No. 90819-2

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

POTALA VILLAGE KIRKLAND, LLC, a Washington limited liability company, and LOBSANG DARGEY and TAMARA AGASSI DARGEY, a married couple,

Plaintiffs/Appellants,

v.

CITY OF KIRKLAND, a Washington municipal corporation,

Defendant/Respondent.

On Petition for Review from Division I
of the Washington State Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

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ISSUE ADDRESSED BY AMICI

Whether statutory incorporation of a limited portion of the vested rights doctrine abrogated its common law forebear, where the statutory rule neither addresses nor conflicts with the common law.

REASONS WHY REVIEW SHOULD BE GRANTED

This case raises important questions regarding Washington's vested rights doctrine. Under the common law, when a landowner files a substantial shoreline development permit application, the zoning rules in effect on that date control the permit review process. The doctrine "is rooted in constitutional principles of fundamental fairness." *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 870, 872 P.2d 1090 (1994). In the decision below, however, Division One of the Court of Appeals held that the common law doctrine had been abrogated several decades ago when the Legislature wrote vesting rules into a statute intended to establish uniform standards for the building and subdivision permit processes. *Potala Village Kirkland, LLC v. City of Kirkland*, 334 P.3d 1143, 1151-52 (2014). In so ruling, the lower court created a conflict of constitutional magnitude between this Court and the Courts of Appeals. Moreover, the decision threatens the development rights of Washington landowners by upholding a permit review process that allowed a local government to circumvent the protections

guaranteed by the vested rights doctrine. This Court should grant review in order to resolve the split of authority and protect common law property rights.

ARGUMENT

I

THE LOWER COURT'S DECISION CREATES A STATE-WIDE SPLIT OF AUTHORITY ON THE QUESTION OF WHETHER WASHINGTON'S VESTED RIGHTS DOCTRINE APPLIES TO SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT APPLICATIONS

The vested rights doctrine protects a landowner's right to develop his or her land from subsequent changes to zoning laws after the filing of a completed permit application. Our courts have historically applied the doctrine to a variety of permit types, including shoreline substantial development permits. *See Talbot v. Gray*, 11 Wn. App. 807, 811, 525 P.2d 801 (1974) (applying the rule to shoreline substantial development permits); Roger D. Wynne, *Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, 24 Seattle U.L. Rev. 851, 866-67 (2001) (describing extension of common law doctrine to multiple permit types). In 1987, the Legislature incorporated portions of the vested rights doctrine into statutes intended to establish statewide standards for the building and subdivision permit application procedures. *See* RCW

19.27.020; RCW 58.17.033. The Legislature later incorporated a vesting rule into the statute governing development agreements. RCW 36.70B.180.

Since then, this Court has continued to recognize that, despite the codification, the common law vested rights doctrine protects shoreline substantial development permit applicants. *See Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 206 n.35, 884 P.2d 910 (1994) (recognizing common law vesting for shoreline substantial development permits). Courts have also continued to apply the traditional common law vested rights doctrine with regard to other permit types since 1987. *See, e.g., Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 960, 954 P.2d 250 (1998) (recognizing the application of the common law vested rights rule to grading permits); *Weyerhauser v. Pierce Cnty.*, 95 Wn. App. 883, 894-95, 976 P.2d 1279 (1999) (applying the common law vested rights doctrine to conditional use permits).

But, in the decision below, the Court of Appeals refused to follow this Court's on-point vested rights precedents because the decisions were based on the common law. According to the lower court, the Legislature had abrogated the entire common law doctrine when, in 1987, it wrote a vesting rule in its updates to the building and subdivision permit statutes. *Potala Village*, 334 P.3d at 1148-49. The appellate court explained that, in its view,

this Court had implicitly acknowledged complete abrogation of the common law doctrine across three vested rights cases. *Id.* In the first two cases—*Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180 (2009), and *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864 (1994)—this Court recognized that the common law doctrine had been extended to a variety of permit applications, including applications of shoreline substantial development permits. 167 Wn.2d at 253 n.8; 123 Wn.2d at 871-72. Then, in *Town of Woodway v. Snohomish County*, this Court noted that "[w]hile it originated at common law, the vested rights doctrine is now statutory." 180 Wn.2d 165, 173, 322 P.3d 1219 (2014). *Town of Woodway*, however, only involved whether a permit application can vest in local regulations later found to be noncompliant with state law. *Id.* at 169. Nonetheless, the lower court took *Town of Woodway* as a conclusion that the Legislature's 1987 amendments to the building permit statute restricted vesting to only those permit types enumerated by legislation. *Potala Village*, 334 P.3d at 1148.

This Court, however, has never overruled *Buechel* or the Court of Appeals' opinion in *Talbot*, both of which hold that vesting applies to shoreline substantial development permit applications. Nor has this Court overturned any of the cases applying the doctrine to other types of permit

applications. Therefore, the decision below creates an irreconcilable split of authority on an important question of constitutional magnitude, which cannot be resolved without this Court's clarification.

II

THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF LAW THAT SHOULD BE SETTLED BY THIS COURT

This Court's review is necessary in order to settle the question of whether the Legislature silently abrogated the common law vested rights doctrine in its 1987 amendments to the building and subdivision permit statutes. This is an important question of law because courts presume that statutes do not abrogate the common law "absent clear evidence of the legislature's intent to deviate from [it]." *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008). Without a "statement in the statute expressing such intent" or "inconsistencies between the two," a statute will not abrogate common law. *State v. Kurtz*, 178 Wn.2d 466, 477, 309 P.3d 472 (2013).

