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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

ALLIANCE INVESTMENT GROUP OF ELLENSBURG, LLC,

Appellant,

v.

CITY OF ELLENSBURG, WASHINGTON,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The Kittitas County Superior Court erred when it ruled that the City of Ellensburg can apply its 2009 critical areas ordinance to Alliance's 2007 vested short plat.

II. ISSUE PRESENTED

The Washington Vested Rights Doctrine is highly protective of individual property rights. "Under the 'vested rights doctrine' recognized in Washington, developers filing a timely and complete land use application obtain a vested right to develop land in accordance with the land use laws and regulations in effect at the time of application."¹ RCW 58.17.033 codified the vested rights doctrine as applied to land divisions in 1987. Under this statute and related case law, once an applicant files a complete plat application with a city or county, where the requirements for a fully completed application are defined by local ordinance, then the project is vested to the zoning and land use control ordinances in effect at the time the applicant files a complete application. As a result of this vesting, the project is not subject to later-enacted development regulations when the applicant seeks subsequent permits implementing, or building out, the vested project. Alliance sought and received approval from the City of Ellensburg for a nine-lot industrial park in 2007, subject to its conditions of approval and the 2007 land use control

¹ *Weyerhaeuser v. Pierce Cnty.*, 95 Wn. App. 883, 890, 976 P.2d 1279 (1999) (footnote omitted).

ordinances. The issue presented in this appeal is whether the City can apply its later-enacted 2009 critical areas ordinance, a land use control ordinance, to build-out of Alliance's 2007 vested short plat.

III. STATEMENT OF THE CASE

Alliance owns a nine-lot industrial subdivision on West Dolarway in Ellensburg.² The property is zoned Industrial Light.³ Alliance filed an application with the City for a short plat on February 16, 2007, and the City finalized the short plat on May 28, 2008, also known as Alliance Short Plat No. 1.⁴ In its review of Alliance's short plat in 2007, state law and local code required the City to review the impacts of the industrial land division under the then applicable critical areas ordinance ("2007 CAO").⁵

The short plat application contained several references revealing that Alliance would develop its lots under the Industrial Light zoning district regulations.⁶ During the City's review of the short plat application, the Department of Fish and Wildlife, in accordance with the State Environmental Policy Act ("SEPA"), commented extensively on the

² Administrative Record ("AR") A, document 21. The Superior Court Clerk did not include the administrative record, Sub. No. 16, in the index or assign it a CP number, but informed Alliance that the entire administrative record was provided to this court. Reference to the administrative record will utilize the designations used in superior court.

³ AR A, document 10.

⁴ AR A, document 4.

⁵ AR A, document 23.

⁶ AR A, documents 1, 10, 11, 23, 25, 27.

application, claiming that the plat would have significant impacts on floodplains.⁷ Alliance's biologist responded to the comment letter by noting that while Alliance's property does lie within the designated floodplain of Reecer Creek, a floodplain study of the region found that the property lies within no critical area buffers, that the property lies mostly to the east of Reecer Creek Floodplain, and that only a small portion of the western property lies within the Reecer Creek floodplain. Furthermore, the biologist concluded that this area is not prone to flooding at any regular frequency, and that development would not significantly affect floodwater conveyance.⁸

The City's Environmental Commission met on Alliance's short plat application and recommended approval of the plat with the proviso that "the SEPA Official be aware and attempt[] no net loss of flood plain storage as a result of this application."⁹

The City approved the short plat application in 2008, after analyzing the floodplain impacts, conditioned on Alliance's including this note on the plat: "3. Any grading and fill activity on the lots must result in a no-net gain to the flood plain."¹⁰ The lots exist today. The City approved development on one lot in the short plat in 2008.¹¹

⁷ AR B, document 22.

⁸ AR B, document 16.

⁹ AR B, document 18.

¹⁰ AR A, document 4.

¹¹ AR C.

In 2009, the City adopted a new critical areas ordinance (the "2009 CAO"), which, in the words of City staff, was "a substantial change in how critical areas are regulated in the City from the critical areas ordinance that was in place at the time of preliminary short plat review and approval which utilized SEPA review for critical areas regulation."¹²

After the City adopted the 2009 CAO, potential buyers and lessees of Alliance's lots were uncertain whether they must comply with the new 2009 CAO, or whether the 2007 CAO would still apply because the short plat had been approved before 2009.¹³

Given this uncertainty, Alliance sought a statement of restrictions from the City under RCW 35A.21.280, requesting confirmation that the 2009 CAO did not apply to build-out of Alliance's short plat because Alliance's short plat, including the right to build out the lots, vested under the 2007 CAO.¹⁴ Alliance also requested an interpretation of Section 13.39.200(D)(1) of the Ellensburg City Code ("ECC") requesting that the City find that Alliance had already complied with the 2007 CAO requirements.¹⁵

The City's Planning Director issued a decision finding that the 2009 CAO applied to build-out of Alliance's lots, and that the 2007 CAO

¹² AR F, document 1.

