

No. 85989-2
Court of Appeals No. 39546-I-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLARK COUNTY, WASHINGTON et al.,

Petitioners for Review

GM CAMAS, LLC, MacDONALD LIVING TRUST and
RENAISSANCE HOMES,

Respondents Below,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, JOHN KARPINSKI, CLARK COUNTY NATURAL
RESOURCES COUNCIL AND FUTUREWISE

Respondents
(Appellants Below).

**AMICUS CURIAE BRIEF ON BEHALF OF JOHNSTON DAIRY,
LLC AND WILLIAM AND ART KENNEDY**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUE OF CONCERN TO AMICUS CURIAE.....1

III. IDENTITY AND INTEREST OF AMICUS CURIAE

JOHNSTON AND KENNEDY.....1-2

IV. STATEMENT OF THE CASE.....2-3

V. ARGUMENT.....4-7

 a. The Court of Appeals lacked jurisdictions to issue its
 opinion in regards to the Johnston and Kennedy
 properties.....4-5

 b. The Washington legislature intended that comprehensive
 plans are valid upon adoption and not to be put in
 Abeyance pending appeals.....5-7

VI. CONCLUSION.....7

TABLE OF AUTHORITIES

Cases

*Clark County, Washington, et al. v. Western Washington Growth
Management Hearings Review Board, et al.,*
161 Wn.App. 204, 254 P.3d 862 (2011).....1,4,5

Statutes

RCW 7.56.010.....2
RCW 7.16.040.....2
RCW 7.16.160.....2
RCW 36.70A.320(1).....5
RCW 36.70A.302(2).....6,7

Other Authorities

FORMER RCW 90.61.....6
FORMER RCW 90.61.040(4).....6
LAND USE STUDY COMMISSION REPORT TO THE
WASHINGTON LEGISLATURE.....6

I. INTRODUCTION

The Court of Appeals decision in *Clark County, Washington, et al. v. Western Washington Growth Management Hearings Review Board, et al.*,¹ potentially subjects the Johnston and Kennedy properties to the jurisdiction of the Western Washington Growth Management Hearings Board (“Growth Board”) despite the Johnston and Kennedy properties having been annexed to the cities of Camas and Ridgefield. The Court of Appeals decision throws into question the ability of local government to pursue an otherwise valid comprehensive plan.

II. ISSUES OF CONCERN TO AMICUS CURIAE

Did the Court of Appeals have jurisdiction to issue a *sua sponte* opinion proclaiming authority of the Growth Board to maintain jurisdiction over local government planning decisions subject to an appeal?

III. IDENTITY AND INTEREST OF AMICUS CURIAE JOHNSTON AND KENNEDY

Johnston owns property identified as area CB in the proceedings below. Kennedy owns property identified as area RB-2 in the proceedings

¹ 161 Wn.App. 204, 254 P.3d 862 (2011).

below. Maps showing these areas are attached to the accompanying motion.

The Johnston property is located within the City of Camas. The Kennedy property is located within the City of Ridgefield. The Court of Appeals opinion appears to indicate that the Growth Board may have authority over these properties despite the properties having been properly annexed.

IV. STATEMENT OF THE CASE

During the pendency of the review, but prior to the decision of the Growth Board, Ridgefield and Camas annexed several properties. Camas annexed properties belonging to Johnston. Ridgefield annexed property belonging to Kennedy. No party challenged the annexations while in progress or after completion in accordance with a *quo warranto* action, writ of mandamus, writ of review procures or other challenge.² And no party asked for a stay of the implementation of the Clark County comprehensive plan while the Karpinski appeal was pending.

The Growth Board issued its decision declaring that Clark County improperly included the Johnston and Kennedy properties in the Camas and Ridgefield urban growth areas. But in later proceedings before the

² RCW 7.56.010, RCW 7.16.160 and RCW 7.16.040

Growth Board, it conceded that it no longer maintained jurisdiction over the annexed properties.

Neither Karpinski, nor the Growth Board filed an appeal with Clark County Superior Court as to the status of these annexed properties. And the Superior Court issued a decision effectively upholding the annexations as valid along with reversing several of the properties that the Growth Board declared as having been improperly re-designated.

Karpinski then filed an appeal to the Division II Court of Appeals challenging those portions of the Superior Court's decision that reversed the Growth Board's ruling. On or about June 1, 2010 the Court of Appeals contacted the cities of Camas and Ridgefield and asked for a response to several questions. At no time did the Court of Appeals attempt to contact Johnston or Kennedy to address the list of additional questions it sent Clark County, the City of LaCenter, McDonald, Renaissance, Camas and Ridgefield.

Johnston and Kennedy also adopts and incorporates by reference the state of facts set forth in the Petitioners' Joint Petition for Review to this Court and to Petitioner Sterling Savings Bank's Supplemental Brief.

