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CASE NO. 253783

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JEFF KELLY, in his individual capacity, and DAVID DORSEY and
NANCY DORSEY, a marital community,

v.

COUNTY OF CHELAN, a municipal corporation acting through its
hearing examiner; and ROBERT CULP, P.E. MANSON ENGINEERS,
INC.; and ANTON ROECKL, d/b/a WICO,

BRIEF OF RESPONDENTS

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I. COUNTERSTATEMENT OF THE CASE

This is a case of trying to develop too many units on too little acreage, with too little mitigation, over too long of a period of time. The 10 acre project site is part of a larger land holding of 100 plus acres owned by the Roekel family, which does business under the name WICO. It is located outside of the Chelan County Urban Growth Area (“UGA”) along the south shore of Lake Chelan in a steeply sloped area currently zoned RR10, which restricts development to one unit per 10 acres. Record of Decision (“RD”) 4, Findings 7, 9, 10.

In 1989, when WICO made its initial Conditional Use Permit (“CUP”) application attempt, and until October 17, 2000, the applicable zoning was General Use (“GU”). In 1990, Chelan County adopted the Lower Lake Chelan Basin Comprehensive Plan (“LLCBCP”). In 2000, the Chelan County Zoning Code and Comprehensive Plan were significantly modified pursuant Ch. 36.70A RCW, the Growth Management Act (“GMA”), in a manner that significantly reduced the allowed density for WICO’s property. It is undisputed that the current project does not comply with the codes in effect since 2000. Thus, WICO has sought to have its CUP permit vest under pre 2000 codes, on the mistaken

assumption that the project was in compliance with the GU zoning and the 2005 project was a mirror image of the 1994 version of its project.

The permitting history of WICO's project is both long and convoluted. From WICO's initial application in 1989 to the Hearing Examiner's Decision in 2005, the project went through countless iterations, resulting in 15 SEPA checklists and four SEPA determinations, the latest of which was July 2005. 2005 Decision Finding No. 38, RD 4. p. 7. Much of the permitting history appears in the Staff Report to the 2005 hearing (RD #33) and comments from interested public agencies. RD 4, 57, 59, 62, 66, 109, 110, 113, 120 131, and 136. Chelan County Planner Walters gave a concise summary of the twists and turns of the project at the 2005 hearing. See Transcript of July 29, 2005 Hearing ("TR") 18:2-25 and 19:1-19. The Findings of Fact, Conclusions of Law, and Decision for the CUP, approved by the Hearing Examiner on August 25, 2005 ("Decision") attempt to establish a chronology and timeline. Findings 37 and 38, RD 4. At various times, WICO altered the numbers of units, the type of units, the location of the units, the acreage of the project, the size and characteristic of the dock/marina, shoreline protection, and the important features for public safety, i.e. a pedestrian underpass and road

realignment, to allow uphill residents to safely access the waterfront features without crossing dangerous South Lakeshore Drive.

The project also required a Shorelines Substantial Development Permit (“SDP”) and Shoreline Conditional Use Permit (“SCUP”). RD 136, p.1. The SCUP was overturned/denied by the Washington State Dept. Ecology in October, 2005. Copy attached as Ex. A to CP 28.

WICO first brought its project to hearing in March 2002. At that time, the Hearing Examiner found that there were “substantial changes between the application submitted in 1994 and the application submitted on November 6, 1998, which render the prior SEPA determinations obsolete and require additional SEPA review.” RD 136, Finding 24. This finding was never appealed.

Three years later, in August 2005, WICO tried again. This time, WICO was successful. The Hearing Examiner found that WICO’s CUP application vested as of April 2004 and approved the CUP presumably based upon the laws in effect at that time. RD 4. Believing the Decision was erroneous, Respondents Jeff Kelly and David and Nancy Dorsey (“Kelly/Dorsey”), owners of property in the vicinity of the project, appealed the Hearing Examiner’s Decision to Chelan County Superior

Court pursuant to Ch. 36.70C RCW, the Land Use Petition Act (“LUPA”). Kelly/Dorsey prevailed. CP 1 and 38. After a failed effort at reconsideration of the Superior Court Decision, CP55, WICO subsequently filed this appeal. CP 42.

