

SUPREME COURT  
OF THE STATE OF WASHINGTON

LOUISE LAUER and DARRELL de TEINNE,

*Petitioners,*

v.

PIERCE COUNTY; and MIKE and SHIMA GARRISON,

*Respondents.*

STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF  
PIERCE COUNTY, STATE OF WASHINGTON  
Superior Court No. 08-2-06665-2

And

COURT OF APPEALS DIVISION II - 38321-7-II

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ANSWER OF RESPONDENTS GARRISON IN RESPONSE TO PETITION FOR REVIEW

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## I. INTRODUCTION

Petitioners Louise Lauer and Darrell de Teinne (hereafter “Petitioners”) have filed a Petition for Review which attempts to disguise a simple factual dispute as a matter of “significant public interest.” *Petition for Review*, at 11 (hereafter “*Petition*”); and RAP 13.4(b). Petitioners’ disagreement with Division II’s factual conclusions does not rise to a level which justifies review by the Supreme Court. RAP 13.4(b) Michael and Shima Garrison (hereafter “Garrisons”) ask this Court to deny Petitioners’ request for discretionary review.

No matter how much Petitioners might want this Court to find otherwise, the decision of Division II cannot be construed to establish a precedence which would “shield and provide vested rights to applicants who knowingly submit inaccurate information with their application.” *Petition*, at 11.

What Division II’s decision actually stands for is a determination that *Petitioners failed to meet their burden* of establishing error; and that substantial evidence supported the Hearing Examiner’s decision that the application was complete. *Lauer v. Pierce County*, 157 Wn.App. 693, 705-707, 238 P.3d 539 (2010). There is simply nothing in Division II’s decision that can be construed to protect or “shield” intentional and material misrepresentations by an applicant. *Lauer*, 157 Wn.App. at 705-

710. Further, Division II clearly concluded that Petitioners failed to satisfy their burden to establish the Garrisons “knowingly misrepresent[ed] salient features of the site” or “affirmatively mislead the County.” *Lauer*, 157 Wn.App. at 707.

Division II properly affirmed the Hearing Examiner’s decision granting the Garrisons’ variance. After more than six years of litigation, the Garrisons ask this Court to end the delay and expense of this perpetual litigation. Review should be denied.

**II. COUNTER STATEMENT OF ISSUES  
PRESENTED FOR REVIEW**

A. ISSUES PRESENTED BY PETITIONERS:

1. Whether this Court should deny the Petition for Review when the case presents no issues of substantial public interest.
2. Whether this Court should deny the Petition for Review when the Division II decision is not in conflict with the decision of another Division of the Court of Appeals.

B. DISPOSITIVE ISSUES PRESENTED BUT NOT DECIDED BY COURT OF APPEALS:

Pursuant to RAP 13.4(d) and 13.7(b), if the Court grants review, the Garrisons ask this Court to also review three issues that were raised

but which were not decided by Division II when it decided the case on other grounds.<sup>1</sup> Specifically:

1. Whether the Superior Court erred in refusing to strike claims regarding standing alleged by Petitioners in paragraph 8 of their LUPA petition when the facts asserted were not supported by the record.
2. Whether the Superior Court erred in finding that Petitioners' met their burden of establishing each of the elements of standing pursuant to RCW 36.70C.060(2) relying upon facts which were directly in conflict with the unchallenged findings of the Hearing Examiner.
3. Whether the Superior Court erred in finding that Petitioners were not equitably estopped from alleging that the Garrisons' application should not vest when Petitioners were actively engaged in a prior land-use dispute between Pierce County (the "County") and the Garrisons which resulted in a settlement agreement which recognized the Garrisons' vested rights.

### III. STATEMENT OF THE CASE

It is an understatement that many of the facts asserted in the *Petition* are disputed. As has become their predicable *modus operandi*,

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<sup>1</sup> See *Lauer*, 157 Wn.App. at 710, FN 12.

