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Court of Appeals No. 46378-4-II

SUPREME COURT OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY, KING COUNTY, and BUILDING
INDUSTRY ASSOCIATION OF CLARK COUNTY,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Petitioner,

And

POLLUTION CONTROL HEARINGS BOARD, PUGET
SOUNDKEEPER ALLIANCE, WASHINGTON ENVIRONMENTAL
COUNCIL, and ROSEMERE NEIGHBORHOOD ASSOCIATION,

Respondents below.

BRIEF OF *AMICUS CURIAE* BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON

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I. INTRODUCTION

Bellevue has misused its power by denying developers the ability to determine the ordinances that will control their land use. The constitution obligates this court to affirm the trial court's declaration of the illegality of Bellevue's ordinance 3359.

West Main Assoc. v. City of Bellevue, 106 Wn.2d 47, 54, 720 P.2d 782 (1986) (“*West Main*”).

Washington courts have recognized vested rights in myriad contexts, including contracts, employment and real property and land use permitting. A vested right is "something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another" *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975). This is so, because “[p]roperty interests derive not from the Constitution but from existing rules or understandings that stem from an independent source such as state law rules . . .” and “[t]he right to improve [real] property, of course, is subject to the *reasonable* exercise of state authority, including the enforcement of *valid* zoning and land-use restriction.” *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1057 (9th Cir. 2012) (citing and quoting *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972))

(internal quotation marks and citations omitted); *see also Palazzalo v. Rhode Island*, 533 U.S. 606, 627 (2001)).

“The vested rights doctrine . . . implicates constitutional protections and prevents a retroactive application [of later-enacted laws] even where the legislative intent is clear.” *Real Progress, Inc. v. City of Seattle*, 91 Wn. App. 833, 842, 963 P.2d 980 (1998)(distinguishing vested rights from existing rights in context of retroactive application of nonuser statute). “Due process is violated if the retroactive application of a [regulation] deprives an individual of a vested right.” *Caritas Servs., Inc. v. Dep’t of Soc. & Health Servs.*, 123 Wn.2d 391, 413, 869 P.2d 28 (1994) (citing *In re Marriage of MacDonald*, 104 Wn.2d 745, 750, 709 P.2d 1196 (1985) (citing *Lynch v. United States*, 292 U.S. 571, 576-80, 78 L. Ed. 1434, 54 S. Ct. 840 (1934)).

As it applies to real property, Washington's vested rights doctrine generally allows land use applications to be reviewed under the land use control ordinances in effect at the time a fully complete application is submitted. It has been long-recognized by the Court as a constitutional doctrine that protects property owners from retroactive application of new regulations resulting from local jurisdictions' fluctuating land use policies.

In more recent years, Washington courts have referred to its origins as the “common law” doctrine of vested rights and suggested that

the doctrine has now become statutory. While there have been statutory codifications of the vested rights doctrine, these enactments have not and cannot change the constitutional nature of the vested rights doctrine; rather, the statutory enactments have merely codified constitutional due process protections against retroactive application of new land use regulations in certain contexts.

Unfortunately, the legislature's codification of the doctrine in the context of two specific types of permits—building permits and subdivision applications—has resulted in an Orwellian erosion of the constitutional due process protections that our courts have historically recognized for all development permits: “All real property development permits are equal” has been changed to “All real property development permits are equal, but some permits are more equal than others.” Cf. “*All animals are equal, but some animals are more equal than others.*” George Orwell, *Animal Farm*.

In the instant case, the Court of Appeals left open the question of whether the vested rights doctrine is purely statutory or whether it continues as a constitutional doctrine applicable to myriad land use permits as has been recognized at common law. *Snohomish County, et. al. v. Pollution Control Hearings Board, et. al.*, 192 Wn. App. 316, 328, n.7, 368 P.3d 194 (2016). The Court is presented with the opportunity to affirm the constitutional foundation of the vested rights doctrine based

upon its holdings in prior cases and to clear up lower courts' split reliance upon language claiming that the constitutionally-derived vested rights doctrine is "now purely statutory."

Amicus, Building Industry Association of Washington ("BIAW"), submits this brief to emphasize the constitutional foundation of the vested rights doctrine and that the nature of the right has not become purely statutory—all permits are equal and subject to the same constitutional due process protections recognized by our courts for nearly a century.

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

BIAW represents over 7,600 member companies who employ nearly 200,000 Washingtonians. BIAW's members engage in every aspect of residential construction in Washington State—from site development to remodeling. They work daily with city and county staff to comply with applicable laws and regulations, and they are directly affected by ordinances that exert a restraining or directing influence over the use of land.

