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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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**No. 73558-6-I**

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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POTALA VILLAGE KIRKLAND, LLC, and LOBSANG DARGEY and  
TAMARA AGASSI DARGEY,

Appellants,

vs.

CITY OF KIRKLAND,

Respondent.

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**RESPONSE BRIEF BY THE CITY OF KIRKLAND**

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## I. INTRODUCTION

The City of Kirkland (“City”) respectfully asks the Court to affirm the trial court’s order granting the City’s motion for summary judgment dismissing this lawsuit in its entirety. Petitioner (collectively referred to as “Potala Village”) claims it is entitled to have its 2013 building permit application reviewed and issued under the land use laws and zoning ordinances in effect on the date it filed its shoreline substantial development permit (SSDP) application in 2011, despite the fact that this exact issue was litigated between the parties previously. In that prior litigation this Court held that the vested rights doctrine does not apply to SSDPs. Accordingly, the developer’s filing of a SSDP application, without filing a contemporaneous building permit application, did not vest Potala Village in any zoning codes or other land use control ordinances. *See Potala Village Kirkland, LLC, et al. v. City of Kirkland*, 183 Wn. App. 191, 334 P.3d 1143 (2014), *rev. den.* (2015) (“*Potala Village I*”). Potala Village did file a building permit application in the summer of 2013; and his application is vested in the zoning codes or other land use control ordinances in effect at that time.

Despite the law of the case doctrine, Potala Village contends it is not bound by in *Potala Village I* for two convoluted and apparently inter-related reasons. First, Potala Village claims that because the City did not

stay the trial court's order pending appeal in *Potala Village I*, the trial court's holding that the vested rights doctrine applied as of the date Potala Village filed its SSDP application remained in effect "pending appeal" and they were allowed to proceed forward with their development pursuant to the terms of the trial court's order (the City agrees with this statement of the law). Second, however, Potala Village claims that because it filed its building permit application in 2013 pursuant to the trial court's writ of mandamus, and before the trial court's order was vacated by this Court in *Potala Village I*, it somehow became "vested" in the trial court's erroneous order and is entitled to proceed with its development pursuant to the City's 2011 regulations (the regulations in effect when Potala Village filed its SSDP application) (the City does not agree with this argument).

Potala Village's ultimate argument, no matter how it tries to get there, is fatally flawed. In the prior litigation, the trial held (incorrectly) that the vested rights doctrine applies to SSDP applications. The bottom line, however, is that the vested rights doctrine confers vested rights only upon the filing of a complete building permit application. See RCW 19.27.095(1). Furthermore, according to RCW 19.27.095(1), an applicant can only "vest" in the "building code ordinance" and "zoning or other land use regulations" in effect on the date its building permit application is complete. *Id.* Potala Village cannot "vest" in a trial court decision (that

has since been reversed on appeal) that set forth only an artificial vesting date. Perhaps if the superior had affirmed passage of some land use regulations that were subsequently invalidated, Potala Village could reasonably argue that it had vested in those regulations, despite the later finding of invalidity. In fact, that is exactly the circumstances in both *Town of Woodway v. Snohomish County*, 180 Wn.2d 185, 322 P.3d 1219 (2013) and *Miotke v. Spokane County*, 181 Wn. App. 369, 325 P.3d 434 (2014), cited by Potala Village in support of their argument. But *Woodway* and *Miotke* are distinguishable, because in those cases the developers had, in fact, filed building permit applications so as to vest in existing regulations.<sup>1</sup> Thus, when these regulations were later held invalid it was of no concern to the developers, because they had already secured vested rights in these regulations.

On the other hand, in this case, it is undisputed that the zoning and land use regulations in effect when Potala Village filed a complete building permit application in 2013 were the City's amended regulations. The 2011 regulations (the regulations that had been in existence when Potala Village filed its SSDP application) were no longer in existence. Applicants can only obtain vested rights in existing development regulations. Applicants cannot obtain vested rights in an incorrect and

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<sup>1</sup> Here, when Potala Village filed its building permit application in 2013, the 2011 regulations it wished to develop under were NO LONGER in existence.

unlawful vesting date. All the trial court order accomplished was to move back the vesting date for Potala Village, letting Potala Village vest in the 2011 regulations by stating that the vested rights doctrine applied to its SSDP application. The trial court order did not bring the City's 2011 regulations into effect in 2013. Thus, when filing their building permit application in 2013, the only regulations Potala Village could vest to – once the trial court's holding that the vested rights doctrine applied to SSDPs was reversed – were the 2013 regulations. Accordingly, the City respectfully requests that the superior court order dismissing this lawsuit in its entirety be affirmed.

## **II. RESTATEMENT OF ISSUES**

1. Should this Court affirm the order of the trial court granting the City's motion to dismiss on summary judgment, denying Potala Village's cross motion for summary judgment, and dismissing this lawsuit in its entirety?
2. Can an applicant vest to a superior court order erroneously stating that the vested right doctrine applies to shoreline substantial development permits, after that order is reversed on appeal by a final decision of the Court of Appeals?
3. Was the City required to seek a stay of proceedings pursuant to RAP 8.1 in the prior lawsuit between the parties in order to preserve its rights on appeal? And, if so, is it too late for Potala Village to raise that defense, as it could and should have been raised with the Court of Appeals in the prior appeal so as to avoid having the Court issue a moot decision?

4. Is the City entitled to an award or reasonable attorneys' fees and costs pursuant to RAP 18.1 and RCW 4.84.370?

### III. RESTATEMENT OF THE CASE

The City incorporates the full statement of facts set forth in *Potala Village I*. In addition, a summary of facts relevant to this appeal follows.

In 2011, Potala Village filed an application for a shoreline substantial development permit (SSDP) for development of a mixed-use project in the City's Neighborhood Business (BN) zone (the "Project"). CP 2. Although Potala Village could have obtained vested rights for its Project by filing an application for a building permit at that time, it chose not to do so.<sup>2</sup> Even after Potala Village was personally advised by City Staff that the City Council was likely going to file a moratorium affecting the BN zones, Potala Village still chose not to file an application for a building permit. As forecast, the City enacted a temporary zoning moratorium in its BN zones soon thereafter. CP 3. Potala Village claimed its Project was not subject to the moratorium because it had obtained vested rights based upon the filing of its SSDP application. CP 3. The City disagreed, based upon its belief that the vested rights doctrine, codified at RCW 19.27.095(1), applied only to the filing of complete building permit applications. Because Potala Village had chosen not to file a building

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<sup>2</sup> As stated above, the City relies upon the facts set forth by this Court in *Potala Village I*.

permit application before the moratorium was enacted, the City applied the moratorium to Potala Village's Project. CP 3. During the pendency of the moratorium, the City amended its land use laws and zoning codes, after which the moratorium expired by its own terms. CP 3. At that time, the City's code amendments were applied to Potala Village's Project.