V. ARGUMENT

A. The Court of Appeals lacked jurisdiction to issue its opinion in regards to the Johnston and Kennedy properties.

The Court of Appeals improperly sought out additional issues in the *Clark County* case by moving beyond the appeal filed by Karpinski. The Court's correspondence soliciting the opinions of various parties, including the cities of Camas and Ridgefield was improper as the issues raised in the correspondence had the potential to impact the properties owned by Johnston and Kennedy.

The Court of Appeals ruling purports to grant the Growth Board jurisdiction over all County legislative actions until appeals are completed.³ But the Court of Appeals failed to contact Johnston or Kennedy. This deprived them of their rights to protect their property rights.

This is particularly troubling given the fact that Karpinski had not appealed the issue of the Growth Board's jurisdiction to the Court of Appeals. The Court simply asserted jurisdiction when no case or controversy existed. To that end Johnston and Kennedy incorporate the

³ *Clark County* at 249.

arguments raised by Petitioner Sterling Bank in its petition for review and supplemental briefing.

B. The Washington legislature intended that comprehensive plans are valid upon adoption and not to be put in abeyance pending appeals.

The Court of Appeals opinion established a new rule on finality not contemplated by the legislature. RCW 36.70A.320(1) states that comprehensive plans are presumed valid upon adoption. And yet in the present case the Court of Appeals essentially puts all plans in abeyance pending the conclusion of all appeals. As argued by numerous parties in their briefing, this contravenes state statute and public policy.

But what is more troubling is that the Court of Appeals opinion appears to contradict state vesting law by suggesting that development applications approved prior to the Growth Board issuing an order of invalidity are still subject to the jurisdiction of the Growth Board because "...GMA planning decisions are not final when they have been appealed and an unresolved legal status."⁴ As the Washington State Association of Municipal Attorneys ("WSAMA") astutely points out in their Amicus

⁴ *Id.*

brief, this contradicts the express language of RCW 36.70A.302(2) and a long history of state vesting law.⁵

This very issue of land use application vesting during appeals was already contemplated by the Washington legislature. In 1995, in accordance with former RCW 90.61, the Washington legislature convened the Land Use Study Commission which was directed to examine various aspects of GMA.⁶ But one item of particular note to this case was the Commission's mandate to study the impact of projects vesting during the pendency of a GMA appeal.⁷ While the Commission's report does not have binding legal authority, it is interesting to note the Commission's conclusion on state vesting law and their application in a GMA appeal context.⁸ The Commission's report to the legislature was clear. They did not recommend any changes to state vesting law affirming that development projects could vest during the pendency of an appeal.⁹ And yet the Court of Appeals opinion eclipses the fundamental understanding

⁵ WSAMA Amicus Brief pp.3-5.

⁶ A copy of this former statute may be found at the Washington Department Commerce of website at http://www.commerce.wa.gov/landuse/documents/rcw_9061.html.

⁷ Former RCW 90.61.040(4).

⁸ For the Court's convenience, we have attached a copy of chapter fourteen of the Commission's report discussing this issue. A copy of this section of the report can also be found at the Washington Department of Commerce's website at <http://www.commerce.wa.gov/landuse/report/chapter14.html>.

⁹ *Id.*

of state vesting law and RCW 36.70A.302(2). For this reason, their decision should be reversed.

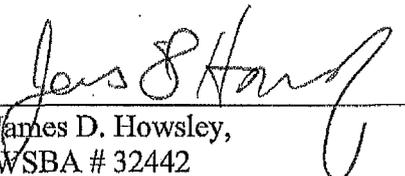
VI. CONCLUSION

The Court of Appeals went out of its way to create an issue and controversy when none existed. And in doing so they trampled on state vesting law and the issue of finality in land-use planning decisions.

Johnston and Kennedy therefore respectfully request that this Court reverse the decision of the Court of Appeals.

Dated this 14 day of May, 2012.

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Chapter 14

Study of the Impact of Vesting During GMHB Appeals

Issue Statement

The 1995 legislation granting the Growth Management Hearings Boards the authority to invalidate GMA comprehensive plans and development regulations also directed the Commission to study the impact on the goals of the GMA of allowing non-compliant plans to remain in effect during appeals. This raised several issues about Washington's vesting laws. The study the Commission was directed to undertake only addressed a small subset of the larger issues involving vesting.

Background

Vesting Law in Washington

Vesting in Washington "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." *Noble Manor v. Pierce County*, 133 Wn.2d 269, 275 (1997). The vested rights doctrine has been the subject of numerous decisions by the Washington Supreme Court.

The Washington Supreme Court has stated that:

The Washington doctrine protects developers who file a building permit application that (1) is sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which the developer seeks to develop. See, e.g., *Allenbach v. Tukwila*, 101 Wn.2d 193, 676 P.2d 473 (1984). Once a developer complies with these requirements a city cannot frustrate the development by enacting new zoning regulations.