Petitioners have chosen to focus on their own skewed version of the facts, which has little relevance to the actual issues. Petitioners routinely attempt to tell a story where the Garrisons are painted as environmental villains -- in what can only be a thinly veiled attempt to distract the Court from the real issues.<sup>2</sup> In truth, the Garrisons are simply a family attempting to build their home, on their own property, near a stream which has little to no ecological value.<sup>3</sup> AR at 30.

Regardless of the pages of “facts” offered by the Petitioners, this is not – *and has never been* – a case about protecting the environment. In point of fact, Petitioners have *conceded* that the Garrisons have met the criteria for a variance under former PCC 18E.60.050, which are designed to ensure the protection of the environment.<sup>4</sup> Furthermore, as mentioned above, the stream at issue in this case is non-fish bearing and in an extremely degraded condition by the time it even reaches the Garrisons’ property. AR at 211, 230, and 235; and RP at 5, 9-10, 38-39. Finally,

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<sup>2</sup> Petitioners have also taken liberty with many of their citations to the record – arguing that the record stands for their version of the facts when a reading of the record in this case speaks for itself. This Court should “decline to consider facts recited in the briefs but not supported by the record.” *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 626, 160 P.3d 31, 39 (2007), citing RAP 10.3(a)(5), 13.4(c).

<sup>3</sup> The stream is degraded by activities *upstream* from the Garrison property, including the culverting of the stream by Petitioner deTeinne, run-off from Highway 302, etc. AR at 211, 230, and 235; and RP at 5, 9-10, 38-39.

<sup>4</sup> The criteria for granting a variance under former PCC 18E.60.050 required that the Garrisons demonstrate that the project would not harm the environment – particularly that the project would: 1) not effect water temperature; 2) minimize sedimentation; and 3) provide food and cover for critical fish species. The Hearing Examiner found that the proposed project satisfied each of these criteria. AR 36-37. Petitioners did not appeal that determination. CP 1-32.

nothing that will be done on the Garrisons' property will have *any impact* on either of the Petitioners' adjacent properties.<sup>5</sup>

In the end, this is just another run-of-the-mill case about a neighborhood dispute over change. Petitioner Lauer has lived on her property since 1963, and has made no secret that she liked things the way they were before the Garrisons bought the property. AR at 32-33. The desire to prevent change was not, however, triggered by anything the Garrisons did, but rather it existed *before* the Garrisons owned the property, as evidenced by a letter sent from Petitioner Lauer's son to the County in 2002. AR at 254-255.

Keeping in mind the relatively narrow issues before this Court as part of a petition for review, as well as the page limitations imposed by RAP 13.4, the Garrisons will focus on the facts which are *actually* relevant to the issues presented. The Garrisons reserve the right to dispute any and all facts asserted by Petitioner should the petition be granted. The following are *uncontested* facts:

1. Petitioners have failed to submit the entire building permit application, submitted by the Garrisons' to the County, as part of

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<sup>5</sup> The entire project is located on the Garrisons' property. When the stream leaves the property it empties into Henderson Bay. AR at 111. Neither Petitioner will be impacted by erosion or turbidity. AR at 30-31, 36, 42-48, and 54-55; RP 4-5, 12-16, and 38-40.

this record. AR 1-338. The *only portion* of the application submitted into the record is a one page site plan. AR at 131.

2. The Garrisons submitted their building permit application in March 2004. AR at 35.
3. The application was accepted and processed by the County, and in May 2004 a building permit was issued by the County. RP at 8.
4. Petitioners have been engaged in litigation with the Garrisons since 2004 and have been monitoring the activities of the Garrisons since 2003. AR at 78 and 302. Petitioners did not question whether the Garrisons had submitted a complete building application until October 24, 2007, 3-1/2 years *after* the building permit application was filed with the County. AR at 236 – 241.
5. The Garrisons' 2004 site plan was professionally prepared. AR at 132-133.
6. The site plan submitted by the Garrisons clearly depicts a drainage course at the location of the stream, as well as the culvert. AR at 263.
7. Prior to the submittal, the County was well aware of the stream's existence. AR at 176, 178, 180 and 184. The County's biologist, Scott Sissons, had visited the site prior to the building permit application. AR at 176, 178, 180 and 184.

