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DIVISION III
STATE OF WASHINGTON
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No. 323706-III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

ALLIANCE INVESTMENT GROUP OF ELLENSBURG, LLC,

Appellant,

v.

CITY OF ELLENSBURG, WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The City of Ellensburg's interpretation of the plat-vesting statute, RCW 58.17.033, completely ignores its essential purpose and effect. In 1987, the Washington legislature codified the vested rights doctrine with respect to land divisions by mandating that a proposed division of land must be considered under the zoning and other land use control ordinances in effect at the time an applicant submits a fully completed application for preliminary plat approval. Courts, in interpreting RCW 58.17.033, have repeatedly held that these vested rights extend beyond the right to divide the land, and also include the right to develop the platted land.¹ Yet the City continues to argue that the 2009 critical areas ordinance ("CAO") applies when Alliance seeks building permits for development on its platted lots by claiming that RCW 58.17.033 does not apply to future building permit applications.² If the City applied the 2009 CAO to development on vested, platted lots, then Alliance's vested rights *would* be

¹ *Noble Manor Co. v. Pierce Cnty.*, 133 Wn.2d 269, 278, 943 P.2d 1378 (1997) (the court took issue with the county's position, noting that "[i]f all that the Legislature was vesting under the statute was the right to divide land into smaller parcels with no assurance that the land could be developed, no protection would be afforded to the landowner") (emphasis added). See also *Noble Manor Co. v. Pierce Cnty.*, 81 Wn. App. 141, 145-146, 913 P.2d 417 (1996) ("The interpretation urged by the County, that RCW 58.17.033 vests only the right to divide, not the right to develop, results essentially in limiting the vested rights doctrine to completed building applications. Their interpretation ignores the plain language of RCW 58.17.033 that those who submit completed short plat applications are entitled to be considered 'under the . . . zoning or other land use control ordinances, in effect.'). Note that there is an incorrect citation for the court of appeals case in Appellant's Opening Brief at 25 n.49; the citation should be 81 Wn. App. at 145-146.

² Brief of Respondent at 1.

limited to a land division, completely contrary to the clear rulings by the court of appeals and supreme court in *Noble Manor*.

Alliance acknowledges that it must comply with the standards of its plat approval, the standards of the 2007 CAO, and the current building code when it applies for a building permit.³ But because it vested with the filing of a complete land use application fully conforming to the City's submittal requirements, then land use control ordinances in effect when Alliance filed its plat application apply to the plat, including the 2007 CAO, not later enacted land use control ordinances. In the Washington Supreme Court's most recent pronouncement on vested rights, it reconfirmed the state's strong commitment to this doctrine: "Washington adopted this rule because we recognize that development rights are valuable property interests, and our doctrine ensures that 'new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law.'"⁴

II. REBUTTAL

A. Alliance's Assignment of Error Is Accurate.

Alliance claimed error by the Kittitas County Superior Court in ruling that the City of Ellensburg can apply its 2009 CAO to Alliance's

³ SEPA review, however, would not need to be repeated because the City was required to review floodplain impacts under SEPA at the plat stage. Former ECC 13.39.200(D)(1).

⁴ *The Town of Woodway et al., v. Snohomish County et al.*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014), quoting *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987).

2007 vested short plat. The City claims that this misstates the court and City's Planning Commission decisions.⁵ But this is exactly the effect of these decisions, and the entire crux of Alliance's argument from day one. It is unclear why the City views the assignment of error as a misstatement.⁶

B. The City Continues to Misunderstand the Ruling in *Noble Manor* and Its Applicability to This Case.

In its statement of facts and argument, the City continues to focus on the fact that Alliance allegedly failed to identify its uses in its short plat application and that if it had done so, it would meet a "limited extension" of vested rights found in *Noble Manor* and vest to the 2007 CAO.⁷

Noble Manor does not represent a limited extension of the vested rights doctrine. It was the Legislature that extended and codified the vested right doctrine with respect to plats; the supreme court in *Noble Manor* simply construed the Legislature's intent behind RCW 58.17.033:

In extending the common law vested rights doctrine to include short and long plat applications, the Legislature has made the policy decision that developers should be able to develop their property according to the laws in effect at the

⁵ *Id.*

⁶ Perhaps it is because the City concluded that the CAO in effect at the time of building permit application applies to Alliance's building permit applications for development within the plat. Alliance's specific reference to the 2009 CAO was meant to identify which CAO is currently in effect. The City did not specifically refer to the 2009 CAO, but this is not a misstatement of the error that the superior court made.