III. STATEMENT OF THE CASE

Amicus Curiae BIAW adopts and incorporates the statement of facts as set forth by the Respondents Snohomish County, King County, and Building Industry Association of Clark County.

IV. DISCUSSION

A. THE RIGHT TO DEVELOP PROPERTY IS CONSTITUTIONALLY PROTECTED AND COMPENSABLE WHEN REGULATION GOES TOO FAR.

Washington law recognizes that the right to develop property is “beyond question a valuable right in property.” *Louthan v. King Cy.*, 94 Wn.2d 422, 428, 617 P.2d 977 (1980); *see also Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 963, 954 P.2d 250 (1998) (“The right to use and enjoy land is a property right.”). “The basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit. U.S. Const. amends. 5, 14.” *Norco Constr., Inc. v. King Cy.*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982). While governmental entities have police power authority to regulate land use, regulations must comport with constitutional due process protections, lest they go too far. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 331, 333-34, 787 P.2d 907 (1990).

Because property interests are created by state law, the very foundation of property ownership lies within the due process protections afforded by the Washington and United States Constitution. The vested rights doctrine is critical to the protection of all property rights, as it fixes the very point in which the constitutional protections for the free use of land arise through the intersection with the regulatory authority of local

governments in the permit process. As discussed below, the vested rights doctrine has been and remains a constitutional due process protection that has not been and cannot be diminished by statutory enactments.

B. VESTED RIGHTS ARE CONSTITUTIONAL RIGHTS.

1. The Vested Rights Doctrine Fixes Land Use Applications to the Regulations in Effect at the Time a Complete Application is Submitted.

In the land use context, the vested rights doctrine is a straightforward constitutional right of property owners that “fixes” the land use regulations governing a particular land use application to those in effect at the time a complete application is submitted. *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 495, 275 P.2d 889 (1954) (“*Ogden*”) (stating “a property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto.”). Because of the certainty it provides, it establishes a “date certain” time upon which the regulations are fixed. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014).

The vested rights doctrine protects developers who comply with three things when submitting an application: (1) that it be “sufficiently” complete, (2) “complies with the existing zoning ordinances and building codes,” and (3) is filed during the effective period” of the ordinances.

West Main, 106 Wn.2d at 51; *see also* RCW 36.70B.030-.150 (Local Project Review).

2. *Washington Courts Extended Vested Rights from Building Permits to Grading Permits.*

In 1954, the Washington State Supreme Court confirmed the applicability of the vested rights doctrine for building permits. The Court in *State ex rel. Ogden v. City of Bellevue* stated:

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... A building or use permit must issue as a matter of right upon compliance with the ordinance.

State ex rel. Ogden, 45 Wn.2d at 496. The court in *Hull v. Hunt* continued to develop the extension of the date certain nature for vested rights in permits:

Notwithstanding the weight of authority, we prefer to have a date certain upon which the right vests to construct in accordance with the building permit. We prefer not to adopt a rule which forces the court to search through 'the moves and countermoves of ...parties...by way of passing ordinances and bringing actions for injunctions'...

Hull v. Hunt, 53 Wn.2d 125, 129-130, 331 P.2d 856 (1958). By 1958 it was clear that the Court recognized that all building permits must be

reviewed in accordance with the land use regulations in effect at the time a complete application was submitted.

Subsequent to the establishment of the applicability of vested rights to building permits, this Court and lower courts extended the vested rights doctrine to conditional use permits, grading permits, shoreline substantial development permits, and septic permits. *Beach v. Board of Adjustment*, 73 Wn.2d 343, 347, 438 P.2d 617 (1968) (conditional use permit); *Talbot v. Gray*, 11 Wn.App. 807, 525 P.2d 801 (1947) (shoreline substantial development permit); *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn.App. 59, 84, 510 P.2d 1140 (1973) (grading permit); *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn.App. 709, 558 P.2d 821 (1977) (septic permit). In addition, local jurisdictions were permitted to develop their own vesting schemes "within the parameters of the doctrine." *Erickson & Assoc., Inc., v. McLerran*, 123 Wn.2d 864, 873 P.2d 1090 (1994) ("*Erickson*") see also RCW 36.70B.030-.150 (allowing establishment of requirements for complete applications and review process for same).