8. The stream at issue in this case is non-fish bearing and in an extremely degraded condition. AR at 211, 230, and 235; and RP at 5, 9-10, 38-39.
9. The Hearing Examiner determined that the Garrisons' variance application *fully satisfied* each of the requirements for a variance under the County's code. The Petitioners have never challenged this determination. AR 28-40. See also, CP 1-32.

#### IV. ARGUMENT

RAP 13.4(b) sets forth the grounds which must be established before review will be accepted:

1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Petitioner appears to seek review under the second and fourth prongs.

*Petition*, at 11-12.

A. THE PETITION FOR REVIEW SHOULD BE DENIED BECAUSE PETITIONERS ARE UNABLE TO ESTABLISH AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

In *Lauer*, Division II affirmed the Hearing Examiner's decision on vesting under two alternative basis: 1) that there was "substantial

evidence” supporting the Hearing Examiner’s determination that the application was complete; and 2) that the Garrisons’ application was complete by operation of law under RCW 36.70B.070(4). *Lauer*, 157 Wn.App. at 705-710. Neither of these alternatives rises to the level of creating an issue of substantial public interest.

1. The Issue in this Case is whether the *Petitioners* were able to Satisfy their Burden of Establishing Error Under RCW 36.70C.130.

Petitioners seek to dress-up their petition for review as a matter of “public interest” when it is really about their failure to meet their burden of establishing that the Hearing Examiner erred.<sup>6</sup> Under RCW 36.70C.130 Petitioners must establish that the Hearing Examiner’s decision was “clearly erroneous.” The “clearly erroneous” test requires the Court to affirm the decision unless the “court is left with the definite and firm conviction that a mistake has been made.”<sup>7</sup> Courts must give “substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulations.”<sup>8</sup>

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<sup>6</sup>*Sylvester v. Pierce County*, 148 Wn.App. 813, 823, 201 P.3d 381 (2009), citing, *N. Pac. Union Conference Ass'n of the Seventh Day Adventists v. Clark County*, 118 Wn.App. 22, 28, 74 P.3d 140 (2003); and *Griffin v. Thurston County*, 165 Wn.2d 50, 54-55, 196 P.3d 141 (2008).

<sup>7</sup> *Schofield v. Spokane County*, 96 Wn.App. 581, 586, 980 P.2d 277 (1999).

<sup>8</sup> *Timberlake Christian Fellowship v. King County*, 114 Wn.App. 174, 180, 61 P.3d 332 (2002).

Division II's decision to affirm the Hearing Examiner was clearly based upon *Petitioners'* failure to meet their burden as required under RCW 36.70C.130. Division II found that:

...Thus, based on the record, *substantial evidence supports the hearing examiner's determination* and he did not err in concluding that the Garrisons' 2004 permit application was complete *and that they did not knowingly misrepresent salient features of the site and affirmatively mislead the County.*

*Lauer*, 157 Wn.App. at 707. Thus, Petitioners failed to establish that the Hearing Examiner erred when he found that the Garrisons' building permit application vested to the pre-2004 regulations. The *Petition for Review* should be denied.

2. Division II's Decision does not Establish a Precedence that Would Allow an Applicant who "Knowingly Submits Inaccurate Information" to Vest.

Despite Petitioners' attempts to distort Division II's decision to meet their version of the facts, the decision does not *actually* stand for the proposition that "applicants who knowingly submit inaccurate information with their applications" are "*shielded*" by the vested rights doctrine. *Petition*, at 11.<sup>9</sup> In their efforts to try and raise this case to a matter of public interest, Petitioners ignore the practical reality that, in the end, an application that might be "vested" could ultimately still be

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<sup>9</sup> As already discussed above, the Court found that the Garrisons did not "knowing misrepresent salient features on the site." *Lauer*, 157 Wn.App. at 707.

denied.<sup>10</sup> There is no “right” to approval simply because an application is incomplete.<sup>11</sup>