⁷ Brief of Respondent at 8.

time they make completed application for subdivision or short subdivision of their property.⁸

The statute, as construed by the courts, applies to all plat applications and not merely in limited circumstances.

The supreme court in *Noble Manor* did, however, limit the land use control ordinances to which an applicant could vest with a plat application, by explaining that an applicant must reveal enough detail about its proposal to vest to a particular land use ordinance.⁹ The court explained:

Since we conclude that what is vested is what is sought in the application for a short plat, then the question becomes what the Developer's application sought in this case.¹⁰

The City still places undue emphasis on Alliance's need to identify a use in a short plat application, believing that it is necessary to vest to a CAO that would apply in its entirety regardless of use. Identifying the use was important under the facts of *Noble Manor* because the use regulations changed in terms of lot sizes for duplexes affecting the number of duplexes allowed. The court noted, "Since the laws effective on that date did allow for three duplexes on the property, the Developer obtained a

⁸ 133 Wn.2d at 280. (Emphasis added.) Because of this extension by the Legislature of the vested rights doctrine, cases decided before the 1987 statute, and discussed on pages 11-13 of Respondent's Brief, are irrelevant. *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998), also cited by the City, is not a vested rights case, and also irrelevant.

⁹ This relates back to the requirement in RCW 58.17.033 for a fully complete application as defined by local ordinance.

¹⁰ 133 Wn.2d at 284.

vested right to develop its land in accord with the application."¹¹

Naturally, the court focused on whether the applicant identified its three duplex lots in its application because new regulations prohibited three duplex lots. The court needed to find that the applicant sought to develop a use that was later prohibited. The court did find that the applicant had identified three lots for duplexes (with no more detail), so it vested to the prior use regulations. Importantly, the court did *not* adopt a blanket rule that an applicant must identify a use in order to vest to a regulation unrelated to the proposed use, or whose applicability is not dependent on the proposed use.

As a result of vesting, when the applicant in *Noble Manor* applied for building permits for its duplexes, Pierce County would find that the applicable use regulations allow the issuance of the building permit. Because of vesting, the County could not apply the land use control ordinances in effect at the time of building permit application, which is what the City believes should happen in this case.

The key is determining whether the subject of the changed regulations was addressed in the application. Here, in contrast to *Noble Manor*, the CAO changed, so the correct inquiry is whether Alliance submitted everything that it was required to submit for the City's CAO

¹¹ *Id.* at 285.

review.¹² Not only did Alliance do this, but the City was required to undertake an analysis of impacts related to floodplain hazards at the plat stage and did so.¹³ Similar to the results in *Noble Manor*, when Alliance seeks building permits for development on its platted lots, its application should be reviewed under the land use control ordinances in effect at the time it filed its complete plat application, consistent with RCW 58.17.033.

C. *Weyerhaeuser v. Pierce County Is Analogous.*

Alliance acknowledges that *Weyerhaeuser v. Pierce County*¹⁴ is not a subdivision case, but that case is analogous to the present one, standing for the proposition that an applicant vests to a land use control ordinance—here, a wetlands ordinance—if the subject of that ordinance was addressed in the application. The City argues that no subsequent permits were at issue in that case, but they were. The importance of vesting in *Weyerhaeuser* to the prior wetlands ordinance was so that when the applicant went to develop its property for a landfill, the applicant would not be required to redesign its project to the standards of the new wetland ordinance. This necessarily involves the applicant's obtaining development permits that respected its vesting, in addition to the

¹² Alliance agrees that if the City had rezoned its property to residential, the focus of the case would be more like the facts of *Noble Manor*. The outcome would depend on whether Alliance adequately identified its uses in its application since the actual *use* regulations changed.

