

No. 32370-6-III  
**COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON**

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ALLIANCE INVESTMENT GROUP OF ELLENSBURG, LLC,

Appellant

v.

CITY OF ELLENSBURG, WASHINGTON

Respondent.

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**BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

	<u>Page</u>
I. COUNTER STATEMENT OF ASSIGNMENT OF ERROR.....	1
II. COUNTER STATEMENT OF ISSUES PRESENTED.....	1
III. COUNTER STATEMENT OF THE CASE.....	2
IV. SUMMARY OF ARGUMENT.....	8
V. STANDARD OF REVIEW.....	9
VI. ARGUMENT.....	11
A. RCW 58.17 Was Not Intended, in These Particular Circumstances, to be Applicable to Future Building Permits.....	11
B. The Limited Extension of Vested Rights Found in the <i>Noble Manor</i> Case is not Applicable to the Facts at Hand.....	17
C. Even if the Court Determines the 2007 Critical Areas Ordinance Applies, ECC 13.39.200(D)(1) Still Requires Flood Water Review for Future Building Permits.....	24
D. ECC Section 12.10.180(D) is Not Applicable.....	27
E. Alliance’s Reliance Upon <i>Mission Springs Inc. v. City of Spokane</i> is Unfounded.....	28
VII. ATTORNEY FEES.....	30
A. The City is Entitled to its Costs and Attorney Fees Pursuant to RCW 4.84.370 and RAP 18.1.....	30

VIII. CONCLUSION.....31

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<i>Abbey Road Group, LLC v. City of Bonney Lake</i> , 167 Wn.2d 242, 250, 218 P.3d 180 (2009) .....	11, 16, 21
<i>Beach v. Board of Adjustment of Snohomish County</i> , 73 Wn.2d 343, 347, 438 P.2d 617 (1968) .....	12-13
<i>East County Reclamation Company v. Bjornsen</i> , 125 Wn. App. 432, 105 P.3d 94 (2005) .....	23
<i>Ellensburg Cement Products, Inc. Kittitas County</i> , 179 Wn.2d 737, 750, 317 P.3d 1037 (2014) .....	17
<i>Erickson &amp; Associates, Inc. v. McLerran</i> , 123 Wn.2d 864, 870, 872 P.2d 1090 (1994) .....	11, 12, 16
<i>Families of Manito v. City of Spokane</i> , 172 Wn. App. 727, 736, 291 P.3d 930 (2013) .....	9, 25
<i>Ford Motor Co. v. City of Seattle</i> , 160 Wn.2d 32, 42, 156 P.3d 185 (2007) .....	24-25
<i>Hama Hama Co. v. Shorelines Hearings Bd.</i> , 85 Wn.2d 441, 448, 536 P.2d 157 (1975) .....	25
<i>Hardy v. Superior Court for King County</i> , 155 Wash. 244, 284 P. 93 (1930) .....	11
<i>Hull v. Hunt</i> , 53 Wn.2d 125, 331 P.2d 856 (1958) .....	12

<i>Mission Springs, Inc. v. City of Spokane</i> , 134 Wn.2d 947, 954 P.2d 250 (1998) .....	9, 28, 29
<i>Noble Manor Company v. Pierce County</i> , 133 Wn.2d 269, 943 P.2d 1378 (1997).....	2, 8, 18-21, 24, 31
<i>Quality Rock Prods., Inc. v. Thurston County</i> , 139 Wn. App. 125, 134, 159 P.3d 1 (2007) .....	9
<i>Phoenix Development, Inc. v. City of Woodinville</i> , 171 Wn.2d 820, 829, 256 P.3d 1150 (2011) .....	24
<i>Potala Village Kirkland, LLC v. City of Kirkland</i> , No. WL 4187807 (2014) .....	16
<i>Rhod-A-Zalea and 35<sup>th</sup>, Inc. v. Snohomish County</i> , 136 Wn.2d 1, 959 P.2d 1024 (1998) .....	15, 16
<i>State ex rel. Ogden v. City of Bellevue</i> , 45 Wn.2d 492, 495-6, 275 P.2d 899 (1954) .....	12
<i>Town of Woodway v. Snohomish County</i> , 180 Wn.2d 165, 173, 322 P.3d 1219 (2014) .....	11, 16
<i>Westside Business Park, LLC v. Pierce County</i> , 100 Wn. App. 599, 5 P.3d 713, rev. denied 141 Wn.2d 1023 (2000) 18, 21-22, 24	
<i>Weyerhaeuser v. Pierce County</i> , 95 Wn. App. 883, 976 P.2d 1279 (1999) .....	13-16

**Statutes**

RCW 4.84.370 ..... 30  
RCW 19.27.095 .....1, 2, 23, 28, 29, 31  
RCW 35A.21.280.....1, 6  
RCW Ch. 36.70C .....8, 9  
RCW 36.70C.130(1) .....9, 10  
RCW 58.17.033 .....1, 2, 8, 9, 11, 14, 16, 17, 18, 31