Potala Village filed a lawsuit against the City (*Potala Village I*) challenging the City's decisions to apply both the moratorium and amended codes to its Project. CP 3. On cross-motions for summary judgment Potala Village asked the trial court to hold that the vested rights doctrine applied to its SSDP application. The trial court ruled in Potala Village's favor. CP 102-105. The trial court also ordered the City to accept and process a building permit application for Potala Village under the land use laws and zoning codes that were in effect in 2011, when Potala Village had filed its SSDP application (i.e., the pre-moratorium regulations). CP 105.

The City appealed the trial court's order to this Court. Despite the City's appeal, Potala Village chose to roll the dice and proceed forward with its Project under the 2011 codes and regulations, knowing that if it was issued a building permit under those codes and constructed under those codes, *and* if the trial court's order was reversed on appeal, it would

have to tear down such construction at its own expense in order to conform to the current codes.<sup>3</sup>

Despite knowing that it was proceeding forward with development at its own risk, based upon the fact that the City had filed an appeal, Potala Village filed a building permit application with the City on June 20, 2013, (cp 4) which, according to the trial court's order, was to be accepted and processed based on the regulations in effect when the SSDP application had been filed on February 23, 2011 (*i.e.*, the pre-moratorium regulations).

Once the City filed an appeal of the trial court's order in *Potala Village I*, that order became subject to the final decision of the appellate courts. The trial court's order did not – and could not – create any vested rights as that term is defined under Washington's vested rights doctrine. The Superior Court order was not the law of the land, as Potala Village proposes, but merely the “law of the case” pending review.

Contrary to Potala Village's assertions, and its twisted interpretation of Washington's vested rights doctrine, codified at RCW 19.27.095(1), the trial court order did not confer any vested rights on its

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<sup>3</sup> In its Opening Brief, Potala Village fails to acknowledge that once litigation commences, a developer proceeds forward with development at its own risk. *See Kelly v. Chelan, infra, p. 16*. Potala Village then contemplates what would happen if their mixed-use condominium had already been built, stating “[W]ould the City next argue that Potala Village has to tear down the building? What if it was already occupied?” *Opening Brief, at 32*. The City did, in fact, make that argument below. CP 280. The law is clear. Once the City filed an appeal, Potala Village proceeded forward at its own risk.

Project. All the trial court order had done was hold that the vested rights doctrine applied to Potala Village's SSDP application. The trial court order did not reverse the City's moratorium or invalidate the ordinances amending its regulations. The trial court order did not address the City's then-existing regulations at all, much less render them invalid. Thus, when Potala Village filed its building permit application in the Summer of 2013, it is undisputed that the building code, zoning code and land use laws in effect at that time were the City's amended regulations.

The City found that Potala Village's building permit application was complete on July 18, 2013. CP 4. No permit could issue at that time, however, because Potala Village still needed to pay some fees and comply with other requirements necessary for issuance of the permit. CP 4. As the City's appeal in *Potala Village I* progressed, the developer continued to work – at its own peril – on obtaining a building permit under the incorrect vesting date set by the trial court.

On August 25, 2014, this Court issued its decision in *Potala Village I*, overturning the trial court's order, stating that the vested rights doctrine applies only to the filing of a complete building permit application. This Court also specifically held that the vested rights doctrine did not apply to Potala Village's SSDP application. This Court stated that although the vested rights doctrine originated at common law, it

is now statutory. *Potala Village I*, Slip Op. at 12; CP 233. This Court noted that in 1987, the Legislature had codified the common law vested rights doctrine at RCW 19.27.095(1) and applied it only to the filing of complete building permit applications. *Id.* at 12-13; CP 233-234. This Court then held that pursuant to RCW 19.27.095(1) the vested rights doctrine does not apply to the filing of a shoreline substantial development. *Id.* at 2; CP 223. Instead, a developer only obtains vested rights upon the filing of a complete building permit application. *Id.*

With regard to Potala Village, as of August 25, 2014, it had still not fulfilled all requirements for issuance of its building permit. CP 260; 262-271. Further, Potala Village now knew that its building permit, which had been filed in 2013, approximately 19 months after the City enacted new regulations, was not vested in the City's old 2011 regulations. Quickly after this Court's decision in *Potala Village I* was issued, however, the developer sent an email to the City suddenly proclaiming that it would have all outstanding requirements and fees delivered to the City the following morning "and pick up the building permit."<sup>4</sup> CP 260.

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<sup>4</sup> Potala Village implies that it sent notice to the City that it would "pick up the building permit" before it received this Court's opinion in *Potala Village I*. See, *Opening Brief*, p. 10. This is not true. Instead, as a purely strategic maneuver, in an attempt to support its claims in this lawsuit, Potala Village advised the City that it wanted to "pick up the building permit" late in the afternoon of August 25<sup>th</sup>, after all parties had received this Court's opinion in *Potala Village I* via email notification. CP 260.

The City was frankly shocked to receive this email from Potala Village. It responded promptly, reminding Potala Village that the land use regulations applicable to its Project had always been subject to the outcome of the City's appeal, and that both parties were now required to comply with this Court's decision in *Potala Village I*:

As you know, **Potala Village's project has always been subject to the outcome of this appeal.** See, for instance, the courtesy copy of the draft "Specific Permit Conditions" the City provided to Potala Village on July 31, 2014, which clearly continued the City's notification to Potala Village that the zoning and other land use regulations applicable to its project would be determined at the conclusion of the appeal.

Today, August 25, 2014, the Washington Court of Appeals issued its opinion in *Potala Village*, . . . reversing the decision of the trial court and holding that Washington's vested rights doctrine does not apply to the Shoreline Substantial Development permit application filed by Potala Village on February 23, 2011. Instead, Potala Village's project did not obtain vested rights until the date it file a complete building permit application with the City, which did not occur until July 18, 2013 [sic]. . . . At this time, the City and Potala Village must both comply with the Court of Appeal's decision." CP 273 (emphasis added).

The City followed this email with a letter dated September 2, 2014, clarifying that the building permit application filed by Potala Village in the Summer of 2013 was no longer "complete," because it did not comply with the City's applicable regulations, which were the regulations in effect

on the day Potala Village had actually filed its building permit application in 2013. CP 276.

Washington's vested rights doctrine, RCW 19.27.095(1), states as follows:

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.

One of the questions for the Court here is under the vested rights doctrine, what can an applicant vest to? Based upon the plain language of the statute, an applicant can vest to the "building permit ordinance" and "zoning or other land-use control ordinances" in effect on the date of its application. An Applicant can vest in adopted and effective development regulations; regulations that are in effect on the date when a building permit is filed. But there is no language in the statute that can even remotely be conceived to support Potala Village's position in this appeal, which is that it obtained a vested right in the superior court order which erroneously held that the vested rights doctrine applied to SSDP applications. A party simply cannot obtain vested rights in a trial court order setting forth an incorrect vesting date.

