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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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SNOHOMISH COUNTY and  
BSRE POINT WELLS, LP,

Appellants,

v.

TOWN OF WOODWAY and  
SAVE RICHMOND BEACH,

Respondents.

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***AMICUS CURIAE* BRIEF ON BEHALF OF BUILDING INDUSTRY  
ASSOCIATION OF WASHINGTON**

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## **I. INTRODUCTION**

The King County trial court's ruling that Appellant BSRE Point Wells' permit applications were not vested to the County's comprehensive plan and development regulations in effect at the date of permit application is of great concern Amicus Curiae Building Industry Association of Washington. In particular, *Amicus* BIAW argues that the court's decision is contrary to our state's decades-old vesting laws. If left to stand, this decision will have far-reaching, detrimental effects on the housing industry.

## **II. ISSUE OF CONCERN TO *AMICUS CURIAE***

Whether the trial court's ruling in favor of the Town of Woodway and Save Richmond Beach is contrary to our state's strong vesting doctrine and therefore affects the certainty and predictability that are cornerstones of the development process in Washington.

## **III. IDENTITY AND INTEREST OF *AMICUS CURIAE* BUILDING INDUSTRY ASSOCIATION OF WASHINGTON**

The Building Industry Association of Washington ("BIAW") represents nearly 8,500 member companies who employ tens of thousands of Washingtonians. BIAW is made up of 16 affiliated local associations: the Building Industry Association of Clark County, Central Washington Home Builders Association, Jefferson County Home Builders Association,

Master Builders Association of King and Snohomish Counties, Home Builders Association of Kitsap County, Lewis-Clark Building Contractors Association, Lower Columbia Contractors Association, North Central Home Builders Association, North Peninsula Building Association, Olympia Master Builders, Master Builders Association of Pierce County, San Juan Builders Association, Skagit-Island Counties Builders Association, Spokane Home Builders Association, Home Builders Association of Tri-Cities and the Building Industry Association of Whatcom County.

BIAW's members are engaged in every aspect of the residential construction industry, from the initial investment stage to the marketing and selling of homes. These are the individuals and companies who apply for permits and pay the fees, taxes and upfront investment cost in reliance on local regulations. They are affected by any change in development regulations and any change in the way the Growth Management Act is implemented. Therefore, the trial court's decision has a unique and direct impact on BIAW members.

#### **IV. STATEMENT OF THE CASE**

*Amicus* BIAW adopts and incorporates the statement of facts as set forth in the Opening Briefs submitted by Appellants Snohomish County and BSRE Point Wells.

## V. ARGUMENT

*“Certainty is the mother of quiet and repose, and uncertainty the cause of variance and contentions.” Edward Coke, English Barrister & Judge (1552-1634)*

*“The tendency of the law must always be to narrow the field of uncertainty.” Oliver Wendell Holmes, Common Law 127 (1881).*

The trial court’s decision creates new law in Washington State because it says landowners and the industry serving them can no longer rely on the planning decisions by local governments. Amicus BIAW asks the Court to consider the effect of this ruling on the building industry because it is contrary to both common law and statutory vesting law.

### **A. A century of common law says our state’s vested rights doctrine ensures certainty and fairness for builders and developers.**

Unlike other states, Washington has a decades-old vested rights policy that gives builders and developers certainty that they can proceed under land use laws in effect at the time that an application is submitted to a local government. Washington’s vested rights doctrine is based on public policy favoring finality and certainty has been addressed and upheld again and again by courts in Washington.

In our state, “a land use application . . . will be considered only under the land use statutes and ordinances in effect at the time of the application’s submission.” *Noble Manor Co. v. Pierce County*, 133 Wash. 2d 269, 275, 943 P.2d 1378, 1381 (1997) (internal citation omitted).

The reasons for this approach, repeatedly articulated by Washington courts, are predictability, certainty and practicality:

[W]e prefer to have a date certain upon which the right vests. . . We prefer not to adopt a rule which forces the court to search through ‘the moves and countermoves of . . . parties . . .’ The more practical rule to consider, we feel, is that the right vests [upon application].

*Hull v. Hunt*, 53 Wash.2d 125, 130, 331 P.2d 856, 859 (1958).

**B. The Washington Legislature made a clear choice in favor of certainty.**

In addition to our state’s common law vesting doctrine, Washington also has two vesting statutes, RCW 58.17.033, which applies to the vesting of plat applications and RCW 19.27.095, which applies to building permits. The two contain nearly identical language.

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. RCW 58.17.033.

In addition, the Legislature punctuated this clear Legislative mandate by enacting a vesting damages statute to compensate property owners whose vested rights have been violated. RCW 64.40.010.

The Legislature made the choice for a “date certain” approach. This was not in following with the majority of other states. Under what is

referred to as the “majority rule,” a developer must (1) make substantial expenditures (2) in good faith reliance (3) on a validly issued building permit in order to acquire a vested right and be protected from subsequent changes in regulations. And under what has been called the “minority rule,” the developer vests to the regulations in effect at the date of project *approval*. See Gregory Overstreet and Diana M. Kirchheim, The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest, 23 Seattle U. L. Rev. 1043, 1045 (2000).

Both of these approaches provide less certainty than Washington’s chosen route. Washington’s law is unique, although other states have recognized the benefits of a “date certain” approach:

Texas and California are the two states with application statutes similar to Washington. Both states enacted such legislation because their common law rules for vesting resulted in substantial hardship for landowners. . .In essence, Washington has been a trailblazer for states like California and Texas, which have adopted vesting legislation similar to Washington's. In fact, California and Texas have used Washington's law as a starting point. However, Washington still has the strongest vesting law because, unlike California or Texas, Washington's vested rights doctrine supplements its statutory protections with a long history of strong common law and constitutional protections.