**Court Rule**

RAP 18.1 .....30

**Municipal Codes**

ECC 12.10.180(D) .....9, 27, 28  
ECC 13.39.200(D)(1) .....1, 7, 8, 9, 24, 25, 26

## **I. COUNTER STATEMENT OF ASSIGNMENT OF ERROR**

Alliance Investment Group of Ellensburg, LLC (“Alliance”) requested that the City of Ellensburg (the “City”), pursuant to RCW 35A.21.280, provide a Statement of Restrictions identifying which critical area ordinance would apply to a future building permit filed for property located within the Alliance Short Plat No. 1. The City responded, in part, that the ordinance in effect at the time a completed building permit was filed would be applicable. This determination, along with a second determination concerning the application of Ellensburg City Code (“ECC”) Section 13.39.200(D)(1) of the 2007 critical area ordinance, were the decisions appealed to the Ellensburg Planning Commission and ultimately to the superior court. Alliance’s Assignment of error misstates the court and Ellensburg City Planning Commission decisions.

## **II. COUNTER STATEMENT OF ISSUES PRESENTED**

This is a case of statutory interpretation. The issue before the court is whether RCW 58.17.033 was intended, in these particular circumstances, to be applicable to future building permit applications. RCW 58.17.033, adopted in 1987, extended common laws vesting principles to applications for a “proposed division of land.” At the same time the Legislature also codified the common law vesting doctrine for building permit applications. See RCW 19.27.095. Neither the common

law vesting doctrine extended by RCW 58.17.033 to applications for a “proposed division of land,” nor the express language of the statute itself, extended vested rights to future permit applications that may be sought for development within the short subdivision in question.

While the provisions of RCW 58.17.033 have, in very limited circumstances, been found to include uses for which a subsequent application may be made within the subject property, See *Noble Manor Company v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997), these circumstances do not exist in the case at hand.

The application and scope of the vested rights doctrine and RCW 58.17.033, RCW 19.27.095, *Noble Manor*, and associated case law is discussed in detail below.

### **III. COUNTER STATEMENT OF THE CASE**

Alliance applied for approval of a short plan within the Industrial Light Zone of the City. The application disclosed only the configuration and dimensions of the lots within the short plat and the roadways and utilities designed to serve those lots. Alliance did not disclose to the City any specific uses or structures that would be constructed on the lots in question. AR A and B.

Alliance’s citations to the record do not refute this conclusion. In fact, the citations provided consist entirely of documents created by the

City during the application process that identify nothing more than the uses already allowed in the underlying zone (Industrial-Light). See AR A, document 1 (Short Subdivision Application Checklist); AR A, document 2 (Routing Slip for Review of Notice of SEPA checklist); AR A, document 10 (Review slip for SEPA notice which indicates that the property is zoned Light Industrial (I-L)); AR A document 11 (a summary of requirements to provide electrical utility equipment in response to the SEPA checklist which only addresses specific requirements for multi-family dwellings); AR A, document 23 (the SEPA Determination of Non Significance); AR A, document 25, (Notice of Short Plat Application and SEPA Checklist); and AR A, document 27 (Notice of Application and SEPA Checklist).

Alliance further cites, as support for its contention that vesting extends to future building permits, to language set forth on the final plat, that, “Any grading and fill activities on lots must result in a no net gain to the floodplain.” AR A document 4. Although the origin of this language is unclear, there is nothing in the record that imposes this specific language as a condition for future development on the lots in question. The only reference to the impact on the floodplain is found in a comment by the City’s Environmental Commission that, “the commission approved a motion requesting the SEPA Official be aware and attempts no net loss

of flood plain storage as a result of this application.” This comment was clearly referencing the application for the division of land, not any specific development on the lots in question. It appears this language was simply carried over from that found in the proposed plat submitted as part of Alliance’s original application. *See* proposed plat filed with Alliance’s application. AR A documents 44-45. In any event, it is clear from viewing the record of the initial application, that specific future development of the lots in question was not considered or conditioned by the City.

Of more import are the communications and documents actually submitted by Alliance and not mentioned in Alliance’s Statement of the Case. Alliance Brief pp 2-5. These documents are discussed in detail in AR K, documents 3-5. As the Ellensburg Community Development Director (the “Director”) asserted and which is not refuted in the record before the Court:

1. There were no communications between Alliance and City staff that identified any specific use for the lots (AR K, document 3);
2. There was no pre-application meeting in which Alliance might have verbally conveyed specific uses (AR K, document 3);
3. There was no mention in the short plat application nor on the face of the short plat that indicated any specific uses (AR K, document 3; see also AR A, document 9, and documents 45-46);

4. In the submitted SEPA checklist, when identification of future additions, expansions or activity was requested, Alliance responded to question A(7) by stating: “Future buildings,” but provided no information as to the type, size, design, location, amount of impervious surface or fill contemplated for such “future building” (AR B, document 1);
5. When requested in the SEPA checklist to provide a “brief, complete description of the proposal” with “number of buildings and units, commercial structure, activity within a critical area, square footage . . . etc.” provided as examples, Alliance responded to question A(11) by stating: “Nine lot short plat” (AR B, document 41);
6. In the same document, when asked about created “impervious surfaces,” Alliance responded to question B(1)(G) by stating “5%,” an amount that clearly did not contemplate the consideration of any buildings (AR B, document 42);
7. In the same document, when asked about the source of runoff (including stormwater), Alliance responded to question B(14)(C)(1) by stating: “Roadways. Water will be treated in Bio swales” (AR B, document 43);
8. In the same document, when asked about the number of parking spaces that would be created, Alliance responded to question B (14)(C) by stating: “NA” (AR B, document 47); and
9. In the same document, when asked about the number of vehicular trips per day that would be generated by the project, Alliance responded to question B(14)(F) by stating: “Not known” (AR B, document 47).

