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No. 70542-3-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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POTALA VILLAGE KIRKLAND, LLC, a Washington limited liability  
company, and LOBSANG DARGEY and TAMARA AGASSI DARGEY,  
a married couple,

Plaintiffs/Respondents,

vs.

CITY OF KIRKLAND, a Washington municipal corporation,

Defendant/Appellant.

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**APPELLANT CITY OF KIRKLAND'S OPENING BRIEF**

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ORIGINAL

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## I. INTRODUCTION

The issue presented in this case is whether a shoreline permit application vests a developer in the local jurisdiction's entire zoning code, or if it only vests the developer in the shoreline regulations in existence at the time the application is filed. Specifically, in this case, did the developer, Potala Village Kirkland, LLC and Lobsang Dargey ("Dargey"), vest to all of the land use laws and regulations in effect on the date Dargey filed an application for a shoreline substantial development permit, or could he only obtain full vested rights by filing a building permit application?

All case law on this matter currently demonstrates that the filing of an application for a shoreline substantial development permit vests a developer only in existing shoreline regulations, not the local jurisdiction's entire zoning code. The trial court's Order, which holds that Dargey obtained fully vested rights via the filing of a shoreline permit application impermissibly expands the vested rights doctrine, which is a job for the legislature, not the trial court. Accordingly, the City respectfully requests that this Court reverse the trial court's Order Granting Plaintiff's Motion for Partial Summary Judgment and, in addition, grant the City's cross-motion and hold, consistent with existing legislative enactments and State Supreme Court case law, that shoreline permit applications do not confer

full vested rights upon an applicant.

Briefly, it is uncontested that Dargey's proposed development project requires multiple permits, and the first permit he applied for was a shoreline substantial development permit. Dargey asserts that this application for a shoreline permit vests him in not only the shoreline regulations in effect at that time, but in all of the City's zoning code provisions, including all land use laws, rules and regulations. The trial court agreed. As set forth herein, both Dargey and the trial court are mistaken.

This case is governed by the Supreme Court's decision in *Abbey Road Group v. Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180 (2009), and the state vesting statute, RCW 19.27.095(1). *Abbey Road* held that as long as the local jurisdiction allows a developer to file a building permit application at any time in the permitting process, only the building permit application—and no other application, including one filed earlier—freezes the land use laws for the rest of the project. *Abbey Road*, 167 Wn.2d at 252-54. In reaching this decision, *Abbey Road* first noted that Washington's vested rights doctrine, as it was originally judicially recognized, entitled developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application was filed, regardless of subsequent changes in zoning

or other land use regulations. *Id.* at 250. *Abbey Road* then noted that the judicially-created vested rights doctrine had been codified by the legislature in 1987, at RCW 19.27.095(1). This statute now explicitly confers vested rights upon the filing of a complete building permit application. Finally, *Abbey Road* reaffirmed its 1994 decision in *Erickson v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994), where it had declined to extend the vested rights doctrine to a Master Use Permit (MUP) application; holding, instead, that under the common law and statute, the vested rights doctrine applies only to building permit applications. *Abbey Road*, 167 Wn.2d at 253 (“For the same reasons we rejected the invitation to extend the vesting doctrine in *Erickson*, we refuse to expand it in this case.”).

It is undisputed that the City of Kirkland allows developers to file building permit applications at any time in the permitting process. Further, the record in this case shows that City Staff affirmatively told Dargey that the City Council was contemplating enacting a moratorium to consider changing the zoning of the properties subject to his project, and that he would need to file a building permit application to vest his development rights. But even with that information, Dargey did not file a building permit application. Because he chose not to file a building permit application before the City enacted an interim zoning moratorium (the

“Moratorium”) affecting his properties, Dargey failed to trigger vested rights for his project.

In support of his arguments below, Dargey relied solely on case law that is distinguishable and/or predates *Abbey Road* and the state legislature’s enactment of the state vesting statute, RCW 19.27.095(1). Because this case is governed by *Abbey Road* and RCW 19.27.095(1), and because Dargey did not file an application for a building permit before the effective date of the City’s Moratorium, the trial court order commanding the City to accept and review his building permit application under the provisions of the pre-Moratorium zoning code should be reversed. Further, the City’s motion to establish that the vested rights doctrine has not been expanded to apply to Dargey’s application for a shoreline substantial development permit should be granted.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred when it held that the vested rights doctrine applies to a shoreline substantial development permit application.
2. The trial court erred when it held that a shoreline permit application vests a developer in all of the land use laws, rules and regulations contained in a local jurisdiction’s entire zoning code, as Washington law holds that a shoreline permit application vests an applicant only in the existing shoreline regulations, and the vested rights

doctrine is only triggered by the filing of a complete building permit application.

3. The trial court erred by granting Dargey's motion under the Declaratory Judgments Act, which is not applicable given the legal posture of this case.

4. The trial court erred by granting Dargey's motion for summary judgment and holding that the vested rights doctrine applied to his application to the City of Kirkland for a shoreline substantial development permit.

5. The trial court erred by denying the City's cross motion for summary judgment requesting an order stating that the vested rights doctrine does not apply to Dargey's application to the City of Kirkland for a shoreline substantial development permit.

### **III. STATEMENT OF THE CASE**

#### **A. Factual Statement**

The parties agree there are no genuine issues of material fact in this case. The only issue before the Court is a legal issue: Whether Dargey's application for a shoreline substantial development permit vested him in all of the land use laws, rules and regulations in effect at that time, or whether Dargey could only obtain vested rights by filing an application for a building permit. The following summary of undisputed facts is

presented as background to help put the issue before the Court in context.

Dargey sought to construct a fairly large mixed-use project (residential, retail and commercial) in the Neighborhood Business (BN) zone in Kirkland. *CP 92*. The City's BN zoning regulations are found in Chapter 40 of the Kirkland Zoning Code (KZC). When Dargey first contacted Kirkland about his proposed development, this particular BN zoned site (which is made up of three adjacent parcels) did not contain any cap or limit on residential density. The surrounding properties, however, were all zoned for a maximum of 12 dwelling units per acre. *CP 92*.

Dargey had two pre-application meetings with the City. *CP 85-86; 92-93*. As a result of these meetings, it was determined that he would need multiple permits, and that the first step was for the City to conduct environmental review under the State Environmental Policy Act (SEPA), RCW Ch. 43.21C. *CP 88-90*. Also, because a small portion of Dargey's site was located within the state mandated shorelines area (*i.e.*, within 200 feet of the ordinary high water line for Lake Washington), Dargey was required to apply for and obtain a shoreline substantial development permit under the State Shorelines Management Act, RCW Ch. 90.58, and Kirkland's Shoreline Master Program (SMP), KZC Chapters 83 and 141. *CP 86, 90, 94*.

Thus, on February 23, 2011, Dargey filed a checklist for

environmental review under SEPA for a mixed-use project that included a total of 143 residential units. He also filed an application for a shoreline substantial development permit. *CP 94, 109-111*. He did not, however, file an application for a building permit at that time. *CP 94, 109-111*.

Dargey does not dispute that staff informed him several times, both verbally and in writing, that he could apply for a building permit at any time. *CP 86-87, 90, 95*. It is also undisputed that the City's code does not prohibit a developer from applying for a building permit at the same time as a shoreline permit and/or while undergoing SEPA review. *CP 86-87, 95-99, 799, 802-803, 805* On May 11, 2011, Dargey's shoreline application was deemed complete and a Letter of Completeness was issued. *CP 95, 113*. Dargey claimed below, without citation to authority, that this letter constituted "notice" that the City "had determined Potala Village's shoreline permit application was vested to the BN zoning and land use regulations in effect" when he filed his shoreline permit application. *CP 350* (emphasis added). But this is neither a correct reading of the letter nor a correct interpretation of the City's code. *CP 968*. The Letter of Completeness did not state that Dargey's Project "vested" in any regulations. All it indicated was that his shoreline application was "complete" for processing, which started the City's 120-

day review clock.<sup>1</sup>

An organized group of neighbors (the “Neighbors”) voiced objection to Dargey’s project, especially the proposed residential density. *CP 96-97*. Recall that the surrounding properties were all zoned with a maximum of 12 residential units per acre; yet Dargey’s site did not have a residential density cap and he was proposing a project with 143 residential units. Dargey was represented by legal counsel at the time and it is uncontested that both he and his former attorney were well aware of the Neighbors’ complaints. *CP 96-97*.

Further, the record shows that in early November, 2011, the City’s Senior Planner (Ms. Teresa Swan) placed a telephone call to Mr. Dargey and informed him that the Neighbors had attended a City Council meeting and had urged the Council to implement a zoning change that would result in lowering the residential density limits applicable to his project. *CP 97-98*. Importantly, she also told him that his shoreline permit application only vested him in the City’s current shoreline regulations, not the entire zoning code. *CP 98*. She further told him that he might want to consider applying for a building permit to obtain vested rights for his project. *CP*

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<sup>1</sup> The City has 120 days from the date it receives a complete application to issue a decision. There are exceptions, of course, and permits can be placed on hold for various reasons. Here, for instance, Dargey’s shoreline permit was put on hold while the City conducted environmental review and prepared an EIS. Once the EIS was issued, the hold was lifted and the City was required to begin processing the shoreline permit again. *CP 799*.

98. Shortly after this phone call, the City's Senior Planner received a call from Dargey's architect. *CP 99*. Again, she told the architect that Dargey's project was not vested simply because Dargey had filed an application for a shoreline permit, but that they could vest by filing an application for a building permit. *CP 99*. Despite these conversations, Dargey did not file an application for a building permit at that time. *CP 73-74, 99-100*.

On November 15, 2011, the City Council enacted an emergency development moratorium (the "Moratorium") that temporarily precluded the issuance of any development related permits or licenses in the BN zones, except for those that were already vested and/or those related to life/safety issues. *CP 100, 139-140*. Specifically, as applied to Dargey, the Moratorium prevented him from filing an application for a building permit for his proposed project. *CP 100*.

Shortly after the Moratorium was enacted, on November 29, 2011, Mr. Dargey and his former attorney met with several representatives of the City, including the Mayor and City Manager, to discuss his project. *CP 73*. At this meeting, Mr. Dargey admitted that he had intentionally chosen not to file an application for a building permit before the Moratorium was enacted because of how expensive it would be to prepare; in addition to the expenses he believed he would need to incur in the future based upon

changes required as a result of environmental review. *CP 73-74*. Thus, it is very clear in the record that Dargey knew he should have filed a building permit application to secure vested development rights, but chose not to do so because of how expensive he perceived it would be.

On May 1, 2012, the City Council extended the Moratorium for six months. *CP 102, 150-152*. Shortly afterwards, Dargey (who had retained new legal counsel) filed this lawsuit against the City. *CP 1-11, 102*.

Approximately six (6) months later, on October 16, 2012, several events occurred. First, Dargey attempted to file a building permit application with the City. *CP 78*. The City, however, refused to accept his building permit application materials due to the Moratorium. *CP 78-79, 82*. Second, later that same evening, the City Council extended the Moratorium one last time.<sup>2</sup> *CP 30, 162-166*.

Then, while the Moratorium was still in effect, the City Council passed amendments to the City's Zoning Code, Design Guidelines, and Comprehensive Plan; all of which had some impact on Dargey's proposed project. Specifically, on December 11, 2012, the City Council adopted legislative, area-wide amendments to (1) Kirkland's Zoning Code via

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<sup>2</sup> This extension was for a short time, only two and one-half months, until December 31, 2012.

Ordinance O-4390;<sup>3</sup> (2) Kirkland's Design Guidelines via Resolution R-4945;<sup>4</sup> and (3) Kirkland's Comprehensive Plan (which, by law, can only be amended once a year) via Ordinance O-4389.<sup>5</sup> *CP103-104*.

For purposes of this lawsuit, the amendments placed a limit, or cap, on the residential density in the City's BN zones. Specifically, pursuant to these amendments, the maximum number of residential units allowable on Dargey's BN zoned properties (absent circumstances not at issue here) is now 60 units; versus the 143 units in his original proposal. *CP 104*.

The City issued Dargey's shoreline permit approval on January 17, 2013. *CP 106, 246-265*. Although Dargey argued below that the City's shoreline approval encompasses his entire development, it does not. A shoreline permit only approves development within the shoreline areas, *i.e.*, here, areas located within 200 feet of the ordinary high water line of Lake Washington. *CP 794-795*. Only a small portion (53-feet) of Dargey's property lies within the state designated shoreline area. *CP 795*,

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<sup>3</sup> O-4390 amended the Zoning Code. Two of the amendments relevant to this lawsuit are (1) the Zoning Code now caps residential density at 48 units per acre in the BN zone applicable to Dargey's Property; and (2) the Zoning Code requires Design Review in the BN zone applicable to Dargey's Property.

<sup>4</sup> R-4945 amended the City's Design Guidelines. Specifically, with relevance to this lawsuit, one of the amendments was to require Design Review for projects in the BN zone applicable to Dargey's Property. *CP 221-227*.

<sup>5</sup> O-4389 amended the Comprehensive Plan. Specifically, with relevance to this lawsuit, the amendments included a change to the description of "Residential Market" and a change to the policy to the BN zone applicable to Dargey's Property, establishing a density cap of 48 units per acre. *CP 168-182*.

797. Thus, the City's shoreline approval is only applicable to this 53-foot section of property. *CP 797*. Furthermore, a shoreline approval is only based on the City's shoreline regulations as set forth in its Shorelines Master Program (SMP); here, Chapters 83 and 141 of the Kirkland Zoning Code, not the entire Zoning Code. *CP 796, 798*. The City performs only a narrow scope of review for a shoreline permit; a full and comprehensive review does not occur until the building permit stage. *CP 798*.

**B. Procedural Status**

As noted above, the Moratorium at issue in this lawsuit was enacted on November 15, 2011. *CP 100, 139-140*. Dargey did not file any lawsuit or administrative challenge of the Moratorium at that time.<sup>6</sup>

The Moratorium was extended for six (6) months by the City Council on May 1, 2013. *CP 102, 150-152*. Shortly thereafter, on May 24, 2013, Dargey filed a Complaint against the City, seeking a declaratory judgment and injunction. *CP 1-11, 102*.

But it was not until almost five (5) months after this lawsuit was filed (on October 16, 2012) that Dargey even attempted, for the first time, to file a building permit application with the City. *CP 78*. Because of the Moratorium, the City rejected that application at the counter. *CP 78-79, 82*. Several weeks later, on November 6, 2012, Dargey filed an Amended

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<sup>6</sup> The validity of the City's Moratorium is not at issue in this lawsuit or this appeal.

Complaint, adding, *inter alia*, a request for issuance of a Writ of Mandamus to order the City to accept his building permit application and process it under the pre-Moratorium zoning code. *CP 12-27*. Dargey claimed his development project was not subject to the Moratorium because his project had vested to all the land use laws, rules and regulations in effect at the time he had filed an application for a shoreline substantial development permit. The City did not agree.

One thing the parties did agree on, however, was that the pivotal issue in this case involved Washington's vested rights doctrine. Specifically, does the vested rights doctrine apply to shoreline substantial development permit applications, or can an applicant only obtain vested rights by filing a building permit application? Thus, the City and Dargey jointly sought a hearing date from the trial court to have that issue determined.

On April 2, 2013, the parties filed cross-motions for summary judgment. *CP 38-71, 347-370*. The hearing occurred on May 3, 2012, before the Honorable Monica J. Benton, who took the matter under advisement.

A week later, on May 10, 2012, Judge Benton entered an order denying the City's motion and granting Plaintiff Dargey's motion. *CP 992-995*. In particular, the order states that "Plaintiffs' shoreline

substantial development permit application is subject to the vested rights doctrine,” and further adds that “Plaintiffs’ shoreline substantial development permit application vested on February 23, 2011 to those zoning and land use regulations in force at the time of that application.”