Kelly/Dorsey’s concerns are more than academic and more than the usual “NIMBY” concerns of those who object to any form of development. It is not the WICO development per se that is objectionable. Rather, the scope and scale of the project was out of character with community standards before the change in zoning and comprehensive plan designations in 2000. It is even more so now.

Another important point was glossed over by WICO and the Hearing Examiner, but caught the attention of Kelly/Dorsey and the Superior Court. In the 1994 version of the project, WICO had agreed (1) its project had significant traffic and public safety impacts and (2) those impacts needed to be mitigated with very specific features. These were reflected in the February 3, 1995 Mitigation Agreement between WICO and Chelan County. RD #33, February 18, 2002 Staff Report Exhibit, p. 31. Yet, the 2005 version of the project, which WICO says vested in 1994, no longer contains these public safety mitigation measures. Culp

Testimony, TR: 13 & 14. Nor did the 2005 project have a traffic report. The Hearing Examiner said that could come later. RD 4, Condition of Approval 12, p. 16.

It is important to understand the topography and the context of the WICO property. The site is very steeply sloped from east to west towards Lake Chelan. TR 13; lines 11-12. The steepest area is 67%. The development is proposed on a slope of 25%. TR 13:12-14. A very significant feature impacting the project is South Lakeshore Drive which traverses the lower portion of the project. The road is narrow, with several reverse curves. Site distance is a significant problem and concern. In its July 29, 2005 memo, the Chelan County Department of Public Works Department (CC-DPW) stated unequivocally: “Based on site review... CC-DPW feels the project as proposed will have *significant long term adverse effects and/or cumulative effects on the local transportation systems.*” [Emphasis added.] RD 110. Local residents used other words to say the same thing and describe the potential safety hazards from this dense, poorly designed project. RD #'s 28, 73, 74, 83, 75, 76, 77, 79, 81, 85, 86, 87, 91, 93, 95, 96, 98. See also Dorsey Testimony, TR 65 – 68; Bartenstein Testimony TR 92-93; Parks

Testimony TR 95-96; Browne Testimony TR 98; Gallatley Testimony TR 108.

As designed, the residential units are uphill and across the road from the waterfront. The 1994 version of the project sought to solve the traffic/pedestrian safety problem in two ways: (1) a relocation of South Lakeshore Drive and (2) a pedestrian underpass. RD #33, February 18, 2002 Staff Report, p. 30, para 8c. Inexplicably neither of these important mitigation measures is part of the approved project.

II. ARGUMENT

A. Errors and Standards of Review

Kelly/Dorsey asserted in their Petition, CP 1, that the Hearing Examiner had committed numerous errors in approving WICO's CUP and those errors are incorporated herein by reference. Applying the standards of review under LUPA at RCW 36.70C.010(1), Kelly/Dorsey's position is that the Hearing Examiner's Decision was (1) an erroneous interpretation of the law; (2) not supported by evidence that was substantial when viewed in light of the whole record; (3) a clearly erroneous application of the law to the facts, and (4) made using unlawful procedure or failed to

follow a prescribed process. Those errors relate to the following primary issues:

- WICO's application was incomplete and could not vest in April 1994.
- WICO's application did not comply with the codes in effect in 1994 and therefore could not vest.
- WICO had abandoned its 1994 application many years ago, and it is contrary to this state's vesting policy to allow an applicant to spend 16 years redesigning its project and then go back and vest to a prior version to avoid changes in the applicable land use codes.
- The Decision required future studies and hearings contrary to the Project Review Act, which contemplates a single open record hearing.

In addition, on appeal WICO now asks this court to determine an alternative vesting date even though the Hearing Examiner's Decision was based upon a particular vesting date, advocated by WICO at the time of the Decision.

On appeal, this court stands in the shoes of the superior court, *Citizens to Preserve Pioneer Park, L.L.C. v. City of Mercer Island*, 106 Wn. App. 461, 470, 24 P.3d 1079 (2001) , and review is limited to the administrative record. *H.J.S. Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 483-84, 61 P.3d 1141 (2003). Factual findings in the Decision are reviewed under the substantial evidence test and conclusions of law are

reviewed *de novo*. *Biermann v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434 (1998).