The City agrees that flood plain issues for the short subdivision itself were addressed by the Department of Fish and Wildlife during the SEPA review (AR B, document 22), and that there was disagreement between the applicant and other agencies concerning the risk of flooding posed by the creation of the lots through the short plat application (AR B, documents 16, 18, 22, 23 and 28). The record, however, contains no evidence that the impact of construction of any specific buildings within the plat was identified, discussed or evaluated by Alliance, the City or any agency. For example, the Department of Ecology's response to Alliance's SEPA application is silent as to the impact of any buildings or construction other than the short plat itself. (AR B documents 19-21).

Alliance's Statement of Facts also misstates what Alliance requested of the City, and what response was provided and subsequently appealed. Alliance requested, pursuant to RCW 35A.21.280, that the City provide a Statement of Restrictions identifying what critical area ordinance would apply to a future building permit filed for property included within the Alliance Short Plat No. 1.

The City responded, in part, as follows:

“After a detailed review of the pertinent documents, and applicable statutes and case law, it is my decision that the zoning regulations and land use controls, including the critical area ordinance,

would be those in place at the time a completed building permit application is filed.”

AR T, document 4.

Alliance further requested a similar statement concerning the application of ECC Section 13.39.200(D)(1) of the 2007 critical area ordinance (the “2007 CAO”) (AR P, document 5) if, in fact, it was deemed to be applicable. ECC 13.39.200(D)(1)<sup>1</sup> set forth the requirements for a permit for “development” in “frequently flooded areas.” The code defined “development” to include, “any manmade alteration to land, including but not limited to buildings, structures, mining, dredging, filling, grading, paving, excavation, drilling operations, or storage of equipment or materials within the area of special flood hazard.” Alliance contended this section should be interpreted to mean that no further studies could be required in conjunction with a future application for a building permit.

The City responded, in part, to this inquiry as follows:

In a letter March 26, 2013 it has been asserted that ECC 13.39.200(D)(1) prohibits the city from requiring any further flood hazard studies related to the short plat or future development on the lots created by the short plat approval because State Environmental Policy Act review of the activity was performed during the short plat application SEPA review. I disagree with this assertion because I have concluded that the “activity” involved in the short plat application SEPA was just

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<sup>1</sup> The Critical Areas Ordinance, ECC Ch. 13.39, was amended in 2009. AR Q.

a division of land without any specified uses identified in the application. . . .

AR T, document 12.

Even if the 2007 critical area ordinance applied, a future applicant for a building permit within the plat would have to comply with the requirements and conditions of that ordinance.

The record below also clearly demonstrates that the risk of flooding on the property in question is present today. (AR M, documents 6-11).

Alliance appealed the decision of the Director to the Planning Commission, which affirmed the Director's decision. Alliance then filed an appeal to Superior Court pursuant to the provisions of Ch. 36.70C RCW. This appeal followed when the Superior Court denied Alliance's Petition for Review.

#### **IV. SUMMARY OF ARGUMENT**

- A. RCW 58.17.033 was not intended, in these particular circumstances, to be applicable to future building permits. Neither the common law vesting doctrine, nor the express language of the statute itself provides for such an extension.
- B. The limited extension of vested rights found in *Noble Manor* is not applicable to the facts at hand. Alliance has not disclosed any specific use that would justify such an extension.
- C. Even if the court finds that the 2007 CAO is applicable, Alliance has not complied with the requirements of ECC 13.39.200(D)(1) as

applied to a future building permits. No SEPA review of such a permit has occurred.

- D. Alliance misreads the intent and application ECC 12.10.180(D). No application to extend a deadline for finalizing a plat has been filed and the cited section does not limit the scope of the City's review of future building permits.
- E. The Statement of Restrictions provided by the City did not violate Alliance's Fourteenth Amendment rights by depriving it of its property without due process of law. *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998) is not applicable.

## V. STANDARD OF REVIEW

This appeal involves both an issue of law, i.e., to what extent does the vesting provision set forth in RCW 58.17.033 apply to a future building permit, and an interpretation of the City's municipal code, i.e., the application of Section 13.39.200(D)(1) of the 2007 Critical Areas Ordinance (AR P, document 5).

On appeal, the party who filed the LUPA petition – Alliance in this case – bears the burden of establishing one of the errors set forth in RCW 36.70C.130(1). See *Quality Rock Prods., Inc. v. Thurston County*, 139 Wn. App. 125, 134, 159 P.3d 1 (2007).