*CP 994*. The order then went on to grant Dargey’s requests for both declaratory relief and mandamus:

9. This Court hereby enters declaratory judgment in favor of Plaintiffs that Plaintiffs are entitled to apply for, and the City of Kirkland is required to issue a decision on, building and other land development permit applications based on the zoning and land use regulation in effect on the date of the shoreline substantial development permit application, i.e., February 23, 2011.

10. In addition, the Court hereby enters a peremptory writ of mandamus commanding Defendant/Respondent City of Kirkland to accept and process an application for [a] building permit by Plaintiffs based on the on the [sic] zoning and land use regulations in effect on the date of the shoreline substantial development permit application, i.e., February 23, 2011, if said application is otherwise complete as required by state law and local regulation.

*CP 994-995* (emphasis added). This order had been prepared by Dargey’s counsel as the prevailing party. But the trial judge did not just sign Dargey’s proposed order, instead she added a citation to the end of paragraph 10, where she wrote in “*Town of Woodway v. Snohomish County*, 172 Wash. App. 643 (2013).”<sup>7</sup> *CP 995*. This citation was added without explanation. The parties do not know what it stands for.

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<sup>7</sup> A copy of the Court’s Order is attached as **Appendix 1**.

The City filed a timely Motion for Reconsideration, which was denied. *CP 996-1024, 1055-1056*. This appeal followed.

#### IV. ARGUMENT

A. **Washington’s Vested Rights Doctrine Confers Vested Rights Only When a Complete Building Permit Application is Filed**

The Washington Supreme Court’s most recent vested rights decision is *Abbey Road Group v. Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180 (2009). In *Abbey Road*, the Court wrestled with two questions: (1) whether the vested rights doctrine extends to permits other than building permits, and (2) the role due process plays in the doctrine. See Roger Wynne, “*Abbey Road: Not a Road Out of Our Vested Rights Thicket*,” *Environmental and Land Use Law*, p. 9 (Dec. 2009).<sup>8</sup>

Washington’s vested rights history is summarized by the Court in *Abbey Road* (and confirmed by Division I in *Town of Woodway v. Snohomish County*, 291 P.3d 278 (2013)).<sup>9</sup> Washington’s vested rights

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<sup>8</sup> Washington Attorney Roger Wynne, who is currently with the Seattle City Attorney’s Office, is this State’s recognized expert on Washington’s vested rights doctrine. In drafting their decision in *Abbey Road*, the Supreme Court relied heavily upon Mr. Wynne’s 2001 vested rights law review article, “Washington’s Vested Rights Doctrine: How We Have Muddled A Simple Concept And How We Can Reclaim It,” *Seattle University Law Review*, Vol. 24, No. 3, pp. 851-903, Roger Wynne (2001). *CP 858-935*. A copy of this article is attached as **Appendix 2**; and a copy of Mr. Wynne’s article “*Abbey Road: Not a Road Out of Our Vested Rights Thicket*,” (2009) (*CP 64-68*), is attached as **Appendix 3**.

<sup>9</sup> While this Court’s decision in *Town of Woodway* summarizes the vested rights doctrine, it does not stand for the proposition that the doctrine should be extended to shoreline permits. Thus, the City does not know why Judge Benton made a reference to *Town of Woodway* in her order on summary judgment in this matter. *CP 995*. This anomaly is discussed more fully, *infra*, pp. 45-48.

doctrine, as it was originally judicially recognized, entitles developers to have a land development proposal processed under the regulations in effect at the time a complete **building permit application** is filed, regardless of subsequent changes in zoning or other land use regulations. *Abbey Road*, 167 Wn.2d at 250, citing *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958); *Woodway*, 291 P.3d at 281. “Vesting ‘fixes’ the rules that will govern the land development regardless of later changes in zoning or other land use regulations.” *Woodway*, 291 P.3d at 281.

Our state’s vesting doctrine grew out of case law recognizing that vested rights are rooted in notions of fundamental fairness. *Abbey Road*, 167 Wn.2d at 250. Washington's vested rights rule is the minority rule, and it offers more protection of development rights than the rule applied in most other jurisdictions. In other jurisdictions, the majority rule provides that development is not immune from subsequently adopted regulations until a building permit has been obtained and substantial development has occurred in “reliance” on the permit. Washington rejected this reliance-based rule, instead embracing a vesting principle which places greater emphasis on certainty and predictability in land use regulations. *Abbey Road*, 167 Wn.2d at 251. By promoting a date certain vesting point, our doctrine ensures 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 Industrial Park v. Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987). That date certain is the date a developer files an application for a building permit.

In 1987, the legislature codified the above-noted judicially recognized principles in RCW 19.27.095(1). *Laws of 1987*, ch. 104, § 1. The state vesting statute now explicitly confers vested rights upon the submission of a complete building permit application. RCW 19.27.095(1) (emphasis added) reads:

A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.

“Naturally, our ‘liberal’ vesting rule comes at a price.” *Woodway*, 291 P.3d at 281; *Graham Neighborhood Ass’n v. F.G. Assocs.*, 162 Wn. App. 98, 115, 252 P.3d 898 (2011). Our Supreme Court has acknowledged that vesting implicates a delicate balancing of interests. *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994). The goal of the statute is to strike a balance between the public's interest in controlling development and the developer's interest in being able to plan their conduct with reasonable certainty.

Development interests can often come at a cost to public

interest. The practical effect of recognizing a vested right is to potentially sanction 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 could be subverted.

*Abbey Road*, 167 Wn.2d at 251 (emphasis added; citations omitted).

In *Abbey Road*, as in this case, the developers could have filed building permit applications to cement their vested rights; but did not do so. In June of 2005, the developers in *Abbey Road* attended a pre-application meeting with the City to discuss construction of a large, multi-family residential development. Thereafter, the developers started their project, expending more than \$96,500 on pre-application costs. Then, on September 13, 2005, they submitted an application for site plan approval for 575 condominium units on 36.51 acres. This project would ultimately require numerous building permits as well, but the developers did not apply for any building permits at that time, only for site plan approval.

*Later that same day*, after the developer had applied for site plan approval, the city council passed an ordinance rezoning a large portion of the subject property to a zoning category that precluded the multi-family residential condos the developers were seeking. The City then issued a written decision notifying the developers that their project had not vested under the prior ordinance because they had not filed a building permit

application and, therefore, their site plan application was denied. *Abbey Road*, 167 Wn.2d at 247-48. The developers filed a judicial appeal of the City's decision under the Land Use Petition Act (LUPA), RCW Ch. 36.70C.<sup>10</sup> The Supreme Court affirmed the City's decision, holding that development rights do not vest absent the filing of a building permit application, and that the developers had not obtained vested rights merely upon the filing of an application for site plan review. *Abbey Road*, 167 Wn.2d at 247.

As Roger Wynne noted, "*Abbey Road* articulates Washington's statutory vesting rule in simple terms: no matter the number of permits required for a project, and unless a local ordinance allows an earlier opportunity,<sup>11</sup> the developer may lock in the law applicable to that project only by filing a complete building permit application." Roger Wynne, *Environmental & Land Use Law*, at 9 (emphasis added).

One of the issues raised by the developers in *Abbey Road* to support their argument that the vested rights doctrine should be extended to cover site plan applications, was the high cost to a developer of

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<sup>10</sup> The different facts in our case have led to different causes of action being prosecuted by the developer. Here, the City Council passed a moratorium before ultimately adopting area-wide amendments that affected the developer's property. During the Moratorium, the City refused to accept Dargey's building permit application, leading to Dargey's mandamus action.

<sup>11</sup> Here, it is uncontested that the City does not have an ordinance that allows for an earlier vesting date than the date provided by state statute in RCW 19.27.095(1) (which states that vested rights accrue upon the filing of a complete building permit application).

submitting a site plan application. But the Supreme Court rejected this argument, noting that it had previously rejected the same cost-based arguments for the extension of the doctrine to Master Use Permit (MUP) applications in *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 874-75, 872 P.2d 1090 (1994):

In summary, in *Erickson*, **we declined to extend the vesting doctrine to MUP applications on the basis of cost for three reasons:** (1) the cost of obtaining MUP applications varies greatly depending on the proposed project; (2) we refused to reintroduce a form of case-by-case analysis of costs and reliance interests, which we had rejected 40 years before in favor of a date certain vesting standard; and (3) unlike building permit applications, MUP applications may be submitted at the infancy of a project before the developer has made a substantial commitment to it. Similarly, the costs involved in preparing and submitting a building permit application are often substantial. For the same reasons we rejected the invitation to extend the vesting doctrine in *Erickson*, we refuse to expand it in this case.

*Abbey Road*, 167 Wn.2d at 252-53 (emphasis added; citations omitted).

Here, Dargey advised the City that he believed it would have been too expensive to file a building permit application before environmental review was completed. *CP 73-74*. Dargey may also try to contend that the expenses he paid for shoreline review and SEPA review alone were so substantial (especially given the fact that he had to pay for an EIS) that they should be sufficient to cement vested rights. But this same argument has been rejected by the Supreme Court at least twice already, in *Erickson*

and *Abbey Road*.

**B. The Vested Rights Doctrine Has Not Already Been Extended to Shoreline Permits by The Court Of Appeals in *Talbot v. Gray***

Dargey argued below that the vested rights doctrine has already been extended to shoreline substantial development permit applications by the court in *Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974). But *Talbot* was decided before the state vesting statute was enacted by the legislature in 1987, and before the Supreme Court's decisions in *Erickson v. McLerran* in 1994, and *Abbey Road* in 2009. *Abbey Road* rejected a similar argument, *i.e.*, that the vested rights doctrine had already been judicially extended to MUP applications by Division I of the Court of Appeals in *Victoria Tower P'ship v. Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987), saying "Even if *Victoria Tower* can be read to expand the common law vesting doctrine to MUP applications, it has been superseded by RCW 19.27.095(1) and our analysis in *Erickson*." *Abbey Road*, 167 Wn.2d at 254 (emphasis added).

The same is true of the alleged extension of the vested rights doctrine to shoreline permit applications. Even if *Talbot* can be read to have expanded the vested rights doctrine to shoreline permits back in 1974, it has been superseded by RCW 19.27.095(1) and the Supreme Court's analysis limiting the vested rights doctrine to building permit

applications in both *Erickson* and *Abbey Road*.

Furthermore, the facts and holding in *Talbot* do not support a claim that the *Talbot* court even intended to extend the vested rights doctrine to shoreline permits. For instance, *Talbot* may stand for the proposition that an application for a shoreline substantial development permit is vested in the shoreline regulations in effect on the date a complete application is filed; but it does not stand for the proposition that an applicant is vested in the full land use laws, rules, and regulations that are present in the zoning code (which is separate and apart from adopted shoreline regulations) simply because he files a shoreline permit. *See, e.g., Talbot v. Gray*, 11 Wn. App. at 811 (developer's rights in shoreline regulations vested upon the filing of an application for a shoreline substantial development permit and they were therefore exempt from the later enacted Shorelines Management Act); *Westside Business Park v. Pierce Cy*, 100 Wn. App. 599, 606, 5 P.3d 713 (2000) (citing *Talbot* for the narrow holding that a "developer's rights in shoreline regulations vested upon the filing of an application for a shoreline substantial development permit and they were therefore exempt from the later enacted Shorelines Management Act").

Again, the City is not aware of any Washington case holding that a shoreline permit application vests the applicant in anything more than the shoreline regulations in existence on the date a complete application is

filed. Thus, even if the vesting doctrine applies to shoreline permit applications, it does not vest an applicant in anything other than shoreline regulations.

It makes perfect legal sense to restrict the vested rights doctrine to the filing of a building permit application, because the building permit is the permit that triggers review of the entire zoning and building codes for a project. On the other hand, a shoreline permit provides only limited review; specifically, a review only of the local jurisdiction's adopted shoreline regulations as set forth by the Washington State Legislature in the SMA (Chapter 90.58 RCW), and as codified, here, by the City of Kirkland in Chapters 83 and 141 of the KZC. Moreover, in this case, shoreline review was restricted even further, *i.e.*, it was limited to only that 53-foot portion of Dargey's proposed project that lies within 200 feet of the ordinary high water line of Lake Washington. See, for instance, the first page of Dargey's shoreline approval, which clearly describes the very limited and minor improvements of his project that are proposed within the shoreline jurisdiction; which is some landscaping, a sidewalk and a small portion of one building.<sup>12</sup> *CP 246*. These are the only improvements subject to the shoreline permit. *CP 801*.

Additionally, the second page of Dargey's shoreline approval

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<sup>12</sup> A copy of Dargey's shoreline approval decision, the City of Kirkland's Notice of Decision, is attached as **Appendix 4**.

plainly states that land use vesting for his project will not occur until he files a complete application for a building permit: “Pursuant to RCW 19.27.095(1), the building permit application will be subject to the zoning and land use control ordinances in effect on the date that a fully complete application is submitted.” *CP 247*.

Furthermore, the City does not have an independent vesting provision related to shoreline permit applications in any of its code provisions. In fact, quite the opposite. The City’s shoreline code, at KZC 83.40.1 (*see Appendix 7*), indicates that shoreline regulations are not part of the City’s general zoning code. This provision excludes a vesting argument. Shoreline regulations are an overlay set of regulations that apply only to certain areas in the City (within 200 feet of the ordinary high water mark of Lake Washington), and are specifically intended to be in addition to other “zoning, land use regulations, [and] development regulations.” *See KZC 83.40 – Relationship to Other Codes and Ordinances*:

1. The shoreline regulations contained in this chapter shall apply as an overlay and in addition to zoning, land use regulations, development regulations, and other regulations established by the City.

(Emphasis added.) Thus, according to *Abbey Road*, the shoreline portion of Dargey’s project (the 53-feet that lies within the shorelines jurisdiction)

is vested only to those shoreline regulations in existence on the date Dargey filed a complete shoreline application. *See, also, Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974) (holding that an application for a shoreline substantial development permit is vested in the shoreline regulations in effect on the date a complete application is filed and, therefore, exempt from the later enacted Shorelines Management Act). In sum, Dargey's shoreline application did not vest him in the City of Kirkland's entire zoning code especially where, as here, he could have vested in the zoning code simply by filing a timely building permit application.

C. **The City's Vesting Rules Do Not Violate Due Process As The City's Code Allows Developers To Vest By Filing For A Building Permit At Any Stage Of The Development**

In his post-*Abbey Road* analysis of the vested rights doctrine, learned scholar Roger Wynne noted that the Supreme Court appears to recognize only one due process concern, and that concern is whether a local jurisdiction has adopted any provisions that unduly frustrate or prohibit a developer from filing a building permit application and obtaining vested rights. As Mr. Wynne stated: "*Abbey Road* seems to recognize a safe harbor; as long as a local jurisdiction allows a developer to file a building permit application at any time in the permitting process, there is no due process violation." Wynne, *Environmental & Land Use*

Law, p. 10 (see **Appendix 3**). “As illustrated by the facts of *Abbey Road*, a local jurisdiction may find shelter in the safe harbor by showing only that its regulations do not prevent simultaneous filing of multiple permit applications for a project, and offering testimony from staff that the jurisdiction allows an integrated permit review process.” *Id.* Here, it is uncontested that the City has complied with these safe harbor provisions. *CP 86-87, 90, 95-99, 799, 802-803, 805*

As background, the Supreme Court previously frowned upon those local jurisdictions that frustrated a developer’s due process rights by adopting vesting procedures that intentionally delayed vesting. *See, e.g., West Main Associates v. Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986), where a developer challenged the validity of a Bellevue vesting ordinance which provided that development rights would vest only as of the time a building permit application was filed, but then prohibited the filing of a building permit application until after a series of other procedures was complete, including administrative design review approval, site plan review approval, administrative conditional use approval, and modification of landscape approval. The Court held the Bellevue ordinance unconstitutional as a violation of due process because the City effectively denied the developer the ability to vest rights by filing for a building permit application until after a series of preliminary permits

were obtained.