Division II’s decision does not present “a matter of significant public interest.” First, the Division II decision does not create any new precedence on issues of vesting. The decision is based on well-established and recognized principles of vesting law.<sup>12</sup> Vesting does not “shield” an applicant from anything other than the right to have their application processed under defined rules. Vesting does nothing more than “allow developers to determine, or ‘fix,’ the rules that will govern their land development.”<sup>13</sup> As discussed above, a finding that a permit application is vested is not tantamount to guaranteeing a developer the ability to build. “A vested right merely establishes the ordinances to which a building permit and subsequent development must comply.”<sup>14</sup> In essence, vesting sets the rules by which all the parties must abide; vesting

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<sup>10</sup> *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986) (...a municipality has the discretion to deny an application for a building permit...). See also, RCW 19.27.095(5); RCW 36.70B.020(2) both contemplate that a “complete” application does not limit the reviewing agency from requesting additional information.

<sup>11</sup> The facts of this case are illustrative. Assuming for the sake of argument that there was evidence that the Garrisons “intentionally deceived” the County, the decision of Division II and the Hearing Examiner did not act to “shield” them from having to comply with the County’s Code requirement. In fact, the Garrisons submitted a variance application, and the Hearing Examiner found that their project was in *actual compliance* with the County’s Code requirements. AR at 32-36.

<sup>12</sup> *Lauer*, 157 Wn.App. at 707-710, citing *West Main*, 106 Wn.2d at 50-51, 720 P.2d 782 (1986); *Abbey Rd. Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 258 and 260, 218 P.3d 180 (2009); and *Schultz v. Snohomish County*, 101 Wn.App. 693, 701, 5 P.3d 767 (2000).

<sup>13</sup> *West Main*, 106 Wn.2d at 51.

<sup>14</sup> *West Main*, 106 Wn.2d at 53.

does not relieve the applicant from the obligation to abide by those rules. No one vests to the right to ignore the law. In this case, it is undisputed that the variance application submitted by the Garrisons fully complied with all of the criteria under the County's Code.

3. The Decision of Division II Simply Gives Effect to the Plain Meaning of RCW 36.70B.070.

a. *The Garrisons' Permit is Vested under RCW 36.70B.070.*

Petitioners have virtually ignored Division II's holding that RCW 36.70B.070(4) *also* mandates a denial of their appeal. It is well-settled that one of the fundamental objectives of the judiciary is to ascertain and carry out the legislature's intent. If a statute's meaning is plain on its face then the courts must give effect to that plain meaning as an expression of legislative intent.<sup>15</sup>

As discussed by Division II, RCW 36.70B.070(4) controls the outcome of this case.<sup>16</sup> RCW 36.70B.070 states in relevant part:

**36.70B.070 Project permit applications — Determination of completeness — Notice to applicant.**

- (1) *Within twenty-eight days* after receiving a project permit application, a local government planning

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<sup>15</sup> *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001); *Young v. Estate of Snell*, 134 Wn.2d 267, 279, 948 P.2d 1291 (1997) (the meaning of a statute must be derived from the wording of the statute itself where the statutory language is plain and unambiguous); *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 752, 953 P.2d 88 (1998); *State ex rel. Royal v. Bd. of Yakima County Comm'rs*, 123 Wn.2d 451, 458, 869 P.2d 56 (1994).

<sup>16</sup> *Lauer*, 157 Wn.App. at 707-710.

pursuant to RCW 36.70A.040 shall mail or provide in person a written determination to the applicant, stating either:

- (a) That the application is complete; or
- (b) That the application is incomplete and what is necessary to make the application complete.

To the extent known by the local government, the local government shall identify other agencies of local, state, or federal governments that may have jurisdiction over some aspect of the application.

- ...
- (4) (a) *An application shall be deemed complete under this section if the local government does not provide a written determination to the applicant that the application is incomplete as provided in subsection (1)(b) of this section.*

...

[Emphasis Added]. RCW 36.70B.070 squarely puts the burden on the reviewing government agency to promptly process an application. The legislature clearly intended to create a simplified and efficient land use application process through the adoption of Chapter 36.70B RCW. See RCW 36.70B.010 (Findings and Declaration).