3. *The Court Declared that the Vested Rights Doctrine Protects Constitutional Rights.*

The Supreme Court affirmed the constitutional foundation of the vested rights doctrine in *West Main*. In *West Main*, the property owner

submitted materials for administrative design review to the City of Bellevue for the development of Meydenbauer Place. *West Main*, 106 Wn.2d at 48. Subsequent to the submission of the materials, the City of Bellevue adopted an ordinance prohibiting the filing of a building permit until after the approval of up to eight additional permits. *Id.* It also stipulated that if there was an appeal with regard to certain approvals, no building permit could be filed and that none of the eight permits would establish vested rights protection for the property owners. *Id.* at 49.

This Court struck down the City of Bellevue's effort to frustrate the constitutional due process protections afforded property owners. The Court acknowledged that the purpose of the vested rights doctrine is to "fix" the rules governing land use development. *Id.* at 51. It cited James Madison's *The Federalist* for the proposition that citizens should be protected from "fluctuating" land use policy. *Id.* It recognized that "[s]ociety suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin." *Id.*

Bellevue argued that it had police power authority to limit vesting, but the Court stated that "due process" considerations limited how local governments used the power. *Id.* at 52. In affirming the *constitutional* nature of the vested right and rebuking Bellevue's legislative adoptions,

the Court stated that “[t]he vesting rule of the Bellevue ordinance does not meet the due process standards of the Fourteenth Amendment. We acknowledge that some commentators advocate that governments legislatively establish vesting guidelines.” *Id.* *West Main* establishes that vested rights, at a fundamental level, are afforded due process protections.

Subsequent to *West Main*, the Court addressed the extent of the vested rights doctrine and the ability to vest to the applicable zoning regulation at the time of the submission of a building permit application in *Valley View Indus. Park v. City of Redmond*, 107 Wn2d 621, 733 P.2d 182 (1987) (“*Valley View*”). The Court confirmed that “due process requires governments to treat citizens in a fundamentally fair manner.” *Id.* at 637. Under these “due process considerations,” developers must “be able to take recognized action under fixed rules governing the development of their land.” *Id.* The “right of a property owner” to vest to existing regulations has been settled for “over half a century” and is based on “due process considerations of fundamental fairness.” *Id.* Ultimately, the court affirmed the vested rights associated with the submission of a complete building permit application. *Id.* at 643.

While the outcome in *Erickson* did not result in the creation of vested rights for a master use permit issued by the City of Seattle, seven years later the Court affirmed the constitutional foundation of the vested

rights doctrine stated in *West Main*. In *Erickson*, the property owner sought to extend vested rights to the filing of a “master use ordinance.” *Erickson*, 123 Wn.2d at 867. The Court affirmed that, although the legislature enacted statutory vesting for building permits under RCW 19.27.095(1), the foundation of the vested rights doctrine still remained constitutional. *Id.* at 870. The Court relied upon the principles in *West Main*, stating that “*Erickson* correctly asserts our vesting doctrine is rooted constitutional principles of fundamental fairness. The doctrine reflects a recognition that development rights represent a valuable and protectable property right.” *Id.* (emphasis added).

The court went on to state that “our doctrine insures ‘that new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law.’” *Id.* (quoting *Valley View*, 107 Wn.2d at 637). *Erickson* stands for the proposition that vested rights can be created three ways: (i) via case law, (ii) via statute, and (iii) via a local ordinance tailored to the “needs of a particular locality” all of which must comply with, but not override, the “constitutional minimum” protections. *Id.* at 873. Even in the wake of the legislature adopting RCW 19.27.095(1), the *Erickson* court confirms that vested rights are constitutional rights.

The 1980s represented a period in which the Supreme Court explicitly and consistently recognized that the foundation of the vested rights doctrine rested in the due process requirements of the Washington and United States Constitutions. Among *West Main*, *Valley View*, and *Erickson*, the Court recognized the constitutional nature of vested rights as providing the necessary protections to property owners and affirming their “date certain” nature and subsequent holdings have not changed this principle.

4. *Statutory Enactments Do Not Alter the Constitutional Nature of the Vested Rights Doctrine.*

In 1987, the legislature codified the vested rights doctrine for building permits (RCW 19.27.095(1)) and subdivisions (RCW 58.17.033). Each of these statutes exists within the statutory scheme for the particular activity: Chapter 19.27 RCW for building permits, and Chapter 58.17 RCW for subdivisions of land. In 1995 the legislature authorized local governments to enter into development agreements with property owners to fix the applicable regulations for a specified term (RCW 36.70B.170). None of these statutes state that they abrogate the constitutional nature of the vested rights doctrine. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008) (courts presume statutes do not abrogate the common law “absent clear evidence of the legislature's intent to deviate.”); *see also*