In the present case, the City's process does not frustrate vesting. Quite the opposite, in fact, as it is uncontested that the City will accept building permit applications concurrently with other development applications. According to the City's Planner, a developer whose project falls under the jurisdiction of the City's Shoreline Master Program (SMP), such as Dargey's project in this case, can submit applications for both a shoreline permit and a building permit to the City at the same time. *CP 86-87, 90*. Plus, it is uncontested that Dargey was informed of his right to file for a building permit concurrently with his shoreline permit and SEPA review in writing well before the Moratorium was enacted. *CP 90*. A similar procedure was found to be in full compliance with all due process requirements in *Abbey Road*. *See*, 167 Wn. 2d at 255-57.

In his argument to the trial court below, Dargey claimed that the Shoreline Administration section of Kirkland's Zoning Code prohibited him from filing an application for a building permit to vest his rights until after his shoreline permit had been issued, violating his constitutional right to due process as set forth in *West Main Assoc. v. Bellevue, supra*. This argument is without merit. Here, it is undisputed that the City's code allows developers to file an application for a building permit at any time in the permitting and development process.

Dargey argues that the City’s shoreline code prohibits a developer from obtaining a building permit until after a shoreline permit is “issued.” While the City cannot “issue” a building permit approval until after a shoreline permit is issued,<sup>13</sup> nothing in the Code prohibits a developer from filing an application for a building permit at any time in order to vest his rights. For instance, the relevant provision reads as follows:

3. Where a proposed development activity encompasses shoreline and nonshoreline areas, a shoreline substantial development permit or other required permit must be obtained before any part of the development, even the portion of the development activity that is entirely confined to the upland areas, can proceed.

KZC 141.30(1) & (3) (emphasis added).<sup>14</sup>

In other words, if any portion of a development site lies within the shorelines jurisdiction, then a shoreline permit (or exemption) is the first approval that must be “issued” before any “work” or “activity” on any portion of the site can commence.<sup>15</sup> But filing an application for a building permit does not constitute “work” or “development activity” under the Code, and a developer can file an application for a building

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<sup>13</sup> This is actually a requirement of the state Shorelines Management Act (SMA) that has properly been adopted by the City. “No development may occur on a shoreline of the state unless it is consistent with the policy of the SMA and a [shoreline] permit is first obtained.” *Samuel’s Furniture v. Dep’t of Ecology*, 147 Wn.2d 440, 448, 54 P.3d 1194 (2002); WAC 173-27-140(1).

<sup>14</sup> **Appendix 5.**

<sup>15</sup> See KZC 5.10.215 Development Permit – Any permit or approval under this code or the Uniform Building Code that must be issued before initiating a use or development activity. **Appendix 6.**

permit contemporaneously with a shoreline permit, and/or at any time while awaiting issuance of a shoreline approval.

The statutory definitions relevant to this code provision support the City's interpretation. "Development activity," is defined as "[a]ny work, condition or activity which requires a permit or approval under this code or the Uniform Building Code." KZC 5.10.210 (emphasis added).<sup>16</sup> Obviously, one does not need a "permit" or "approval" to apply for a building permit, thus, applying for a permit – any type of permit – does not constitute "development activity" under the Shorelines Administration Code and such applications are not prohibited by the Code. In sum, KZC 141.30(1) & (3) do not in any way impede a developer from filing an application for a building permit to vest rights.

As stated, Dargey argued below that the City code provisions above prevented him from filing a building permit to vest his rights pending processing of his shoreline application. At most, this argument amounts to nothing more than an erroneous interpretation of the City's code. And an erroneous interpretation of the City's code does not support Dargey's claim that he should be granted vested rights. This same argument was rejected by the Supreme Court in *Abbey Road*:

In the final analysis, nothing in the City's municipal code or in its application procedures conditions the submission of a

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<sup>16</sup> Appendix 6.

complete building permit application on prior approval of a site permit plan application. Abbey Road's own erroneous interpretation of the building permit application form is not a basis for finding the City's vesting procedures unconstitutional under the *West Main* standard. Abbey Road elected to proceed by obtaining site plan approval before applying for a building permit and cannot argue that its interpretation of the process it chose makes that process unconstitutional.

*Abbey Road* at 259-260 (emphasis added).

In sum, the City of Kirkland has no ordinance or regulation precluding Dargey from simultaneously filing a shoreline substantial development permit application and/or a request for SEPA review concurrently with a building permit application. Here, Dargey simply chose not to use this process. Instead, he chose to first obtain shoreline approval and complete environmental review before filing a building permit application. While this may make good business sense in the short term, as building plans may change significantly based upon environmental concerns or conditions of the shoreline substantial development permit, “by the same token it suggests a builder that is not ready to proceed, and thus is not entitled to vesting under the very rationale of that doctrine.” *Abbey Road*, 167 Wn.2d at 257-58, citing to Roger D. Wynne, *Washington's Vested Rights Doctrine*, 24 Seattle U. L. Rev. 851, 928-29 (2001) (noting the developer may want to hedge its bets by seeking one permit at a time, but does so at its own risk). Here, as in

*Abbey Road*, the City provided Dargey with a process that allowed him the ability to control the date of vesting. It was Dargey's own failure to timely file an application for a building permit that prevented vesting.

**D. The Supreme Court Has Already Rejected Dargey's Argument That The Vested Rights Doctrine Should Apply to All Land Development Permits**

Dargey argued below that the vested rights doctrine should be expanded to all land use applications. *CP 361-365*. But the Supreme Court has already declined to accept this argument:

Finally, *Abbey Road* [the developer] argues that as a matter of fundamental fairness this court should expand the vesting rights doctrine to all land use applications . . . . We find that such a rule would eviscerate the balance struck in the vesting statute . . . . **[I]nstituting such broad reforms in land use law is a job better suited to the legislature.** See *Wynne, supra*, at 916-17 (“[r]eform [of the vesting rights doctrine] should not be left to the judiciary, which must focus on one narrow fact pattern at a time”[.]

*Abbey Road*, 167 Wn. 2d 260-61 (emphasis added; citations omitted).

In making this argument below, Dargey relied heavily upon a case that not only pre-dates *Abbey Road*, but does not even address building permit vesting, *Noble Manor v. Pierce County*, 133 Wn. 2d 269, 943 P.2d 1378 (1997). As discussed below, *Noble Manor* is completely inapplicable as it addresses subdivision vesting (versus building permit vesting) and, thus, has no application to the facts of this case.

The line of decisions interpreting Washington's subdivision

vesting statute do not apply here, where no subdivision application is involved. In *Noble Manor*, our Supreme Court interpreted the vesting language contained in the subdivision statute, RCW 58.17.033<sup>17</sup>, holding that a subdivision developer obtains a vested right not only to subdivide its property under the laws in existence at the time it submits a complete subdivision application, but also to develop its land in accord with the zoning and land use laws existing at the time it files its application. *Noble Manor*, 133 Wn.2d at 285.

*Noble Manor* is distinguishable because it relied upon a vesting provision in the state subdivision statute, RCW 58.17.033, which is not applicable to building permit cases. Building permit cases rely upon the statutory vesting provisions of RCW 19.27.095(1).<sup>18</sup> *Noble Manor* even discussed the distinction between the statutory vesting provisions for subdivisions and building permits, noting that at common law, this state's vested rights doctrine had long entitled developers to have a land

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<sup>17</sup> RCW 58.17.033, the subdivision statute:

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

<sup>18</sup> RCW 19.27.095(1), the building permit vesting statute:

A valid and fully complete building permit application . . . shall be considered under . . . the zoning or other land use control ordinances in effect on the date of application.

(Emphasis added.)

development proposal processed under the regulations in effect at the time a complete building permit application was filed. *Noble Manor*, 133 Wn.2d at 175, citing *Erickson v. McLerran*, 123 Wn.2d at 867-68. But under the common law, the vested rights doctrine had never been extended to applications for preliminary or short plat approval. Then, in 1987, the legislature stepped in and: (1) codified the vested rights doctrine as to building permits (*RCW 19.27.095(1)*); and (2) expanded the vesting doctrine to also apply – for the first time – to subdivision and short subdivision applications (*RCW 58.17.033*). Laws of 1987, ch. 104. *Noble Manor* was the Supreme Court’s first opportunity to interpret the subdivision vesting statute. Both *Noble Manor* and the subdivision vesting statute are unique to subdivision applications. Here, Dargey did not file an application to subdivide property, and neither *Noble Manor* nor the state subdivision vesting statute is applicable or helpful to Dargey with regard to the vested rights issue now before this Court.

Furthermore, the fact that the legislature, in 1987, applied the vested rights doctrine to only two types of permits, subdivision permits and building permits, implies that it intended not to have the doctrine apply to any other permit application. This reasoning is a canon of statutory construction known as *expressio unius est exclusio alterius*, which means to express one thing in a statute implies the exclusion of the

other. *State v. Delgado*, 148 Wash.2d 723, 729, 63 P.3d 792 (2003). Had the legislature intended for the vested rights doctrine to be expanded to any other land use permits other than subdivision permits and building permits when it enacted the state vesting statutes in 1987, it would have either done so then – or at any time since. It has not.

The second case relied upon by Dargey in support of his argument that the vested rights doctrine should be applied to all permit applications was *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (2000). *Weyerhaeuser* is an old Division II decision that, when read and analyzed, was obviously not only poorly decided at the time, but has since been specifically questioned by the Supreme Court in *Abbey Road*, as discussed more fully below. In *Weyerhaeuser*, Division II had to decide whether the common law vested rights doctrine should be extended to an application for a conditional use permit (CUP). Relying principally on *Noble Manor v. Pierce County, supra*, (a subdivision case), Division II held that it did. But *Weyerhaeuser* was not a subdivision case, and *Noble Manor* should not have been relied upon for any reason under the facts in *Weyerhaeuser*.

Furthermore, as the City noted above, had the legislature intended for the vested rights doctrine to be expanded to conditional use permits (or any permits other than subdivision and building permits) when it enacted

the state vesting statute in 1987, it would have either done so then – or at any time since.

Additionally, *Weyerhaeuser* is in direct conflict with Supreme Court authority interpreting the vested rights doctrine as it applies to the building permit vesting statute, RCW 19.27.095(1), as interpreted by the Court in *Erickson v. McLerran*, *supra*, and *Abbey Road v. Bonney Lake*, *supra*. In both *Erickson* and *Abbey Road*, the Supreme Court made it very clear that the vested rights doctrine applied to building permit applications only, even going so far as to hold that a prior case decided by a lower court that might be interpreted as having expanded the vested rights doctrine to Master Use Permit (MUP) applications had been “superseded” by RCW 19.27.095(1). *See Abbey Road*, 167 Wn.2d at 254 (criticizing the applicant’s claim that the vested rights doctrine had already been judicially extended to MUP applications by this Court, Division I, in *Victoria Tower v. Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987), saying “Even if *Victoria Tower* can be read to expand the common law vesting doctrine to MUP applications, it has been superseded by RCW 19.27.095(1) and our analysis in *Erickson*.”) (emphasis added).

Finally, *Weyerhaeuser* appears to have relied upon out-of-context dicta from another pre-*Abbey Road* case for the proposition that the vested rights doctrine had already been judicially applied to CUP applications.

*Weyerhaeuser* makes reference to *Beach v. Board of Adjustment*, 73 Wn.2d 343, 347, 438 P.2d 617 (1968), where the state Supreme Court remanded the judicial appeal of a final land use decision back to the local jurisdiction for a new CUP hearing because the City had failed to record the first hearing and, thus, there was no verbatim record on appeal. The *Beach* court stated that although the regulations applicable to CUPs had changed since the first hearing, those changes could not be applied to the applicant in this situation, where the only reason for the delay and a new hearing was the City's failure to properly record the first hearing. *Id.*

*Weyerhaeuser* took this statement from *Beach* out of context, noting that a "subsequent change in the zoning ordinance does not operate retroactively so as to affect vested rights." *Weyerhaeuser*, 95 Wn. App. at 892-93, citing *Beach*, 73 Wn.2d at 347. In fact, the vested rights doctrine probably does not come into play at all when, as in *Beach*, an appeal is remanded for a new hearing based upon the local jurisdiction's failure to record the first hearing. But even if *Beach* might be interpreted as stating that the vested rights doctrine applies to CUP permits, this statement was only set forth in dicta, and courts cannot rely upon dicta as *stare decisis*. *State ex rel. Evergreen Freedom Found. v. Nat'l Educ. Ass'n*, 119 Wn. App. 445, 452, n.9, 81 P.3d 911 (2003). Also, as explained above, *Beach*'s decision on vested rights (if any) has been superseded by RCW 19.27.095(1), and

the Supreme Court's analysis in both *Erickson* and *Abbey Road*. *Abbey Road*, 167 Wn.2d at 254.

Finally, this Court should take notice of footnote 8 in *Abbey Road*, which specifically cites with disfavor to *Weyerhaeuser* (along with other non-building-permit decisions from the Courts of Appeals, such as *Beach v. Bd. of Adjustment* and *Talbot v. Gray*):

*Abbey Road* also argues that we should expand the vested rights doctrine based on case law, contending that there is no "rational reason" for refusing to expand the doctrine to site plan applications when the courts have done so in other contexts. . . . See *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 510 P.2d 1140 (1973) (grading permit applications); *Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974) (shoreline permit applications); *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 558 P.2d 821 (1977) (septic tank permit application); *Beach v. Bd. of Adjustment*, 73 Wn.2d 343, 438 P.2d 617 (1968) (conditional use permit applications); *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (1999) (conditional use permit applications). Again, in *Erickson*, we considered and rejected similar arguments, and we are not persuaded to overrule our analysis or holding in *Erickson*.

*Abbey Road*, 167 Wn.2d at 253, n. 8 (emphasis added).

Finally, the trial court appears to have relied in general on pre-*Abbey Road* case law in making its decision to apply the vested rights doctrine to Dargey's shoreline permit application. Specifically, before

*Abbey Road* was decided, various courts had extended vesting principles to single permit applications, such as applications for grading permits<sup>19</sup> and septic tank permits.<sup>20</sup> This extension of vesting principles is best described as “permit vesting” (versus “project vesting”). Under the permit vesting cases, the issue was not whether an entire “project” vested to the zoning code in effect at the time a particular permit application was filed; but only whether the permit itself vested in existing regulations, such that subsequently enacted regulations could not be applied to that specific permit. *See, for instance, Juanita Bay v. Kirkland*, 9 Wn. App. at 82-85 (grading permit was not subject to zoning changes adopted after the date a complete application for the grading permit had been filed); and *Ford v. Bellingham & Whatcom Cy*, 16 Wn. App. at 714-715 (property owners who failed to file applications for septic tank permits before new regulations were enacted were not entitled to have septic tank permits issued under prior regulations; but were instead required to comply with the septic tank regulations in effect on the date they filed complete permit applications). Based on these cases, the courts held that specific permits, such as grading permits and septic tank permits – *not* entire development projects – were subject to vesting protections. This “permit vesting” issue

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<sup>19</sup> *Juanita Bay v. Kirkland*, 9 Wn. App. 59, 84, 510 P.2d 1140 (1973), *rev. den.*, 83 Wn.2d 1002, 1003 (1973).

<sup>20</sup> *Ford v. Bellingham-Whatcom Cty Dist. Bd. Of Health*, 16 Wn. App. 709, 715, 558 P.2d 821 (1977).

is not before the Court of Appeals today. Instead, the City agrees that permit vesting may be appropriate here, *i.e.*, that Dargey may, in fact, be vested in the shoreline regulations in effect when he filed a complete shoreline permit application. The City simply does not agree that a shoreline permit application can confer vested rights to a local jurisdiction's entire zoning code (not just the adopted shoreline regulations) on an applicant's entire project (here, not just the 53 feet of Dargey's properties that lie within the shoreline's jurisdiction).

A little further discussion of this Court's decision in *Talbot v. Gray, supra*, may be helpful. The same "permit vesting" analysis found in *Juanita Bay* and *Ford* was used by Division I back in 1975 when this Court decided whether to apply "permit vesting" to a shoreline permit application. *Talbot* held that a residential property owner who wanted to build a dock adjacent to his home on Lake Washington was "vested" in the notice provisions of the State Shoreline Management Act (SMA) in effect at the time he filed his dock application. *Talbot*, 11 Wn. App. at 811. A careful reading of *Talbot* shows that the case was strictly limited to the notice provisions of the SMA, and further limited to a single private residential dock. The issue of "project vesting" was not addressed in *Talbot*. The issue of whether the filing of a shoreline permit application could vest a large project – such as Dargey's mixed-use development

project with a proposed 143 residential units – was not addressed at all in *Talbot* or *Juanita Bay* or *Ford*.