¹³ AR H.

¹⁴ AR H.

¹⁵ AR N.

did not apply to build-out of the lots, rejecting Alliance's vested rights argument.¹⁶

Alliance timely appealed the Planning Director's decision to the City's Planning Commission, and the Planning Commission upheld the Planning Director's decision with a 4-to-2 vote.¹⁷ Alliance further appealed to the Kittitas Superior Court, and the court upheld the Planning Commission's decision under the Land Use Petition Act, Chapter 36.70C RCW.

IV. SUMMARY OF ARGUMENT

1. Build-out of the lots in Alliance Short Plat No. 1 is not subject to the City's current critical areas ordinance, codified in 2009 and amended in 2010. Alliance's short plat vested in 2007 once its short plat application became fully complete. With respect to plats, "vested" means that build-out of the lots is subject to the land use control ordinances in effect at the time Alliance filed the plat application.

2. Alliance did comply with the 2007 CAO under ECC 13.39.200(D)(1) at the time of short plat approval. The City was required to and did apply its 2007 CAO, which was in effect at the time Alliance filed its short plat application in 2007, and imposed, as a mitigation measure, a requirement that Alliance avoid any impacts to the

¹⁶ AR T.

¹⁷ AR V.

floodplain. No new requirements can be imposed by the City on build-out of the lots. Alliance is still subject to the 2007 CAO and its conditions of plat approval.

3. Under ECC 12.10.180(D), the City is authorized to impose new ordinance requirements on approved plats *only* when the applicant seeks to extend the deadline for building out the lots within the plats. Alliance did not seek an extension of Alliance Short Plat No. 1; therefore, under the ECC, it cannot be subject to later-enacted ordinances.

V. ARGUMENT

A. STANDARD OF REVIEW

This controversy hinges on the interpretation of statutes passed by the Legislature, case law, and the ECC provisions. The issues presented, therefore, are pure issues of law: there are no disputes as to the facts, only as to the application of the law to the undisputed facts.

Questions of law are reviewed *de novo* to determine whether the facts and law supported the land use decision. On review of a superior court's land use decision, the court of appeals stands in the shoes of the superior court and reviews the administrative decision on the record before the administrative tribunal—not the superior court record—and reviews the record and the questions of law *de novo* to determine whether the facts and law support the land use decision.¹⁸

¹⁸ *Lauer v. Pierce Cnty.*, 157 Wn. App. 693, 696 n.2, 238 P.3d 539 (2010).

B. THE 2009 CAO DOES NOT APPLY TO ALLIANCE'S SHORT PLAT

1. What Is Required to Vest a Plat.

Under the state's subdivision law, RCW 58.17.033:

(1) A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.

(2) The requirements for a fully completed application shall be defined by local ordinance.

(3) The limitations imposed by this section shall not restrict conditions imposed under chapter 43.21C RCW [SEPA].¹⁹

Under this vesting statute, and applicable case law discussed below, to vest under the 2007 CAO with its short plat application—which vesting carries over to build-out—Alliance needs to show three things:

a. That Alliance filed a complete short plat application before the City adopted the 2009 CAO.

b. That Alliance included all the information required by the City for a complete application.

c. That Alliance's application caused the City to apply its 2007 CAO and analyze floodplain impacts during the short plat review process.

¹⁹ Emphasis added.

As further detailed in this brief, Alliance complied with each of these requirements. It filed a complete plat application in 2007, and at that time the plat became subject to all zoning and other land use control ordinances in effect. The City found that Alliance's application was complete on March 8, 2007.²⁰ And, in its review of the short plat, the City analyzed the project's impacts on the floodplain.

2. A Plat Is Vested to More Than Just Land Division Ordinances.

The vesting statute states that a plat application vests to the zoning and land use control ordinances in effect at the time of application.²¹ The Washington Supreme Court in *Noble Manor Co. v. Pierce County*²² explained that this vesting extends to build-out of the project, in that an application for a land division vests not simply to platting ordinances, but to all land use control ordinances.