Potala Village treated the City's compliance with this Court's opinion in *Potala Village I* as a "land use decision" under the Land Use Petition Act ("LUPA"), RCW Ch. 36.70C, and filed this lawsuit as a LUPA appeal.<sup>5</sup> But the City's compliance with the decision in *Potala Village I* does not result in any new "land use decisions" under LUPA.<sup>6</sup> If it did, then land use appeals would never end; the losing party would simply be able to repeatedly file appeals of each "new" decision after remand, in contravention to the doctrines of collateral estoppel, res judicata, and the law of the case. *See, e.g. Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) (pursuant to the law of the case doctrine "once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation"). Per the law of the case doctrine, upon remand the City applied this Court's holding to Potala Village's building permit application. This did not result in a new land use decision (or decisions)<sup>7</sup> under LUPA, it simply concluded the appeal of the land use decision that was already on review.

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<sup>5</sup> In an attempt to cover all bases, Potala Village also included in this action a Complaint for Declaratory Judgment, Writ of Mandamus, Constitutional Writ, and Injunction.

<sup>6</sup> Land use decisions are defined at RCW 36.70C.020(2). The definitions do not include decisions made by the local jurisdiction in compliance with the final appellate opinion issued in a pending land use appeal.

<sup>7</sup> Potala Village lists several actions the City took to implement this Court's decision in *Potala Village I* (*see Opening Brief*, pp. 38-42), none of which are land use decisions subject to LUPA.

The City moved to dismiss the LUPA appeal and all other claims pled by Potala Village on summary judgment. CP 227-294; 309-324; 325-331. Potala Village crossed-moved, contending, as it does in this appeal, that it obtained vested rights in the City's old (2011) regulations when it filed its building permit application 19 months after the new regulations had been adopted (in 2013). Furthermore, Potala Village argued that because the City had not sought to stay the trial court's order on appeal pursuant to RAP 8.1, this Court's decision in *Potala Village I* was effectively moot after its building permit application had been deemed "complete." CP 55-78; 295-307; 332-336.

At oral argument, the trial judge (The Honorable Dean Lum), was struck immediately by the fact that, given Potala Village's argument that this Court's decision in *Potala Village I* was moot, then why hadn't the developer moved to dismiss the City's appeal in *Potala Village I*? In addressing counsel for Potala Village, Judge Lum questioned why Potala Village had not moved to dismiss the previous appeal:

**COURT:** So part of your argument is that there was, you're alleging that the City did not file a motion to stay even though there's an appeal. And obviously, we're well aware of the Court of Appeals appellate activity in this particular case. Did the Court of Appeals, did you argue, did the parties argue or raise an issue of lack of stay or necessity of a stay before the Court of Appeals or any appellate court [during *Potala Village I*]?

**COUNSEL FOR POTALA VILLAGE:** Your Honor, it was not argued in any form or fashion.

RP, p. 5, ll. 12-21 (emphasis added).

The trial judge repeatedly asked Potala Village why it had not moved to dismiss *Potala Village I*, strongly implying that the developer's mootness defense should have been raised in the prior appeal:

**COURT:** But I guess when I was reading each of your motions, the thought occurred to me why would the Court of Appeals go to all the trouble of ruling on the merits and essentially really, you know, with all due respect, ruling against your client's position in kind of a disastrous loss; why would they go to all that trouble just to have it all undone by some alleged failure to stay? **If and when this goes back to the Court of Appeals, aren't they going to ask some pretty harsh questions, like why are we doing this, why didn't you raise this fact, why did we go to all the trouble of doing this** if all that has to happen is every time it goes up to the Court of Appeals, you file a new application and then we do it all over again? I mean, this could go on forever, right? Isn't that what they're going to be really grilling you about when you, if and when you get back to them?

RP, p. 6, ll. 3-18 (emphasis added).

**COUNSEL FOR POTALA VILLAGE:** . . . The City made a fatal error by not filing a stay. It had eight weeks to do it. Chose not to. Fine. That's the City's decision. . . .

**COURT:** I guess I still don't understand why you didn't raise this to the Court of Appeals [in *Potala Village I*].

RP, p. 9, ll. 9-11, 25; p. 10, ll.1-5.

**COURT:** I firmly believe that, without knowing for sure, but I firmly believe that the Court of Appeals will ask, will ask why all of this wasn't litigated previously. That's a virtual guarantee that you will get some very aggressive questioning. Guaranteed you're going to get very aggressive questioning on that if and when you ever get back there.

RP, p. 41, ll. 20-25; p. 42, l. 1.

After taking the matter under advisement for several weeks, the trial court granted the City's motion to dismiss on summary judgment, denied Potala Village's motion, and dismissed this lawsuit in its entirety. CP 339-342. Potala Village filed an appeal to this Court. CP 343-348.

#### IV. ARGUMENT

##### A. Introduction

Potala Village claims its allegations support a cause of action against the City under LUPA, or for issuance of writs of mandamus or certiorari, or for a declaratory judgment. But Potala Village is merely attempting an end-run around the vested rights issue that was already decided in *Potala Village I* and which is applicable to Potala Village under the law of the case doctrine.<sup>8</sup> This Court held that the vested rights doctrine applies only upon the filing of a complete building permit application and, further, clearly stated that its decision was applicable to Potala Village's Project:

We reverse the order granting Potala Village's motion for summary judgment. We remand with direction to the trial court to grant the City's cross-motion for summary judgment and dismissal.

*Potala Village I, Slip Op. at 25; CP 246.*

Potala Village does not exactly attempt to re-litigate the vested rights issue head-on, a tactic it knows would be unsuccessful under the

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<sup>8</sup> *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

doctrines of *collateral estoppel*<sup>9</sup> and/or *res judicata*,<sup>10</sup> it simply tries to create new law out of whole cloth. First, Potala Village claims that this Court's decision in *Potala Village I* does not apply because the City pursued its appeal without seeking a stay pursuant to RAP 8.1, thus rendering this Court's decision in *Potala Village I* moot.<sup>11</sup> Second, Potala Village claims that because the City did not obtain a stay pursuant to RAP 8.1, Potala Village was allowed to proceed with its development pursuant to the trial court's order, and that it obtained "vested rights" after it filed a building permit application and that application had been deemed "complete" by the City. Neither of these arguments supports Potala Village's lawsuit, as more fully explained below. Accordingly, the City

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<sup>9</sup> Collateral estoppel is discussed further in this memorandum. Collateral estoppel prevents relitigation of an issue after a party has had a full and fair opportunity to present its case. The purpose of the doctrine is to promote the policy of ending disputes, to promote judicial economy and to prevent harassment of and inconvenience to litigants. *Hanson v. Snohomish*, 121 Wn.2d 552, 561-62, 852 P.2d 295 (1993).

<sup>10</sup> Res judicata is discussed further in this memorandum. Res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action, should not be litigated again. It ends strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings. *Marino Prop. Co. v. Port Comm'rs*, 97 Wash.2d 307, 312, 644 P.2d 1181 (1982).

<sup>11</sup> In its Opening Brief, Potala Village makes it crystal clear that it does not believe this Court's decision in *Potala Village I* can be applied to the developer's Project. It variously calls the decision "inapposite" (*Opening Brief*, p. 17), "inapplicable" (*id.* at 18), irrelevant (*id.* at 18), and "meaningless" (*id.* at 31).

respectfully requests that the Court affirm the trial court order granting the City's motion to dismiss this lawsuit in its entirety.<sup>12</sup> CP 339-342.