Furthermore, the trial Court’s order is also contrary to *Beuchel v. State*, 125 Wn.2d 196, 884 P.2d 910 (1994), which is the only State Supreme Court case the City could find that appears to directly address the vested rights doctrine as applied to shoreline permits. In *Beuchel*, the Supreme Court limited its analysis to “permit” vesting, not “project” vesting. *Beuchel* held that a shoreline application vested the applicant in the County’s existing shoreline regulations, and later-enacted shoreline regulations could not be imposed on the applicant. *Beuchel*, 125 Wn.2d at 206-207. No mention of possible vesting in any other regulations, much less the County’s entire zoning code, was made in *Beuchel*.

In conclusion, the trial court’s reliance on Division I’s 1975 decision in *Talbot* and/or the Supreme Court’s decision in *Beuchel* to apply “project” vesting to Dargey’s filing of a shoreline permit application goes far beyond the holdings of these cases. It also expands the vested rights doctrine far beyond what the legislature intended when it enacted the vesting provisions for subdivisions and building permits back in 1987, resulting in “broad land use reform,” which is a “job better suited to the

legislature.” *Abbey Road*, 167 Wn.2d at 260-261.<sup>21</sup>

**E. Dargey is not entitled to relief under the Declaratory Judgments Act**

Dargey asked the trial court to declare that (1) his project was vested in the BN zoning regulations and other land use regulations in place on the date he submitted his application for a shoreline substantial development permit, and (2) the City must accept and process his building permit application under those “vested” regulations. As set forth above, Dargey did not obtain vested development rights by virtue of filing only a shoreline permit application. But even if he had, he is not entitled to relief under the Declaratory Judgments Act given the issue presented here.

Declaratory judgment is used to determine questions of construction or validity of a statute or ordinance. *Federal Way v. King County*, 62 Wn. App. 530, 534-35, 815 P.2d 790 (1991). It is the proper form of action to determine the “facial validity of an enactment, as opposed to its application or administration.” *Federal Way*, 62 Wn. App.

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<sup>21</sup> The City asks this Court to recall and consider that Washington's vested rights doctrine is the minority rule, and it offers more protection of development rights than other jurisdictions. In other jurisdictions, the majority rule provides that development is not immune from subsequently adopted regulations until a building permit has been obtained and substantial development has occurred in “reliance” on the permit. Washington rejected this reliance-based rule. By adopting a date certain vesting point, Washington’s doctrine ensures that new land-use ordinances do not oppress development rights, thereby denying a property owner's right to due process under the law. That date certain is the date a developer files an application for a building permit. Washington’s vested rights rule is very generous to developers, more so than in any other state; all a developer has to do is file a building permit application.

at 535. Ordinarily, if a plaintiff has another completely adequate remedy, he is not entitled to relief by way of a declaratory judgment. *Id.* Thus, in a typical land use case, e.g., one which challenges the decision to issue or deny a permit, resort to a declaratory judgment procedure is not permitted because the Land Use Petition Act (LUPA) RCW Ch. 36.70C, provides an adequate remedy. *Id.* Here, given the fact that Dargey sought to file a permit application during the City's Moratorium, and his application was rejected due to the Moratorium, it appeared proper to the parties to proceed forward with a mandamus action. Ultimately, then, the seminal issue – whether or not Dargey could obtain vested rights merely by filing an application for a shoreline permit – was decided on summary judgment pursuant to CR 56.

But declaratory judgment is not a proper cause of action here because Dargey did not challenge the facial validity of an enactment (*i.e.*, he did not challenging the legality of the Moratorium itself), he merely challenged its application to his properties. Dargey can fully address this as-applied challenge in his request for mandamus. Accordingly, his request for a declaratory judgment should have been denied and dismissed by the trial court below.

Dargey cited to *Woodway v. Snohomish County*, 172 Wn.App. 643, 291 P.3d 278 (2013), for the proposition that the courts can decide the

application of the vested rights doctrine to a pending land use case in a declaratory judgment action. But *Woodway* is inapposite. Here, unlike *Woodway*, there is no “pending” land use decision; instead, *Dargey’s* building permit application was rejected at the counter. Furthermore, in *Woodway*, the declaratory judgment action was not filed by either the applicant or the permitting jurisdiction (which were both constrained to resolving any land use disputes between them via the LUPA), but by third parties whose only means of inserting their interests was via the Declaratory Judgment Act.

**F. Woodway V. Snohomish County Is Inapplicable to the Vested Rights Issue on Appeal in this Case**

In the Order on summary judgment on appeal in this case, the trial judge hand-wrote in, without any explanation, a citation to “*Town of Woodway v. Snohomish County*, 172 Wash. App. 643 (2013).” *CP 995*. To the extent she meant for *Woodway* to support her grant of relief under the Declaratory Judgment Act, her Order is in error and should be reversed by this Court as set forth above.

To the extent the trial judge intended for her citation to *Woodway* to support her conclusion that vested rights are triggered by a shoreline permit application, her order is also in error. *Woodway* does not hold that project vesting is triggered by a shoreline permit application; in fact, the

vesting doctrine as applied to shoreline permits is not even discussed in *Woodway*. In *Woodway*, the developer of a large project located on a 61-acre site had filed many permit applications with the County; including, among others, a subdivision permit and a building permit. Because these two applications were deemed complete, under both the common law vested rights doctrine and the state vesting statutes, the entire 61-acre “project” was indisputably vested.<sup>22</sup> The fact that the developer filed additional permit applications, such as an application for a shoreline substantial development permit, was immaterial to the vesting issue. After the developer’s project was fully vested via its subdivision application and building permit application, the Growth Management Hearings Board (GMHB) issued a decision holding that some of the zoning regulations to which the developer had been vested were “invalid” because they had not been adopted in compliance with SEPA. Thus, the core issue in *Woodway* was whether the developer could remain vested in regulations that were subsequently deemed “invalid” by the GMHB. *Woodway* held that pursuant to the vested rights doctrine, the developer’s project was allowed to remain vested to these regulations, even though they were “invalid” for all other future projects. *Woodway*, 172 Wn. App. at 664.

In conclusion, *Woodway* does not support the proposition that the

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<sup>22</sup> See, the subdivision statute, RCW 58.17.033; and the building permit vesting statute, RCW 19.27.095(1), discussed at length in this brief.

filing of a complete shoreline permit application can or does trigger “project” vesting under the vested rights doctrine. In fact, the City could not find any Washington case that supports this proposition. This is an issue of first impression. The result of the trial court’s Order on appeal is to expand “project” vesting under the vested rights doctrine to shoreline permit applications for the first time. As already fully explored and explained above, given the fact that the legislature did not include shoreline permits in its vesting statutes in 1987 (or at any time since); and further given the fact that the Washington State Supreme Court has twice refused to expand the vested rights doctrine to any permit other than a building permit (in both *Erikson* and *Abbey Road*), the City believes the trial court’s Order is in error and respectfully requests that it be reversed on appeal by this Court.

## V. CONCLUSION

Washington’s vested rights doctrine, as it was originally judicially recognized, entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations. In 1987, the Washington legislature codified the above-noted judicially recognized principles in RCW 19.27.095(1). The state vesting statute now explicitly confers vested rights upon the

submission of a complete building permit application, reading as follows:

“A valid and fully complete building permit application . . . shall be considered under . . . the zoning or other land use control ordinances in effect on the date of application.” (Emphasis added).

The reach of the vested rights doctrine is not ambiguous. In general, it applies only to building permit applications. In its most recent decision on this issue, *Abbey Road v. Bonney Lake, supra*, the Washington Supreme Court declined to expand the vested rights doctrine to applications for site plan review, even though the Court knew that the developers had expended a large amount of time and money in preparing their site plan application. *Abbey Road* noted that as long as a local jurisdiction allows a developer to file a building permit application and obtain vested rights at any time in the permitting process, then there is no reason to expand this state’s already liberal vesting doctrine to other permit applications.

Finally, this case presents facts even more persuasive than the facts presented in *Abbey Road*, because here it is undisputed that (1) the developer was represented by knowledgeable legal counsel during the entire application process; (2) both the developer and his counsel were given prior warnings that a moratorium was likely going to be enacted; and (3) the developer was specifically told by the City’s Senior Planner

that he was not vested by virtue of having filed a shoreline application, and that he could vest his rights by filing an application for a building permit. Despite these facts, the developer chose not to file a building permit application before the Moratorium was enacted. There is nothing about these facts that warrant the extension of the vested rights doctrine to shoreline permit applications as requested by Dargey.

In conclusion, Dargey could have vested his rights simply by filing a building permit application simultaneous with his shoreline permit application and request for SEPA review – or at any time prior to the enactment of the development moratorium affecting his property – but, for some reason, he chose not to. Although the City agrees that Dargey is vested in the City’s shoreline regulations in effect at that at the time he filed his shoreline permit application, his shoreline application alone did not vest him in the City’s entire zoning code, land use laws and regulations. Because he was not vested, the City acted properly when it refused to accept his application for a building permit during the pendency of the Moratorium. Thus, the City respectfully requests that this Court reverse the trial court order granting summary judgment to the Plaintiff Dargey. The City also respectfully requests that the Court grant its cross-motion for summary judgment, which seeks to establish that Plaintiff Dargey did not vest to all of the land use laws and regulations in effect on

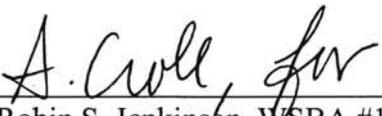
the date he filed an application for a shoreline development permit,  
because he could only obtain full vested rights by filing a building permit  
application.

Respectfully submitted this \_\_\_\_ day of October, 2013.

KEATING, BUCKLIN & MCCORMACK,  
INC., P.S.

By:   
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Attorneys for Defendant City of Kirkland

CITY OF KIRKLAND

By:   
Robin S. Jenkinson, WSBA #10853  
Attorneys for Defendant City of Kirkland

**DECLARATION OF SERVICE**

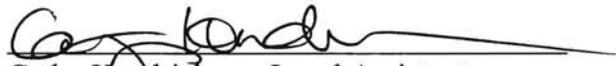
I declare that on October 28, 2013, a true and correct copy of the foregoing document was sent to the following parties of record via method indicated:

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DATED this 28<sup>th</sup> day of October, 2013.

  
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## **City of Kirkland's Appendix to Opening Brief**

**Appendix No. 1** – Order Granting Plaintiff's Motion for Partial Summary Judgment, filed May 10, 2013 (CP 992-995);

**Appendix No. 2** – *Washington's Vested Rights Doctrine: How We Have Muddled A Simple Concept And How We Can Reclaim It*, Roger D. Wynne, 24 Seattle U. L. Rev. 851 (2001) (CP 858-935);

**Appendix No. 3** – *Abbey Road: Not a Road Out of Our Vested Rights Thicket*, Roger D. Wynne, Environmental & Land Use Law, pp. 7-11 (December 2009) (CP 64-68);

**Appendix No. 4** – City of Kirkland Notice of Decision, Shoreline Substantial Development Permit, Potala Village Mixed Use Development, City File SHR11-00002, dated January 17, 2013 (CP 246-265);

**Appendix No. 5** – Kirkland Zoning Code, Chapter 141 – Shoreline Administration;

**Appendix No. 6** – Kirkland Zoning Code, Chapter 5 – Definitions; and

**Appendix No. 7** – Kirkland Zoning Code, Chapter 83 – Shoreline Management.

# APPENDIX 1

**FILED**  
KING COUNTY, WASHINGTON

MAY 10 2013

SUPERIOR COURT CLERK  
BY Carolina Ceja  
DEPUTY

THE HONORABLE MONICA BENTON  
HEARING DATE: MAY 3, 2013 / 10:00 AM

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING

POTALA VILLAGE KIRKLAND, LLC, a  
Washington limited liability company, and  
LOBSANG DARGEY and TAMARA AGASSI  
DARGEY, a married couple,

Plaintiffs/Petitioners,

vs.

THE CITY OF KIRKLAND, a Washington  
municipal corporation,

Defendant/Respondent.

NO. 12-2-18714-2 SEA

ORDER GRANTING PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

THIS MATTER having duly come on for hearing before the undersigned Judge of the above-entitled Court upon cross motions for summary judgment filed by both Plaintiffs/Petitioners Potala Village Kirkland, LLC, and Lobsang Dargey and Tamara Agassi Dargey, and by Defendant/Respondent the City of Kirkland, all parties having been duly represented by counsel, and the Court, being fully advised in the premises, having heard oral arguments of counsel for the parties, having reviewed the pleadings, exhibits, and other documents in the court file, and having reviewed those documents specifically listed below, finds that there are no genuine issues of material fact and that summary judgment should be entered as set forth below.

ORDER GRANTING PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT - *Page 1 of 5*

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**ORIGINAL**

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1. Plaintiffs/Petitioners' Motion For Partial Summary Judgment;
2. *Declaration Of Duana T. Koloušková In Support Of Plaintiffs/Petitioners' Motion For Partial Summary Judgment And Exhibits;*
3. *Declaration Of Lobsang Dargey In Support Of Plaintiffs/Petitioners' Motion For Partial Summary Judgment And Exhibits;*
4. City's Response in Opposition to Plaintiffs' Partial Motion for Summary Judgment and in Support of the City's Motion for Summary Judgment;
5. Supplemental Declaration of Teresa Swan;
6. Declaration of Eric Shields in Opposition to Plaintiffs' Partial Motion for Summary Judgment and in Support of the City's Motion for Summary Judgment;
7. Plaintiffs' Reply in Motion for Partial Summary Judgment;
8. Proposed Order Granting Plaintiffs' Motion for Partial Summary Judgment;
9. City of Kirkland's Motion for Summary Judgment to Dismiss Petitioners Request for Issuance of a Writ of Mandamus;
10. Declaration of Kurt Triplett in Support of City's Motion for Summary Judgment to Dismiss Petitioners Request for Issuance of a Writ of Mandamus;
11. Declaration of Tom Radford in Support of City's Motion for Summary Judgment to Dismiss Petitioners Request for Issuance of a Writ of Mandamus;
12. Declaration of Desiree Goble in Support of City's Motion for Summary Judgment to Dismiss Petitioners Request for Issuance of a Writ of Mandamus;
13. *Declaration of Teresa Swan in Support of City's Motion for Summary Judgment to Dismiss Petitioners Request for Issuance of a Writ of Mandamus;*
14. *Proposed Order Granting City of Kirkland's Motion for Summary Judgment to Dismiss Petitioners Request for Issuance of a Writ of Mandamus;*
15. Plaintiffs Potala Village Kirkland, LLC's and Dargey's Response to City of Kirkland's Motion for Summary Judgment;
16. Declaration of Justin Stewart;
17. Second Declaration of Duana T. Koloušková;
18. *Proposed Order Granting Plaintiffs' Motion for Partial Summary Judgment;*
19. City of Kirkland's Reply in Support of City's Motion for Partial Summary Judgment;

ORDER GRANTING PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT - *Page 2 of 5*

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1 regulations in effect on the date of the shoreline substantial development permit application,  
2 i.e. February 23, 2011.

3 10. In addition, this Court hereby enters a peremptory writ of mandamus  
4 commanding Defendant/Respondent City of Kirkland to accept and process an application  
5 for building permit by Plaintiffs based on the on the zoning and land use regulations in effect  
6 on the date of the shoreline substantial development permit application, i.e. February 23,  
7 2011, if said application is otherwise complete as required by state law and local regulation.