*Families of Manito v. City of Spokane*, 172 Wn. App. 727, 736, 291 P.3d 930 (2013) discussed the grounds for relief pursuant to Ch. 36.70C RCW and stated:

Under LUPA, RCW 36.70C.130(1)(a)-(f) provides six different grounds for a petitioner to challenge the local land use decision. This court may grant relief from a land use decision if the party seeking relief establishes any one of the following standards:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1); Federal Way, 161 Wn. App. at 36–37, 252 P.3d 382.

RCW 36.70C.130(1)(a), (b), (e), and (f) address questions of law and receive *de novo* review. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). RCW 36.70C.130(1)(c) concerns a factual determination and is reviewed for substantial evidence. *Id.* RCW 36.70C.130(1)(d) is reviewed under the clearly erroneous standard. *Id.*

Alliance alleges that each of these standards has been met. The City disagrees.

## VI. ARGUMENT

### A. RCW 58.17.033 Was Not Intended, in These Particular Circumstances, to be Applicable to Future Building Permits

In 1987 the legislature extended the vested rights doctrine to applications for the “division of land.” RCW 58.17.033. While this doctrine originated at common law, *see Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014), it was “rooted in notions of fundamental fairness, recognizing that development rights represent a valuable and protectable property interest.” *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009) *citing Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 870, 872 P.2d 1090 (1994). The doctrine was limited in its application and vested only the right to have a particular application considered under the laws that are in effect at the time that a completed application was filed.

A review of the early vesting cases is instructive. For example, in *Hardy v. Superior Court for King County*, 155 Wash. 244, 284 P. 93 (1930), a property owner applied for a building permit for a business use and the county refused to issue the license pending a judicial determination because, in part, the underlying zoning was changed shortly after the application was made, restricting uses to residential. The court

held that the building permit should issue if it was in accord with the zoning classification in effect at the time it was sought. *See also State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 495-6, 275 P.2d 899 (1954) (property owner's application for a building permit rejected even though the proposal complied with the laws existing at the time the permit was applied for).

Similarly, in *Hull v. Hunt*, 53 Wn.2d 125, 331 P.2d 856 (1958), a building permit for a twelve story building was filed one day before an ordinance was passed limiting the height of buildings in that area. The court chose to not follow the vesting rule set forth in *McQuillin* (8 *McQuillin on Municipal Corporations* (3d ed. 1949) Section 25.157 at 360) and instead stated the parameters of Washington's vested rights doctrine as follows:

The more practical rule to administer, we feel, is that the right vests when the party, property owner or not, applies for his building permit, if that permit is thereafter issued. This rule, of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of application for the permit.

*Hull*, 53 Wn.2d at 130.

See also *Beach v. Board of Adjustment of Snohomish County*, 73 Wn.2d 343, 438 P.2d 617 (1968), the Board of Adjustment convened a hearing to consider a conditional use permit application to operate a

wrecking yard. The Board approved the application. On appeal the Board was unable to provide a verbatim record of the proceedings due to a “mechanical failure of a tape recording machine.” The lack of a complete record was found to be a fatal flaw and the matter was remanded to the Board. In determining what law should be applied at the rehearing the court stated as follows:

The applicant's right to a hearing vested at the time the application was properly filed with the Board and, furthermore, the subsequent change in the zoning ordinance does not operate retroactively so as to affect vested rights. See *Bishop v. Town of Houghton*, 69 Wn.2d 786, 420 P.2d 368 (1966); *Pierce v. King County*, 62 Wn.2d 324, 382 P.2d 628 (1963); *Hull v. Hunt*, 53 Wn.2d 125, 331 P.2d 856 (1958); *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954).

The order of the trial court is modified with instructions to remand to the Board for a rehearing at which the zoning code which was in force at the time of the filing of the application shall apply. The judgment is in all other respects affirmed.

*Beach*, 73 Wn.2d at 347.

In none of these early cases did the court find that *subsequent* applications should be afforded the same protection. When the legislature adopted RCW 58.17.033 it codified the vesting principles previously created by the courts. It did not expand this doctrine.

Alliance also relies upon *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (1999) to support its contention that future

building permits in this instance should be considered under land use regulations that existed at the time the original short plat application was filed. Neither *Weyerhaeuser*, nor the cases cited by *Weyerhaeuser*<sup>2</sup>, support this conclusion.

In *Weyerhaeuser* the court was concerned with the application of the *common law* doctrine of vesting discussed above, not the application of RCW 58.17.033. The specific issue was whether a conditional use permit could, as a condition of approval, require compliance with a wetland ordinance passed subsequent to the time the initial application was made. Even though a significant period of time had passed and appeals taken, the matter was eventually brought before a hearing examiner for a consideration of the original conditional use permit. The court found that the application should be conditioned in accord with the laws that existed at the time the original application was made. *Weyerhaeuser*, 95 Wn. App at 895. No subsequent permit was at issue.<sup>3</sup>

*Weyerhaeuser* is also distinguishable from the facts in this case because the impacts necessitating a wetlands analysis were clearly

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<sup>2</sup> *Weyerhaeuser* cites *Erickson and Associates, Inc.*, 123 Wn.2d at 867-68 (1994); *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 50-51, 720 P.2d 782 (1986); *Thurston County Rental Owners Ass'n. v. Thurston County*, 85 Wn. App. 171, 182, 931 P.2d 208 (1997); *Adams v. Thurston County*, 70 Wn. App. 471, 475, 855 P.2d 284 (1993); *Vashon Island Comm. for Self-Gov't v. Boundary Review Bd.*, 127 Wn.2d 759, 767-68, 903 P.2d 953 (1995); and *Hull v. Hunt*, 53 Wn.2d at 130 (1958). None of these cases concern vested rights attaching to a subsequent permit.

