATE OF WASHINGTON

ORIGINAL

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

Evanna L. Charlot, being first duly sworn on oath, deposes and says:

1. I am a citizen of the United States, over the age of 18 years of age, and am competent to testify to the facts herein.

2. On September 8, 2015, I caused to be served a true and correct copy of: APPELLANT’S OPENING BRIEF upon counsel of record for Defendant/Respondent City of Kirkland as follows:

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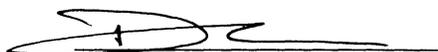
Pursuant to RCW 9A.72.085, I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is true and correct.

Dated this 8th day of Sept, 2015.


Evanna L. Charlot

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

SIGNED AND SWORN to (or affirmed) before me on Sept 09-08-15 by Evanna L. Charlot.


Darrell S. Mitsunaga
Notary Public residing in Sammamish, WA
My appointment expires 1-28-17