8 DATED this 9 day of May, 2013.

9 KING COUNTY SUPERIOR COURT

10 Monica Benton  
11 JUDGE MONICA BENTON

Town of  
Woodway  
✓  
Snohomish  
County,  
172 Wash.  
App. 43  
(2013)

12 Presented by:  
13 JOHNS MONROE MITSUNAGA & KOLOUŠKOVÁ, PLLC

14 By \_\_\_\_\_  
15 Duana T. Koloušková, WSBA #27532  
16 Attorneys for Petitioners/Plaintiffs

17 Approved as to form; Notice of Presentation waived:  
18 KEATING BUCKLIN & MCCORMACK, INC., P.S.

19 By \_\_\_\_\_  
20 Stephanie E. Croll, WSBA #18005  
21 Attorneys for Defendant

22 CITY OF KIRKLAND

23 By \_\_\_\_\_  
24 Robin S. Jenkinson, WSBA #18053  
25 Attorneys for Defendant

435-1 Order (Proposed) Granting Plaintiffs' Motion for Summary Judgment 04-29-13 doc

ORDER GRANTING PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT - *Page 4 of 5*

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## APPENDIX 2

C

Seattle University Law Review  
Winter 2001

Article

**\*851 WASHINGTON'S VESTED RIGHTS DOCTRINE: HOW WE HAVE MUDDLED A SIMPLE CONCEPT AND HOW WE CAN RECLAIM IT**

Roger D. Wynne [FNa1]

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Abstract

Washington's land use vested rights doctrine needs repair. The doctrine attempts to balance the interests of developers and municipalities by freezing the law applicable to the review of a land use permit application on the date that the developer submits that application. But the details of a doctrine originally designed to provide certainty and fairness now frequently offer neither in sufficient measure. The doctrine's inconsistent rationales account for much of the confusion that has become a fixture of the doctrine, and courts and the legislature have failed to resolve a host of issues clearly, accessibly, or fairly. This is especially true in the context of development projects that require multiple permits. The legislature should adopt a statutory rule that replaces the muddled details of the common-law doctrine with a principle that reestablishes certainty and at least strives for fairness.

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**\*855 Introduction**

Every real estate developer wants to manage the risks inherent in a project. One of those risks is that after purchasing property with a particular project in mind, the local government could change the development regulations applicable to the property in a way that either precludes the project or diminishes its value. To reduce this risk, developers [FN1] in Washington

often invoke the state's vested rights doctrine. Seattle newspapers report the doctrine being invoked, for example, by a real estate development company to blunt amended county laws that could preclude its 'mini-city,' slated for development in an otherwise rural area; [FN2] by a pipeline company to challenge new zoning laws that could dictate the pipeline's route through a city; [FN3] and by a casino to avoid a city moratorium on off-track betting. [FN4]

Use of the vested rights doctrine has its price, however. It leaves local governments less able to update and enforce their land use laws to keep pace with changing conditions and evolving views of appropriate land uses. This is especially critical in jurisdictions that revamped their development laws in the 1990s to respond to Washington's \*856 Growth Management Act (GMA). [FN5] Among other things, the GMA forced local governments to encourage more dense urban land use patterns in cities and to prohibit low-density 'sprawl' in unincorporated rural areas. [FN6] A Tacoma newspaper recently called on the Pierce County Council to hamper the use of the vested rights doctrine by those wanting to avoid GMA-era regulations and develop intensely in rural parts of the county. [FN7] Casting land use applications under this doctrine as 'ticking time bombs,' the newspaper complained that the doctrine allows developers 'to speculate, their parcels rising in value because they can be developed without conforming to costly new regulations.' [FN8] The King County Executive issued an emergency order to preclude certain applications of the vested rights doctrine to development projects 'that skirt modern environmental and zoning rules.' [FN9]

The vested rights doctrine attempts to balance these competing interests. It is designed to protect a developer's interest in having some certainty that the applicable rules will not continue to change while he or she attempts to develop or use property, and to accommodate local governments' and the public's interest in shaping land use codes to meet their communities' evolving needs. The doctrine does this by fixing a point in time at which a developer can no longer be subject to changes in local land use laws. This bright-line approach enhances both certainty and fairness, at least in theory.

The unfortunate reality is that the details of this theory have been muddled irrevocably in practice. As far back as 1939, the Washington Supreme Court observed that the 'term 'vested right' is not easily defined and has been used by the courts to express various shades of meaning.' [FN10] The ensuing six decades have done little to \*857 erode this observation, at least in the context of land use law. The judiciary and, to a lesser extent, the legislature have confused the doctrine's critical details. Today, any attempt to state the current vested rights doctrine with certainty falters when that statement is applied to a set of facts, especially where resolution of the issue can make the difference in a controversial land use project. In some key respects, the doctrine fails to provide fairness as it slides unjustifiably toward the developers' side of the spectrum in the context of multiple-permit projects.

This Article explores many of the problems with the details of the vested rights doctrine and outlines a statutory solution to them. [FN11] Part I examines the inconsistent rationales that underlie the various manifestations of the doctrine. The differences between the 'mandamus' and 'fairness/certainty' rationales help explain some of the confusion that has become a fixture of the doctrine. Part II discusses a host of issues that the doctrine fails to resolve adequately. It groups these issues into four fundamental questions, the divergent answers to which often form the key dispute in any vested rights case: (1) to which types of land use permit applications is the doctrine applicable; (2) what types of laws does the doctrine freeze in time; (3) when does the doctrine begin to freeze those laws in time; and (4) for how long, and for what purpose, does the doctrine apply in the context of development projects that require more than one permit? Part III makes the case for adopting a statutory rule that replaces the muddled common-law doctrine in a way that reestablishes certainty and at least strives for fairness in the law's details.

### I. Why the doctrine? The Hazards of Divergent Rationales

Why do we have a vested rights doctrine? Washington courts' answers to this question generally conform to one of two rationales, although courts rarely acknowledge these rationales explicitly. This Article will refer to these two rationales as 'mandamus' and 'fairness/certainty.' The fairness/certainty rationale has emerged as the more dominant, but both rationales continue to influence the doctrine. As this Article explains later, [FN12] the persistent interplay between these \*858 rationales creates much of the confusion that has undermined the vested rights doctrine.

#### A. The Mandamus Rationale: A Bad Fit, but Still Invoked

When initially articulated in the context of land use law, [FN13] the vested rights doctrine arose out of actions for mandamus in which a developer sought judicial assistance to force a municipality to issue a building permit for which the developer had applied. Given the nature of this action, [FN14] courts understandably tried to determine whether the municipality enjoyed discretion to deny the permit or if it was instead obligated to perform a nondiscretionary, ministerial duty and grant the permit. This led, in 1954, to one of the earliest summaries of the vested rights doctrine in the context of land use law:

A property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto. A building or use permit must issue as a matter of right upon compliance with the ordinance. The discretion permissible in zoning matters is that which is exercised in adopting the zone classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. [FN15]

The rule that implements this rationale applies only to building permit applications and features two relevant inquiries: (1) is the building permit application complete; and (2) does the application comply with the law in effect on the date of application? If the answer \*859 to both questions is 'yes,' then the local government must meet its ministerial duty to issue that permit. Figure 1 illustrates this rule.

The mandamus rationale announced by the Washington Supreme Court in 1954, as well as the rule that implements it, fit poorly with the reality of land use permitting today. Posing three questions illustrates this point. First, how does this rule affect applications for land use authorizations other than building permits and laws other than zoning codes? Land use development today usually requires a host of different permits in addition to building permits [FN16] and brings into play a number of different bodies of development regulations other than zoning laws. [FN17]

#### The Mandamus Rationale

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Figure 1. The rule implementing the vested rights doctrine under the mandamus rationale.

\*860 Under the mandamus rationale, if a building permit application is complete and complies with the law in effect on the date of application, the local government must issue the building permit. (Bldg. = building)  
Second, how many truly 'ministerial,' nondiscretionary land use authorizations exist? Conversely, how many truly 'dis-

cretionary' authorizations exist in which the decisions are purely legislative, unhampered by any criteria set out in an ordinance? Decisions on most development authorizations today are neither purely ministerial nor purely discretionary. With the advent in 1971 of supplemental, substantive authority to condition or deny permits on the basis of environmental effects, [FN18] even the most 'ministerial' of permits--the building permit--became imbued with a significant amount of discretion. [FN19] Decisions on land use permits are generally bounded by legal criteria against which the local government must assess the facts presented by each application. [FN20] These decisions are subject to judicial review for, among other things, errors of law or failure to make decisions based on substantial evidence. [FN21] A writ of mandamus is generally not available to force a particular land use decision precisely because land use decisions usually involve some exercise of discretion. [FN22] In this regime, the line between ministerial and discretionary acts tends to evaporate.

Finally, if the proposed land use project contains a few elements that do not 'comply,' must the municipality reject the application and force the applicant to reapply (potentially subject to newly-enacted law), or may the municipality condition or issue the permit if the developer changes certain elements of the proposal? The mandamus rationale suggests an all-or-nothing proposition for local governments--the government must either find that the proposal complies in its entirety and issue the permit, or reject it if even the slightest element does not comply. This approach fails to comport with the reality of contemporary land use permitting, where local governments often condition projects to address environmental impacts [FN23] or to meet criteria specified in local development regulations. [FN24]

#### \*861 B. The Fairness/Certainty Rationale: The More Appropriate and Dominant Approach

At some point during the evolution of Washington's vested rights doctrine in the context of land use decisions, courts evidently realized the limits of mandamus as an intellectual foundation. Increasingly, courts articulated a rationale that furthers two primary goals. First, the doctrine is intended to strike a fair balance between the interests of (a) developers in planning, financing, and implementing land use projects with some certainty that the rules of the game will not change mid-course; and (b) municipalities in revising their land use laws to meet the demands of growth, comply with new state laws, and avoid nonconforming uses. [FN25] Second, the doctrine is intended to provide certainty to all involved by fixing in time a particular, definable right.

The Washington Supreme Court eventually described the balancing act that forms the 'fairness' prong of this rationale:

Development interests . . . 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 . . . 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. The application for a building permit demonstrates the requisite level of commitment. [FN26] \*862 Acknowledging the 'certainty' prong of the fairness/certainty rationale, the court also noted that the Washington vested rights doctrine 'places great emphasis on certainty and predictability in land use regulations.' [FN27] The 'certainty' prong actually dates back to early, mandamus-based vested rights decisions. In those early decisions, the Washington Supreme Court rejected the majority vesting rule, [FN28] which invokes notions of estoppel and

holds that a municipality may change the laws applicable to a particular development as long as the developer has not changed his or her position in reliance on the existing law. [FN29] The court justified rejecting this majority rule in favor of a practical rule that provides certainty:

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'--to which may be added the stalling or acceleration of administrative action in the issuance of permits--to find that date upon which the substantial change of position is made which finally vests the right. The more practical rule to administer, we feel, is that the right vests when the party . . . applies for his building permit . . . [FN30]

The fairness/certainty rationale manifests itself in a rule that freezes in time the law applicable to the review of a given land use permit application. Figure 2 illustrates this rule. Once a developer files a complete permit application, this rule ensures that subsequent changes to local land use or zoning laws will not affect the review of that application. In other words, this rule extends to developers a right to freeze the applicable law in place for purposes of bounding a local government's decision on a developer's application. [FN31]

\*863 The fairness/certainty rationale, and the law-freezing rule that implements it, provide a more appropriate fit with the realities of contemporary land use permitting than does the mandamus rationale. Unlike the mandamus rationale, the fairness/certainty rationale does not depend on a local permit being ministerial and nondiscretionary. The fairness/certainty rationale also provides more flexibility than the mandamus rationale because it creates a rule that, in theory, could apply to an application for any type of land use authorization (not just a building permit application) and to all development regulations that affect the ultimate decision on the application.

#### The Fairness/Certainty Rationale

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Figure 2. The rule implementing the vested rights doctrine under the fairness/certainty rationale.

Under the fairness/certainty rationale, a complete permit application freezes in time the law applicable to the local government's consideration of that application. The local government may still deny the application, but it may not do so on the basis of laws that take effect after the date of a complete application.

Fairness/certainty has generally emerged as the dominant rationale for the vested rights doctrine in Washington. The Washington Supreme Court acknowledged the primacy of this rationale and the law-freezing rule in 1997: 'In Washington, 'vesting' refers generally \*864 to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission.' [FN32] The legislature has attempted to codify the law-freezing rule in the context of certain land use applications. [FN33]

#### C. Is the Mandamus Rationale Dead?

The fairness/certainty rationale did not emerge through a watershed opinion, and no Washington court has explicitly rejected the mandamus rationale. In 1982, however, the Washington State Supreme Court attempted to lay to rest the ministerial-discretionary dichotomy at the heart of the mandamus rationale:

The distinction between ministerial and discretionary acts is not relevant to the validity of procedural limits placed

on the decisionmaking entity. The need for a 'date certain' upon which a right vests is to avoid tactical maneuvering between parties and that need would appear equally strong whether the act is discretionary or ministerial. [FN34]

This 1982 observation, however, did not kill either the mandamus rationale or even the ministerial-discretionary dichotomy on which it rests. Subsequent decisions invoked the mandamus rationale unquestioningly. [FN35] Other decisions confused the two rationales, or at least the authority for them. For example, the Washington Supreme Court has repeatedly cited 1950s mandamus-rationale case law as authority for the rule that can only be supported by the fairness/ certainty rationale. [FN36] Gregory Overstreet and Diana Kirchheim hold out the ministerial-discretionary distinction at the heart of the mandamus rationale as the touchstone of the current vested rights doctrine: \*865 'The basic rule was (and still is) that ministerial permits vest, while discretionary ones do not.' [FN37]

In sum, even though the trend appears to be toward a vested rights doctrine founded on notions of fairness and certainty, the mandamus rationale continues to haunt the doctrine. This confusion helps explain why critical details of Washington's vested rights doctrine remain elusive, as explored in the next section of this Article.

## II. What Is the Rule? The Unresolved Issues That Plague the Doctrine

The rule that implements the vested rights doctrine under the fairness/certainty rationale requires answers to at least four persistent questions: (1) to which types of applications does the doctrine apply; (2) what laws does the right freeze in time; (3) at what point in time does this 'freeze' begin; and (4) for how long and for what purposes do the laws remain frozen?

The following sections demonstrate how the answers to these questions remain unclear even though the essential framework of the vested rights doctrine remains reasonably sound. A rule that should provide measures of certainty and fairness all too frequently provides neither. Certainty is lost in the hands of attorneys who can invoke authority to justify most positions, and fairness erodes through piecemeal, often unwitting judicial opinions. This problem is most acute in the context of development projects that require multiple permits.

### \*866 A. To Which Types of Land Use Permit Applications Does the Doctrine Apply? Extending the Doctrine in Fits and Starts

Courts have not consistently identified the universe of land use permit applications to which the doctrine applies. [FN38] From its inception in the 1950s, the vested rights doctrine has always applied to building permit applications. [FN39] Washington courts have moved beyond this base haphazardly. From 1968 to 1977, Washington courts extended the doctrine to four other types of land use development applications without much explanation. In the 1980s, courts expressed a new-found reluctance to extend the doctrine further. The legislature overcame this judicial reluctance in the case of subdivision applications, but it left in place the judiciary's curious refusal to extend the doctrine to site-specific rezone applications. The result is a rule that is difficult to apply without first checking piecemeal case law and legislation.

#### 1. The Judiciary's Initial, Almost Matter-of-Fact Extension of the Doctrine Beyond Building Permit Applications

The vested rights doctrine first ventured beyond the confines of building permit applications in 1968. [FN40] In dicta, and without explicitly acknowledging the new ground it was breaking, the Washington State Supreme Court extended the vested rights doctrine to conditional use permit applications. [FN41]

This initial, off-handed extension of the doctrine opened the door to the court of appeals, which, in the following decade, extended the doctrine almost matter-of-factly to three other types of permit applications. In 1973, the court of appeals found 'no rational distinction between building or conditional use permits and a grading \*867 permit,' [FN42] and so held that the vested rights doctrine also applies to grading permit applications. [FN43] The court of appeals quickly applied the doctrine to shoreline substantial development permit applications without even acknowledging that it was extending the doctrine beyond the three types of applications to which the doctrine had been applied to date. [FN44] More cautiously, in 1977, the court of appeals held that to the extent the vested rights doctrine might apply to septic tank permit applications, it only freezes the applicable law as of the date a complete septic tank permit application is filed. [FN45] Twenty years later, an unquestioning court of appeals cited this as authority for the proposition that '[t]he doctrine applies to septic tank installations.' [FN46] By the end of the 1970s, therefore, the judiciary had essentially taken the doctrine from the realm of building permit applications and extended it to conditional use, grading, shoreline substantial development, and septic permit applications.