<sup>3</sup> It should be noted that the Supreme Court accepted review of this decision but the appeal was apparently withdrawn.

identified in the application itself. In *Weyerhaeuser*, the court found that the “. . . project proposed extensive activity involving wetlands, ranging from the cutting and clearing of significant wetland acreage to the creation and enhancement of the same . . .” and “. . . disclosed all of the proposed uses of the wetlands in its application for the conditional use permit.” *Weyerhaeuser*, 95 Wn. App at 894. In the case at hand future industrial uses were expressly *not* identified or discussed in any detail by Alliance, making such an analysis impossible.

The issue of subsequent permits was also discussed in *Rhod-A-Zalea and 35<sup>th</sup>, Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998). In that case, the court refused to extend vested non-conforming rights that a property owner had acquired to operate a peat mining operation to a subsequent required grading permit. The court, in dicta, noted:

Even if the “vested rights doctrine” were at issue in this case, it would not allow a business to operate exempt from later enacted police power regulations. The “vested rights doctrine” *only* protects a permit applicant from regulations enacted after a permit application has been completed and filed and *only serves to fix the rules that will govern a particular land use permit application*. Once the development is established, it must then comply with later enacted police power regulations which are limited only by constitutional safeguards. *See* Richard L. Settle, *Washington Land Use and Environmental Law and Practice* § 27(c)(vi) (1983).

*Rhod-A-Zalea*, 136 Wn.2d 1 at footnote 1 (emphasis in original and added). See also the *Weyerhaeuser* Court's examination of the *Rhod-A-Zalea* case<sup>4</sup>, where the court also recognized that its review was limited to the conditional use permit at issue.

Washington courts have also consistently refused to extend the scope of the statutorily adopted vesting rules except in the limited circumstances discussed below. See *Town of Woodway*, 180 Wn.2d 165 at 173; see also *Abbey Road Group*, 167 Wn.2d at 251; *Erickson*, 123 Wn.2d at 873; and *Potala Village Kirkland, LLC v. City of Kirkland*, No. WL 4187807 (2014).

Finally it is of some import that “building permits” or “subsequent permit applications” were expressly excluded from RCW 58.17.033. The

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<sup>4</sup> The *Weyerhaeuser* court, in footnote 11, stated the following concerning the limited scope of the *Rhod-A-Zalea* decision:

In *Rhod-A-Zalea*, the court addressed the question of whether a nonconforming land use was subject to later enacted health and safety regulations. Here, in contrast, we are concerned with LRI's *application* for a conditional use permit in determining which set of rules govern its approval; that is, whether the rules in effect at the time of its application apply or whether LRI's project should also have to comply with regulations enacted after it submitted its conditional use permit application. We are not asked to determine whether LRI's proposed project, subsequent to an issuance of a conditional use permit, should be exempted from compliance with later enacted police power land use regulations. As the Supreme Court in *Rhod-A-Zalea* explained, the vested rights doctrine “only applies to permit *applications* ”-a situation that was not before that court.

vesting provisions contained within that statutory provision apply only to, “A proposed division of land.” As set forth in *Ellensburg Cement Products, Inc. Kittitas County*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014):

Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* – specific inclusions exclude implication.

Thus, the omission in RCW 58.17.033 of any reference to “building permits” or “subsequent permit applications” evidences the Legislature’s intent that vesting of short plat applications would not extend to such permits.

**B. The Limited Extension of Vested Rights Found in the Noble Manor Case is not Applicable to the Facts at Hand**

Alliance contends that the vested rights created by RCW 58.17.033 extend to the “build-out” of a subdivision. Alliance further contends that to avail itself of this right it need only show that a completed short plat application was filed, that the application included all information required by the City and the application caused the City to apply the 2007 critical areas ordinance and analyze floodplain impacts during the review process. (Alliance Brief at p. 7). Alliance cites no authority for this proposition

other than referring to RCW 58.17.033 and the court decisions, which, as discussed below, are inapplicable to this case. The statute contains no such language and, as noted, is expressly applicable only to, “A proposed division of land.”

*Noble Manor* and *Westside* are also inapplicable to the facts and circumstances before the court for the reasons that follow.