Caritas Servs., Inc. v. Dep't of Soc. & Health Servs., 123 Wn.2d 391, 413, 869 P.2d 28 (1994) ("Due process is violated if the retroactive application of a statute deprives an individual of a vested right.").¹

Subsequent to these statutory enactments, courts have made generic statements that the vested rights doctrine is now considered "statutory." None of these cases have gone so far to state that the constitutional basis of vested rights doctrine is altered in any way by the statutory enactments, and that is because they cannot do so. *See, e.g. Anderson v. Whatcom County*, 15 Wn. 47, 53, 45 P. 665 (1896) ("positive declarations in the constitution cannot be abrogated or destroyed by unreasonable action or nonaction on the part of the legislature."); *Tilton v. Cowles Pub. Co.*, 76 Wn.2d 707, 715, 459 P.2d 8 (1969) ("Where a constitutional right conflicts with a common law principle - however ancient or cherished - the guarantee of the constitution must prevail.").

For instance, in *Abbey Road Group, LLC v. City of Bonney Lake*, the Court acknowledged that the "judicially recognized principles" of vesting for building permits were codified under RCW 19.27.095(1). *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251,

¹ There is nothing within Chapter 19.27 RCW or Chapter 58.17 RCW or their respective legislative histories suggesting the legislature intended building permit applications and subdivision applications to be the only permits applications that were permitted to vest. Chapter 36.70B RCW contains no reference to those land use permits that a jurisdiction can attach vested rights to. Common law vesting or constitutional vesting has not been altered in any way by these statutory enactments.

218 P.3d 180 (2009). In *Deer Creek Developers, LLC v. Spokane County*, Court of Appeals, Division III stated “the Washington legislature codified Washington’s common law vested rights doctrine for building permit applications.” *Deer Creek Developers v. Spokane County*, 157 Wn.App. 1, 10, 236 P.3d 906 (2010); see also *Alliance Inv. Group of Ellensburg, LLC, v. City of Ellensburg*, 189 Wn.App. 763, 358 P.3d 1227 (2015).

Often dubiously cited in subsequent cases is the Supreme Court’s statement in *Town of Woodway v. Snohomish County* “[w]hile it originated at common law, the vested rights doctrine is now statutory.” *Town of Woodway*, 180 Wn.2d 165 at 174. Immediately preceding this quote, the Court recognized that the vested rights doctrine rested upon affording due process rights to property owners., *Id.* Immediately after this quote, the Supreme Court cited the three statutes that apply vesting to building permits, subdivisions, and development agreements. *Id.* This Court later noted “our vested rights doctrine protects *due process* and property interests by setting a clear date for vesting development rights.” *Id.* at 180 (emphasis added). Despite widely being regarded as the end of “common law” vesting, *Town of Woodway* does nothing to undermine the constitutional nature of the vested rights doctrine, and in fact expressly rests upon the constitutional origin of the doctrine.

More recently, Division I of the Court of Appeals addressed whether a shoreline substantial development permit filed without a permit properly vested in *Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn.App. 191, 334 P.3d 1143 (2014) (“*Potala Village*”). In that case, the Court of Appeals struck down vesting of a shoreline substantial development permit submitted without a building permit, apparently contrary to the holding in *Talbot v. Gray*. *Id.* at 213. It further rested upon the quote in *Town of Woodway* without reference to its constitutional discussion: “[w]hile it originated at common law, the vested rights doctrine is now statutory.” *Id.* at 203. Despite its reliance upon *Erickson* and *Town of Woodway*, *Potala Village* contains no discussion of the constitutional nature of the vested rights doctrine.

None of the foregoing cases that rest upon the legislative enactments of the vested rights declare that there is no constitutional basis for the vested rights doctrine. These holdings only rest upon the confines of legislative enactments protecting building permits, subdivision permits, and development agreements. The vested right protected by the Washington constitution remains soundly in existence and has not been quashed by subsequently enacted statutes or court holdings.