Gregory Overstreet and Diana M. Kirchheim, The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest, 23 Seattle U. L. Rev. 1043, 1068-69 (2000).

**C. The housing industry's survival depends on certainty.**

The Washington Supreme Court has repeatedly articulated the importance of this approach to the health of the housing industry. “The purpose of the vested rights doctrine is to provide a measure of certainty to developers and to protect their expectations against fluctuating land use policy.” *Noble Manor* at 278.

In *West Main Associates v. City of Bellevue*, 106 Wash.2d 47, 720 P.2d 782 (1986), the Court considered the application of the vested rights doctrine to a city ordinance. The Court in *West Main* reasoned that “society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.” *West Main*, 106 Wash.2d at 53. The Court concluded that the city “misused its power by denying developers the ability to determine the ordinances that will control their land use.” *Id.*

The same reasoning was used by the Court more than 50 years ago:

An owner of property has a vested right to put it to a permissible use as provided for by prevailing zoning ordinances. The right accrues at the time an application for a building permit is made. The moves and countermoves of the parties hereto by way of passing ordinance and bringing actions for injunctions, should had did avail the parties nothing. A zoning ordinance is not retroactive so as to affect rights that have already vested.

*State ex rel. Ogden v. City of Bellevue*, 45 Wash. 2d 492, 496, 275 P.2d 899, 902 (1954) citing to *State ex rel. Hardy v. Superior Court for King County*, 155 Wash.2d 244, 284 P. 93 (1930).

Certainty and predictability are necessary for the building industry's survival. The PCHB's decision upsets one hundred years of common law, and if left to stand, a builder or property owner in Washington will be forced to proceed without knowing which rules and regulations apply.

**D. The law on vesting strikes the proper balance and should not be weakened.**

Our state's vested rights doctrine does not let developers "off the hook" when it comes to complying with laws; it simply lays out the rules of the game that the developer has to follow. Having "a vested right" does not mean that the law is frozen in place. Virtually all land use permits expire. A developer has only seven years between preliminary and final plat approval, for example. RCW 58.17.140. (This "vesting period" was five years until the Legislature extended it to seven in 2010 to address the housing recession. The seven year allowance sunsets in 2014.) See also, for example, Spokane County Code 12.100.116: "Approval of preliminary subdivisions, large lot subdivisions, short subdivisions, and binding site plans shall automatically expire five years after preliminary

approval is granted. . .” Local governments can also require construction to commence in a reasonably short period after permit approval. Most local governments follow the model building code, which provides that a building permit expires 180 days after the date of issue.

The Washington Supreme Court recognized that the vesting rule strikes a balance between the public interest and property rights:

“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.

This court recognized the tension between public and private interests 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 substantial commitment by the developer, such that the good faith of the applicant is generally assured.”

*Erickson & Associates, Inc. v. McLerran*, 123 Wash. 2d 864, 873-74, 872 P.2d 1090, 1095-96 (1994).

Washington’s vested rights doctrine should not be weakened by allowing the trial court’s decision to stand.

**E. The economic consequences of the trial court’s decision will have far-reaching, detrimental effects on the building industry.**

Builders and developers must be risk takers. They must also do a significant amount of homework before beginning a project in order to

ensure it is feasible – both financially and on-the-ground. The paperwork part of the project is a significant investment. Each application made to a city or county represents an extraordinary cost to the developer or builder.<sup>1</sup>

From the developer’s perspective, it is critical to point out that the land development process – from feasibility studies to being “shovel-ready” – is risky and expensive. Recognizing this fact, our state’s courts have upheld and strengthened the “date certain” vesting rule as a way to provide fairness, certainty and predictability to the building industry.

The trial court’s decision is a fatal blow to this doctrine which provides a strong foundation for our state’s land use system. The trial court has re-written the law and essentially said that developers cannot rely on existing regulations when appeals are pending against those regulations. This is not only contrary to the law, it leads to absurd results. For years upon end, no applicant – or local government -- would know which rules apply to the application. This presents an opposite picture of what was intended by the Legislature and repeatedly articulated by the Courts of Washington.

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<sup>1</sup> Using Thurston County as an example, the “base fee” for site plan review is over \$2,000. This does not include Critical Areas Review, Design Review, Environmental Assessment, Environmental (SEPA) Checklist, Hearing Examiner Review (required for many large projects), or administrative “conference fees” – *each* of these additional items also runs in the thousands of dollars.

## VI. CONCLUSION

Repeatedly, the Legislature and our state's Supreme Court have concluded that it is critical to the land use system to provide certainty, predictability and finality to both the land owners and the government. In this case, the trial court's decision that BSRE Point Wells permits did not vest to the regulations in effect at the time of permit application, ignores our state's strong vesting laws and if left to stand, this decision will have broad, detrimental effect on the residential housing industry in Washington state.

RESPECTFULLY SUBMITTED this 8 day of October, 2012.

By Julie Sund Nichols

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**DECLARATION OF SERVICE**

I, Jan Rohila, make the following true statement:

On October 8, 2012, I filed a Motion for Leave to File Amicus Brief and Brief of Amicus Curiae Building Industry Association of Washington with the Court of Appeals Division 1, at the Supreme Court of Washington, and forwarded copies via regular mail as follows:

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

Signed at Olympia, Washington on this 8 day of October, 2012.

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Administrative Services Director  
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