In *Noble Manor*, the developer applied for a short plat for the purpose of allowing duplex residential structures. The lots were sized for duplexes according to the zoning provisions that were in effect. Fees were charged based upon the fact that the lots would be developed for duplexes, and a county technician initially issued building permits for all three duplexes. *Noble Manor*, 133 Wn.2d at 273. Following final approval of the plat, and after substantial construction of the duplexes had occurred, the county changed the minimum lot size for duplexes and refused to issue building permits for the same. *Id.*

The court’s decision was, however, strictly limited to the facts and circumstances presented in that case. The court concluded that the applicant “has the right to have the application considered for that use under the laws existing on the date of the application” only where a municipality requires an applicant to apply for a use in the subdivision

application and the requested use is disclosed. *Noble Manor*, 133 Wn.2d at 278.

The court also recognized the developer's concession that any such vesting would be limited to those matters that were considered in the short plat application process, *Noble Manor*, 133 Wn.2d at 274-275, and that, "In Washington, 'vesting' refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission. [Citations omitted]." *Noble Manor*, 133 Wn.2d at 275.

Importantly, the court expressly limited the scope of the identified vested right, stating:

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

*Noble Manor*, 133 Wn.2d at 285 (emphasis added).

At most, *Noble Manor* suggests that if the use is sufficiently identified it can and should properly be examined and conditioned as part of this initial process. While those circumstances may have existed in *Noble Manor* (the county had the clear opportunity to identify the impacts

of the proposed structures), that facts and circumstances in the case at hand are starkly different. The potential impact of the construction of industrial buildings in an identified floodplain was not disclosed by Alliance, and therefore could not be examined or considered by the City.

In *Noble Manor* the specific use was identified in the Short Plat Preliminary Subdivision Review Application and the Environmental Checklist, which repeatedly requested disclosure of uses, and in response to which the developer “repeatedly” disclosed the specific use. Evidence of such a disclosure was also found in a letter from Pierce County that estimated the sewer connection charge based upon three residential duplex sites, and where the initial building permits for the duplexes were issued based upon the notification on the face of the short plat listing the zoning as “SR-9 zone with duplex building sites and with duplex addresses assigned to each site.” *See Noble Manor*, 133 Wn.2d at 284-5.

It was significant to the *Noble Manor* court that, “the Developer did *clearly communicate its intended use to the County.*” *Noble Manor*, 133 Wn.2d at 285 (emphasis added). The facts here, however, are in sharp contrast to *Noble Manor*. In this matter, the City repeatedly requested that Alliance identify specific uses, but the developer repeatedly refused to provide any information. *See supra* at pp. 4-5. Alliance seeks to have this Court do exactly what *Noble Manor* refused to do, i.e., extend the vested

rights doctrine to “all conceivable uses allowed by the laws in effect at the time of a short plat application . . .” *Id.* Simply filing a short plat application does not create such vested rights. While refusing to allow the construction of duplexes on a plat just approved for duplex construction may offend the notion of fundamental fairness as discussed in *Abbey Road*, 167 Wn. 2d at 250, requiring a future applicant for a building permit for an industrial structure, located in an identified floodplain, to conform with the current critical areas ordinance does not.

*Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 599, 5 P.3d 713, rev. denied 141 Wn.2d 1023 (2000) is also distinguishable. In *Westside Business Park*, the court found that a very specific use was identified by the developer. The court stated:

The material facts of this case are undisputed. On September 11, 1997, Westside met with Pierce County Planning and Land Services for a predevelopment conference. In this meeting, Westside told the County that it planned a two-lot commercial short plat *with an office building and parking on one lot and four mini storage building and a small office on the other lot. Westside's preliminary site plan also showed storm drainage facilities.*

*Westside Business Park*, 100 Wn. App. at 602 (emphasis added).

While the application submitted in *Westside Business Park* did not contain this detailed description, the court found that a specific use had been sufficiently identified during the pre-development conference to allow the vesting extension recognized by *Noble Manor* to be applied to

certain stormwater regulations. *Westside Business Park* then cautioned that:

“[I]f the application had called for this information or if the county had taken the stance that it was unaware of the proposed use, our decision might differ.”

*Westside Business Park*, 100 Wn. App. at 605.

It is important to recognize that Alliance did not specifically identify any use despite the fact it was requested to do so by the City. As a result, the City had no information concerning the type, size, location, method of construction or grading necessary for any future building application – all issues which could significantly impact the existing floodplain in this area. By contrast, in *Westside Business Park*, the applicant provided all of this specific information, including the building types and locations, as well as the parking requirements for those buildings.

When an industrial subdivision is at issue, the necessity for a clear identification of specific uses is significant. As pointed out by Alliance in their Brief at p. 12, a myriad of different and dissimilar uses are allowed in the zone, many of which could have a significant impact on the identified critical area, especially in that this project is located within a floodplain. None of these impacts were identified or studied when the bare bones Alliance short plat was filed and considered.

It is also important that the court give meaning to the language of RCW 19.27.095(1) which states in pertinent part:

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.* (Emphasis added).

Alliance's position would render the building permit vesting statute meaningless because the statute, RCW 19.27.095, would have no application to the very thing it identifies, i.e., a "fully complete building permit application for a structure."