Petitioners, however, ignore the plain language of RCW 36.70B.070 and instead focus on RCW 19.27.095.<sup>17</sup> While it is clear that

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<sup>17</sup> Petitioners' argument that the 1997 Uniform Building Code (UBC) supports their conclusion is misplaced. First, the UBC codes referenced are provisions relating to *issued permits* – not *applications* for permits (i.e. the codes cited have nothing to do with vesting – which is a pre-decision doctrine). These codes direct how the adopting agency should handle permits which are in violation of the law. Second, the UBC cannot override the requirements of State law. For example, if the County fails to act on an allegedly "invalid" permit within the requisite appeal period it will be barred from taking any action. See, *Samuel's Furniture v. Department of Ecology*, 147 Wn.2d 440, 453, 54 P.3d 1194 (2002); and *Chelan County v. Nykreim*, 146 Wn.2d 904, 929, 52 P.3d 1 (2002). The import of this is: 1) these provisions have nothing to do with the vesting of an application; and 2) these provisions cannot be deemed to over-ride the clear

RCW 19.27.095 defines the *content* for a complete building permit application, it is equally clear that the provisions of Chapter 36.70B RCW also apply to building permit applications and define the *procedure* by which the local jurisdiction must *process* the application.<sup>18</sup>

In this case, the Garrisons' application was filed in March 2004. AR at 35. There is nothing in the record to indicate County staff issued a written determination that the application was not complete; in fact, all evidence is to the contrary.<sup>19</sup> At the very least, the Garrisons' permit application was deemed "complete" by operation of law twenty-eight days after the application was filed (sometime in April 2004). Because the Garrisons' application was complete, they were vested to the regulations that were in effect as of March 2004.

***b. A Plain Reading of RCW 36.70B.070 does not "Promote Deceitful Conduct" on the Part of Applicants.***

Without citing to any case law, Petitioners argue that to allow an application to be vested by operation of law will "promote deceitful conduct in the application process." *Petition*, at 13. The Petitioners argument appears to be premised on the belief that a "deceitful" applicant

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requirements of RCW 36.70B.070 which mandate efficient and prompt processing of applications.

<sup>18</sup> RCW 36.70B.020(4) (Defining "Project permit" or "project permit application" to include building permits).

<sup>19</sup> In fact, the permit was sufficiently complete that in May 2004 the County issued a building permit. RP at 8.

will be rewarded for his or her conduct. This argument is without merit.

First, as already discussed above, vesting does nothing other than “fix the rules” – an applicant gains *nothing* by being “deceitful” in filing his or her application. The application will be processed, and if the project does not satisfy the code provisions it will be denied. Second, this argument completely ignores the fact that this Court has adopted a bright line rule explicitly rejecting a requirement that an applicant demonstrate good faith before his or her application vests.<sup>20</sup>

*c. Petitioners’ Disagreement with Division II over whether the Garrisons’ Application Satisfies RCW 19.27.095 is not an Issue of Substantial Public Interest.*

Petitioners argue that the Court should grant review because the Garrisons’ application “was not complete” under RCW 19.27.095. *Petition*, at 15-17. As noted above, the Garrisons’ strongly dispute many of the facts asserted by the Petitioners,<sup>21</sup> however, for purposes of this *Answer*, the question is not whether there were facts demonstrating that the Garrisons’ application did or did not satisfy RCW 19.27.095, but

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<sup>20</sup> *Eastlake Community Council v. Roanoke Associates, Inc.* 82 Wn.2d 475, 481, 513 P.2d 36 (1973), citing *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958) (“We prefer not to adopt a rule which forces the court to search through the moves and countermoves of parties ...”); see also, *Allenbach v. City of Tukwila*, 101 Wn.2d 193, 199, 676 P.2d 473 (1984) (Under the Washington vested rights doctrine, there is no need for Courts to inquire into the “good faith” of the applicant.).

<sup>21</sup> Furthermore, as noted above, Petitioners submitted only one page of the Garrisons’ entire building permit into the record. Their failure to establish a record of the actual building permit, when coupled with the fact that they bear the burden of establishing error, further warrants the Court’s denial of their *Petition*.

rather whether this issue is of “substantial public importance.” RAP 13.4(b). The fact that Petitioners disagree with how Division II viewed these facts does not, itself, warrant this Court accepting review.