C. COURT OF APPEALS DECISIONS OPEN THE DOOR TO ADDRESSING THE CONSTITUTIONAL BASIS OF THE VESTED RIGHTS DOCTRINE.

1. The Court of Appeals Decisions are Split Regarding the Statutory Versus Common Law Nature of the Right.

As discussed above, the three division of the Court of Appeals have split their interpretation of the vested rights doctrine. Division II's decision in this case stated that a "question exists" as to whether the doctrine is purely statutory. *Snohomish County*, 192 Wn.App. at 329, n.7. Division I's decision in *Potala Village*, relies on the court's decision in *Town of Woodway* to claim that all vested rights are solely statutory. *Potala Village*, 183 P.3d at 203. Finally, Division III has only held that the legislature has now codified vesting as applied to building permits. *Deer Creek Developers, LLC*, 157 Wn.App. at 10; *Alliance Inv. Group of Ellensburg, LLC*, 189 Wn.App. at 769. None of these cases expressly challenges the constitutional nature of the vested rights doctrine or go so far as to undermine the fact that a vested right is a constitutional right. As a result of the absence of any discussion of the constitutional foundation of the right, the opportunity now exists to clarify and affirm the constitutional basis of the vested rights doctrine.

2. No Precedent from the Court Changed the Nature of the Vested Rights Doctrine.

The Court of Appeals decisions arising after the enactment of statutory vesting for building permits and subdivisions has created static

over the constitutional nature of the vested rights doctrine. With the exception of *Abbey Road* (although not without reference to “judicially recognized principles”), each time the Court considered the vested rights doctrine within the last thirty years it has affirmed the notion that vested rights lie within the constitutional principles of “due process” and “fundamental fairness.” *West Main*, 106 Wn.2d at 52; *Valley View*, 107 at 637. *Erickson*, 123 Wn.2d at 867. *Abbey Road* did nothing to change those constitutional protections and merely acknowledged that the legislature statutorily enacted vesting for building permit applications.

3. *The Door Remains Open for Local Jurisdictions to Develop Vesting Schemes.*

Erickson allows local jurisdictions to develop their own vesting schemes within the confines of the “doctrine” established by statutes and case law. *Erickson*, 123 Wn.2d at 873. Chapter 36.70B RCW, the Local Project Review Act, requires local jurisdictions to define what constitutes a *complete* application for vesting purposes, but does not allow local jurisdictions to diminish the constitutional protections afforded to vested rights. Decisions like *Town of Woodway* and *Potala Village* declaring that the “the vested rights doctrine is now statutory” appear to bar local jurisdictions from adopting vesting schemes that must be measured against the principles of due process and fundamental fairness. The Court should

continue to provide local jurisdictions with the ability to develop local vesting ordinances and reiterate the requirement that such ordinances comply with the Washington constitution.

V. CONCLUSION

This case presents the opportunity for the Court to declare that the vested rights doctrine is alive and well, existing in constitutionally-based case law, statutory law, and local regulation. It provides the Court with the opportunity to rectify all the inconsistent decisions of the Court of Appeals that ignore the well-established principles laid out by the Court since the 1950s. For the reasons set forth herein, the Court should affirm that the vested rights doctrine is founded within the Washington State Constitution and affirm the decision of the Court of Appeals.

DATED this 26th day of August, 2016.

BUILDING INDUSTRY
ASSOCIATION OF
WASHINGTON

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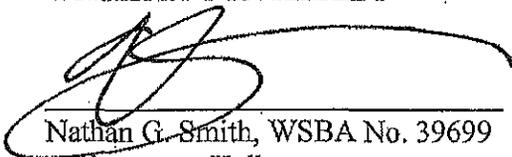
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OFFICE RECEPTIONIST, CLERK

From: Karina Hermanson <karinah@witherspoonkelley.com>
Sent: Friday, August 26, 2016 4:18 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Nathan G. Smith
Subject: Snohomish County v. Washington State Department of Ecology (No. 92805-3) - Amicus Curiae Filings
Attachments: Declaration of Service (S1439671x9FC0D).pdf; Notice of Appearance (S1439639x9FC0D).pdf; Brief of Amicus Curiae Building Industry Association of Washington (S1439644x9FC0D).pdf; Motion for Leave to File Brief of Amicus Curiae (S1439641x9FC0D).pdf

Dear Clerk of Court:

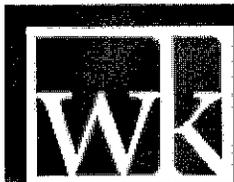
Please find attached the following documents for filing in Snohomish County, *et al.* v. Washington State Department of Ecology (No. 92805-3):

- Motion for Leave to File Brief of *Amicus Curiae* in Support of Respondents
- Brief of *Amicus Curiae* Building Industry Association of Washington
- Notice of Appearance
- Declaration of Service

Please let me know if you have any trouble with the attachments.

Thank you,

Karina Hermanson | Witherspoon • Kelley
Legal Assistant to Stanley M. Schwartz, Michael L. Loft, Nathan G. Smith, and William C. Lenz
karinah@witherspoonkelley.com | [vCard](#)



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