Here, the statutes at issue contain no language abrogating the common law. The statutes simply describe the procedure for vesting building permits, RCW 19.27.095(1), subdivision applications, RCW 58.17.033, and development agreements, RCW 36.70B.180. Nor do the statutes' legislative

histories indicate any intent to abrogate the common law. Instead, the legislation had two primary purposes: (1) to create the "additional requirement that a [building] permit application be *fully completed* for the doctrine to apply;" and (2) to extend the doctrine "to applications for preliminary or short plat approval," which the common law doctrine had not at that time extended to. S.B. Final Rep. on S.B. 5519, 50th Leg., Reg. Sess. (1987) (emphasis added).

This Court has long hesitated to hold that a statute implicitly abrogates common law absent an inconsistency so "repugnant to the prior common law that both cannot simultaneously be in force." *State ex rel. Madden v. Pub. Utility Dist. No. 1 of Douglas Cnty.*, 83 Wn.2d 219, 222, 517 P.2d 585 (1973). The mere fact that the statute and the common law speak to the same subject does not establish abrogation. *See Kurtz*, 178 Wn.2d at 474-75. Instead, this Court has recognized that three considerations drive the analysis of a statute's impact on the common law. First and foremost, "the court should strive to uphold the purpose of the statute." *Potter*, 165 Wn.2d at 87. Second, the court must consider the "adequacy or comprehensiveness" of the statute. *Id.* at 84. And third, when the common law rule is older than its statutory sibling, "the court infers the [statute] is cumulative, not exclusive." *Id.* at 88.

This Court's abrogation case law demonstrates that this test—missing from the decision below—is essential to determining the effect of legislation on the common law. For example, in *State v. Kurtz*, this Court held that a common law rule does not conflict with a statute's purpose just because it applies more broadly than the statute does. In that case, this Court addressed whether the common law medical marijuana necessity defense remained available after passage of the Medical Use of Marijuana Act, which provided a statutory defense to a possession of marijuana charge. 178 Wn.2d at 467. To invoke the statutory defense, the patient had to receive authorization from a *qualified* physician, while the common law defense did not require the prescribing physician to meet the statute's qualifications. *Id.* at 475. This Court held that this difference did not render the laws inconsistent but rather "demonstrate[s] that the common law may apply more broadly in some circumstances." *Id.*

Similarly in *Wilmot v. Kaiser Aluminum and Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991), this Court determined that a statute that created a cause of action for retaliatory discharge did not abrogate the common law's cause of action for wrongful discharge. *Id.* at 53. Although the statute authorized courts to "order all appropriate relief" for successful plaintiffs, it remained unclear, for instance, whether "all appropriate relief" included

damages for emotional distress, which are available under a wrongful discharge claim. *Id.* at 61. As a result, this Court held that the remedy was not so comprehensive as to abrogate a wrongful discharge claim. *Id.*

The analysis this Court employed in *Kurtz* and *Wilmot* is necessary in this case because there is nothing in the plain language or legislative history of the statutes that indicates an intent to abrogate a well-settled doctrine of the common law.[1] And, just as in *Kurtz*, the breadth of the common law vested rights doctrine does not demonstrate inconsistency with the narrower statutory rule. Moreover, the Legislature's incorporation of vesting rules into the building and subdivision permit statutes is far less comprehensive than the common law doctrine. Because this Court's case law indicates that the common law should continue to operate in the absence of express abrogation or incompatibility, this Court should grant review to resolve this important question of law.

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[1] To the contrary, the legislative history indicates an expectation that the common law would remain intact. For example, the background description of the senate bill, as amended by the House, says: "The right for a permit vests under the standards in place at the time a valid and complete application has been filed for the permit if the permit is a ministerial permit, *such as a grading permit or a septic tank permit.*" H.B. Rep. on Amended S.B. 5519, 50th Leg., Reg. Sess. (Wash. 1987) (emphasis added); *see also Erickson & Associates, Inc.*, 123 Wn.2d at 871-72 (recognizing that rights vest for septic tank permits under the common law); *Juanita Bay Valley Comm'ty Ass'n v. Kirkland*, 9 Wn. App. 59, 83-84, 510 P.2d 1140 (1973) (holding that the common law vested rights doctrine applies to grading permits).

III

THIS CASE RAISES AN IMPORTANT QUESTION OF PUBLIC POLICY

Review by this Court is further warranted because the lower court's decision upheld a permit review process that is contrary to the policies of fairness and due process, which underlie the vested rights doctrine.

The decision below involved the common situation where a land use applicant is required to secure multiple permits for a development. In that circumstance, local governments will often sequence the applications. If only the last of those sequenced permits is subject to vesting, then a local government can review the development proposal and change the rules mid-game in order to stymie the project or compel unwanted changes.

This public impact is not conjecture—it is precisely what happened here. Kirkland does not process building permits until shoreline permits have been approved. After reviewing Potala Village's shoreline permit application (and hearing public opposition), the City amended its zoning rules to block the proposed development. Thus, because of how the City structured the permitting process, vesting (as construed by the Court of Appeals) did not protect Potala Village. This Court rejected a similar scheme in *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1983).

Without review by this Court, the lower court's decision will provide cities and counties with a roadmap for circumventing the protections guaranteed by the vested rights doctrine, which is contrary to sound public policy.

CONCLUSION

PLF and BIAW respectfully ask this Court to grant Potala Village Kirkland's petition for review.

DATED: December 1, 2014.

Respectfully submitted,

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Dear Mr. Carpenter:

Attached for filing in *Potala Village Kirkland, LLC v. City of Kirkland*, No. 90819-2, are copies of Pacific Legal Foundation's *Motion for Leave to File Amicus Brief in Support of Petition for Review* and the proposed *Brief Amicus Curiae of Pacific Legal Foundation in Support of Petition for Review* (with attached declarations of service).

Please Let me know if you have any difficulty opening the attachments.

Thank you,

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