¹³ Former ECC 13.39.200(D)(1).

¹⁴ 95 Wn. App. 883, 976 P.2d 1279 (1999).

conditional use permit that it vested under. It does no good to limit vesting to the conditional use permit because that permit does not authorize construction. There necessarily has to be subsequent permits. The *Weyerhaeuser* court agreed and explained that as a result of vesting, development of the project could proceed under the prior ordinance, by noting, consistent with *Noble Manor*, "Here, a vested right for the conditional use permit, but not for land use and development, would be 'an empty right' as wetland development was an integral component of the project."¹⁵

D. The City Was Required to and Did Study Floodplain Impacts When Reviewing Alliance's Short Plat.

The City also argues that *Weyerhaeuser* is distinguishable because, there, Pierce County conducted a thorough wetlands analysis when reviewing the conditional use permit application.¹⁶ This is not a distinguishing feature. Under the 2007 CAO, the subdivision statute (Chapter 58.17 RCW), and the State Environmental Policy Act (Chapter 43.21C RCW), the City was required to study the impacts of Alliance's plat on the floodplains. Obviously, this analysis required more than studying the impacts of drawing lines on a map because that act by itself would have no impact on floodplains. The City is simply wrong when it states that the City's Environmental Commission's requirement

¹⁵ *Id.* at 895 (emphasis added) (quoting *Noble Manor*, 133 Wn.2d at 280).

¹⁶ Brief of Respondent at 14.

that there be no net loss of flood storage referenced the application for the division of land, not any specific development on the lots in question.¹⁷ Requiring no net loss of flood storage is meaningless at the plat level. This condition, that ended up on the plat, was clearly designed to apply at the building permit stage.

Again, the City was required by its own code to analyze the impacts of development at the plat stage. Specifically, under former ECC 13.39.200(E)(6)(a), the 2007 CAO, all subdivisions and short subdivisions were required to (1) minimize flood damage; (2) have adequate drainage; and (3) show flood areas on plat maps.¹⁸ In addition, former ECC 13.39.200(D)(1) provided:

If State Environmental Policy Act (SEPA) review of the activity is required, such review shall constitute the development permit review for flood hazards. If no SEPA review is undertaken, the permit for development review shall be incorporated into the basic underlying permits necessary for the project or activity to proceed, e.g., building permit, short plat, fill permit, and similar permits.¹⁹

In its brief, the City repeatedly accuses Alliance of not providing enough information. If the City wanted more information to complete its statutorily required floodplain analysis at the plat stage, then it could have required more information before making a decision. RCW 58.17.195

¹⁷ Brief of Respondent at 3-4.

¹⁸ This analysis requires a study of the impacts of developing the subdivision, since a paper plat by itself is useless in determining impacts.

¹⁹ SEPA was triggered with Alliance's plat application. (Emphasis added.)

states, "No plat or short plat may be approved unless the city, town, or county makes a formal written finding of fact that the proposed subdivision or proposed short subdivision is in conformity with any applicable zoning ordinance or other land use controls which may exist." The 2007 CAO was an applicable land use control ordinance that applied to Alliance's plat. The City had everything that was required under its code for "development permit review for flood hazards," it received extensive comments from the state of Washington on floodplain impacts, and it imposed a note on the plat prohibiting the loss of flood storage at build-out. Obviously, by finding Alliance's application fully complete, and approving the plat, the City concluded—as it is statutorily required to do—that appropriate provisions had been made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, etc.²⁰

The City has also failed to explain how identifying a specific use would have aided in its floodplain analysis. What the City is really arguing is that it is not so much the use that must be identified to vest, but the details of that use in terms of size, location, etc. The problem for the City with this argument is that (1) the *Noble Manor* court ruled under the facts of that case that the use needed to be identified, not construction