The City relies heavily on the *Noble Manor* case to argue that since Alliance did not disclose specific uses in its short plat application, it cannot vest to the critical areas ordinances in effect at the time it filed its short plat application. But the City ignores the overriding, distinguishing factual difference between *Noble Manor* and this case. *Noble Manor*

²⁰ AR A, document 27.

²¹ Land use control ordinances are those that restrain or direct influence over land use, as opposed to an impact fee ordinance, which only increases the cost. *New Castle Invs. v. City of LaCenter*, 98 Wn. App. 224, 229, 989 P.2d 569 (1999).

²² 133 Wn.2d 269, 943 P.2d 1378 (1997).

concerned a change in use regulations (specifically, minimum lot-size requirements). This case concerns a change in floodplain regulations.

In *Noble Manor*, the applicant applied for a short plat for three multi family dwellings, each on one lot. The minimum lot-size at the time was 13,500 square feet. Before Pierce County approved the plat, it adopted new zoning regulations and prohibited the proposed lots by increasing the minimum lot-size to 20,000 square feet.²³ Importantly, it was not so much that the applicant identified its duplex use that caused it to vest (because it could still build one duplex). Rather, what was important for vesting was that the applicant proposed three lots of less than 20,000 square feet each in its application.²⁴ A number of subsequent cases and argument focus on whether a *use* was revealed in order to vest, but even in *Noble Manor*, the key was whether the application identified the sizes of the lots, because the minimum lot standard changed, not the allowed uses. In *Noble Manor*, "use" meant the three duplex lots, not simply duplexes. Identifying three duplex lots was important to vest to minimum lot-size requirements, because these regulations changed.

The primary issue in *Noble Manor* was whether a short plat proposal was subject to the land use regulations in effect at the time of application so that the project could continue, or whether the only right

²³ *Id.* at 272.

²⁴ *Id.* ("The Developer's three lots were larger than 13,500 square feet but smaller than 20,000 square feet.").

that vested at the time of a short plat application was the right to divide the land.

After reviewing the language of RCW 58.17.033 and its legislative history, the supreme court concluded that the regulations in effect at the time of a plat application vested the project under those regulations:

We conclude that when the Legislature extended the vested rights doctrine to plat applications, it intended to give the party filing an application a vested right to have *that application* processed under the land use laws in effect at the time of the application. . . . If all that the Legislature was vesting under the statute was the right to divide land into smaller parcels with no assurance that the land could be developed, no protection would be afforded to the landowner.²⁵

[W]e also recognize developers' needs for certainty and fairness in planning their developments. In extending the common law vested rights doctrine to include short and long plat applications, the Legislature has made the policy decision that developers should be able to develop their property according to the laws in effect at the time they make completed application for subdivision or short subdivision of their property. We do not accept the County's argument that the only right that vests upon a subdivision application is to draw lines on a map to create smaller legal parcels of property. This would be an empty right and would conflict with the Legislature's intent to extend the protections of the vested rights doctrine to subdivision applications.²⁶

Because the use regulations changed in terms of lot size in *Noble Manor*, naturally, the court focused on whether the applicant had disclosed its proposed uses (i.e., lots) in its application to preserve its vesting as to

²⁵ *Id.* at 278.

²⁶ *Id.* at 280.

those uses. But the subdivision vesting statute is about more than vesting to uses. By the clear terms of the statute, a fully complete short plat application vests a plat to *all* land use control ordinances at the time of filing, not just lot-size requirements. The City argued below that despite this vesting, Alliance is still subject to land use ordinances at the building-permit stage (the 2009 CAO) when the platted lots are developed. But that completely misses the entire point and purpose of the vesting statute and the "zoning and other land use control ordinances" language of that statute. This is confirmed by the *Noble Manor* court, which identified the City's position as espousing "an empty right."²⁷

3. Vesting Occurs When a Complete Application Is Filed.

The *Noble Manor* court also made it clear that for a plat to vest to all land use control ordinances under RCW 58.17.033, the applicant must submit everything that is required for the application to be fully complete.

The Court stated:

Therefore, if the County requires an applicant to apply for a use for the property in the subdivision application, and the applicant discloses the requested use, then the applicant has the right to have the application considered for that use under the laws existing on the date of the application.²⁸

²⁷ *Id.*

²⁸ *Id.* at 278.