A finding is clearly erroneous when, “although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.” *Anderson v. Pierce County*, 86 Wn. App. 290, 299, 936 P.2d 432 (1997). The Washington Supreme Court has noted that the clearly erroneous standard for review is broad in scope. *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 700-701, 601 P.2d 501 (1979). In applying this standard the court is “expected to do more than merely determine whether there is substantial evidence to support an administrative or governmental decision.” The court is required to consider the public policy and values of the laws being implemented as well. *Sisley v. San Juan County*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977) (Policy and values of SEPA must be considered in reviewing negative threshold determination under the clearly erroneous standard.)

An appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *LaMon v. Butler*, 112 Wn.2d 193, 200-

201, 770 P.2d 1027 (1989), citing *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

B. An Alternate Vesting Date Is Not A Possible Remedy

WICO's Opening Brief argues that if this court doesn't agree with the Hearing Examiner's vesting date of April 1994, it can pick an alternative vesting date. This appeal is limited to the Hearing Examiner's Decision, which did not analyze the project for code compliance with the alternative dates, but rather accepted WICO's proposed vesting date of April 1994. RD 4, Finding 38, P. 8. There is no substantial evidence to support any alternative vesting dates. There is no code analysis or evidence that supports approval of the project at an alternative vesting date over its 16 year history. The Court of Appeals should not be placed in the position of trying to find a vesting date for WICO. It is WICO's responsibility to prove that the vesting determination in the Decision was correct.

C. A Vesting Date in April 1994 Is Not Supported by Substantial Evidence and/or Is An Erroneous Application of the Law to the Facts.

WICO and Kelly/Dorsey generally agree on the law of vesting, but disagree on the application of the law of vesting to the facts applicable to this project. “A landowner obtains a vested right to develop land when he or she makes a timely and complete building permit application that complies with the applicable zoning and building ordinances in effect on the date of the application.” [Emphasis Added.] *Norco Construction Inc. v. King County*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982). Kelly/Dorsey (and the Trial Court) believe that WICO’s application was not complete in 1994 and, even assuming that it was for the sake of argument, it did not comply with the codes in effect at that time. Furthermore, the site plan on which the approval is based does not reflect the components of the April 1994 application. The law of vesting has never been stretched to fit these facts.

1. WICO’S Application Was Not Complete.

Prior to the adoption of GMA, Chelan County did not have a code definition of “complete application.” TR 21:19-20. Thus, the

interpretation of County staff, based on their actual real world experience becomes important. *See Mall Inc. v. City of Seattle*, 108 Wn.2d 369, 378, 739 P.2d 668 (1987). (Deference given to Seattle's method of calculating lot size.) Here Chelan County planning department staff could never reach a conclusion that the project vested to the County's pre-GMA codes. County Planner Walters, the person charged with making a determination, summed up the vesting issue in August of 2005:

“And honestly, looking through the file and the history of this file and that it's gone on for 16 years, I can't make a determination at any point when it was deemed complete, because the site plan was changed – was changed from 1989 and then 1990 and '91, and then '93 and '98, and –and so forth.” TR 21:24-25; 22:1-7.

Staff's confusion was understandable. In February 15, 2002 a Chelan County staff Memorandum (RD 136, Exhibit 2, page 2) bemoans the lack of a complete application:

There are many other aspects to this proposal that remain unanswered. As this project is an **intense development** adjacent to a county road and Lake Chelan it **seems prudent to require a complete application** before a hearing. [Emphasis added.]

In March 2002, the County Hearing Examiner also determined that there had been substantial changes made to the project between 1994 and 2002, necessitating additional information:

Findings Of Fact

23. There are substantial changes between the application submitted in 1994 and the application submitted on November 6, 1998, which render the prior SEPA determinations obsolete and require additional SEPA review.

36. This project in its current form has changed significantly and materially from prior applications.

37. The overwhelming evidence leads this Hearing Examiner to find that the environmental review process regarding the current application has not been closed.

Findings of Fact, Conclusion, And Decision, March 8, 2002. [RD #136].