**B. The City was not required to seek a stay of proceedings pursuant to RAP 8.1 in order to preserve its rights on appeal**

Potala Village asserts the City cannot rely on this Court's decision in *Potala Village I* because the City did not request a stay of the trial court order under either LUPA or RAP 8.1 when it filed its prior appeal. This argument is without merit. It would require appellants to seek a stay of trial court proceedings for every land use appeal, because – if we follow Potala Village's reasoning – the failure to do so makes the outcome of the appeal moot. This argument has already been rejected by the Washington Supreme Court in several cases, including *Kelly v. Chelan County*, 167 Wn.2d 867, 224 P.3d 769 (2010) and *Pinecrest Homeowner's Assoc. v. Cloninger & Assoc.*, 151 Wn.2d 279, 287-88, 87 P.3d 1176 (2004). Furthermore, it is not consistent with the intent behind RAP 8.1, nor the long-standing tenet that development which occurs after litigation commences is at the developer's own risk. *See, Kelly*, 167 Wn.2d at 871.

Although Potala Village argued at the trial court level that the City could have sought a stay under LUPA, RCW 36.70C.100(1), it makes only

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<sup>12</sup> Potala Village claims that the City did not move to dismiss this action in its entirety below. This is incorrect. *See*, CP 283;285.

a passing reference to this argument on appeal. *See Opening Brief*, at 27 & 31. The LUPA stay provisions are not applicable here as they only address a party's right to seek a stay when first filing a LUPA appeal in superior court:

**Stay of action pending review.**

(1) A petitioner or other party may request the court to stay or suspend an action by the local jurisdiction or another party to implement the decision under review. The request must set forth a statement of grounds for the stay and the factual basis for the request.

RCW 36.70C.100(1) (emphasis added). The "court" referred to in the above-cited provision is the superior court.

In *Potala Village I*, the City did not file a LUPA appeal of a final land use decision in superior court. It filed an appeal of the superior court's order on cross-motions for summary judgment with Division I of the Court of Appeals. Thus, LUPA stay provisions do not apply. The only stay provisions that could possibly apply in this case are those provided for at RAP 8.1.

Potala Village argues that this Court's decision in *Potala Village I* does not apply because the City did not seek a stay of the trial court's

decision on appeal per RAP 8.1.<sup>13</sup> RAP 8.1 reads that a party to a review proceeding “has the right to stay enforcement” of a decision affecting real property pending review; but it does not require a party to seek a stay to preserve its rights on appeal. Simply put, RAP 8.1 does not require a party to seek a stay pending appeal, it simply allows a party to do so.

Given the facts of this case, the City was not able to find any Washington authority to support Potala Village’s contention that the City was required to obtain a stay in order to preserve its rights on appeal. Instead, all authority on this issue is to the contrary. For instance, Washington land use treatises and case law uniformly hold that a developer assumes the risk of proceeding forward with development after litigation is commenced, irrespective of whether or not a stay of proceedings is sought. “Development which occurs after the commencement of litigation is at the Developer’s risk. . . . Developers, and especially their lenders, generally are unwilling to assume this risk

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<sup>13</sup> RAP 8.1 (emphasis added):

**(a) Application of Civil Rules.** This rule provides a means of delaying the enforcement of a trial court decision in a civil case in addition to the means provided in CR 62(a), (b), and (h).

**(b) Right To Stay Enforcement of Trial Court Decision.** A trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule. Any party to a review proceeding has the right to stay enforcement of a money judgment or a decision affecting real, personal or intellectual property, pending review. . .

and hence refrain from development until litigation is concluded . . .” *Kelly v. County of Chelan*, 167 Wn.2d 867, 871, 224 P.3d 769 (2010), citing Richard L. Settle, *Washington Land Use and Environmental Law and Practice*, sec. 8.7(a), at 252 (1983). “A risk is inherent in proceeding with the development where no permit exists including the costs of meeting permit conditions in the face of litigation that may result in the permit’s revocation.” *Id.* Here, no building permit had even been applied for, much less “existed,” when the City filed its appeal with the Court of Appeals in *Potala Village I*. Thus, when Potala Village filed a building permit application during the pendency of the City’s prior appeal, it did so at its own risk. Washington courts note that if no stay is filed, “the decision being appealed is effective pending review.” *Kelly*, 167 Wn.2d at 871 (emphasis added). But a decision being appealed is only effective “pending review.” If that decision is reversed on appeal, then the parties are bound by the reversal, because that is the appellate court’s final decision. To hold otherwise would render appeals meaningless.<sup>14</sup>

Potala Village contends that *Kelly* supports its position. Not so. In *Kelly*, the developer applied to the county for a conditional use permit

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<sup>14</sup> Potala Village wants the Court to ignore the case law under RAP 8.1, which holds that if a stay is not obtained then the decision being appealed remains in effect; but it only remains in effect “pending review.” If the decision is reversed on appeal (as it was in this case), then all parties must comply with the reversal. It is for this very reason that developers pursue development cautiously, and at their own risk, once litigation ensues.

(CUP), which the county granted.<sup>15</sup> A group of neighbors appealed the county's decision to grant the CUP to superior court under LUPA. The trial court reversed the county and revoked the CUP. The developer then filed an appeal with the Court of Appeals, but did not seek a stay of the trial court order under RAP 8.1, choosing not to assume the risk of proceeding forward with development during review. At the Court of Appeals level the neighbors argued that the appeal should be dismissed as moot because the developer had not sought a stay and, in addition, during the pendency of the appeal the county code's two-year time limit to fulfill the requirements of the CUP had expired. *Kelly*, 167 Wn.2d at 870. The Court of Appeals agreed and dismissed the developer's appeal.<sup>16</sup>

The Supreme Court reversed, holding that although the developer could have requested a stay, it was not required to do so to preserve its rights on appeal. *Id.* at 871. Had the developer wanted to take the risk of pursuing its permit pending appeal, it could have sought a stay of the trial court's reversal and proceeded forward. But *Kelly* held that once the permit was revoked by the trial court, the terms of the permit were

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<sup>15</sup> *Kelly* is an interesting decision because it mistakenly analyzed the parties' issues under the stay provisions of LUPA instead of the Rules of Appellate Procedure. However, the analysis and reasoning of *Kelly* are also directly applicable under RAP 8.1

<sup>16</sup> *Kelly* is an example of what should have procedurally occurred in this case. Once Potala Village believed the Court of Appeals decision was moot (after it received notice that its building permit application was "complete"), it should have moved to dismiss the appeal in *Potala Village I*, just as the parties did in *Kelly v. Chelan County*.

terminated “pending review,” including the two-year limitations period.<sup>17</sup> *Kelly* further held that if the developer was successful on review, the effect would be to reinstate the county’s decision to approve its permit. *Id.* at 873. This reinstatement would occur whether or not the developer had sought and received a stay.<sup>18</sup>

Potala Village contends *Kelly* is distinguishable because in that case the developers (not the local jurisdiction) appealed an adverse permit decision. Potala Village claims *Kelly* is limited to the holding that developers are not required to seek a stay of proceedings when they file land use appeals; but that the same is not true for a local jurisdiction,

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<sup>17</sup> Based upon regulations enacted by the Legislature in the Shoreline Management Act (SMA), Potala Village did not face the risk the developers in *Kelly* faced. Under the SMA, the time limits for action on a SSDP are automatically tolled during the time either an administrative appeal or judicial appeal of the SSDP is pending. RCW 90.58.143(4) and WAC 173-27-090(4). The tolling provisions of the SMA appear to be very broad. For instance, the time limits for action on a SSDP are also automatically tolled “due to the need to obtain any other government permits and approvals for the development that authorize the development to proceed, including all reasonably related administrative or legal actions on any such permits or approvals.” Needless to say, Potala Village did not ask for a stay from any court in either Potala Village I or this action. Instead, Potala Village has proceeded forward under the belief that its SSDP is protected by the automatic tolling provisions in the SMA.