To contest vesting to a land use control ordinance in effect at the time of filing, the City needs to show that the ECC *required* Alliance to disclose additional information that it did not disclose. But the City determined that Alliance had submitted a fully complete plat application. Not only that, but the City approved the plat after determining that it met all requirements. And the ECC does not require an applicant to identify in its plat application specific uses in terms of the tenants and businesses that will locate on the lots or specific construction details. Nor should it, since for a commercial short plat, that would be speculative at best. The specific uses for the Alliance lots that were allowed in 2007 under the light industrial district regulations were:

1. Wholesaling, warehousing, distribution, repair, rental and servicing of any commodity, the sale of which is permitted in any commercial district, but excluding live animals, explosives and aboveground storage of flammable liquids and gases;
2. Food and drug processing;
3. Bottling works;
4. Cold storage plants;
5. Welding and machine shops;
6. Public uses;
7. Manufacture and assembly of light and small items made from previously prepared materials, etc.;
8. Residential uses existing at the time of adoption of the ordinance codified in this section;
9. Public utilities;
10. Public transportation, deadhead stations;
11. Heavy equipment yards;
12. Brokerage firms;

13. Retail sales of goods or products manufactured on the premises.²⁹

There is no guesswork on what uses could locate in the plat. The light industrial regulations provide the short list. An applicant should not have to go through the charade of identifying all possible uses for a project just so that it can vest to land use control ordinances unrelated to use.

The City has also yet to explain how knowing the use would have changed its analysis of floodplain impacts. Any use on the property would impact any floodplains on site, and any use would have to comply with the requirements of the 2007 CAO, which include:

1. New construction shall not increase the base flood elevation more than one foot.
2. All new construction and substantial improvements shall be constructed using flood-resistant materials and utility equipment, and with methods and practices that minimize flood damage.
3. All structures shall be located on the buildable portion of the site out of the floodplain unless there is no buildable site area out of the floodplain.
4. When a structure is to be floodproofed, it shall be designed and constructed using methods that meet [certain] requirements.
5. All new construction and substantial improvements within the floodplain shall be anchored to prevent flotation, collapse, or lateral movement of the structure.

And so on.³⁰ Alliance is not arguing that no floodplain regulations apply to its build-out, just that the 2007 standards do.

²⁹ CP 59-60.

³⁰ AR P, at 5-6.

Although the City does not require an applicant to reveal its uses in its plat application, the City claims that Alliance was required to do so to vest under the 2007 CAO. If Alliance stated that it would build a cold-storage plant on one of the lots, for instance, the City has not articulated why this fact alone would vest it to the 2007 CAO when that fact alone would not impact its floodplain-impact analysis. Construction details are not needed to apply the 2007 floodplain regulations. The City's review would be the same under the floodplain regulations whether Alliance proposed a cold-storage plant, a welding shop, or a brokerage firm, all allowed uses under the then applicable light industrial regulations. The 2007 floodplain regulations made distinctions only between residential and nonresidential development, and for nonresidential development, its review and impact analysis did not require it to know the type of tenant or business that would move onto a lot. The floodplain regulations for nonresidential development would apply in the exact same way regardless of use.

The City also took the *Noble Manor* holding one step further than what the court held. It argued below that Alliance needed to identify not only uses in order to vest, but also specific buildings or proposed construction.³¹ Nowhere does the *Noble Manor* court make that holding. RCW 58.17.033 mandates vesting to all land use control ordinances for

³¹ CP 68.

plats when the applicant submits a fully complete plat application as defined by local ordinance. If the City does not require construction detail at the plat stage in the application, *there is still vesting* under the clear wording of the vesting statute.

The court in *Westside Business Park, LLC v. Pierce County*³² reached a similar conclusion that vesting for plats occurs when an applicant addresses exactly what the application requires for completeness, consistent with RCW 58.17.033. There, the court explained:

Under RCW 58.17.033(2), the County has the duty to define by local ordinance the requirements for a fully completed application for a subdivision or a short subdivision of land. Westside completed the County's application form and provided all the information required of it. Therefore, Westside did "reveal" its intended use in the way the particular process of the County allowed and therefore it was vested with regard to that use. The parties should be able to rely upon the application. But where the County invites vague information in the application and declares it to be complete, the only resort may be to other communications. However, if the application had called for this information or if the County had taken the stance that it was unaware of the proposed use, our decision might differ.³³

In *Westside*, the application did not provide the type, size, location, method of construction, or grading necessary for any future building application. There, the hearing examiner "characterized Westside's

³² 100 Wn. App. 599, 5 P.3d 713 (2000).