The record consistently shows concern with the completeness of WICO's applications:

- An Internal Memo dated February 19, 1999, from the Dept. Public Works states: "In general the application does not supply enough information to allow for complete comments and suggested recommendations of approval. . . . RD 136, Ex. 3
- An Internal Memo dated February 15, 2002, from the Dept. Public Works (RD136, Ex.2) states: "To date an accurate site plan has not been submitted. . . Without a survey and an accurate/complete site plan it is impossible to fully evaluate the impacts."
- The Department of Ecology ("DOE") also noted the incomplete plans in its letter dated November 26, 2001 (RD 136, Ex. 7) "The site plan submitted with the Notice of Application are not of sufficient detail to determine if the proposed community dock is in compliance with those requirements. "

- In an October 22, 2004 letter, DOE refers to WICO's non-responsiveness on requirements for the water features of the proposal. DOE threatened to cancel WICO's state water quality certification due to WICO's inactions. RD 110.
- In April 2005, the U.S. Army Corps of Engineers ("Corps") cancelled WICO's application to the Corps (relating to waterfront features), due to failure to provide necessary information. RD 109.

There are more, but the picture is obvious. The County and other agencies tasked with reviewing this large, complicated and constantly changing proposal were continually frustrated by the inability to get a complete set of plans or other information necessary for their review. Their confusion was not restricted to any particular period of time, but is widespread throughout the sixteen year permitting history.

In short, WICO's moving target approach meant there was never a complete application for the CUP before October 2000, which substantially conformed to the project reviewed and approved in 2005. The Hearing Examiner's determination of vesting in 1994 is simply wrong as a matter of law.

2. WICO Application Did Not Comply with Applicable Codes.

Fundamental to the notion of vested rights is that the application must conform to the codes in place at the time. *Norco Construction Inc. v. King County*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982). The project proposed by WICO in 1994 did not even meet the basic zoning requirements for density, in the then GU zone. So if the project did not vest in 1994 as the Hearing Examiner found, then the Decision applied the incorrect zoning and density standards. WICO proposed too many units on too few acres in 1994.

The acreage which WICO proposed for this project is a bit like the project itself – an elusive, moving target. Possibly the Hearing Examiner was confused. Under the “old” Chelan County Code Section 11.02.020, no permit can be granted in violation of the zoning code. In 1994, the GU zone required 10,000 SF per dwelling unit. Former CCC 11.36.030. Thus, in 1994, WICO’s project required 800,000 square feet (80 units at 10,000 square feet per unit) or just over 18 acres. 10 acres is too little. WICO incorrectly asserts the project acreage was 23 acres at the time of vesting. The record, including WICO’s own assertions, says otherwise:

- WICO's application for 80 condominium units in June 1994 lists acreage of "60" in typing, which is overwritten in hand with the number "10" acres. RD 137.
- In a Memorandum of August 7, 2002, the County states that "Robert Culp, on behalf of WICO has submitted a revised site plan and SEPA checklist for 80 unit condominium development on 10 acres of land." RD 63.
- A letter from Munson Engineers Inc. (dated stamped Jun 13, 2002) asks about a boundary survey requirement: "Did you mean a boundary survey of the ten acres encumbered by the application?" RD 65.
- The Hearing Examiner 2002 Decision found that the development was "on 10 acres of land." RD 136, Finding of Fact #1. The 2002 Decision and Findings are part of the 2005 Decision. See Finding #70, Decision.
- The July 15, 2005 site plan delineates a "10 acre development site" but does not otherwise indicate the acreage of the project. The area beyond the 10 acre demarcation is not labeled as an "open space" tract or otherwise restricted to native growth. It is not subject to any development restriction in the Conditions. RD 34.

The Supplementary Staff Report notes that the acreage, like the project features, has changed over time varying between 101 acres, 6 acres, 10 acres, 20.5 acres and 23 acres. RD 33, pp. 3-5. The critical date for the

analysis, and the Hearing Examiner's analysis in the Decision is the alleged vesting date in 1994.

If WICO truly proposed to use 23 acres to meet the GU density requirements then, WICO would have a site plan reflecting that size of an area. WICO does not. A reasonable person could infer that WICO was attempting to burden as little of its land as possible so it could try to attach the excess acreage onto its adjoining (and dormant) subdivision project. By trying to obfuscate the true size of its project, WICO took a risk that it might not vest. WICO lost that gambit.