²⁰ RCW 58.17.110. RCW 58.17.110 is made applicable to short plats in RCW 58.17.060.

details; (2) the City does not require construction details for a fully complete determination; and (3) the standards and requirements of the City's former floodplain ordinance did not change depending on the proposed use or even the construction detail. If Alliance stated that it would put a warehouse on each lot, the City has not explained how this would have changed its required floodplain analysis.²¹ The entire property is in a floodplain.²² Any building in the floodplain, regardless of tenant, would require application of the same standards of the 2007 CAO.²³ And any fill whatsoever, regardless of the use and regardless of amount, must meet the following plat note: "Any grading and fill activities on lots must result in a not net gain to the floodplain," in addition to the standards in the 2007 CAO. Contrary to the City's claim to the contrary,²⁴ at the plat stage, the City did account for floodplain impacts resulting from development, as it was required to do. And further review will occur at the building permit stage and that review will ensure that the development meets the 2007 standards.

It is again worth noting that even under the current floodplain regulations, the City must complete its analysis of floodplain impacts at the subdivision stage.²⁵

²¹ See Appellant's Opening Brief at 13-14.

²² Administrative Record ("AR") G at 1.

²³ AR P at 5-6.

²⁴ Brief of Respondent at 6.

²⁵ ECC 13.39.120(B).

E. Vested Under the 2007 CAO Means That the 2007 CAO Applies.

The City attempts to create an issue where none exists. The City claims that Alliance is arguing that since the 2007 CAO applied at the plat stage, it can no longer be enforced or applied.²⁶ That is not what Alliance is arguing or argued below.²⁷ Alliance is arguing that the City should have applied, and did apply, the 2007 CAO at the plat stage, but that those standards continue to apply to build-out, such as the following: new construction may not increase the base flood elevation more than one foot; all new construction and substantial improvements must be constructed using flood-resistant materials and utility equipment, and with methods and practices that minimize flood damage; all structures must be located on the buildable portion of the site out of the floodplain unless there is no buildable site area out of the floodplain.²⁸ What Alliance has consistently argued is that the City does not get to redo its entire floodplain impact and SEPA analysis under the standards of the 2009 CAO at the building permit stage because it is vested under the 2007 CAO and this review has already occurred.

In claiming that the 2007 CAO does not apply to build-out, the City continues to ignore the *Noble Manor* precedent by arguing that since

²⁶ Brief of Respondent at 26.

²⁷ CP 50.

²⁸ AR P at 5-6.

RCW 58.17.033 does not reference building permits, vesting under the plat statute does not extend to such permits.²⁹ This is contrary to law.³⁰

F. ECC 12.10.180(D) Is Provided as an Example of When the City Can Apply New Regulations to a Short Plat.

The City argues that its own code section recognizing when new regulations can apply to an approved plat is irrelevant. It is not. This code section, and the planning director's statements regarding it,³¹ demonstrate that the City's own code is consistent with the vesting provisions of RCW 58.17.033 and that new regulations can apply to an approved plat only if the applicant seeks an extension of preliminary plat approval. The inverse is true. If an applicant does not seek an extension, then the regulations in effect at the time of filing continue to apply to a preliminary plat, and the terms of preliminary plat approval continue to apply to the final plat.³²

G. *Mission Springs Inc. v. City of Spokane*³³ Is Applicable.

The City attempts to distinguish *Mission Springs* on its facts

²⁹ Brief of Respondent at 17.

³⁰ See footnote 1, *supra*. In addition, RCW 19.27.095 is an alternative method of vesting with a building permit application.

³¹ AR E at 3.

³² See, e.g., RCW 58.17.170(1): "When the legislative body of the city, town or county finds that the subdivision proposed for final plat approval conforms to all terms of the preliminary plat approval, and that said subdivision meets the requirements of this chapter, other applicable state laws, and any local ordinances adopted under this chapter which were in effect at the time of preliminary plat approval, it shall suitably inscribe and execute its written approval on the face of the plat." (Emphasis added.)