<sup>18</sup> One of the key factors in *Kelly* was the Court’s analysis that although a party is allowed to seek a stay of a local jurisdiction’s actions, it is not required to do so. (Again, *Kelly* mistakenly analyzed their case under the stay provisions of LUPA, instead of RAP 8.1.) *Kelly* based this decision on the plain language of LUPA’s stay provision, which states that a stay “may” be sought. RCW 36.70C.100(1). This is consistent with the plain language of RAP 8.1, which reads: “. . . Any party to a review proceeding *has the right* to stay enforcement . . . of a decision affecting real . . . property, pending review.” (Emphasis added.) This has also long been the recognized analysis of the stay and supersedeas provisions of RAP 8.1. *See, Lampson Universal Rigging v. WPPSS*, 105 Wn.2d 376, 378, 715 P.2d 1131 (1986) (holding that an appellant has the right to seek to supersede a trial court judgment from which it is appealing, but is not obligated to do so). Thus, the fact that *Kelly* mistakenly analyzed LUPA instead of RAP 8.1 does not affect its application to this appeal.

which must seek a stay to preserve its rights on appeal. This is the proverbial double standard. There is no Washington authority in support of this proposition. In fact, the Illinois case Potala Village alludes to, *Gold v. Kami*, 170 Ill.App.3d 312, 524 N.E.2d 625 (1988), does not help them. In *Gold*, the developers were granted a variance by the local jurisdiction to expand a log house on their property. The neighbors appealed without requesting a stay of proceedings.<sup>19</sup> The variance limited the developer to 18 months to obtain a permit and complete construction. To ensure that the variance did not expire during the appeal, *Gold* held that the developers were required to either request an extension of time from the issuing jurisdiction or request a stay from the court. *Gold*, 170 Ill.App.3d at 315. Because the developers did neither, their permit expired after 18 months and the appeal was dismissed as moot. *Id.* But *Gold* does not stand for the proposition that a party to a land use appeal must request a stay to preserve their rights on appeal. Quite the opposite. *Gold* actually noted that the developers could have preserved their rights simply by obtaining an extension of time from the local jurisdiction. The fact that the developers could have filed a stay in *Gold* does not mean they were required to do so to preserve their rights on appeal; it was simply one way they could have done so.

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<sup>19</sup> *Gold* noted that Illinois law allowed the parties to request a stay at least three different times in these proceedings. *Gold*, 170 Ill.App.3d at 315.

Potala Village next argues that *Pinecrest Homeowner's Assoc. v. Cloninger*, 151 Wn.2d 279, 287-88, 87 P.3d 1176 (2004), supports its position. It does not. In *Pinecrest*, the Supreme Court held that in a land use appeal filed by a homeowners association against a developer (the local jurisdiction was not an appealing party), the association's failure to stay the superior court's judgment did not render its appeal moot, although it did allow the developer to lawfully proceed with development during the appeals process. *Pinecrest*, 151 Wn.2d at 287-288. The City agrees that this is the correct analysis that should be applied to the facts presented here also. In *Pinecrest*, however, there are some key factual differences that distinguish the ultimate resolution of that case from the present case. Thus, a brief discussion of *Pinecrest* is in order. The developer in *Pinecrest* filed several land use permits and applications with Spokane County seeking approval for increased commercial use of his property (collectively referred to as the "Application"). *Id.* at 286. To the best of the City's knowledge, unlike in the case at bar, the Application did not involve any vested rights issue. Spokane County's final decision was to grant the Application. *Id.*

A neighboring homeowners association opposed to the Application (collectively referred to as "Pinecrest") filed a LUPA appeal of the County's decision to superior court. Pinecrest did not, however, seek a

stay of the County's decision under LUPA (RCW 36.70C.100(1)). The superior court affirmed the County's decision and Pinecrest appealed to the Court of Appeals. Once again, Pinecrest did not seek a stay of the superior court's decision (under either LUPA or RAP 8.1).<sup>20</sup> The Court of Appeals reversed and ordered the County to deny the application, at which point the developer appealed to the Supreme Court.

The developer had argued to the Court of Appeals that Pinecrest's failure to supersede the superior court's judgment rendered Pinecrest's further appeals moot. The Supreme Court disagreed, holding that "RCW 36.70C.100 [LUPA] did not require Pinecrest to request a stay" because the statute is permissive.<sup>21</sup> *Id.* For instance, the court said that the "statute provides in part that '[a] petitioner or other party *may* request the court to stay or suspend an action by the local jurisdiction or another party to implement the decision under review.'" *Id.* at 287-88 (emphasis in original).

Because Pinecrest had not asked for a stay the developer had proceeded forward with his development. Prior to reversal by the Court of Appeals, the developer had sought and received a building permit for a

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<sup>20</sup> Interestingly enough, *Pinecrest* is another case where the courts analyzed the issue only under the LUPA stay provisions.

<sup>21</sup> Again, the City believes that appeals from superior court to the appellate court should be analyzed under RAP 8.1. The stay provisions of RAP 8.1 and the stay provisions of the LUPA are very similar, however, so analysis under one provision will generally be applicable to the other.

parking lot from the County. Pinecrest asked the Supreme Court to hold that the issuance of this building permit was “illegal” because the Court of Appeals had reversed approval of the developer’s application. But because the Supreme Court reversed the Court of Appeals and affirmed the City’s decision to approve the application, it declined to find the intermediary building permit illegal:

While Pinecrest’s failure to seek a stay did not compromise its right to appeal the superior court decision, the failure permitted [the developer] to act on the superior court decision; the hearing examiner’s subsequent approval of the rezone and the city’s granting of a building permit were thus legal actions.

*Id.* at 288.