To solve the density issue (and keep more land for other projects), WICO argues that the General Use (GU) zoning somehow allows 1 unit per 5000 SF, instead of 10,000 SF. This is a creative, but inaccurate distortion of the Chelan County zoning code. WICO argues that since the General Use zoning allows duplexes, and the minimum lot size is 10,000 square feet, then the code authorizes density at 1 unit per 5,000 square feet. Therefore, since WICO's proposal was for 78 condo units and two houses on supposedly 10 acres, they comply. It's magic!

However, like most magic, there is a reality that differs from the illusion. Once again, WICO uses faulty logic and math to game the

system. WICO's project consisted of 2 single family home and 78 condos in groups of two to four buildings with 3 units per building. The smallest grouping of units is a six-plex, not a duplex. Just as 10 acres are not 23 acres, so is a six-plex not a duplex.

The County previously recognized this apparent "disconnect" in its review of a WICO SEPA checklist, submitted on August 14, 2003. RD 32. In the section "Proposed measures to ensure the proposal is compatible with existing and projected land uses and plans, if any," WICO's stated that "Underlying zoning permits duplex per 10,000 square foot lot". Noteworthy, the County reviewer rejected that assertion and wrote in the margin that it is "irrelevant – not what is proposed." Paragraph 8.1. Deference is due staff interpretation of its codes. *Mall Inc., supra.*

To recap, to meet the CU zoning density of 10,000 SF per unit, the WICO application needed to be at least 800,000 square feet (78 condo units x 10,000 sq. ft. per unit plus two single family residences) or over 18 acres. The six acres listed on the so-called "vested" 1994 application is completely inadequate. Nor would ten acres suffice, which, by WICO's own admission, is the acreage on its application of June 1994. Appellant's

Opening Brief p. 4. Either way, WICO's project did not conform to existing land use codes in 1994 and the Hearing Examiner erred.

Adding more property later is irrelevant. The measuring date for vesting was 1994, at which time, the application simply did not conform to the GU density standard. If the application did not vest in 1994, the rest of the Decision is invalid, since compliance of the project was analyzed under the wrong codes.

There is more. WICO's project was also inconsistent with the Lower Lake Chelan Basin Comprehensive Plan ("LLCBCP"), which was adopted in 1990. WICO's counsel correctly states the general rule that a zoning code will control over a conflicting comprehensive plan, *Citizens of Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861,873, 947 P.2d 1208 (1997). However, WICO overlooks an important corollary principle when "the zoning code itself expressly requires that a proposed use comply with a comprehensive plan, the proposed use must satisfy **both** the zoning code and the comprehensive plan." *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 770, 129 P.3d 300 (2006); *See also West Main Assocs. v. Bellevue*, 49 Wn. App. 513, 524-25, 742 P.2d 1266

(1987) (noting that a comprehensive plan can be given regulatory effect through enactment, in whole or in part, as a regulation or ordinance.)

Here the corollary rule applies. The Chelan County zoning code requires conditional uses to be compatible with the applicable comprehensive plan: “Conditional uses shall be denied . . . where the board [of adjustment] finds that the proposed conditional use would be incompatible with the adopted comprehensive plan for the area, irrespective of whatever conditions might be imposed.” Former CCC 11.56.010. See also 2005 Decision, Finding 52 and Planning Department Staff Report Feb. 18, 2002, p. 13, RD 136. In the LLCBCP, WICO’s property was designated “Rural”, with a low density development standard:

A density of one unit per acre is appropriate for lands served by adequate and safe year round access, domestic water supply systems capable of providing minimum fire flows and where reasonable opportunities exist to create a buffer or separation to safeguard the integrity of adjacent lands that are in resource production. For other lands a density of one unit per five acres is appropriate in recognition of the limitations posed by physical restraints and the lack of a full range of utilities.

RD 33, February 18, 2002 Staff Report Exhibit, P. 12

Therefore, if we assume that WICO's project was to be on 23 acres, at the most, 23 units would be allowed under the LLCBCP. If the project encompassed 6 acres in April 1994, then a maximum of 6 units would be allowed. In either case, WICO's project was grossly non-conforming.