B. THE PETITION FOR REVIEW SHOULD BE DENIED BECAUSE PETITIONERS ARE UNABLE TO ESTABLISH THAT DIVISION II’S DECISION IS IN CONFLICT WITH ANOTHER DECISION OF THE COURT OF APPEALS.

Petitioners argue that Division II’s decision conflicts with Division III’s decision in *Kelly v. County of Chelan County*, 157 Wn.App. 417, 237 P.3d 346 (2010). The *Kelly* and *Lauer* decisions, however, are not in conflict and are easily distinguishable.

*a. Lauer v. Pierce County – Holding*

As noted above, Division II’s decision in *Lauer v. Pierce County* stands for two alternative propositions: 1) the Hearing Examiner did not err in finding that the Garrisons’ application was complete; and 2) the application was complete by operation of law under RCW 36.70B.070(4)(a). *Lauer*, 157 Wn.App. at 705-710.

*b. Kelly v. County of Chelan County – Holding*

Division III’s decision in *Kelly v. Chelan County* holding is as follows:

The Developers’ 1994 application was incompatible with the comprehensive plan in effect at the time. The applications, then, had to be denied. Former CCC 11.56.010(c). *And, for*

that reason, the Developers' rights could not have vested in 1994.

*Kelly*, 157 Wn.App. at 428. [Emphasis Added]. In *Kelly*, the applicant submitted an application that would have required an amendment to the County's comprehensive plan.<sup>22</sup> Thus, *Kelly* stands for the holding that an application that could never have been approved from its inception cannot be deemed to have vest.

c. *Kelly and Lauer are not in Conflict*

The *Kelly* decision is not in conflict with the *Lauer* decision. First, the determination by Division II that there are facts sufficient to find that the Garrisons' permit application was "complete" is not contrary to the decision in *Kelly*. There is nothing within the *Kelly* decision which discusses the requirements for a complete application. *Kelly*, 157 Wn.App. at 417-428.<sup>23</sup>

Finally, the *Kelly* decision never discusses the applicability of RCW 36.70B.070. *Kelly*, 157 Wn.App. at 417-428.

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<sup>22</sup> The factual history of the *Kelly* case is confusing and convoluted, with apparently seven or more significant revisions to the application. However, the Court makes very clear that the applicant was seeking development approval for a project which was "incompatible with the adopted comprehensive plan" which had been incorporated into the County's zoning ordinance. The initial application was for a "multi-family dwelling" which was also in violation of the zoning requirement which only allowed single-family homes or duplexes. *Kelly*, 157 Wn.App. at 417-428.

<sup>23</sup> *Kelly* does mention the Hearing Examiner's finding that the SEPA application was complete. However it does not discuss the "completeness" of the CUP application and notes that the Hearing Examiner's finding was "troublesome." *Kelly*, 157 Wn.App. at 424-425.

Petitioners argue that the holding in *Kelly* requires that *only* outright permitted applications will vest. *Petition*, at 17-18. Under such a theory, only the simplest projects would vest. As noted above, this is not the holding in *Kelly* and would be contrary to long established case law.<sup>24</sup>

Additionally, Petitioners' theory, if accepted, would completely undermine the purposes of LUPA in supporting administrative finality in land use decisions.<sup>25</sup> Persons who are dissatisfied with the results of any land use decision could raise the issue of vesting at any time even when, as in this case, several *years* have passed from the determination that the application was complete. Such a result would be disastrous to the fundamental purposes of finality, particularly in such cases where a project proponent has invested significant time and money developing the project proposal.