³³ *Id.* at 605.

application as a 'bare bones' application in that it showed only two vacant lots with no structural improvements, no storm drainage facilities, no roads, and no utilities."³⁴ The fact that more detail about what Westside proposed was outside the application allowed the court to conclude that there was vesting because Westside complied with the application submittal requirements and Pierce County understood the scope of the project. Had the code required more detail and none was provided, there would have been no vesting. In short, the vesting statute requires a fully complete application, defined by local ordinance, for vesting of plats and subsequent development. If the applicant provides all the required information, there is vesting. As a consequence of vesting, all land use ordinances in effect at the time of vesting apply to build-out of the plat.

4. Even if Revealing Uses Is Relevant to Vesting to a Critical Areas Ordinance, Alliance Did Reveal Its Use.

Only minimal information on uses is needed before there is vesting. In *Noble Manor*, the developer had merely stated that it would develop three multifamily residences, each on a lot that would meet the minimum lot size of 13,500 square feet. Because the application showed three lots less than the new standard of 20,000-square-foot lots, the Supreme Court found that sufficient to put Pierce County on notice of the intended use.³⁵

³⁴ *Id.* at 603.

³⁵ 133 Wn.2d at 284-85.

Again, even if identifying a use is necessary to vest to a critical areas ordinance, which Alliance asserts it is not, Alliance did reveal to the City, and the City knew, that Alliance would develop a "light industrial park," a statement that functionally has the same specificity as the statement in *Noble Manor* that the applicant would build duplexes on three lots with no other detail provided. What was sufficient in *Noble Manor* is analogous to what was provided in Alliance's application. The wetland report submitted as part of the application identified the project as a "light industrial park."³⁶ The SEPA notice stated that the project was "a 9-lot short plat of property that is zoned Industrial Light (I-L)."³⁷ The routing notice for the application to various City departments mentioned that the project was a short plat and that the property was zoned light industrial.³⁸ In its comment letter on the application, the State of Washington stated that it was "a light industrial subdivision."³⁹ Specifically, the state's letter read that "since the proponent has indicated the proposal aims to provide light industrial development, it is reasonable to anticipate that some business activities that require the use of substances/chemicals that are toxic to fish life will occur here."⁴⁰ This is no more detailed than what the applicant in *Noble Manor* provided when it simply stated that it would

³⁶ AR B, document 50, at 1.

³⁷ AR B, document 12, at 1.

³⁸ AR A, document 10, at 1.

³⁹ AR B, document 22, at 1.

⁴⁰ AR B, document 22, at 1-3.

build duplexes on three lots. Obviously, the only uses allowed on Alliance's lots would be those allowed in the light industrial zoning district, and those uses were limited in number. What more needs to be revealed about the proposed uses? The record does not support the City's assertion that the proposed uses were not revealed. Moreover, the City did not require any more specificity in its application process, which was also a key fact in *Noble Manor*.⁴¹

5. *Noble Manor* = Change in Minimum Lot-Size Requirements. Alliance = Change in Floodplain Regulations. Were Floodplain Impacts Addressed in Alliance's Application? If So, There Is Vesting to the 2007 CAO.

The City's position might be more relevant if the City had rezoned Alliance's property to residential. In that case, the use regulations would have truly changed, and the question would be whether Alliance revealed its light industrial uses in its application in order to maintain its vesting to those uses. The case of *Weyerhaeuser v. Pierce County*⁴² also stands for the proposition that vesting to a particular land use ordinance occurs when the applicant has addressed the requirements of *that* land use ordinance in its application. This is why it was important in *Noble Manor* to determine

⁴¹ 133 Wn.2d. at 284 ("Under RCW 58.17.033, the County has the duty to define by local ordinance the requirements for a fully completed application for a subdivision or a short subdivision of land. Here, the County failed to enact such an ordinance. In completing the County's application form, environmental checklist and any other forms required, the Developer did all it could do to meet the County's requirements.").

⁴² 95 Wn. App. 883.

whether the number of lots was revealed in the application, because the minimum lot-size requirements changed. As the supreme court stated, "Since we conclude that what is vested is what is sought in the application for a short plat, then the question becomes what the Developer's application sought in this case."⁴³

In *Weyerhaeuser*, the wetlands ordinance changed, and the question for the court was whether the applicant vested to a prior wetlands ordinance. There, the applicant filed a conditional use permit for a landfill within a floodplain and wetlands area in 1989. The project was mired in legal challenges that resulted in a delay of the permit approval. In 1992, Pierce County adopted new wetlands regulations. Eventually, the county's hearings examiner approved the project, but subject to the condition that the applicant comply with the 1992 wetland regulations. The Washington Court of Appeals held that the applicant's rights had vested to the critical areas ordinance in effect when the application was submitted in 1989, in part because:

LRI submitted a complete conditional use permit application disclosing its intentions and proposed uses as to the wetlands. Thus, LRI's rights vested as to the laws governing applications for conditional use permits and as to the regulations governing wetland activities applicable at the time of LRI's application. LRI's landfill project proposed extensive activity involving wetlands, ranging from the cutting and clearing of significant wetland acreage to the creation and enhancement of the same. Wetland

⁴³ *Noble Manor*, 133 Wn.2d at 284.

development, therefore, was not only foreseeable at the time of application, but also necessary and essential to the project's successful development because a substantial part of the proposed landfill site is situated upon 70 acres of wetlands.⁴⁴

The court specifically found LRI vested to the prior wetlands ordinance because its application analyzed wetland impacts. The court did not find vesting because the applicant disclosed its proposed landfill use in isolation; it found vesting because the applicant disclosed how the landfill project would impact wetlands. There, Pierce County analyzed wetland impacts under the prior ordinance, so the prior ordinance applied, and there was vesting.

The City's distinction of this case below was unpersuasive and not factually accurate. The City pointed out that the issue in *Weyerhaeuser* was what laws applied to an application for a conditional use permit, not what laws applied to a later-filed building-permit application. This is not correct. Similar to a short plat, a conditional use permit authorizes only a use, not construction. The applicant for a conditional use permit application would still need to apply for site plan review or building permits to build out the project. The court in *Weyerhaeuser* clearly found that the *project* vested to the wetland ordinances when the applicant applied for a conditional use permit. This necessarily carries over to the building-permit stage. The *Weyerhaeuser* court, quoting *Noble Manor*,

⁴⁴*Weyerhaeuser*, 95 Wn. App. at 894 (emphasis added).

stated, "Here, a vested right for the conditional use permit, but not for land use and development, would be 'an empty right' as wetland development was an integral component of the project."⁴⁵

In Alliance's case, the City specifically considered the impact of its proposal on floodplains during the 2007 application process, and in fact the subdivision statute, SEPA, and the ECC all required this analysis.

Under the subdivision statute, the City cannot approve a plat unless it can determine (a) whether it appropriately provides for the public health, safety, general welfare, and a variety of other considerations, and (b) whether the short plat serves the public interest.⁴⁶

Under SEPA, the City is required to analyze the impacts of a proposal on elements of the environment, including floodplains.⁴⁷

Under former ECC 13.39.200(E)(6)(a), the 2007 CAO, all subdivisions and short subdivisions were required to (a) minimize flood damage; (b) have adequate drainage; and (c) show flood areas on plat maps. In addition, former ECC 13.39.200(D)(1) provided:

If State Environmental Policy Act (SEPA) review of the activity is required, such review shall constitute the development permit review for flood hazards. If no SEPA review is undertaken, the permit for development review shall be incorporated into the basic underlying permits necessary for the project or activity to proceed, e.g., building permit, short plat, fill permit, and similar permits."

⁴⁵ *Id.* at 895 (emphasis added) (quoting *Noble Manor*, 133 Wn.2d at 280).

⁴⁶ RCW 58.17.110.

⁴⁷ *See generally* ch. 1.42 ECC.

ECC 13.39.200(D)(1) of the 2007 CAO further stated that a "development permit shall be obtained before land is altered or a new use is commenced within a frequently flooded area." "Development" includes alterations to land, including but not limited to buildings, structures, and, according to the provision above, any action that requires SEPA review, such as platting.

It could not be stated any clearer in the ECC. If SEPA is triggered, and it was in this case at the plat stage, then the plat application process is "the development permit review for flood hazards." It is only when SEPA is not triggered that this floodplain-impact analysis occurs at the building-permit stage. The City argued at superior court that the floodplain analysis must occur at the building-permit stage under the 2009 CAO, but this is contrary to its own ordinance and state law, which require this analysis earlier in the process.

In this case, the City did consider impacts of the floodplain during the platting stage, as required by code, that resulted in a plat note designed to protect the floodplain from impacts. This requirement on the plat is recorded and binds the land to it for all activity that occurs on the lots, and the plat remains subject to the 2007 CAO.

6. The Building Code Applies Even With the 2007 CAO.

The City's argument that floodplain impacts must also be analyzed at the building-permit stage confuses the issue. Alliance is not arguing

that its buildings can adversely impact the floodplain, or that building codes must be ignored. When Alliance proposes a building, it will need to comply with its floodplain conditions of approval and any applicable requirements of the 2007 CAO. The City can also enforce its most recent building code requirements. It just cannot apply the 2009 CAO because of vesting.