3. Allowing This Project to Vest to 1994 Codes Is Contrary to Washington's Vesting Policy.

Vested rights is an important land use doctrine in Washington, but it is not an unlimited or unfettered right. The policy behind the vested rights doctrine does not allow a developer to substantially alter its proposal over an extended period of years and then still retain the right to develop under the laws applicable to the original application. "A landowner obtains a vested right to develop land when he or she makes a timely and complete building permit application that complies with the applicable zoning and building ordinances in effect on the date of the application." *Norco Construction* at 684. Washington's vested rights are a balance between the developer's right to certainty in the use of its land upon submittal of its application and the public's right to enforce the land use laws it has legislatively determined to be appropriate for the community.

In *Erickson & Assocs. V. McLerran*, 123 Wn.2d 864, 874, 872

P.2d 1090 (1994) the court examined the impact of vested rights as follows:

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

The court recognized the tension between the public and private interest when it adopted Washington's vested rights doctrine. The court balanced the private property and due process rights against the public interest by selecting a vesting point, which prevents "permit speculation", and which demonstrates a substantial commitment by the developer, such that the good faith of the applicant is generally assured. [Emphasis added.]

Permit speculation is exactly what has happened here. WICO submitted one application in 1989 and then, over the course of more than 16 years, has continuously "tried out" iterations of that application. The moving target project has featured changes in the amount of land that is subject to the application, the number of units, the density of those units, the presence or absence of a store, the presence or absence of a pedestrian underpass, a change from marina to community dock, the removal of beach

access, changing a seawall to engineered bank protection. It comes as no surprise then, that this speculation has resulted in 15 different SEPA environmental checklists (Decision Finding #38), 4 separate SEPA determinations (Decision Finding #38), a public hearing at which the Hearing Examiner found the application materials to be so deficient that no review was possible, (2002 Decision, Conclusion 5 & 8 and prior Findings. RD #136), and a confused County staffer who could not conclude the project ever vested, TR 21:24-25; 22:1-7. The Decision itself which was the culmination of the confusion. How else can you explain Finding No. 64 in the Decision, which applies performance standards for “wineries” to the project?

Both WICO and Kelly/Dorsey agree that one important purpose of the vesting rule “is to establish a date certain upon which the owner’s right to use his or her property in a particular way becomes fixed so that in determining the applicable law the court is not required to search through the moves and countermoves of the parties, and ‘the stalling or acceleration of administrative action in the issuance of permits’ in each case.” *East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 438, 105 P.3d 94 (2005) (citing *Norco Constr., Inc. v. King County*, 29 Wn. App. 179, 189,

627 P.2d 988 (1981) (citations omitted) (quoting *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958)) (Applicant cannot selectively waive its vested rights to take benefit from advantageous newly enacted regulations.). Beyond that, WICO and Kelly/Dorsey disagree. No reported case in Washington holds that the doctrine of vested rights runs forever or that an applicant has the right to take forever to decide on the parameters of its project.¹

WICO's position seems to indicate there are no temporal limits on vested rights. This position is not consistent with Washington law. More than the filing of an application is required to protect an applicant from a subsequent zoning change. *Parkridge v. City of Seattle*, 89 Wn.2d 454, 465, 573 P.2d 359 (1978). In *Parkridge*, the court found substantial evidence that an applicant had been diligent in its efforts to pursue development permits, notwithstanding efforts by the City of Seattle to thwart the project, and was therefore entitled to vest. WICO, quite to the contrary, has not been diligent in its efforts to pursue its application(s).

¹ Kelly/Dorsey's Opening Brief, CP 28, referenced an unpublished Division I opinion with a lengthy vesting analysis on facts similar to those here, but it will not be discussed here in compliance with RAP 10.4(h).

The facts here are unique and possibly egregious, as WICO has fumbled with this project for sixteen years, during which time, we have had 4 presidential elections, two wars in the Middle East, the rise of the Internet, and the dot.com bust. Other development abounds around Lake Chelan.

Meanwhile, WICO plodded along, in starts and fits. In 1991, WICO separated its original 1989 project into two separate projects. (This is sometimes known as piece-mealing development.) Neither project has yet to come to fruition. The site plans and designs continued to change. RD 33, Project Background Pg. 3-5. Information was not provided to regulatory agencies in a timely manner. See Pg. 8-10 above. An accurate site plan was not submitted until very late in the process. Sixteen years is an unbelievably long time.

Vesting is not a blank check. Vesting does not mean that any or all possible uses are vested after an application is filed. The developer has no right to keep changing the parameters of the project. After an application has vested, the applicant's vested rights are limited to the uses disclosed in the application. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997).

