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Supreme Court No. 90819-2

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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

Plaintiffs/Appellants,

v.

CITY OF KIRKLAND, a Washington municipal corporation,

Defendant/Respondent.

**AMICI CURIAE MEMORANDUM OF
THE ASSOCIATION OF WASHINGTON
BUSINESS AND WASHINGTON REALTORS
SUPPORTING THE PETITION FOR REVIEW**

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I. INTRODUCTION

The Association of Washington Business and Washington Realtors are or represent commercial and industrial premises owners, developers and companies routinely involved at state and local levels in land use planning and permitting. This amici coalition supports review of the Court of Appeals' published opinion that reversed the trial court's order granting Potala Village's motion for summary judgment and remanded the case to the trial court with directions to grant the City of Kirkland's cross-motion for summary judgment. *Potala Village Kirkland, LLC et al, vs City of Kirkland* __ Wn. App. __, WL 4187807 (August 25, 2014). The decision undermines Washington's long-established vested rights doctrine, so is of substantial public interest. Additionally, it conflicts with precedent where it fails to recognize that vested rights flows from the state constitution, as recognized under the common law.

II. IDENTITY AND INTEREST OF AMICI CURIAE

A. THE ASSOCIATION OF WASHINGTON BUSINESS

The Association of Washington Business ("AWB") is Washington State's Chamber of Commerce and the principal representative of the state's business community. AWB is the state's oldest and largest general business membership federation, representing the interests of

approximately 8,350 Washington companies who in turn employ over 700,000 employees, approximately one-quarter of the state's workforce. AWB members are located in all areas of Washington, represent a broad array of industries, and range from sole proprietors and very small employers to the large, recognizable, Washington-based corporations that do business across the country and around the world. As commercial and industrial premises owners, developers and companies, AWB members routinely work at state and local levels on a variety of land use planning and permitting issues. AWB members are often involved in development projects that can take years to complete. Development projects take years to complete in part because the permitting process generally includes obtaining a broad entitlement such as a shoreline substantial development permit, that includes use restrictions (e.g., limits on residential or commercial uses) and design restrictions (e.g., the location of driveways and utilities, and the aesthetics of the planned structure), followed by more detailed engineered construction permits, such as grading permits and building permits. The state's vesting laws are of great importance to AWB members. They ensure predictability in how real estate projects are planned, financed, permitted, and marketed.

B. THE WASHINGTON REALTORS

Washington REALTORS® is a trade association of approximately 16,000 licensed real estate brokers who represent the interests of both realtors and Washington's homeowners and businesses on a variety of issues affecting residential and commercial real estate. The REALTORS® organization includes 33 local associations. REALTORS® works at both the state and local level on a variety of land use planning and permitting issues, including ongoing efforts in the Washington Legislative to review Washington's vesting laws. REALTORS® is often involved in development projects that can, for the reasons identified above, take years to complete. REALTORS® considers the state's vesting laws to be of great importance to ensure predictability in how real estate projects are planned, financed, permitted, developed and marketed.

III. ISSUE OF CONCERN TO AMICI CURIAE

Among the issues presented in the Petition for Review, this memorandum seeks to address:

Whether the Court of Appeals erred in abolishing the common law vested rights doctrine as applied to shoreline substantial development permit applications?

IV. REASONS TO GRANT REVIEW

The Court may accept review of a decision of the Court of Appeals where “the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). Amici contend that whether common law vesting rights for shoreline substantial development permit applications were abolished by the Washington Legislature's adoption of statutory vesting rights under RCW 19.27.095 and RCW 58.17.033 is an issue of substantial public interest. Additionally, the opinion is in conflict with precedent, supporting review under RAP 13.4(b)(1)-(2).¹

The Court of Appeals' reversal and remand ignores the common law vesting right doctrine and violates jurisprudence in effect for over 60 years. *See Ogden v. City of Bellevue* 45 Wn.2d 492,496, 275 P. 2nd 899 (1954) and *Hull v. Hunt* 53 Wn.2d 125, 130, 331 P.2d 856 (1958). To abolish the common law vested rights doctrine would ignore a basic tenet of land use law that has been relied on by property owners and developers in Washington State for more than half a century—a tenet that flows from our state constitution.

¹ Petitioner did not raise RAP 13.4(b)(1)-(2) as grounds for review, but these criteria also are met.