If Petitioners reasoning was followed to its natural conclusion, then every government entity could prevent vesting by simply making all

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<sup>24</sup> See, e.g., *Weyerhaeuser v. Pierce County*, 95 Wn.App 883, 976 P.2d 1279 (1999) (conditional use permit); *Beach v. Board of Adjustment of Snohomish Cy.*, 73 Wn.2d 343, 347, 438 P.2d 617 (1968) (conditional use permit); *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 207, 884 P.2d 910, 917 (1994) (variance); and *Talbot v. Gray*, 11 Wn.App. 807, 811, 525 P.2d 801 (1974), review denied, 85 Wn.2d 1001 (1975) (substantial development permit)

<sup>25</sup> *Nykreim*, 146 Wn.2d at 931-932; quoting *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001), (alterations in original) (quoting *Deschenes v. King County*, 83 Wn.2d 714, 716-17, 521 P.2d 1181 (1974)). See also *Grundy v. Brack Family Trust*, 116 Wn.App. 625, 67 P.3d 500 (2003), reversed on other grounds, 155 Wn.2d 1, 117 P.3d 1089 (2005).

of its permits “conditional.” Such a result would completely undermine the recognized vested rights established under Washington law. Any such ordinance or application procedure would be unduly oppressive upon individuals. In *West Main*, the City of Bellevue adopted just such an ordinance by defining the elements for a complete building permit application to require the applicant to obtain conditional use permits, get site plan approval, and a series of other actions before it could vest its rights by filing a building permit application. The court invalidated the ordinance because it improperly established several hurdles for *West Main* to clear before it could vest its rights.<sup>26</sup>

Finally, the facts in this case are easily distinguished. Unlike the application in *Kelly*, the Garrisons’ project was for an approved use (single family home). AR at 44. The Garrisons needed neither a zoning code amendment nor a comprehensive plan amendment for their project to be approved. The Garrisons’ project complied with the applicable regulations which were in effect at the time of the application, including the variance criteria under the Pierce County Code. AR 28-38, and 42-48.

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<sup>26</sup> *West Main*, 106 Wn.2d at 52-53.

**V. ISSUES RAISED BUT NOT CONSIDERED  
BY DIVISION II**

In reaching its decision, Division II declined to reach three issues raised in briefing by the parties.<sup>27</sup> These issues presented alternative grounds for denying the Petitioners' appeal. If the Court accepts review, the Garrisons respectfully request that the following issues also be decided by this Court:

1. Whether the Superior Court erred in refusing to strike claims regarding standing alleged by Petitioners in paragraph 8 of their LUPA petition when the facts asserted were not supported by the record.
2. Whether the Superior Court erred in finding that Petitioners met their burden of establishing each of the elements of standing pursuant to RCW 36.70C.060(2) relying upon facts which were directly in conflict with the unchallenged findings of the Hearing Examiner.
3. Whether the Superior Court erred in finding that Petitioners were not equitably estopped from alleging that the Garrisons' application should not vest when Petitioners were actively engaged in a prior land-use dispute between the County and the Garrisons

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<sup>27</sup> *Lauer*, 157 Wn.App. at 710, FN 12. In footnote 12, Division II discusses two issues; however the issues of standing also included the question of whether certain evidence should have been stricken.

which resulted in a settlement agreement which recognized the  
Garrisons' vested rights.

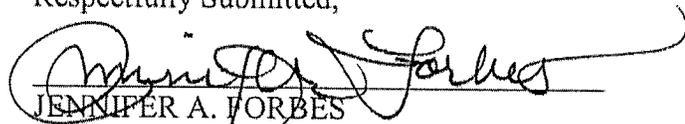
While these three issues do not rise to the level necessary to establish independent grounds for this Court to accept review under RAP 13.4(b), each of these issues presents an alternative ground for denying the relief requested by Petitioner.

## VI. CONCLUSION

For the above-stated reasons, the Garrisons respectfully request that the Court deny the Petition for Review. If the Court accepts review, then the Court should also consider the three issues raised but not decided by the Court of Appeals.

Dated this 8<sup>th</sup> day of November 2010.

Respectfully Submitted,



JENNIFER A. FORBES

Attorney for Michael and Shima Garrison  
WSBA #26043

CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of November, 2010, a true and correct copy of the foregoing document was served upon counsel of record, via the methods noted below, properly addressed as follows:

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Both Counsel for Petitioners and Counsel for Pierce County have consented to receive service of this pleading by e-mail.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8<sup>th</sup> day of November 2010.

Anita K. Acosta  
Anita Acosta

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