In facing the question of what rights vest, *Noble Manor* takes a narrow approach. The uses **disclosed in an application**, not all uses allowed by the laws in existence at the time of application shall vest. *Noble Manor* at 283. The proposal and site plan in the April 1994 application are not the same as what was approved in the Decision. In 1994, WICO's proposal acknowledged substantial public safety/traffic impacts and proposed mitigation consisting of a realignment of the county road and a pedestrian underpass. WICO and the County memorialized both the impact and the various mitigation agreements between WICO and the County. CP 33, Ex Feb. 18, 002 Staff Report, P. 30. By 2005, those important features were now deleted and missing from the approved site plan. RD 34. This is a substantial, adverse change. The traffic/safety issues are magnified by the 2005 site plan, not ameliorated. The trial court certainly recognized the importance of this change. CP 38, Finding 15, p.6.

It is hard to understand the basis for the Hearing Examiner's vesting determination of April 1994. In an August 15, 2001 letter, the assistant director of the Chelan County Planning Dept. notified WICO that as of that time it considered WICO's November 1998 re-application to be different enough to be considered a new application. Ex.1, p.6 to

2002 Decision, RD #136. Again, this is hardly surprising. At the hearing in 2002, the Hearing Examiner found that there were “substantial changes between the application submitted in 1994 and the application submitted on November 6, 1998, which render the prior SEPA determinations obsolete and require additional SEPA review.” 2002 Decision Finding #23, RD 136. WICO did not appeal that finding, although it seems to ignore it. It is not consistent with the February 3, 1995 SEPA/Mitigation Agreement between WICO and Chelan County. RD #135. It is likely that Hearing Examiner was confused by tortured history of this project and was willing to give WICO the benefit of the doubt.² If so, the public interest was not well served.

Although WICO chose to piecemeal the development of its land, that does not confer a right to piecemeal vesting. WICO cannot vest to the housing component on one date, the community dock on another, and roadway configuration on another. The application should vest at

² There is other objective evidence of the Hearing Examiner’s confusion. Finding 64 applies “winery” standards to the project. Condition “VII(c)” requires the road realignment and pedestrian underpass that are not part of the project.

whatever point it includes all of the major elements that are currently being examined. *East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 438, 105 P.3d 94 (2005) (Selective vesting not allowed.).

Courts have recognized the limited scope of vested rights. Municipalities can regulate or even extinguish vested rights by exercising police power reasonably and in furtherance of legitimate public goal. *Edmonds Shopping Center Associates v. City of Edmonds*, 117 Wn. App. 344 (2003) citing to *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 53 (1986).

Likewise, the legislature has set dates for the expiration of vested rights. A vested preliminary plat approvals expire after five (5) years. RCW 58.17.140. Final plat approvals are likewise protected from subsequently adopted land use codes for five (5) years. RCW 58.17.170. If the Hearing Examiner's vesting date is accepted, the applicant has succeeded in extending the approval process for 10+ years, and now has additional time within which to complete the project, which is grossly out of character with the community's legislatively adopted development standards for this area.

4. SEPA Is Not A Benchmark For Vesting.

The Hearing Examiner made an unwarranted and unsupported assumption that SEPA determinations equate to vesting. RD 4, Finding 38. We are unable to locate any case law or statutory law which supports this legal assertion. Nor does WICO offer any legal authority for the position that vested rights derive from completing the SEPA threshold determination process.

If anything, the many SEPA checklists and determinations are an indication of the uncertainty of the project. Under WAC 197-11-340, significant changes to a project warrant the withdrawal of a prior determination of nonsignificance (“DNS”) and a new threshold determination. WAC 197-11-340(3). So using the Hearing Examiner’s own logic, the vesting date for the project would be the last SEPA determination, which was July 2005. RD 131.

The Hearing Examiner’s use of SEPA for a benchmark for a vesting does not square with the 2002 Decision, where he made it clear that the environmental aspects of the project had not been adequately addressed. RD 136, Finding 37.