The purpose of the vesting doctrine is to allow developers to determine, or "fix," the rules that will govern their land development. See Comment, *Washington's Zoning Vested Rights Doctrine*, 57 Wash. L. Rev. 139, 147-50 (1981). The doctrine is supported by notions of fundamental fairness. As James Madison stressed, citizens should be protected from the "fluctuating policy" of the legislature. The *Federalist No. 44*, at 301 (J. Madison) (J. Cooke ed. 1961). Persons should be able to plan their conduct with reasonable certainty of the legal consequences. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960). Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.

West Main Assocs. v. Bellevue, 106 Wn.2d 47,50-51, 720 P.2d 782 (1986). The court has recognized that the Washington rule, which allows for vesting at the time a complete application is submitted, is not the rule applied in most other states.

The Supreme Court has also recognized that the vesting doctrine does have other impacts.

Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

Erickson & Associates v. McLerran, 123 Wn.2d 864,874 (1994).

Commission's Mandate

It's enabling statute directs the Commission to:

Monitor instances state-wide of the vesting of project permit applications during the period that an appeal is pending before a growth management hearings board, as authorized under RCW 36.70A.300. The commission shall also review the extent to which such vesting results in the approval of projects that are inconsistent with a comprehensive plan or development regulation provision ultimately found to be in compliance with a board's order or remand. The commission shall analyze the impact of such approvals on ensuring the attainment of the goals and policies of chapter 36.70A RCW, and make recommendations to the governor and the legislature on statutory changes to address any adverse impacts from the provisions of RCW 36.70A.300. The commission shall provide an initial report on its findings and recommendations by November 1, 1995, and submit its further findings and recommendations subsequently in the reports required under RCW 90.61.030.

RCW 90.61.040(4). The direction to conduct the study was in response to the provision in ESHB 1724 providing that county and city comprehensive plans on appeal to a Growth Management Hearings Board would remain valid, and that projects could vest under those plans and development regulations, unless a Growth Management Hearings Board entered an order to invalidate the plan or development regulation. The study was intended to determine to what extent vesting to those plans and development regulations that did not comply with the GMA interfered with meeting the GMA's goals and policies.

Vesting Study

In order to conduct the study required RCW 90.61.040(4), the Commission contracted with David Evans and Associates to collect the information needed to make the analysis. The Commission concluded that to understand the significance of vesting during a period of non-compliance or invalidity, it is also important to know the amount of permit activity at other significant times during the comprehensive planning process, including the period prior to plan adoption. The contractor was asked to collect the following information:

- For each local government that has been subject to an appeal to a GMHB: the number of completed permit applications submitted (on a monthly basis), beginning from date the local government commenced planning under the GMA; the dates of significant events taken by the local government to comply with the GMA (e.g. interim urban growth areas, critical area ordinances, draft comprehensive plan, final comprehensive plan); and the dates of GMHB proceedings (e.g., date of appeal, GMHB hearing, and GMHB

decision).

- For each appeal to a GMHB that has resulted in a finding that a local government comprehensive plan or development regulation was not in compliance with the GMA the number of permit applications that vested under that plan or development regulation that was found not in compliance and that would not be permitted under the plan or development regulation that has been adopted and found in compliance with the GMA.
- For each appeal that has resulted in a determination of invalidity for part or all of a comprehensive plan or development regulation the number of permit applications that vested under that plan or development regulation that was determined to be invalid and that would not be permitted under the plan or development regulation that has been adopted and found in compliance with the GMA.

The study limited its review to ten counties that had comprehensive plans or development regulations held invalid or not in compliance with the GMA. Counties were selected because issues involving vesting and GMA goals and policies were more likely to occur in rural areas

than in urban areas.⁴² The study examined a limited number of permit types, including formal subdivisions, short subdivisions, planned unit developments, master planned communities, master planned resorts, and major industrial developments.

Discussion

The following is the summary and conclusions from the report submitted to the Commission by David Evans:

There were two major issues which prevented the complete collection of data.

7.1 Data Availability

Timing. Tight time constraints of the study prevented the examination of individual permit files to determine the projects' compliance with the goals of GMA. Additional complications arose with the individual stages of the counties in planning under GMA. In addition to several cases which are still pending before the Boards, some counties (e.g. Skagit and Jefferson) were adopting revised comprehensive plans within the time frame of this study. Staff members involved with those tasks were understandably unavailable to assist in permit data collection. Compliance hearings in these instances have yet to occur.

Databases. Few, if any, jurisdictions have compiled databases of permit information with the intent of tracking the impacts of vested permits. Many of the issues examined by this study require the ability to search using geographical parameters which was not possible. Other technical difficulties arising from the incompatibility of database versions used within some individual jurisdictions which temporarily prevented the use of pre-existing electronic data.