The present case is distinguishable from *Pinecrest* for several reasons. First, the Supreme Court in *Pinecrest* ultimately issued a decision that approved the developer’s Application, whereas here this Court denied Potala Village’s request that the vested rights doctrine be applied to its SSDP application (which would have resulted in the project being vested in the City’s 2011 zoning regulations). Second, in *Pinecrest* a building permit (for a parking lot) had actually been issued pending appeal, whereas here no building permit was ever issued. In sum, the question here is whether Potala Village is entitled to rely on the superior court’s order applying the vested rights doctrine to a SSDP when that

order has been reversed on appeal *and* no building permit was ever issued. *Pinecrest* simply does not address the facts presented here and is of no help to Potala Village. The rule, as stated previously, is that the developer takes the risk of continuing with its development after litigation commences. In *Pinecrest*, the developer rolled the dice and won. Here, the developer lost. As the trial judge in this matter noted below, this Court ruled against the developer in a “disastrous loss” in *Potala Village I*. RP, p. 6, l. 8. *Pinecrest* does not in any way change the general rule that developers proceed at their own risk after litigation commences.

Potala Village’s citation to *Spahi v. Hughes-NW, Inc.*, 107 Wn. App. 763, 27 P.3d 1233 (2001), *modified* 33 P.3d 84 (2001), is also inapposite. *Spahi* addressed real property obtained through a forfeiture sale, and the effect of an un-superseded appeal on the rights of a third party attempting to obtain title to the real property through a subsequent sale. *Spahi* confirmed that by failing to supersede the judgment, the appellant (who was appealing the loss of his real property through forfeiture) took the risk that title to the property would fall into the hands of a third party during the appeal. *Spahi*, 107 Wn. App. At 770. *Spahi* held that because the appellant had not filed a stay of the order forfeiting his real property, a third party was able to lawfully purchase such property during the appeal period, even though that third party knew about the pending appeal.

“Knowledge by the third party that the judgment is being appealed does not deprive the third party of protection as a purchaser in good faith; a successful appellant’s recourse is against the judgment creditor only.” *Id.* at 766 (emphasis added).

First, *Spahi* did not address an appeal regarding a land use permit between a developer and the issuing jurisdiction, so it is actually of little relevance here. Second, even considering *Spahi*, the rule of law announced in *Kelly* has not changed: *i.e.*, a party’s decision not to seek a stay of proceedings pending appeal does not prejudice the final appellate decision. As noted in the highlighted portion of the quote above, according to *Spahi*, a successful appellant still has recourse against the judgment creditor, even if it does not have recourse directly against a third party purchaser. Thus, the final appellate decision still rules the issues between the two parties, whether or not the judgment was superseded.

Furthermore, the City had good faith reasons not to seek to supersede or stay the trial court’s order in *Potala Village I* pending appeal. A similar issue was presented to the local jurisdiction in *Norco Construction v. King County*, 106 Wn.2d 290, 721 P.2d 511 (1998), where a developer sought damages against the County resulting from the County’s choice to stay enforcement of a trial court decision during an unsuccessful appeal. In *Norco*, the developer contended that the county

had not timely acted on its preliminary plat application, thus, it filed a petition for a writ of mandamus with the trial court to compel such action. The trial court agreed with the developer and issued a writ of mandamus. The County appealed and sought a stay of the trial court's order under RAP 8.1, which was granted. The County, however, was unsuccessful on its appeal and the developer then filed a separate action seeking delay damages based upon the stay.

Most parties seeking a stay per RAP 8.1 must post a supersedeas bond. Municipalities, however, are exempt from bonding requirements. RCW 4.92.080; CR 65(c). One of the County's arguments in *Norco* was that it should not be liable for damages because it was not required to post a bond. The court disagreed:

King County's exemption from the requirement of posting a bond does not affect its potential liability for such damages. As long as it has filed a notice that the trial court decision is superseded without a bond, a party that is exempt from the bond requirement is in the same position as if it had posted a bond.

*Norco Construction*, 106 Wn.2d at 297 (emphasis added).

Potala Village's argument here puts the City in a Catch-22; the City is liable under *Norco* if it requests a stay of the trial court's judgment pending appeal and that appeal is unsuccessful; *and* (according to Potala Village) the appellate court's decision is moot if the City does not request

a stay, and its appeal is successful. While the first scenario, the *Norco* scenario, is supported by the primary purpose behind RAP 8.1, the second scenario is not. If local jurisdictions obtain only moot decisions after a successful appeal, simply because the developer took the risk of proceeding forward with development, then it would have a chilling effect on the willingness of local jurisdictions to file any appeals whatsoever, because they would be faced with a damned-if-they-do and damned-if-they-don't situation. Basically, accepting Potala Village's position would be like loading the dice in the developers' favor, instead of presenting the parties with an even playing field.

Finally, this Court need not grant the relief requested by Potala Village simply to ensure that local jurisdictions seek a stay in appropriate circumstances. Despite *Norco*, the City believes there will be situations where local jurisdictions may seek to stay trial court decisions pending appeal, even given the potential exposure to damages they face. Those cases will likely involve circumstances where the local jurisdiction fears irreparable harm if a stay is not granted; such as where development activities include actions that cannot be undone or mitigated, including destruction of a wetland, clearing of old-growth trees, or demolition of a

historic structure. Such irreparable harms would support placing public funds at risk for a delay damages claim by developers.

In the present case, no such irreparable harm was at issue. Thus, the City did not seek a stay under RAP 8.1. Instead, it allowed Potala Village to proceed forward at its own risk. As stated earlier, “Development which occurs after the commencement of litigation is at the Developer’s risk. . . . Developers, and especially their lenders, generally are unwilling to assume this risk and hence refrain from development until litigation is concluded . . .” *Kelly*, 167 Wn.2d at 871, citing *Richard L. Settle* at 252.

**C. The decision of this Court in *Potala Village I* regarding vested rights is applicable to Potala Village’s building permit application**

Here, the City was successful on appeal in *Potala Village I* regarding the vested rights issue. Therefore, consistent with *Kelly*, the City’s original determination that Potala Village did not obtain vested rights by virtue of filing a SSDP application has been reinstated.

Pursuant to the vested rights doctrine, Potala Village’s building permit application could only trigger vested rights in the land use codes, rules and regulations in effect at the time it was filed. It is undisputed that Potala Village did not file its building permit application until

approximately 19 months after the City's regulations were amended, in 2013. Thus, pursuant to the vested rights doctrine, Potala Village's building permit is vested in the City's 2014 zoning codes, rules, and regulations. As in *Kelly*, the fact that the City did not seek a stay of the trial court's order pending appeal is immaterial to this outcome.

Potala Village's vested rights argument is inventive, but not persuasive. The vested rights doctrine is codified at RCW 19.27.095(1):

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.

The first question is, under the vested rights doctrine codified above, what can an applicant vest to? Pursuant to the plain language of the statute, an applicant can vest to the "building permit ordinance" and "zoning or other land-use control ordinances" in effect of the date of their application.

Case law holds that "the plans and regulations to which development rights vest are a product of the GMA [Growth Management Act.]" *Town of Woodway*, 180 Wn.2d at 173-174. They are the ordinances, the laws, the regulations that local jurisdictions can enact

through the GMA. An artificial and erroneous vesting date is not a regulation that can be enacted through the GMA. Thus, as a matter of law, it is clear that Potala Village could not vest in the trial court's order that was subsequently reversed in *Potala Village I*.