D. The Conditions of Approval Which Require Future Studies and Public Review and Comment Violate RCW 36.70B.050.

In 1995 the legislature adopted RCW 36.70B and 36.70C to institute reforms in the land use permitting and appeals process. In RCW 36.70B, sometimes referred to as the Project Review Act, the legislature declared that the existing “regulatory burden . . . has made it difficult for the public to know how and when to provide timely comments on land use proposals that require multiple permits and have separate environmental processes.” RCW 36.70B.010(3). Therefore, RCW 36.70B dictates the minimum procedures that jurisdictions must incorporate into their local project review procedures with the goal of coordinating numerous permit procedures into a single process that simplifies the process for applicants, the reviewing jurisdiction and the public. RCW 36.70C (LUPA) provides for judicial review of land use decisions. Both of these statutes are procedural in nature and have applied to the subsequent permit process. *Godfrey v. State*, 84 Wn.2d 959, 961-965, 530 P.2d 630 (1975).

An important regulatory goal was consolidating and simplifying the hearing process. RCW 36.70B.050(2) requires local governments to provide a project review process that: “Except for the appeal of a

determination of significance as provided in RCW 43.21C.075 provides for *no more than one open record hearing* and one closed record appeal.”

[Emphasis added.] In other words, the public has only a single obligation and opportunity to scrutinize the project and its related studies and to provide comment on them.

In the current case, there have been two hearings, in 2002 and 2005. In both cases, WICO’s project was not yet ready for review. In 2002, the Hearing Examiner simply remanded the project for further review. RD 136, p.7. In 2005, the Hearing Examiner adopted a flawed approach that the review would be piecemealed. Critical studies or permits upon which the public should have the right to comment have not even been completed. These include a traffic study (Decision, Condition #12), a cultural resources survey (Decision, Condition #13), stream typing (Decision, Condition #32) and a variance for parking (Decision, Finding #16).

The Decision compounds this error by allowing additional hearings. Condition of Approval 12, Decision, p.16, requires a traffic study be done and circulated to all parties of record who can then request a new or additional public hearing. Condition of Approval #13 also provides for a new or additional public hearing. Condition of Approval #5 does not even

contemplate that there will be an opportunity to comment on the parking variance or stream typing.

RCW 36.70B.050 requires that a consolidated process be used to avoid the public needing to follow along and participate repeatedly. RCW 36.70B.050 contemplates one hearing, not an ongoing process of hearings. The Examiner materially erred in approving the application without such information, which is vital to the review of the project.

Since no more than one public hearing is allowed on a proposal, the effect of the Decision is either (1) the public will be denied an opportunity to challenge the assumptions upon which these studies are based or (2) the applicant and the community will be required to engage in an unlawful process of multiple hearings on the same development project. Rather than provide a consolidated process and opportunity for review, the Hearing Examiner has set up a process that extends the time during which critical information can trickle in and/or shields the developer's project from public comment. Apparently, 16 years of project history was not enough. This was certainly not what was envisioned by the Project Review Act. The Hearing Examiner erred by failing to follow the one open record hearing rule of RCW 36.70.B.050(2).

III. CONCLUSION

WICO's project, as approved, is a substantial non-conforming use, which by definition is inconsistent with "reasoned planning" and detrimental to the public interest. *Anderson v. Island County*, 81 Wn.2d 312, 323-324 (1972). No Washington statutes or case law support an analysis that an application can be vested for over ten years while the applicant experiments with different designs and then decides to come back to one which partially resembles one which may or may not have vested 11 years earlier. No statute or case law supports a vesting determination based upon a withdrawn SEPA determination.

Even today, if approved, the project remains a muddle. The Shoreline Conditional Use Application, critical for the waterfront facilities, has been denied by DOE. No traffic analysis has been submitted, notwithstanding significant, and unrebutted, concerns from Chelan County Public Works Department and the public due to the removal of a significant feature designed to mitigate potentially dangerous traffic conflicts. RD #110.

The Hearing Examiner's 2005 Decision is not supported by substantial evidence and the application of the law to the facts is clearly

erroneous. The Superior Court did not err in reversing the Decision and denying the issuance of the CUP.

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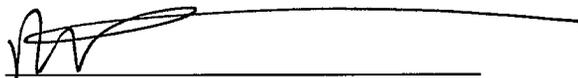
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I filed with the Court of Appeals, Division III, the foregoing Brief of Respondents, and served, via U.S. Mail, first-class postage prepaid, a copy of the same on the following:

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