The City argues that there is a different level of review at the building-permit stage, but this was not the case under the prior ordinance, since the floodplain provisions were triggered when an applicant applied for a plat that triggered SEPA. This is also exactly the same under the 2009 CAO. The 2009 CAO review under the current ordinance occurs at the land division stage:

13.39.120 Applicability.

.....

B. The city shall not approve any permit or otherwise issue any authorization to alter the condition of any land, water, or vegetation, or to construct or alter any structure or improvement in, over, or on a critical area or associated buffer, without first ensuring compliance with the requirements of this chapter [CAO], including, but not limited to, the following (as applicable):

1. Building permit;
-
4. Short subdivision;
 5. Subdivision[.]

Even under the City's 2009 CAO, it must analyze floodplain impacts at the plat stage. Again, this is not to say that Alliance is not subject to the current building code. When buildings are proposed on the lots, it will follow the current building code in effect, the 2007 CAO, and its conditions of approval.

The City is also incorrect when it argued below that it can apply the 2009 CAO at the building-permit stage because of RCW 19.27.095, the vesting statute applicable to building permits. Until Alliance files a building-permit application, the City argues, it cannot vest to any CAO, but this argument ignores the fact that the CAO, then and now, is applied at the plat stage.

The City also ignores the rule that vesting can occur earlier with plat applications under RCW 58.17.033. The Washington Supreme Court rejected the same argument that the City is making in this case, and that Pierce County made in *Noble Manor* when it unsuccessfully argued "that use or development rights only vest under RCW 19.27.095 (upon the submission of a building permit), while only the right to divide property vests under RCW 58.17.033."⁴⁸ The court of appeals in *Noble Manor* also explained the two options for vesting:

Both RCW 58.17.033 and RCW 19.27.095 vest rights in the zoning or other land use control ordinances in effect at the time or on the date of application.

⁴⁸ *Noble Manor*, 133 Wn.2d at 277.

RCW 58.17.033 merely defines another context other than building permit applications, namely, applications for land division, where a developer's rights become vested.

The interpretation urged by the County, that RCW 58.17.033 vests only the right to divide, not the right to develop, results essentially in limiting the vested rights doctrine to completed building applications. Their interpretation ignores the plain language of RCW 58.17.033 that those who submit completed short plat applications are entitled to be considered "under the . . . zoning or other land use control ordinances, in effect." This language is no different from that in RCW 19.27.095. Land use cannot mean "divide" in one statute, and "develop" in the other.

. . . RCW 58.17.033 merely allows the vesting to occur at the earlier moment a person confronts zoning and other land use regulations.⁴⁹

In light of its vesting, when Alliance submits a building permit application, the 2007 CAO should apply.

7. City Code Confirms That Approved Short Plats Are Vested to the Rules in Effect at the Time of Application/Approval Unless the Applicant Seeks an Extension.

The City has a current regulation that if an applicant wishes to extend the date to finalize a plat after preliminary approval, then the City can impose new regulations on the plat as a condition of approval.

Specifically, ECC 12.10.180(D) states:

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

⁴⁹ *Id.* at 146.

changes and may impose new conditions along with the granting of the extension request if warranted by substantial changes in conditions or development regulation.⁵⁰

Under this provision, the City may impose new conditions and development regulations on an approved plat only if the applicant seeks an extension to finalize the plat. The inverse is true. If there is no extension request, then the regulations adopted after preliminary approval cannot be imposed on the approved plat.

Alliance did not seek an extension for Short Plat No. 1. Therefore, there is no opportunity or authority under the ECC to impose later-adopted regulations. If, as the City asserts, the 2009 CAO and other new regulations applied automatically to an approved short plat, the language about applying new regulations in conjunction with extension decisions would be meaningless. There would be no need to state in the code provision above that new regulations may apply to an approved plat if they, in fact, automatically applied, as the City is asserting in this case. Rather, this code provision indicates that new development regulations may be applied only if an extension is sought and the regulations have substantially changed.