**D. Potala Village's claims are all barred by collateral estoppel, res judicata, and/or waiver**

Potala Village's claims in this lawsuit were already addressed in *Potala Village I* – or could have and should have been addressed in *Potala Village I*, making them barred by collateral estoppel, res judicata and/or waiver.

Collateral estoppel is commonly known as issue preclusion. Collateral estoppel bars re-litigation of an issue in a subsequent proceeding involving the same parties, even though a different claim or cause of action may be asserted.<sup>22</sup> *Christensen v. Grant Cty Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). The purpose of the doctrine is to promote the policy of ending disputes, to promote judicial economy and to prevent harassment of and inconvenience to litigants. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561-562, 852 P.2d 295 (1993). The requirements which must be met when applying the doctrine

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<sup>22</sup> The City raised collateral estoppel, res judicata and waiver below. CP 317-320. This should not be confused with the parties' admissions, at oral argument on the summary judgment hearing, that these same defenses were not being raised against the City by Potala Village. RP, pp. 26027.

are: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom it is applied. *Christensen*, 152 Wn.2d at 307; *Hanson*, 121 Wn.2d at 561-562.

Here, all four elements weigh in favor of applying collateral estoppel against Potala Village. First, the LUPA and Complaint filed by Potala Village against the City is based upon the identical issue already decided in *Potala Village I*: whether the vested rights doctrine applied to Potala Village's SSDP application; or whether a developer can only obtain vested rights upon the filing of a complete building permit application. CP 1-19.

In other words, the seminal question in both cases is: What is the vesting date for Potala Village's building permit? The answer is: The date the building permit application was filed; not the date the SSDP was filed.

Second, the prior adjudication ended in a decision on the merits. Third, the lawsuits both involve the exact same parties. And fourth, application of collateral estoppel “will not work an injustice” against Potala Village.

There is no injustice here, where it is undisputed that Potala Village could have filed an application for a building permit before the City enacted its moratorium and then amended its zoning code and other relevant land-use regulations. A calculated business risk and chose not to do so.<sup>23</sup>

Potala Village attempts to demonstrate an “injustice” by contending that the City “acquiesced” in its building permit being vested under the old regulations. *Opening Brief*, p. 1-2, 6. Potala Village tries to bolster this argument by pronouncing that the City’s compliance with the Superior Court’s writ of mandamus pending appeal, which commanded the City to accept and process the developer’s building permit application under the regulations in effect when Potala Village filed its SSDP application (i.e., the pre-moratorium zoning regulations), bound the City to continue processing the building permit application in that manner even after this Court reversed the trial court in *Potala Village I*. This argument

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<sup>23</sup> Again, the City is referencing from the statement of facts set forth in the prior decision on this matter, *Potala Village I*.

has no merit. First, it continues to be based on the false assumption that the City was required to request a stay under RAP 8.1 in order to preserve its rights on appeal. As previously discussed, the City was not required to request a stay and Potala Village's development is subject to the final appellate decision in *Potala Village I*.

Second, clearly these are estoppel and waiver arguments. But neither estoppel nor waiver are applicable against the City in this case. Equitable estoppel is based on the notion that "a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." *Kramarevcky v. Dpmt. of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (quotations omitted). The elements of equitable estoppel are: "(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." *Board of Regents v. Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie. *Chemical Bank v. WPPS*, 102 Wn.2d 874, 905, 691 P.2d 524 (1984). Equitable estoppel

must be shown "by clear, cogent, and convincing evidence." *Berschauer v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994). Waiver is "the intentional abandonment or relinquishment of a known right. It must be shown by unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive." *Mid-Town v. Preston*, 69 Wn. App. 227, 233, 848 P.2d 1268 (1993).

Here, the City filed an appeal of the trial court's order in *Potala Village I*. This appeal alone is sufficient to defeat Potala Village's collateral estoppel and waiver theories.

Potala Village implies that a letter posted by the City on its website stating that the City would comply with the trial court's order *pending appeal* somehow amounts to waiver or estoppel. *Opening Brief*, pp. 7-8. But a review of this letter demonstrates the exact opposite. The letter states that the City does not agree with, and has filed an appeal of, the trial court's order holding that the Vested Rights Doctrine applies to SSDP applications. CP 152-153. The letter makes clear that it considers the trial court's order regarding vested rights to be fully subject to the appellate process. For instance, the letter first explains that although the City is, at that time (November 2013), following the Superior Court's order with

regard to vested rights, it has filed an appeal in the hopes of getting that decision reversed:

**Appeal of Decision:**

Even as we review the building permit application under the old regulations, the City has appealed the above mentioned Superior Court decision to the Washington State Court of Appeals. . . . [I]t is not known when . . . the Court [of Appeals] would issue a decision. In the meantime, the City is bound to follow the Superior Court decision. CP 152 (emphasis added).

The language of this letter is clear, the City is only following the superior court's order pending review by the Court of Appeals on appeal, *i.e.*, "in the meantime." It is clear that the words "in the meantime" mean pending appeal and awaiting the appellate courts final decision. Potala Village urges the Court to read the City's letter out of context.<sup>24</sup>

Potala Village's argument is that even though the City filed an appeal of the trial court's order, and even though it knew the issue of which zoning code and land use regulations would apply to its project was being hotly debated, the City not only had a duty to advise Potala Village that it was proceeding forward with development at its own risk; but the

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<sup>24</sup> The City also addresses Potala Village's misguided reference to *Mission Springs v. Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998), which is completely distinguishable from the facts of the case at bar. In *Mission Springs*, the Spokane City Council unlawfully interfered with the issuance of a developer's ministerial permit, resulting in a finding of liability. Here, Kirkland carefully followed the law and allowed Potala Village to pursue its building permit pending appeal. In fact, the November 2013 letter notes that the Council will not interfere with the permit process pending appeal, despite angry letters from citizens urging it to do so. This case is simply nothing like *Mission Springs*.

City had a duty to so advise Potala Village in every communication it had with the developer. There is simply no support for this argument. Especially where, as here, the developer is very savvy and experienced, in addition to the fact that it was represented by competent legal counsel at all times.

The bottom line is that the City was not required to advise Potala Village that it was proceeding forward at its own risk at all. Instead, by filing an appeal the City put Potala Village (and its counsel) on notice that it was challenging the trial court's order. Thus, Potala Village knew or should have known that its permit would be subject to the final appellate decision. Also, although the City was not required to specifically advise Potala Village that it was proceeding forward at its own risk, the City actually did so. It is undisputed that the Specific Permit Conditions issued by the City with regard to the building permit stated as follows:

If the City of Kirkland prevails in its appeal, Potala Village Kirkland, LLC v. City of Kirkland, No 70542-3-I, Washington State Court of Appeals, Division I, building permit No BMU13-03290 will no longer be vested to the zoning and land use regulations in place when Potala Village Kirkland, LLC filed its application for a shoreline substantial development permit in February, 2011 the Potala Village project, Building Permit No. BMU13-03290 would have to be revised to conform to the current zoning requirements regardless of the stage in construction. CP 262 (emphasis added).