Finally, it is noteworthy that a change in the zoning text for the Industrial Light Zone was approved in 2008, adding a number of permitted uses within this zone, *after* the plat had been approved. AR K document 6. By Alliance's logic, the City should deny a permit for an allowed use under the current code, but was disallowed at the time of the plat application, because they assert that only those laws existing at the time of the original application apply. It appears that Alliance seeks to selectively apply only those laws providing the greatest benefit for their development plans. Such selective vesting has never been permitted. *East County Reclamation Company v. Bjornsen*, 125 Wn. App. 432, 105 P.3d 94 (2005).

In reviewing Alliance's application to determine if it falls within the limited circumstances discussed in *Noble Manor* and *Westside*, the court must rely upon the facts and circumstances set forth in the record below. In reviewing such evidence the court views "facts and inferences in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority." *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 829, 256 P.3d 1150 (2011). In this case, the Planning Commission concluded that such requisite evidence did not exist. The record supports this decision. The City reviewed and conditioned the application for a short plat, only; it did not consider the potential undisclosed industrial uses that could be permitted at some undetermined time in the future.

**C. Even if the Court Determines the 2007 Critical Areas Ordinance Applies, ECC Section 13.39.200(D)(1) Still Requires Flood Water Review for Future Building Permits.**

Washington courts have held that, "When construing an ordinance, a reviewing court gives considerable deference to the construction of the challenged ordinance by those officials charged with its enforcement." *Phoenix Dev.* 171 Wn.2d at 830 (internal quotations omitted) (*quoting Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 42, 156 P.3d 185 (2007)). "The primary foundation and rationale for this rule is that considerable judicial deference should be accorded to the special expertise

of administrative agencies.” *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). *See Families of Manito*, 172 Wn. App. at 740.

In this case, both the Director and the Planning Commission found that, if in fact the 2007 critical area ordinance applied, an application for a future building permit would be subject to the provisions set forth in that ordinance.

Alliance argues that no additional SEPA review can be required because future building permits were considered as a part of the City’s initial SEPA review. Their position is based on ECC Section 13.39.200(D)(1) of the 2007 CAO (AR P, document 5), which provides that, “If State Environmental Policy Act (SEPA) review of the activity is required, such review shall constitute the development permit review for flood hazards.” Alliance would have the court interpret this provision to mean that a SEPA review of “any activity” forecloses any further review of future development activity. Such a reading is not supported by the code’s limitation to a review of “*the* activity,” i.e., the basis for the review.

At the time Alliance’s application was filed, the short plat was clearly subject to SEPA review. Future building construction was not because Alliance chose not to disclose its future development plans. As previously set forth, the SEPA checklist submitted by the applicant

specifically and clearly limited itself to the short plat and the roadways and utilities contained therein. It did not identify the construction of any specific buildings nor did it identify any impacts such as stormwater, drainage, parking, traffic or impervious surfaces that would result from construction of any buildings. In short, there has not been a SEPA review pertaining to any application for a future building permit.

If a future building permit is requested, the provisions of this section would clearly be applicable, i.e. “for application of this section, development shall include any man-made alteration to land, including but not limited to buildings, structures, mining, dredging, filling grading, paving, excavation, drilling operations, or storage of equipment or materials within the area of special flood hazard.” ECC Section 13.39.200(D)(1) of the 2007 CAO (AR P, document 5). Alliance asks the Court to hold that any of these activities be permitted in the future, without any further review, even though the potential impact of any such activity has never been analyzed or addressed. This clearly is not the intent of this ordinance.

Both state law and this ordinance require review of the proposed activity at the time an application is made. In this case, Alliance did not identify what construction activity was proposed and consequently there was no review of the issue by the City. The City had no information on

any proposed building elevation, footprint, impervious surface or design, all of which would be relevant to the required flood plain analysis for buildings that are located in a flood plain. If the developer wished to have such impacts included within the SEPA analysis for the short plat application, it should have provided the information to the City.

Alliance's contention that new industrial structures would not be subject to review for flood hazards is not supported by the language of the ordinance or the record submitted.

**D. ECC Section 12.10.180(D) is Not Applicable**

Alliance contends that ECC Section 12.10.180(D)<sup>5</sup> bars the City from conditioning future building permits within an approved plat. Alliance misapplies the purpose of this code provision. ECC Section 12.10.180(D) concerns a situation where there is a request to extend the time allowed to finalize an approved preliminary short plat. In those cases, only, the ordinance allows for the imposition of new conditions or

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<sup>5</sup> ECC 12.10.180(D) provides, in part, that:

The administrator may grant the extension request or may deny the extension request. In granting the extension request, the administrator shall also make a determination whether or not conditions or development regulations have changed so substantially as to warrant imposition of new conditions to address those substantial changes and may impose new conditions along with the granting of the extension request if warranted by substantial changes in conditions or development regulations.

development regulations. There was no such request for an extension in this case. The preliminary plat was finalized in a timely manner.

The fact that an extension request may be approved subject to the imposition of new conditions on a preliminary plat is irrelevant to the facts in this case and argument. Alliance did not seek an extension of Short Plat No. 1, and the City is not seeking to impose any new conditions on the short plat as approved. The City is seeking to act in a manner that consistent with the provisions of RCW 19.27.095 by considering future applications for a building permit under the laws that are in existence at the time such an application is filed.