## 2. The Judiciary's Subsequent Reluctance to Extend the Doctrine and the Legislature's One-Time Intervention

In the 1980s, the judiciary began retreating from its liberal extensions of the vested rights doctrine to other types of development permit applications. The Washington Supreme Court first developed its apparent reluctance to extend the doctrine in the context of preliminary subdivision applications. In *Norco Construction, Inc. v. King County*, [FN47] the court refused to extend the vested rights doctrine, at least in so many words, to preliminary subdivision applications. In that case, the county council failed to act on a preliminary subdivision application [FN48] within ninety days of the date of completed application, as required by statute. [FN49] The council based its refusal on a perceived conflict between the application and a draft comprehensive plan that the county had not yet adopted. [FN50] The court of appeals held that the vested rights doctrine applied to this situation, but the particular con-\*868 text of preliminary subdivision applications required a rule that froze the applicable law in effect at the end of the 90-day statutory period, rather than at the start of the period on the date of complete application. [FN51]

The supreme court agreed that the law in effect at the end of the statutory 90-day period should apply, but based its decision on an interpretation of the statute, not the vested rights doctrine: '[T]he use of the term 'vested right' in the opinion of the Court of Appeals overstates the nature of [the developer's] right.' [FN52] Although *Norco's* direct treatment of the vested rights doctrine was ambiguous, subsequent decisions removed any ambiguity by describing *Norco* as holding that the vested rights doctrine does not apply to preliminary subdivision applications. [FN53]

The retreat continued in 1984, when the court of appeals ruled that submitting a preliminary site plan does not trigger the vested rights doctrine. [FN54] Three years later, the supreme court held that the vested rights doctrine does not apply to binding site plan applications. [FN55] The legislature responded to the judiciary in 1987, extending \*869 the vested rights doctrine to preliminary subdivision applications, [FN56] but not to preliminary or binding site plan applications.

Even after the legislature intervened, the supreme court continued to resist extending the doctrine to other types of development permit applications. In 1994, for example, the court considered an application for a master use permit (MUP) from the city of Seattle. [FN57] 'MUPs are 'umbrella' or 'master' permits, which actually represent a number of independent regulatory components, including environmental impact review, comprehensive plan review, and other use inquiries.' [FN58] The court refused to extend the vested rights doctrine to the developer's MUP application because filing a MUP application could occur in the infancy of a project, well before the developer had committed substantial resources to a project. [FN59] Fur-

thermore, the court noted that the city had put in place a local vesting ordinance that allowed a MUP applicant to file a building permit application and thereby lock in the law applicable to both the building permit and the MUP application. [FN60] This gave the court comfort that the developer had the control to freeze the applicable law when he or she actually decided to commit to develop. [FN61] The legislature has not responded to this decision with any MUP vesting law of its own.

### 3. The Unique Case of Site-Specific Rezones: The Mandamus Rationale Rears Its Head in the Wrong Place

The issue of whether the doctrine applies to site-specific rezone applications merits particular attention. The legislature's decision to extend the doctrine to preliminary subdivision applications [FN62] and the \*870 judiciary's decisions not to extend the doctrine to a binding site plan [FN63] or to MUP applications [FN64] arguably find some basis in a dispute over the policies on which the doctrine is constructed. By contrast, the judicial refusal to extend the doctrine to rezone applications appears to be based more on a misapplication of the doctrine in the guise of the mandamus rationale than on any fundamental policy.

The determination that the vested rights doctrine does not apply to site-specific rezone applications occurred in *Teed v. King County*. [FN65] In that case, developers applied for a rezone, which the county granted on the condition that the developers dedicate a right-of-way to the county. [FN66] After the developers dedicated the right-of-way, the county amended the zoning code applicable to the entire area and then used the new code to deny the requested rezone. [FN67] The court ordered the county to convey the land back to the developers, but refused to order the county to issue the requested rezone. [FN68]

Two problems hamper the court's rationale. First, it relied on the mandamus rationale for the vested rights doctrine: 'The situation raised in the instant appeal is clearly not the type of ministerial action which warrants the granting of mandamus contemplated under the 'vested rights' doctrine.' [FN69] The court apparently overlooked the *Norco* court's announcement roughly eighteen months earlier that the ministerial/discretionary distinction was not relevant to the vested rights doctrine. [FN70] Second, the *Teed* court invoked authority regarding areawide rezones to reason that site-specific rezones may not be compelled by the judiciary through a writ of mandamus. [FN71] Although area-wide zoning and rezoning is a legislative function, [FN72] site-specific rezones are quasi-judicial decisions bounded by local regulations and criteria. [FN73]

\*871 Despite its shortcomings, the *Teed* decision has become accepted as authority for the proposition that the vested rights doctrine does not apply to site-specific rezone applications. This has forced courts to engage in needless contortions to reach reasonable results, only to have those contortions further confuse the doctrine. For example, the court of appeals faced the issue of the vested rights doctrine in the context of a site-specific rezone application in *Hale v. Island County*. [FN74] In that case, the county had in place a two-step rezone procedure similar to that for subdivisions: the developer must first seek preliminary approval and then apply for final approval. [FN75] The developer filed its preliminary rezone application, obtained preliminary approval, and then filed its application for final approval shortly before the state Growth Management Hearings Board invalidated the county zoning provisions that favored the rezone application. [FN76] The court found itself in a bind. The Growth Management Act (GMA) maintains that a Board order of invalidity does not affect those 'rights that vested under state or local law' prior to the order. [FN77] However, as the court \*872 noted, *Teed* precludes the vested rights doctrine from applying to site-specific rezone applications. [FN78]

To reach the result it wanted, the *Hale* court executed an end-run around *Teed*. Although it acknowledged that the vested rights doctrine does not apply to rezones, the court essentially picked, out of thin air, a point of vesting that allowed it to fit the case into the GMA's protection of vested rights. The court made a few observations about the county's apparent intent behind

its two-step rezone application procedure, and from those observations concluded that, at least in that county, the 'applicant's development rights on specific rezones vested upon preliminary use approval.' [FN79] Applying this non-vested-rights-doctrine-vested-rights rule to the case at hand, the court held that the developer's rights had 'vested' upon preliminary rezone approval and therefore could not be affected by the Board's invalidation order. [FN80]

Hale would have been a relatively easy case were it not for Teed. If site-specific rezone applications were subject to the general vested rights doctrine, the applicant in Hale would have been able to freeze the law applicable to its final rezone application at least as of the date it submitted that application, which was before the Board's ruling. This would have fit the developer within the GMA's protection of vested rights.

Teed remains unquestioned authority for the proposition that the vested rights doctrine has no place in the realm of site-specific rezones. [FN81] More importantly, it remains yet another example of how we have muddied the vested rights doctrine. The doctrine deserves more certainty and simplicity than decisions like Teed allow.

#### 4. So, What Is the Rule?

As of now, the rule in Washington seems to be that the vested rights doctrine applies to applications for building permits, preliminary subdivisions, [FN82] conditional use permits, shoreline substantial \*873 development permits, grading permits, and septic permits, but not to applications for site-specific rezones, preliminary or binding site plans, or master use permits.

What about applications for other types of development permits or applications for types of permits that do not currently exist, but that, given the evolving nature of land use law, will arise in the future? Unfortunately, the doctrine does not provide a discernible pattern for determining which types of applications are covered by the doctrine. Should we assume that the doctrine does not apply to any type of development authorization to which neither the judiciary nor the legislature has explicitly extended the doctrine? Instead, should we assume that the doctrine applies to all types of development authorizations except those that the judiciary has determined do not trigger the doctrine?

The doctrine should provide more certainty than this. Its applicability should be apparent without resorting to piecemeal case law and legislation.

#### B. What Bodies of Law Does the Doctrine Freeze in Time? Bounding the Substantive Reach of the Doctrine

Beyond the issue of what types of land use permit applications trigger the vested rights doctrine lies this question: once triggered, what bodies of law does the doctrine freeze in time? Courts have generally noted that 'zoning ordinances' are within this universe of laws, along with most ordinances requiring a host of other land use authorizations. [FN83] Courts have struggled, however, with laws that might not fit neatly within this category of zoning or land use controls. This section discusses three such laws: (1) 'health and safety' regulations; (2) procedural land use requirements; and (3) GMA impact fees.

##### 1. 'Health and Safety' Regulations

Most zoning or land use regulations advance public health and welfare, and many directly promote safety. Nevertheless,

two judicial decisions suggest, as do Overstreet and Kirchheim, that some body of 'health and safety' regulation exists apart from zoning or land use restrictions that is not frozen in time by application of the vested \*874 rights doctrine. Divining this distinction remains one of the more difficult, and unnecessary, aspects of the vested rights doctrine.

a. *Hass v. City of Kirkland* [FN84]

In *Hass*, the Washington Supreme Court considered an appeal from a developer who submitted a building permit application after the effective date of an amendment to the city's fire code. [FN85] The amendment created a requirement that buildings of the developer's type had to be within a certain distance from an improved public street to secure adequate fire service access. [FN86] The court held that because the building permit application was filed after the effective date of the amendment, the developer was subject to the amendment. [FN87] This was a simple case, requiring a direct, uncomplicated application of the vested rights doctrine--the court applied the law in effect on the date of building permit application.

Unfortunately, the court indulged in dicta that has taken on a life of its own. 'Even if, arguendo, the [developer] had a vested right to a building permit, this right would have been extinguished through the exercise of the [[city's] police power in enacting the ordinance.' [FN88] The court relied on the 1905 case of *Seattle v. Hinckley*, [FN89] which includes the following statement: 'There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community.' [FN90] The *Hass* court also pointed to the body of law exploring the constitutionality of municipal exercise of police powers to further the public health and welfare. [FN91]

The authorities cited by the *Hass* court, however, do not support its dicta. The 1905 *Hinckley* decision had nothing to do with the vested rights doctrine, at least as that doctrine came to affect land use decisions half a century later. In *Hinckley*, the owner of an existing office building challenged a city's attempt to force him to upgrade his fire escapes to meet a newly-enacted fire code provision. [FN92] This was not a case in which the law changed while a municipality was considering a permit application. Instead, the new fire escape law applied universally to future and existing buildings, thereby overcoming the \*875 presumption that new laws act only prospectively. [FN93] Likewise, the other decisions cited in the *Hass* decision deal with the authority of municipalities to enforce health and safety rules generally, not necessarily with their retroactive application to existing land uses or to uses for which an application has been submitted. [FN94]

Although at least one appellate court evidently recognized the *Hass* treatment of 'health and safety' laws as mere dicta, [FN95] *Hass* continues to muddy the water. For example, the supreme court relied on *Hass* when concluding that '[m]unicipalities can regulate or even extinguish vested rights by exercising the police power reasonably and in furtherance of a legitimate public goal,' [FN96] and the court of appeals has nodded toward *Hass*, at least on a theoretical basis. [FN97]

b. *Rhod-A-Zalea & 35th, Inc. v. Snohomish County* [FN98]

In *Rhod-A-Zalea*, a peat mine began operations decades before the county enacted both a zoning code that required a conditional use permit and a grading ordinance that required a grading permit. The parties agreed that the peat mining operation constituted a valid, nonconforming use and, as such, it was not subject to the conditional use permit requirement. [FN99]

Nevertheless, the court agreed with the county that the developer still had to apply for a grading permit. The court's rationale appears to hinge upon labeling the grading ordinance as 'police power regulations subsequently enacted for the health,

safety and welfare of the community.' [FN100] The court asserted that the vested rights doctrine did not apply because 'the doctrine only applies to permit applications' and no application was at issue in the case. [FN101] In the alternative, the court reasoned that the doctrine cannot prevent application of 'later \*876 enacted police power regulations.' [FN102] Curiously, the court never even mentioned case law that applies the vested rights doctrine to grading permit applications. [FN103] If grading regulations are truly 'health and safety' regulations that a local jurisdiction may upgrade and apply through exercise of its 'police powers,' then the Rhod-A-Zalea court should have overruled grading permit vested rights case law.

Like Hass, Rhod-A-Zalea forced a cumbersome distinction between zoning or other land use regulations (which the vested rights doctrine presumably freezes in place) and some more specific set of 'health and safety' regulations (which are apparently immune from the vested rights doctrine). [FN104] Application of the vested rights doctrine should not hinge on such fuzzy distinctions.

### c. Overstreet and Kirchheim

Hass and Rhod-A-Zalea each characterized the imposition of 'health and safety' regulations as an exercise of 'police power' that can apply to a project notwithstanding the vested rights doctrine. [FN105] Overstreet and Kirchheim, by contrast, perceive a distinction between 'police power' and 'health, safety, and welfare' laws and reason that only the latter may trump vested rights. [FN106] According to Overstreet and Kirchheim, 'local governments can still impose valid (that is, reasonable) health, safety, and welfare regulations (e.g., fire protection standards) on a vested project. However, activities that can be regulated under the 'police power' are much broader than activities subject to 'health, safety, and welfare' regulations.' [FN107]

\*877 Overstreet and Kirchheim's distinction between 'police power' and 'health, safety, and welfare' regulations cannot stand in light of the history of police power jurisprudence. Courts, including Hass and Rhod-A-Zalea, have consistently defined the 'police power' to be concurrent with-- indeed, defined by--the authority to promote 'health, safety, and welfare.' [FN108] The terms are synonymous.

Overstreet and Kirchheim's distinction is unsupported by the four decisions they cite. [FN109] As explained above, [FN110] two cases, Hinckley [FN111] and Hass, [FN112] were either unrelated to the vested rights doctrine or amounted to unjustifiable dicta. Even the Hass dicta stated that a municipality could extinguish vested rights through the exercise of its 'police power,' [FN113] not just through the exercise of some more limited authority to regulate health, safety, or welfare. In the third case cited by Overstreet and Kirchheim, DeTamore v. Hindley, [FN114] the court analyzed a railroad overpass safety ordinance purely as a 'police power regulation' and not as a 'health, safety, and welfare' regulation. [FN115] Furthermore, DeTamore, decided in 1915, did not have anything to do with the vested rights doctrine, which was announced some forty years later. The vested rights holding in the final case cited by Overstreet \*878 and Kirchheim, Ford v. Bellingham-Whatcom County District Board of Health, [FN116] was not premised on the septic regulation at issue somehow being a 'health, safety, and welfare' regulation instead of a mere 'police power' regulation. Ford was a direct application of the vested rights doctrine in which the court determined that the developer did not trigger the doctrine. The court did not decide whether a septic regulation was subject to the doctrine. [FN117] It merely held that 'to the extent' the doctrine could apply to such regulations, the applicant did not trigger the doctrine in that case. [FN118] Overstreet and Kirchheim's assertion that septic regulations may trump the vested rights doctrine is undermined by a post- Ford decision that found that 'the doctrine applies to septic tank installations.' [FN119]

Even Overstreet and Kirchheim trip over their own distinction. Describing an example elsewhere in their article, they state that 'if an elected body thinks the public health, safety, and welfare requires less housing density, it exercises its regulatory powers and passes a new antisprawl ordinance increasing minimum lot sizes.' [FN120] It seems unlikely that Overstreet and Kirchheim would therefore conclude that minimum lot sizes are among the 'health, safety, and welfare' laws that may trump the vested rights doctrine. That conclusion would conflict with established case law. [FN121] Overstreet and Kirchheim's own confusion of this distinction undermines their use of the distinction 'to avoid confusion about which kind of regulations can trump vested rights.' [FN122]

**\*879 d. A 'Health and Safety' Distinction Is Relevant to the Law of Nonconforming Uses, Not the Vested Rights Doctrine**

Hass, Rhod-A-Zalea, and Overstreet and Kirchheim illustrate the danger of confusing the vested rights doctrine with the law of nonconforming uses. A new land use law (no matter how tailored to 'health and safety' concerns) can apply to both existing and new land uses. A local government may force land owners to cease their existing, nonconforming uses--in effect, enforce the law retroactively--but only if the governmental interest is strong enough and, sometimes, only if the government allows a reasonable period to phase out the existing use and perhaps pays compensation. [FN123] Because new or future uses are not sheltered as valid nonconforming uses, the government has much wider discretion to apply a new law--in effect, to enforce it only prospectively.