A. The Court of Appeals' decision ignores the common law vesting right doctrine that has been recognized by this Court for over a half century.

The central legal error in the Court of Appeals' decision is failure to recognize that the adoption by the Washington Legislature of the statutory vesting rights in 1987 did not abolish the common law vested rights doctrine. The 1987 legislation was limited to two specific types of land use permits: building permit applications and subdivision permits. *See* RCW 19.27.095 and RCW 58.17.033. The statutes merely codified established case law addressing two types of permits; they did not otherwise limit or expand this judicially-created doctrine. The Court of Appeals decision ignores subsequent case law recognizing that the common law vested rights doctrine remains in force even after the 1987 enactments.

Subsequent decisions by this Court and the Court of Appeals recognize that the common law vested rights doctrine continues to apply to land use matters. For example, after 1987 the appellate courts applied the common law vested rights doctrine to storm water drainage ordinances, conditional and special use permits, as well as others. *See Phillips v. King County* 136 Wn.2d 946, 963, 968 P.2d 871 (1998); *Weyerhaeuser V. Pierce County* 95 Wn. App. 883, 976 P.2d 1279 (1999);

Schneider Homes v. City of Kent 87 Wn. App. 774,779-80, 942 P.2d 1096 (1997). In the decision at issue, the Court of Appeals ignored these cases. Review by this Court is appropriate to maintain uniformity in the case law, and to reaffirm that the common law vested rights doctrine continues and property owners and developers can rely on it.

B. The Court of Appeals decision conflicts with constitutional due process protections

This Court should accept review to decide whether the Court of Appeals failed to protect vested rights, rights that are rooted in the constitutional principles of “fairness and due process.” Because the vested rights doctrine reflects due process considerations, the case presents issues of constitutional magnitude. *See W. Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986). In reversing, the Court of Appeals stated that Potala could have filed for a building permit. *Potala Village, Slip Op.* at 3. Yet the Court of Appeals also acknowledged that the city’s permitting process allowed the city to require Potala to submit a new and different building permit during the process. This new permit requirement would subject Potala to the new land use ordinances adopted subsequent to the original permit application. *Id.* Accordingly, under the Court of Appeals’ analysis, the vested rights from Potala’s earlier building permit were illusory—they remained subject to change by the city’s subsequent

actions. The Court of Appeals' opinion eviscerates common law vesting attendant to Potala's shoreline permit application and ignores the constitutional principles of "fairness and due process"—principles which this Court continues to reiterate post-*Potala*. See, e.g., *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 185, 322 P.3d 1219 (2014). The opinion merits scrutiny because it prevents a property owner or developer from relying on its vested rights by allowing a city or other jurisdiction to change the rules of the game midway through the process.

C. Abolishment of a common law vesting rights doctrine will fundamentally impact property owners and developers

Amici are concerned that the opinion will have a chilling effect on development throughout the state. Property owners and developers rely on the common law vesting right doctrine to bring certainty the development process. When a property owner/developer cannot rely on the current laws in place at the time of the application process, projects become unpredictable and unmanageable, making development risks unacceptably high. . This Court should review the opinion to decide for itself whether the fundamental changes the opinion portends are legally justified—amici believes they are not—and in the best interest of the citizens of Washington.

If the opinion is not reviewed, the resulting land use processes likely would become so cumbersome and unpredictable that few, if any, property owners and developers would be able to develop their own property for fear that the local jurisdiction will change the rules midway through. Such an outcome would ultimately stifle economic growth in the Washington. These issues of substantial public interest alone justify review.

V. CONCLUSION

Based on the foregoing, amici urge the Court to grant the petition.

Respectfully submitted this 24th day of November, 2014.

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Importance: High

Dear Clerk:

Please find attached for filing in the above-referenced matter, electronic copies of the following documents:

- Motion for Leave to file Memorandum of Amici Curiae of The Association of Washington Business and Washington Realtors Supporting the Petition for Review
- Memorandum of Amicus Curiae The Association of Washington Business and Washington Realtors Supporting the Petition for Review
- Declaration of Service

By copy of this e-mail, electronic service to counsel of record is made. In addition, hard copies have been sent via US mail.

Please let me know if there is any difficulty opening the .pdf files.

Yours,

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