The Director's response to Alliance's query relating to the possibility of such an extension for a different, preliminarily-approved short plat was simply a summary of the application of ECC Section 12.10.180(D) if, in fact, an application for an extension was made.

**E. Alliance's Reliance Upon *Mission Springs Inc. v. City of Spokane* is Unfounded.**

In *Mission Springs*, 134 Wn.2d 947, 954 P.2d 250 (1998), the developer had applied for a grading permit to begin construction of a project. The court found the city's denial of the permit to be unlawful. The *withholding* of that permit was the act found to violate the applicant's constitutional rights. The court did not consider a circumstance in which a

building permit was conditioned pursuant to a local ordinance. In fact, the absence of any authority for the city to engage in the action taken was the basis for finding that the city acted unlawfully. As the court concluded, “Mission Springs was entitled to regular administrative processing and issuance of the requested grading permit in accordance with ordinance criteria. The Spokane City Council, contrary to the advice of its own city attorney, deprived the permit applicant of that process lawfully due by instructing its city manager to withhold the permit for reasons extraneous to ordinance, or lawful, criteria.” *Id.* at 971-972.

In this case the City has simply identified the “regular administrative process” prescribed by ordinance that must be followed if and when a future building permit for construction within this short plat is filed. The City has, to the best of its ability, applied the vesting laws of the state of Washington and the mandates of applicable statutes cited above. No permit has been applied for or denied. No constitutional violation has occurred.

Moreover, *Mission Springs* does not stand for the proposition that approval of a short plat under the laws of the State of Washington in some way prohibits a municipality from imposing conditions upon future building permits that are filed. *See* RCW 19.27.095. In this case the short

plat in question was applied for and approved. The construction of specific buildings was not.

## VII. ATTORNEY FEES

### A. The City is Entitled to its Costs and Attorney Fees Pursuant to RCW 4.84.370 and RAP 18.1.

RCW 4.84.370 states in pertinent part:

- (1) Notwithstanding any other provision of this chapter, reasonable attorneys' fees and cost shall be awarded to the 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 sit-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:
  - (a) the prevailing party on appeal was the prevailing party or substantially prevailing party before the county, city or town, ... 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.

The City meets the criteria set forth above and is entitled to an award of attorney fees if it prevails on appeal before this court.

### VIII. CONCLUSION

There is no showing in the record that the Director or the City engaged in an unlawful procedure, failed to follow any prescribed process, made an erroneous interpretation of law, or that the City's determinations were not supported by the record. Alliance has not met its burden.

At issue is the application of two statutory provisions, RCW 58.17.033 and RCW 19.27.095. The first concerns an application for "a proposed division of land," while the second applies to a "building permit application." Both applications are, in the language of the respective statutes, to be considered under the "zoning or other land use control ordinances, in effect ..." at the time an application is submitted.

The land use regulation in question, the critical areas ordinance, is one that could be applicable by statute and ordinance to both the short-subdivision application and the development of a structure pursuant to a building permit for an industrial building.

The key to determining the point in time at which vesting occurs is to ascertain when the probable impacts of a proposal can be examined and mitigating conditions, if necessary, imposed. In *Noble Manor*, the court

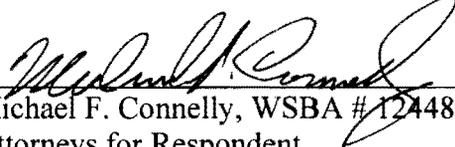
found that the specific use, duplexes, was clearly identified and considered by Pierce County at the short plat stage. In the case at hand the as yet to be identified industrial structures were neither identified nor considered when the short plat application was filed. The inability to identify and properly condition such future buildings was the direct result of the omissions made by Alliance when the application was submitted. The fact remains that the property in question is located within a floodplain and has recently experienced flood events, emphasizing the necessity for such consideration.

The City asks that the Court deny Alliance's appeal and uphold the decision of the Director and the Planning Commission, finding further that the CAO in effect at the time a completed building permit is filed by Alliance will be controlling. If the Court finds that the CAO in effect at the time the original short plat was filed (the 2007 COA) is controlling, the City asks the Court to hold that Alliance must still comply with the requirements of the 2007 COA when a future building permit is filed.

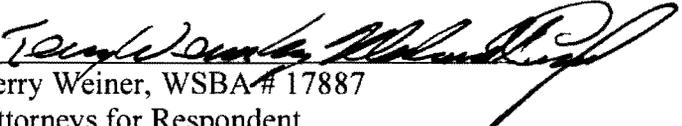
DATED this 8<sup>th</sup> day of September, 2014.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this date I served a true and correct copy of BRIEF OF RESPONDENT on the individuals named below at the addresses set forth, by depositing the same with the U.S. Postal Service in a postage prepaid properly addressed envelope and by email.

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

Executed this 8 day of September, 2014, at Spokane, Washington.

  
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Michael F. Connelly, WSBA# 12448  
Attorney for Respondent