This reading of the ECC was confirmed when Alliance sought to extend the preliminary approval for another short plat, known as Short Plat No. 2, and was concerned about the new CAO requirements. Alliance's

⁵⁰ Emphasis added.

engineer stated to the City's Planning Director, Mike Smith: "Based on Robert's conversation with you this morning, if the City grants him the extension he will have to comply with the most current Development Standards and Critical Area Ordinance."⁵¹ Mr. Smith responded with several options: "First, Alliance could seek an extension of the short plat approval but would be subject to the new CAO, or Alliance could bond and submit for final short approval [without an extension request] and be regulated under the previous SEPA and previous CAO."⁵² Exactly. The previous CAO would apply to the short plat if it were finalized before expiration. Alliance Short Plat No. 1 was finalized before expiration. The 2007 CAO applies to build-out of Alliance's lots.

8. *Mission Springs, Inc. v. City of Spokane is On Point.*

The City's land use decision violates Alliance's Fourteenth Amendment rights by depriving it of its property without due process of law. *See Mission Springs, Inc. v. City of Spokane.*⁵³

In *Mission Springs*, the applicant received approval for a 790-unit apartment complex. Later, when the applicant sought a grading permit to begin construction of the project, the City of Spokane delayed issuance of the permit and sought to impose additional requirements on the project that were not imposed when the project was approved. Eventually the

⁵¹ AR E, at 3.

⁵² AR E, at 1-3.

⁵³ 134 Wn.2d 947, 954 P.2d 250 (1998).

City approved the project without the additional conditions, but after considerable delay. The applicant sued for damages and injunctive relief. The case ended up at the Washington Supreme Court, where the court first noted that the applicant's planned unit development was an approval under the state subdivision statute and that once it was approved, no additional conditions could be imposed:

As previously recounted, the process for PUD approval and build-out is set forth in RCW 58.17. These requirements are often supplemented by local ordinance. Final approval of the PUD represents a final determination by the local unit of government that the proposal satisfies all applicable statutory and ordinance requirements. RCW 58.17.195 ("No plat or short plat may be approved unless the city, town, or county makes a formal written finding of fact that the proposed subdivision or proposed short subdivision is in conformity with any applicable zoning ordinance or other land use controls which may exist."). It is also essential to recall PUD approval entitles the applicant to build out to previously approved specifications within five years of the date of approval as a matter of vested legal right based upon the same ordinances which were in effect as of the date the final approval had been obtained "unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision." RCW 58.17.170. The analysis here is quite simple since no relevant laws changed during the period in question and no finding was made by the legislative body as referenced in the cited statute.⁵⁴

The court then held that the applicant had the right to immediate issuance of grading and building permits consistent with its prior approval

⁵⁴ *Id.* at 958 (footnote omitted). Divestment referenced in this quote does not apply to short plats, only subdivisions. *Noble Manor*, 133 Wn.2d. at 281.

and that the City had no discretion to ask for further study.⁵⁵ Finally, the court found that the City of Spokane violated the applicant's due process rights under the Fourteenth Amendment because:

Mission Springs was entitled to regular administrative processing and issuance of the requested grading permit in accordance with ordinance criteria. The Spokane City Council, contrary to the advice of its own city attorney, deprived the permit applicant of that process lawfully due by instructing its city manager to withhold the permit for reasons extraneous to ordinance, or lawful, criteria. The City Manager did in fact suspend the required process and acceded to the City Council's demand to withhold the permit without lawful justification, thereby depriving Mission Springs of its property absent the lawful process due under the laws of this State and the ordinances of Spokane. The duration of the deprivation, and the ultimate issuance of the permit after suit had been commenced, does not change the fact that the legal rights of Mission Springs were violated in the first instance.⁵⁶

While in Alliance's case the City did not deny or delay building-permit applications filed by Alliance, the City did make a binding land use decision denying recognition of Alliance's vested rights. This would result in the imposition of significant, additional requirements on an approved project. This has exactly the same impact as denial of a permit for the same reasons. The City has deprived Alliance of its property (vested rights) without due process of law.

⁵⁵ *Mission Springs*, 134 Wn.2d at 960-61.

⁵⁶ *Id.* at 971-72.

VI. CONCLUSION

Alliance's short plat, including development of it, is subject to all the land use control ordinances in effect at the time it filed a complete application with the City, including the 2007 CAO. Alliance respectfully requests the court of appeals to reverse the superior court's decision.

DATED this 5 day of August, 2014.

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I hereby certify that I served the foregoing BRIEF OF APPELLANT on:

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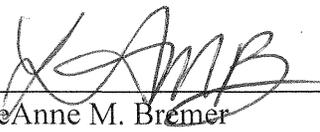
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by the following indicated method or methods:

- by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Vancouver, Washington, on the date set forth below..

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

Executed at Vancouver, Washington, this 5th day of August, 2014.



LeAnne M. Bremer
Attorney for Appellant