7.2 Suggestions for Further Study

To more specifically address questions on issues which have the potential to frustrate the goals of GMA requires that individual permit application files be

scrutinized by either the Commission, its contractor(s), or county employees. Some questions include:

How many new developments will be built at higher densities than would have been permitted by the plan or regulation deemed compliant by the Board?

How many acres of resource lands will be lost to inappropriate development due to vesting?

The number of hours required for this intensity of data collection is outside the scope of this initial study. Should the Commission or others decide to pursue the issue of vesting further, this appears to be the next logical step.

7.3 General Observations

While the lack of permit data prevented specific, detailed conclusions, general observations on the impact of vesting were made based on the researchers [sic] collective experiences. Two observations are pertinent. First, none of the jurisdictions contacted expressed an opinion that vesting was a major land use issue. Second, to the extent that vesting occurs it appears more often as a local issue and does not have widespread impacts across the jurisdiction.

The normal response of a local government to a land use issue with widespread impacts is to allocate additional resources, draft new land use regulations, or both. The additional resources could be the provision of new staff through the budget process or the reassignment of existing staff. New regulations are often also drafted to provide the legal basis for regulating the subject land use. Sometimes the regulations take the form of a moratorium on permit applications.

With one exception, local governments responding to the survey were not using these tools to respond to vesting. None of the jurisdictions communicated that they had hired new staff or reassigned existing staff to deal with vested permits despite repeated conversations with their staff on the issue from the director level on down. It is our belief that, if vested permits were considered to be a major land use issue for these jurisdictions, they would have responded to the problem in some fashion and would have informed the researchers. From the researchers inquiries, this was not the case. The only exception was the development moratoria enacted by Jefferson County in response to a potential rush to the permit counter. But the general observation stands that the jurisdictions did not perceive there was a major land use issue or controversy associated with vested permits and therefore were not responding as expected.

Nonetheless, based on anecdotal and documented evidence, vested permits can create land use issues on a case-by-case basis. Generally, these cases are localized in their impact. They do not usually set precedent for other applications because of the requirement for submitting the permit within a relatively narrow window of opportunity. Also the cost of preparing complete land use applications sufficient to meet the vesting requirements is not insignificant. These time and cost constraints inhibit decisions by local land owners to act on short notice, thus dampening most potential rushes to the permit counter to take advantage of a

window.

Vested permits can impact local land use issues because they may be inconsistent with the existing or proposed land uses. Neighbors and other local residents may be sufficiently upset by the vested permit to file an appeal. But the impacts of the vested permit are usually confined to the immediate surroundings. While these impacts are of importance to the local residents, they are less important to the overall land use plan because of their limited number and scope of impact.

Report on Permits Vested During Periods of Invalidity or Non-Compliance Under the Growth Management Act, Report to the Land Use Study Commission, David Evans and Associates, pp. 24-25 (September 1998)

Recommendation

Based on the limited information available from a study prepared for the Commission, no changes to Washington's vesting statutes are recommended at this time to address the specific issue the Commission was asked to consider: whether vesting during a period of time a comprehensive plan is on appeal results in the approval of projects that are inconsistent with a comprehensive plan that is found in compliance with the GMA.

Some Commission members and environmental community representatives expressed disappointment with the data collected. They suggest a further general study of the vesting issue should be considered. The environmental community believes there is anecdotal evidence that Washington's vesting law, which grants vesting at the time a complete application is submitted, creates problems for implementation of the GMA. However, there has been no systematic study to indicate whether vesting in general is a problem.

Since many comprehensive plans have now been adopted, the impact of vesting during the adoption and appeal of comprehensive plans may be less of an issue in the future. Also local governments do have authority to adopt moratoria to limit vesting during plan adoption if a problem arises. Some advocate, however, that the option of a moratorium is not sufficient, and that more direct legislative changes to the vesting laws are appropriate.

There are equally strong views that property rights and vested rights must be strengthened in any future consolidated land use code. Advocates of property rights view the GMA and other environmental laws as infringements of their constitutional rights.

Any legislative change to the current rules on vesting would be a very controversial issue and would need further legal analysis, given the doctrine's judicial roots.

⁴² The counties were: Chelan, Clark, King, Kitsap, Jefferson, Kittitas, Pacific, Pierce, Skagit, and Whatcom.

[Previous Chapter](#)

[Table of Contents](#)

[Next Chapter](#)

CERTIFICATE OF SERVICE

I hereby certify that on the date shown I served a true and correct copy of the foregoing Motion to File an Amicus Brief and Amicus Brief on Behalf of Johnston and Kennedy by email first class mail, postage prepaid, on counsel of record at the address shown below:

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I certify under penalty of perjury under the laws of the State of
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