The vested rights doctrine, by contrast, resolves only the issue of when a particular land use ceases to be 'new' and must be considered 'existing' such that it is protected as a nonconforming use. The vested rights doctrine does not dictate what types of regulations may apply retroactively to existing uses. That determination remains within the purview of the law of nonconforming uses. Although distinctions between 'zoning,' 'police power,' or 'health and safety' might have relevance for the law of nonconforming uses, such distinctions remain an unnecessary distraction within the vested rights doctrine.

**2. Land Use Procedures That Do Not Affect Substantive Requirements**

Local land use codes will invariably affect developers' substantive rights by regulating the type, degree, or physical attributes of \*880 development or use. Most local land use codes also dictate the procedures that developers must follow to obtain the permits that they seek. These procedures generally include elements such as a determination of an application's completeness, public notice of applications, and administrative hearings and appeals. [FN124]

Beyond land use law, the general rule in Washington is that any new law that affects only procedural rights applies retroactively. [FN125] An exception to this general rule is that new laws that affect vested rights do not apply retroactively. [FN126] With most procedural laws, this exception is not available because a party does not have a 'vested right'--at least as that term is used in its broadest sense--to any particular form of procedure. [FN127]

Despite this general rule, is something special about 'vested rights' in the context of land use law that allows a developer to have his or her application processed according to the procedural rules in effect on the date he or she files a complete land use permit application? Washington courts have twice suggested that this is the case. First, in a decision that is generally cited for the proposition that the vested rights doctrine extends to shoreline substantial development permit applications, a procedural, rather than a substantive rule, was at issue. In *Talbot v. Gray*, [FN128] property owners tried to enjoin a city from issuing a

shoreline permit to one of their neighbors for the construction of a dock. The property owners argued that while the neighbors gave notice pursuant to the Washington State Department of Ecology's shorelines regulations, they did not give the notice required by the city shorelines ordinance. [FN129] The court noted that the neighbor applied for the permit before the effective date of the city ordinance, at which time the state regulations were the only applicable notice provisions. [FN130] Without noting any distinction between substantive and procedural requirements, the court cited a 1950s mandamus-rationalis decision [FN131] as the applicable rule (without noting that the decision did not address procedural issues) and held that the neighbors' 'obligations and rights to develop vested . . . when they applied for a substantial development permit.' [FN132]

Later, in *Norco Construction, Inc. v. King County*, [FN133] a case involving substantive law, not procedures, the court of appeals stated that the vested rights doctrine freezes in time both 'the zoning ordinances and procedures.' [FN134] The supreme court referred to 'procedural limits' when noting that the distinction between ministerial and discretionary acts should not be relevant to application of the vested rights doctrine. [FN135]

As a matter of policy, should the vested rights doctrine confer a right to freeze procedures in time, contrary to the general rule of retroactive application of procedures? The advantage to such an approach is that it would clearly protect both developers and local governments from having to repeat procedural steps that they have already taken just in order to comply with newly enacted procedures. The disadvantage of this approach is that it could force a local jurisdiction to maintain dual procedures--one set of procedures for handling existing applications, and a new set of procedures for handling new applications. This period of dual procedures could be significant because, as a consequence of environmental review or judicial appeals, a local jurisdiction may consider an application many years after the original application date. [FN136]

\*882 One way to resolve this issue would be to focus not on the date of permit application, but rather on the date that the developer completes the type of procedure at issue. For example, if a local government adopted a new ordinance after the date of a developer's application and that ordinance shifted review of that type of application from a planning commission to a hearing examiner proceeding, the hearing examiner would review the developer's application, unless the planning commission had already commenced its hearings. This approach would prevent the inefficiency of having to repeat procedural steps that have already been taken and having to maintain dual procedures until the local government finally decides all existing applications. For now, *Talbot* and *Norco* remain authority for the proposition that a local government must consider an application using the procedures in effect on the date of permit application, even though this could force local jurisdictions to use long-expired procedures.

### 3. GMA Impact Fees Pursuant to RCW 82.02

Litigation has followed the debate over whether impact fees assessed by local governments pursuant to RCW 82.02 (GMA impact fees) must be frozen by the vested rights doctrine. As part of the GMA, the legislature authorized local governments to assess impact fees to fund certain types of capital facilities (such as schools, roads, and parks) that the local jurisdiction identifies in its capital improvement plan. [FN137] The fees take the form of an excise tax on the activity of growth that a local jurisdiction assesses either as part of the subdivision or building permit process. As the local jurisdiction's capital needs expand, it may amend the relevant impact fee schedules.

The court of appeals recently held that GMA impact fee ordinances are not frozen in time by the vested rights doctrine. In *New Castle Investments v. City of LaCenter*, [FN138] a developer filed a preliminary\*883 inary subdivision application two days

before the local city council adopted an impact fee ordinance that required impact fee payment as a condition of building permit issuance. [FN139] The court ruled that the city could apply the new impact fee ordinance to the developer's project. [FN140] Although much of the court's reasoning was focused on the particular language, history, and policy of the impact fee statute, [FN141] the court found that the common-law vested rights doctrine offered no support to the developer's argument. The court conceded that the doctrine affords a measure of certainty and predictability to developers and that impact fees can add to the cost of development. [FN142] 'But,' the court noted, 'it does not necessarily follow that the cost of development is the type of expectation that the vested rights doctrine was intended to protect.' [FN143] The court reasoned that impact fees do not limit or control the actual use of land and, like taxes, they only affect the ultimate cost of land use. [FN144] Controlling cost 'is not the type of right that vests under the vested rights doctrine.' [FN145]

Although the New Castle court answered the question of whether impact fees are subject to the vested rights doctrine, the fact that the nearly half-century-old doctrine failed to provide a clear, non-litigious \*884 answer only underscores the need to reform the doctrine by legislation that adds much-needed clarity.

### C. When Does the Doctrine Begin to Freeze Law in Time? Fixing a Date Certain on the Date of a Complete Application Submittal

Practicality underlies the choice of the date of a complete application as the bright line from which a developer may invoke the vested rights doctrine. It obviates the litigation necessary under the majority rule to probe for a developer's good-faith change in position to lock in the applicable development regulations. [FN146] From this consistent, practical foundation stems a number of issues that the vested rights doctrine has not resolved clearly. The following subsections explore some of those issues.

#### 1. When Is the Application 'Complete'?

Courts have consistently held that an application must be complete before a developer can invoke the vested rights doctrine. But how complete is 'complete'? In the case of building permit and subdivision applications, the legislature has dictated that the application must be 'fully' complete. [FN147] The Washington Supreme Court, however, has pointed out that this statutory standard is different from the common-law requirement for a 'sufficiently' complete application. [FN148] This may be mere semantics, but the difference injects unnecessary uncertainty into the doctrine.

Even if we assume that an application must be 'fully' complete, how do we know exactly when that application is fully complete? In 1987, the legislature stated only that '[t]he requirements for a fully completed application shall be defined by local ordinance.' [FN149] The legislature may have inadvertently confused this statement in 1995 by requiring local governments to provide a written determination of an application's completeness or incompleteness within twenty-eight days of application submittal. [FN150] The 1995 law dictates that an application is 'complete for purposes of this section' if the application \*885 'meets the procedural submission requirements of the local government and is sufficient for continued processing, even though additional information may be required or project modifications may be undertaken subsequently.' [FN151] But is an application that is good enough to continue processing complete enough for purposes of the vested rights doctrine, even though the local government may ultimately need more information to render its decision? If the application is deemed incomplete for purposes of RCW 36.70B, may it still be deemed complete for purposes of the vested rights doctrine? [FN152] Is the application complete for the purposes of the vested rights doctrine as of the date of application or only as of the date of the notice of

completeness? These types of questions cloud the doctrine.

## 2. Is the Good Faith of the Developer or the Local Jurisdiction Relevant to the Point at Which the Doctrine Applies?

The issue of good faith on the part of the relevant actors further complicates the question of 'completeness.' This may arise when a local jurisdiction tries to delay a developer from completing an application and then changes the underlying law while keeping the developer at bay. In these situations, courts have applied equitable or due process principles to suspend the usual rules of 'completeness' and deem applications complete for the purpose of applying the vested rights doctrine. [FN153]

Courts have reminded developers that the issue of good faith is relevant to their conduct as well. The supreme court has noted that a developer must pursue an application diligently, not just submit a complete application, in order to reap the law-freezing benefits of the vested rights doctrine. [FN154] In another case, where a local code was 'highly ambiguous' with respect to the requirements for a complete \*886 application, the court considered the good faith of the developer in resolving that ambiguity in the developer's favor. [FN155]

Even though an overlay of good faith to the vested rights doctrine offers some appeal, it makes little sense as part of a doctrine that should foster certainty. The Washington Supreme Court specifically rejected the majority vesting rule, in part, to avoid having to probe good faith reliance on a case-by-case basis. [FN156] It should not be difficult to enforce a rule regarding completeness that eliminates the possibility of chicanery from the local government, and a rule regarding time limits that handles the prospect of the laggard developer. Unfortunately, because the current vested rights doctrine offers no such rules, the relative good faith of both developers and local governments continues to influence application of the vested rights doctrine.

## 3. Must the Application Be Filed During the Period That the Laws Under Which the Developer Seeks to Develop Are in Effect?

Many courts have maintained that for a developer to take advantage of the vested rights doctrine, the developer's application must be 'filed during the effective period of the zoning ordinances under which the developer seeks to develop.' [FN157] This observation is perhaps relevant in situations where a local legislative body enacts a new or amended law, but the developer submits a complete application before that law takes effect. In such cases, the law in effect on the date of the application controls, even if we might bemoan the developer's strategic decision to out-race the effective date of the new law by rushing the submittal of a complete application. [FN158]

Including 'during the effective period' as a separate requirement to invoke the vested rights doctrine is unnecessary. It adds nothing to the part of the vested rights rule that freezes in time the law 'in effect' on the date of the application. Laws are either in effect on a particular \*887 day or they are not. Submitting an application 'during the effective period' of a law should, therefore, not be a threshold requirement for freezing in time the law applicable to that application.

The requirement actually came into existence not from the judiciary, but from a 1981 University of Washington Law Review Comment, in which the author, Fredrick Huebner, explained this requirement as a product of his own synthesis of case law through 1981. [FN159] As a practical matter for any developer wanting to use the vested rights doctrine strategically, Huebner accurately stated that '[t]he ordinance under which the applicant seeks to develop must be in effect when the applicant applies for a building permit.' [FN160] This observation, however, does not lead to an additional threshold requirement for the application of the vested rights doctrine. The doctrine applies regardless of the developer's wishes--the doctrine imposes the law

in effect on the date of application.

#### 4. May a Moratorium Thwart a Developer from Freezing the Applicable Law for a Given Application?

The questions of good faith and the effective dates of local land use laws come into sharpest focus when considering the interplay of the vested rights doctrine and local authority to implement a temporary moratorium on establishing certain types of land uses. [FN161] Just like a developer may act strategically by submitting an application on the day before a new law takes effect, [FN162] a local legislative body may learn of a forthcoming application for a particular project and enact a temporary moratorium--even without first holding a public hearing--against the type of use at issue while it studies a permanent ban.

The court of appeals has expressly endorsed such behavior by municipalities by ruling that a moratorium is valid even though it can be enacted quickly to prevent property owners from obtaining vested rights. [FN163] Indeed, the court pointed to the potential for the vested \*888 rights doctrine to frustrate deliberative land use planning efforts as the very reason for allowing moratoriums to trump the doctrine. [FN164]

Left unanswered by case law is whether a developer may freeze the applicable law by submitting a complete application before the effective date of a moratorium, only to have the municipality refuse to process the application during the moratorium period. Given that the municipality would be unable to impose new substantive law on the application, [FN165] that the municipality likely has a code provision requiring it to render a final decision on the application within a certain period of time, [FN166] and that an overlay of due process bounds the municipality's actions, [FN167] a municipality would have difficulty arguing that a moratorium justifies an attempt to delay the inevitable decision on the pre-moratorium application.

The prospect of moratoriums demonstrates the essential trade-off at the heart of Washington's bright-line minority vested rights doctrine. We should be able to determine with a high degree of certainty when a developer obtains a right to freeze the applicable law, but we must be willing to accept that a municipality may outmaneuver the developer before he or she reaches that point.

#### 5. Must the Application 'Comply' with Applicable Laws at the Time of Submittal?

The Washington Supreme Court noted that the early, mandamus-based vested rights rule, 'of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of application for the permit.' [FN168] This statement has evolved into a freestanding, additional requirement for invoking the vested rights doctrine-- that an application must 'comply' with applicable laws at the time of submittal. [FN169]

\*889 As an anachronistic vestige of the mandamus rationale, this requirement continues to muddy the vested rights doctrine. Under the now common certainty/fairness rationale, the local government cannot determine whether an application 'complies' without first determining what law to apply. The local government applies the law in effect on the date of application. Whether that law results in a finding of compliance (resulting in the granting of a permit) or noncompliance (resulting in permit denial) goes to the merits of the application. Demonstrating 'compliance' cannot be a threshold for invoking a process designed to assess compliance itself.

The genesis of the 'complies with' requirement is likely Huebner's analysis in his 1981 Comment regarding *Mercer Enterprises v. City of Bremerton*. [FN170] Huebner was perhaps influenced by one sentence in the dissenting *Mercer Enterprises* opinion. [FN171] However, both Huebner and the dissent in *Mercer Enterprises* relied on cases involving incorrectly issued permits, where the issue was whether the developer had a right to enjoy a permit that did not comply with the applicable rules. [FN172] This authority is not necessarily relevant to cases involving applications, where the issue is the core question of the vested rights doctrine--what law applies to determine whether and how to grant a permit in the first instance?

The Washington State Supreme Court actually tried unsuccessfully to kill the 'complies with' requirement. In 1994, the court noted that the 'complies with' rule is best dealt with as part of the review of the merits of the application. [FN173] But just two months later, the court \*890 unquestioningly recited the 'complies with' rule as part of the vested rights doctrine. [FN174] Such flip-flops on critical details help mire the doctrine in unnecessary ambiguity.

6. Does Freezing the Law for Purposes of the Underlying Application Also Freeze the Law for Purposes of Exercising SEPA Substantive Authority?

Pursuant to the State Environmental Policy Act (SEPA), a local government may exercise substantive authority to condition or deny a land use proposal on SEPA policies adopted by the local government. [FN175] At what point in time does the vested rights doctrine freeze applicable local SEPA policies in place--at the time of permit application or at some later stage of the permitting process? Two possible answers exist.

First, the usual vested rights rules may apply. Some courts of appeals have apparently determined that SEPA policies should be among the laws frozen in place at the time of permit application. In *Victoria Tower Partnership v. City of Seattle*, the Division One court reasoned that SEPA policies are among the zoning and other building codes subject to the vested rights doctrine. [FN176] Although this reasoning suggests that applicable SEPA policies should be frozen on the same date that all other applicable zoning and building codes are frozen (namely, the date of application), the court did not resolve this issue explicitly. [FN177] Evidently believing that Division One resolved the issue, Division Two cited *Victoria Tower* for the proposition that a local government 'must base any condition or denial on SEPA policies adopted prior to the application or submittal date, because vesting applies to those policies as well.' [FN178]

The second possible answer is that SEPA policies might not be frozen in place until later in the development process. In 1984, the Washington State Department of Ecology (Ecology) adopted a vested \*891 rights rule for the exercise of this SEPA substantive authority. [FN179] Ecology maintains that any exercise of SEPA substantive authority must be based on policies adopted and in effect as of the date that either a determination of nonsignificance (DNS) or a draft environmental impact statement (DEIS) is issued for the proposal. [FN180] Even though Ecology selects a point in time well after the filing of any application for a proposal, and even though this rule predates the case law applying the usual vested rights doctrine rules to SEPA substantive authority, those judicial opinions did not mention or resolve this conflict of authority.