The fact that the City filed an appeal; and did things like make compliance with the final appellate decision a condition of the building permit, makes Potala Village's claim that it was blind-sided by the City on this issue – and that the City pulled a bait-and-switch on the developer – difficult to believe.

At the motion hearing below, the trial judge was not convinced of Potala Village's alleged lack of notice either:

**COURT:** . . . So, you know, I understand your technical argument, okay. They [the City] didn't, they didn't move, didn't move for the stay so there's some consequences that flow from that. But as a practical matter, what difference does it make? **You are on notice that they were hotly contesting this whole vested rights kind of issue. I mean, it was no secret. You guys were fighting about it, right?** So as a practical matter, what, what, what difference would it make? . . .

RP, p.12, ll. 20-25; p. 13, ll. 1-3 (emphasis added).

Res judicata is also applicable here. To the extent Potala Village's request for relief arises either from issues that were or could have been litigated in *Potala Village I*, it is barred by the doctrine of res judicata. *See Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997) (res judicata prevents relitigation of claims that were or should have been decided among the parties in an earlier proceeding).

Here, Potala Village argues that once the time limit for the City to file a stay had passed, then it was no longer subject to this Court's

decision on appeal. The problem with this argument is that Potala Village never raised it with this Court in the previous litigation. Thus, even if this claim had merit, which the City disputes, it should have been raised with this Court in the first litigation. *See, e.g., Kelly v. County of Chelan, supra.*

**E. Potala Village's requests for a writ of mandamus, declaratory judgment, writ of certiorari, and all other causes of action were properly denied**

Writ of mandamus - Potala Village's request for issuance of a writ of mandamus was properly denied. The first element for issuance of a writ of mandamus is that the party subject to the writ is under a clear duty to act. RCW 7.16.160. Potala Village notes that the International Building Code (IBC)<sup>25</sup> "requires" the City to issue a building permit once certain conditions have been met. But here, those conditions have not been met. The IBC reads: "If the building official is satisfied that the proposed work conforms to the requirements of this code and laws and ordinances applicable thereto," then the official shall issue the permit. IBC 105.3.1 (emphasis added). Here, the work proposed in Potala Village's building permit does not conform to the land use codes, rules and regulations that were in effect on the date Potala Village filed its building permit

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<sup>25</sup> Adopted by reference by KMC 21.08.010.

application. Thus, the trial court properly denied issuance of a writ of mandamus.

Declaratory Judgment - Potala Village's request for a declaratory judgment was also properly denied. The first element required to support a declaratory judgment is that the action must involve "an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative or moot disagreement." *Burman v. State*, 50 Wn. App. 433, 439, 749 P.2d 708 (1988). Here, there is no present dispute between the parties. The original dispute between the parties, *i.e.*, whether or not the vested rights doctrine was triggered by the filing of a SSDP application, was decided in *Potala Village I*. Potala Village lost. Potala Village's stubborn adherence to the argument that its building permit application is vested in the City's old codes when it was indisputably filed after the City's new code amendments took effect is nothing more than a "moot" argument. Accordingly, Potala Village's request for a declaratory judgment was properly denied.

Writ of Certiorari - Potala Village's request for a writ of certiorari was also properly denied. The request for certiorari is based upon the false premise that the City was required to request a stay under RAP 8.1 in *Potala Village I* in order to preserve its rights on appeal. As fully briefed above, no such requirement existed.

**F. Request for fees**

The City requests an award of reasonable attorneys' fees and costs pursuant to RAP 18.1 and RCW 4.84.370, which provides for an award of fees and costs to the prevailing party or substantially prevailing party on appeal before the court of appeals in land use cases; including, specifically, cases involving a city's decision to condition or deny a building permit. The City is considered the prevailing party if its decision is upheld at both superior court and on appeal. The City is entitled to fees and costs only when it is successful in defending its decision on the merits. *Durland v. San Juan County*, 182 Wn.2d 55, 78, 340 P.3d 191 (2014). Here, the City prevailed at superior court on the merits, and anticipates prevailing in this Court on the merits. If so, then it requests an award of reasonable attorneys' fees and costs pursuant to RCW 4.84.370.

**V. CONCLUSION**

This case presents a classic example of Potala Village attempting to take a second bite of the apple. Potala Village could easily have obtained vested rights by filing a building permit application before the City enacted its zoning moratorium. As fully explained and analyzed in *Potala I*, the developer knew about the moratorium beforehand, yet intentionally chose, for purely financial reasons (*i.e.*, making a calculated

business decision) not to file a building permit application when it had the chance to do so. Potala Village lost the appeal in *Potala Village I* and now must live with the consequences. As this Court held in *Potala Village I*, the vested rights doctrine applies only upon the filing of a complete building permit application pursuant to RCW 19.27.095(1).

Potala Village's building permit application is vested in the laws in effect on the date it was filed which, in this case, was after the City's zoning code amendments took effect. Potala Village's claim that it obtained "vested rights" in the City's old zoning code and land use laws by virtue of the superior court order in *Potala Village I*, which was vacated upon appeal, is not supported by citation to any case law. Furthermore, it runs afoul of numerous legal doctrines, such as collateral estoppel, res judicata, waiver, and the law of the case doctrine.

Potala Village asserts that the only way the City could have prevented the creation of vested rights was to ask for a stay of the superior court's order under RAP 8.1. Once again, Potala Village fails to grasp the fundamental distinction between the creation of a vested right under the vested rights doctrine, and a temporary right to proceed – pending review – under the law of the case. A party is not required to seek a stay of a superior court order pending review in order to preserve its rights on appeal. *Kelly*, 167 Wn.2d at 871. As noted by Richard L. Settle,

Washington's preeminent land use expert who was cited by the Supreme Court in *Kelly*, a developer that chooses to proceed with development after the commencement of litigation does so at its own risk. *Id.*

Finally, the Court of Appeals does not decide moot issues. If Potala Village wanted to argue that the City was required to file a stay in order to preserve its rights on appeal in Potala Village I, then it should have raised that issue with the Court of Appeals in *Potala Village I*. Certainly the Court of Appeals felt that it was issuing the decision to which Potala Village was going to have to comply. It seems a little too late to raise that mootness issue now.

Accordingly, the City respectfully requests that the trial court order dismissing this lawsuit in its entirety be affirmed by the Court of Appeals at this time.

Respectfully submitted this 17<sup>th</sup> day of November, 2015.

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**CERTIFICATE OF SERVICE**

I certify and declare under penalty of perjury of the laws of the state of Washington that on November 16, 2015, I served a copy of the foregoing pleading on the attorneys for the Plaintiffs/Petitioners in this action as set forth below:

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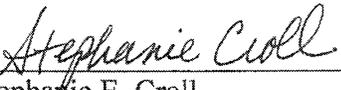
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*Service via email as agreed by the parties.*

DATED this 17<sup>th</sup> day of November, 2015, at Issaquah, Washington.

  
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Stephanie E. Croll