³³ 134 Wn.2d 947, 954 P.2d 250 (1998).

because that case involved the withholding of a permit, and those are not the facts of this case. Certainly, if all cases could be distinguished on their facts, there would be little precedent. Alliance cites *Mission Springs* because, here, the City is unlawfully withholding recognition of its vested rights, resulting in the imposition of new, more burdensome land use regulations on an already approved project. *Mission Springs* stands for the proposition that final approval of a plat represents a final determination that the proposal satisfies all applicable statutory and ordinance requirements and that no new conditions can be imposed.³⁴

H. The City Is Not Entitled to Attorney Fees in This Case.

The City claims that if it prevails in this appeal, it is entitled to attorney fees under RCW 4.84.370. But RCW 4.84.370 is inapplicable in this case because Alliance has not appealed the issuance, conditioning, or denial of a development permit. RCW 4.84.370 states:

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

³⁴ *Id.* at 958.

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

Instead of seeking a development permit, Alliance sought a statement of restrictions under RCW 35A.21.280:

(1) A property owner may make a written request for a statement of restrictions applicable to a single parcel, tract, lot, or block of real property to the code city in which the real property is located.

(2) Within thirty days of the receipt of the request, the code city shall provide the owner, by registered mail, with a statement of restrictions as described in subsection (3) of this section.

(3) The statement of restrictions shall include the following:

(a) The zoning currently applicable to the real property;

(b) Pending zoning changes currently advertised for public hearing that would be applicable to the real property;

(c) Any designations made by the code city pursuant to chapter 36.70A RCW of any portion of the real property as agricultural land, forest land, mineral resource

land, wetland, an area with a critical recharging effect on aquifers used for potable water, a fish and wildlife habitat conservation area, a frequently flooded area, and as a geological hazardous area; and

(d) If information regarding the designations listed in (c) of this subsection are not readily available, inform the owner of the procedure by which the owner can obtain that site-specific information from the code city.

"Development permit" is not defined, but under the Growth Management Act, a similar term, "project permit," is,³⁵ and it would not include a request for a statement of restrictions. A statement of restrictions would not in itself authorize development. It is not an application for a rezone, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar request to develop land. When presented with a request, the City simply confirms which regulations apply to a particular property; it does not authorize development. RCW 4.84.370 is inapplicable.

III. CONCLUSION

Alliance has met the standard under the Land Use Petition Act for reversing the superior court decision.³⁶ In denying Alliance's vested

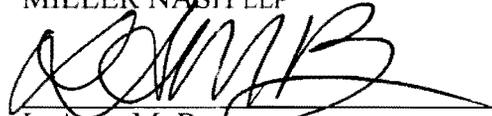
³⁵ RCW 36.70B.020(4): "'Project permit' or 'project permit application' means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection."

³⁶ RCW 36.70C.130(1)(a)-(f).

rights, the City erroneously interpreted the law, failed to follow a prescribed procedure, made a decision not supported by substantial evidence, erroneously applied the law to the facts, made a decision outside its authority, and violated Alliance's constitutional rights. Alliance respectfully requests that the court of appeals reverse the decision of the superior court and deny the City's request for attorney fees.

DATED this 6th day of October, 2014.

MILLER NASH LLP

A handwritten signature in black ink, appearing to read 'LeAnne M. Bremer', written over a horizontal line.

LeAnne M. Bremer
WSB No. 19129

Attorney for Appellant

I hereby certify that I served the foregoing REPLY BRIEF OF APPELLANT on:

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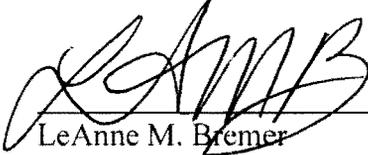
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by the following indicated method or methods:

- by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, and deposited with the United States Postal Service at Vancouver, Washington, on the date set forth below.

The undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Vancouver, Washington, this 6th day of October, 2014.



LeAnne M. Bremer
Attorney for Appellant