In defense of Ecology's rule, some might note that SEPA is expressly intended to be an overlay that is supplemental to all other land use authority. [FN181] Conceding that SEPA is a distinct body of law, however, does not help explain why the goals of fairness and certainty that underlie the vested rights doctrine necessarily favor choosing a point in time for SEPA that is later in the process than for other types of applicable law. For now, the issue of when SEPA policies are frozen in time by the vested rights doctrine remains unresolved. [FN182]

7. May an Applicant Modify or Supplement an Application Without Affecting the Date on Which the Applicable Law Is Frozen?

In considering this question, courts have generally held that a developer who submits a complete application freezes in time the law applicable to that application and does not lose that benefit if he or she \*892 later modifies or supplements the application. The most direct statement to this effect arose in the context of grading permit applications: '[T]he 'vested rights' doctrine is applicable such that, even if the original application were defective in some manner, a grading permit properly may issue provided the application is subsequently modified or completed to bring it into conformance with the applicable ordinances.' [FN183] How far can a developer push this? What is to prevent a developer from rushing in a complete application for a relatively simple, 'bare bones' proposal to lock in the applicable law days before the effective date of a new, more restrictive law, only to 'modify' that proposal later by intensifying the proposal and adding more mitigation in a manner that complies with the former law but not the new one? The vested rights doctrine does not currently offer a way to limit creeping expansions of a 'complete,' albeit thin, proposal.

8. May an Applicant 'Opt' to Be Considered Under a Later Version of a Particular Law?

The vested rights doctrine typically arises when a developer prefers to avail him or herself of a less restrictive development regulation rather than comply with a newer, more restrictive regulation. Situations may arise, however, in which a developer prefers a newer, less restrictive law to an older, more restrictive one.

If the vested rights doctrine actually conveys a 'right' to the applicant to insist that the application be considered under the law in effect on the date of application, then the doctrine should allow the applicant to forego that right and select some later, more favorable version of the law to guide that determination. This comports with the doctrine's origin as a right that an applicant could vindicate through a mandamus action. Presumably, the applicant could elect not to vindicate that right by declining to seek mandamus relief.

If the vested rights doctrine finds its only manifestation in a rule, should the rule be applied consistently, regardless of the developer's preferences? The vested rights doctrine is often phrased as a mandate that an application shall be considered under the law in effect on the date of application, suggesting a rule of universal application, not a \*893 right to be invoked at the will of the applicant. [FN184] Do only the interests of the developer matter, or do local governments and third parties have an interest in determining, with certainty and without exception, which laws will govern review of a particular application? As with so many aspects of the vested rights doctrine, questions like these remain unanswered.

D. For How Long and for What Purpose Does the Doctrine Apply? Contorting the Doctrine to Fit the Reality of Multiple-Permit Projects

Typically, a building permit alone is not sufficient to authorize development. For example, one project may require a rezone, subdivision approval, a conditional use permit, a shoreline substantial development permit, critical area review, stormwater approval, and a building permit. The developer might apply for these authorizations over the course of time. If a developer can invoke the vested rights doctrine as of the date of submittal of a complete application, does the doctrine freeze in time the law applicable only to that particular application and not subsequent ones? May the local government change the

relevant development regulations such that one set of regulations applies to one application, but an amended set applies to a later application for the same development? If the submittal of one complete application freezes the law applicable to subsequent applications, should we be concerned if the developer submits the original application years or decades in advance of any physical development?

The vested rights doctrine has become added most dramatically in response to questions like these that arise in the context of multiple-permit projects. In particular, the legislature and the courts have struggled to decide how applications to subdivide land--which developers may submit at the very beginning of the development process--should affect the law applicable to subsequent applications to physically develop that land. As described below, the vested rights doctrine's divergent rationales lend themselves to two different approaches to this issue. The legislature attempted to chart a course along one of these approaches, but failed to do so clearly. The Washington Supreme Court, unfortunately, further confused the matter and tipped the scales too far to one side in the process. [FN185]

**\*894 1. Two Possible Approaches: Follow Either the Mandamus or Fairness/Certainty Rationale**

In broadest terms, two possible ways exist to apply the vested rights doctrine in the context of multipermit developments. These approaches mirror the different rationales that underlie the vested rights doctrine: (1) pick one permit application that freezes all law applicable to all permit applications for that development, following one derivation of the mandamus rationale; or (2) follow the fairness/ certainty rationale, applying it on an application-by-application basis in which each permit application freezes the law that controls that application, but not necessarily any subsequent application.

**a. The Mandamus Rationale Justifies a Right 'To Use' or 'To Develop,' but Only as of the Date of Building Permit Application Submittal**

Under the facts of the early mandamus rationale cases, courts held that a complete application for a building permit (assuming that the application complies with the law then in effect) vests the applicant with a right to issuance of that permit. [FN186] Even though these cases focused on the permits at issue, they often used language suggesting that the law with which a building permit complies is the law applicable to later uses of the property. For example, when first enunciating the mandamus rationale for the vested rights doctrine in 1954, the Washington Supreme Court pointed to something more like a right 'to use' or 'to develop': 'An owner of property has a vested right to put it to a permissible use as provided for by prevailing zoning ordinances.' [FN187]

In the context of the mandamus rationale, this right 'to use' appears broader than a right 'to a permit.' As depicted in Figure 3, a right 'to use' seems to have ramifications beyond the granting of a building permit. It might grant a developer the right to put property to some later, undefined uses that are consistent with the law in effect on the date the developer submits a complete and compliant building permit application.

**\*895 The Mandamus Rationale (The Right to Use?)**

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Figure 3. The rule implementing the mandamus rationale if that rationale were to vest the right to 'use' or 'develop' property.

Under this expression of the doctrine, filing a complete and compliant building permit application earns the applicant some rights to some later, undefined uses that are consistent with the law in effect on the date of the building permit application. Compare this to Figure 1, supra, in which the right is to 'a permit.' (Bldg. = building)

In reality, the right 'to use' under the mandamus rationale is not broad at all. As the court explained in 1954, '[t]he right accrues at the time an application for a building permit is made.' [FN188] A developer necessarily submits a building permit application at the very end of the development permitting process, when he or she is ready to construct. Generally, no other permits are required after that point. In 1958, the court explained that it chose the date of building permit application precisely because it occurs at the end of the process, after the developer has invested time and money in a development and when the developer is ready to break ground:

[T]he cost of preparing plans and meeting the requirements of most building departments is such that there will generally be a good faith expectation of acquiring title or possession for the \*896 purposes of building, particularly in view of the time limitations which require that the permit becomes null and void if the building or work authorized by such permit is not commenced within a specified period . . . [FN189]

Given this rationale, it is not surprising that courts later pointed to these 1950s-era decisions for the proposition that the vested rights doctrine conveys a broad right 'to use,' or 'develop,' or 'construct,' noting that any such right arises only at the time of a building permit application. [FN190] Any right 'to use' or 'to develop' under the mandamus rationale should therefore be read as an unfortunate rhetorical flourish. This characterization of such a 'right' is necessarily tied to an application that arises only at the very end of the development permitting process. None of the mandamus-rationale courts needed--and so probably never intended--to suggest that filing an application for any one permit early in the permitting process vests in a developer the right 'to use' or 'to develop' the property later pursuant to the laws in effect at that early stage.

**\*897 b. The Fairness/Certainty Rationale Justifies Freezing in Time the Law That Controls Each Permit Application, but Only on an Application-by-Application Basis**

As discussed at the beginning of this Article, in Washington, fairness/certainty has become the dominant rationale for the vested rights doctrine. [FN191] The freeze-the-law-in-time rule that implements the fairness/certainty rationale makes more sense, in part, because it can be applied to a variety of permit applications other than building permit applications.

The fairness/certainty rationale developed in case law justifies an application-by-application approach in the multipermit context. Figure 4 illustrates this approach. Each application freezes the law applicable to that application, but not to any subsequent application.

Case law regarding septic permit applications illustrates this application-by-application approach. In *Ford v. Bellingham-Whatcom County District Board of Health*, [FN192] a county approved a subdivision for certain property in 1969. Owners of eleven lots within that subdivision received approval for septic systems pursuant to applications filed with the local public health agency between 1969 and 1972. [FN193] In 1972, the agency adopted new septic regulations. [FN194] The agency then began applying the new regulations, rejecting septic permit applications for other lots in the subdivision when filed in or after 1973. [FN195] The court held that the new regulations applied to all applications filed after the effective date of those regulations. [FN196] The court rejected an argument that the applications should be considered under the law in effect in 1969, the year the subdivision was approved. [FN197] In other words, the fact that the developer had applied for and been granted an earlier permit (the subdivision approval) had no effect on the law applicable to a subsequent application for a different permit

(the septic permit application).

#### \*898 The Fairness/Certainty Rationale

##### The Application-by-Application Approach

Figure 4. The application-by-application approach required by the rule that implements the fairness/certainty rationale.

Under the fairness/certainty rationale, an application for a permit freezes in time the law applicable to consideration of that permit. See *supra* Figure 2. In the context of a development that requires multiple permits, this means that the local government should assess each application under the law in effect on the date of that particular application only. (Appl. = application)

The court of appeals reaffirmed this approach twenty years later. In *Thurston County Rental Owners Ass'n v. Thurston County*, [FN198] a county required two distinct permits: a septic construction permit and a septic use permit. [FN199] The developer in that case obtained a septic construction permit, but the court rejected the developer's argument that this earlier permitting had any effect on the developer's subsequent obligation to apply for a septic use permit. [FN200] As in *Ford*, the Rental Owners court adhered to the application-by-application approach necessitated by the fairness/certainty rationale.

#### \*899 c. The Hazards of Blending the Two Approaches

It is possible to invoke the mandamus rationale in the multi-permit context, but only if the rationale grants a right at the time of building permit application and not earlier. This means that a developer should not expect to freeze the law applicable to his or her development until very late in the permitting process.

In the alternative, it is possible to invoke the fairness/certainty rationale on an application-by-application basis. As with the mandamus rationale, this would also mean that a developer does not have the most favorable rule at his or her disposal. Under this approach to a multiple-permit project, the developer could expect to freeze the law for each permit application, but could not stop a local government from applying a new law that takes effect before the developer submits a later application.

The real danger comes from blending parts of the mandamus and the fairness/certainty rationales to justify freezing all the law applicable to all phases of a development as of the date of one of the earliest application submittals. It makes little sense to use the language from mandamus-rationale case law that speaks of a right 'to use' or 'to develop' with the law frozen in time (ignoring the part of that case law that picks the building permit application as the freezing point) and to use the part of the fairness/certainty rule that moves the point in time back to the filing of earlier applications (ignoring the part of the rule that grants only the right to have each application considered under the laws in effect on the date of that particular application).

Unfortunately, the Washington legislature and judiciary have failed to maintain an intellectually consistent or sensible approach to applying the vested rights doctrine in the multipermit context. As explained in the following subsections of this Article, the legislature complicated the issue in 1987, and the supreme court distorted it in 1997. The resultant confusion continues to cloud the vested rights doctrine and erode the fairness that justifies Washington's unique approach.

## 2. The Legislature Adopted Four Contradictory Vested Rights Rules That Affect Residential Subdivisions

The legislature attempted to codify a vested rights rule for subdivisions and building permits in 1987. The core language is nearly identical for both types of permits:

A proposed division of land . . . 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 \*900 fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted . . . .  
[FN201]

A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application. [FN202]

This clear language is consistent with the application-by-application approach mandated by the fairness/certainty rationale. [FN203] In the context of subdivisions, the language applies only to the 'proposed division' and says nothing about applications filed for later phases of development, such as conditional use, grading, or building permit applications. The only twist is that the subdivision provision freezes the law in time, not only for the initial authorization for which the developer submits an application (preliminary subdivision approval), but also for a subsequent authorization (final subdivision approval). The subdivision provision goes no further. In the context of building permit applications, the language is a verbose recitation of the fairness/certainty rationale: a decision on a building permit application must be guided by the law in effect on the date of the building permit application. Figure 5 illustrates these two provisions.

\*901 RCW 8.17.033(1) & RCW 19.27.095(1): Fairness/Certainty

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Figure 5. The rule created by RCW 58.17.033(1) and RCW 19.27.095(1).

This is essentially an application of the fairness/certainty rationale. Cf. supra Figure 2. The only variation comes in the context of subdivision applications, where the legislature extended the temporal reach of the 'freeze' to include not only the decision on the preliminary subdivision approval but also on the final subdivision approval. By its very terms, the language of these provisions has no effect on other permit applications, and so is consistent with the application-by-application approach that the fairness/certainty rationale requires. See supra Figure 4. (Prelim. = preliminary; appl. = application; bldg. = building)

A preexisting section of the subdivision statute, RCW 58.17.170, [FN204] contains two additional rules that reduce the clarity of RCW 58.17.033(1) and RCW 19.27.095(1) in the context of formal subdivisions. [FN205] First, it suggests that, notwithstanding RCW 58.17.033(1), a decision to grant final subdivision approval will be \*902 subject to the laws in effect at the time of preliminary subdivision approval, not at the time of application:

When the legislative body of [a municipality] finds that the subdivision proposed for final plat approval conforms to all terms of the preliminary plat approval, and that said subdivision meets the requirements of this chapter, other applicable state laws, and any local ordinances adopted under this chapter which were in effect at the time of preliminary plat approval, it shall [approve] the plat. [FN206]

As depicted in Figure 6, this first rule of RCW 58.17.170 is a variation of the mandamus rationale. Consistent with that

rationale, this approach depends on a complete application complying with the body of law in effect on a certain date, and then forces approval of the application. Unlike the standard mandamus rationale, however, this approach starts with the application for final subdivision approval (not for a building permit) and applies the law in effect on the date of approval of an earlier application (not the law in effect on the date of submittal of the application at issue).

The second relevant part of RCW 58.17.170 suggests that granting final approval for a formal subdivision may freeze in place some laws applicable to later phases of development within that subdivision if those applications are filed within five years of final subdivision approval.

A subdivision shall be governed by the terms of approval of the final plat [ [by the local government], and the statutes, ordinances, and regulations in effect at the time of approval [by the local health department and the local municipal engineer] under RCW 58.17.150(1) and (3) [FN207] for a period of five years after final plat approval unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision. [FN208]

**\*903 RCW 58.17.170: 1st Rule (Formal Subdivisions Only)**

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Figure 6. The first rule created by RCW 58.17.170.

This is a variation of the standard mandamus rationale. Cf. supra Figure 1. Like that rationale, this rule forces approval of an application (the final, formal subdivision) if that application is complete and complies with the law in effect on a certain date. Unlike the standard mandamus rationale, this approach focuses on an application that arises much earlier in the development process than does a building permit application, applying the law in effect on the date of the approval of an earlier application, not the law in effect on the date of submittal of the application at issue. (Prelim. = preliminary)

As illustrated in Figure 7, this approach is not directly premised on either of the standard rationales for the vested rights doctrine. Like the fairness/certainty rationale, this provision freezes some law in time, but it does so not as of the date of any application, but rather as of the date that certain officials consent to grant the permit. Furthermore, the law remains frozen not for the purpose of deciding the application at issue, but for a fixed number of years after the permit is eventually granted, seemingly for the purpose of assessing subsequent permit applications for that property.

**\*904 RCW 58.17.170: 2d Rule (Formal Subdivisions Only)**

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Figure 7. The second rule created by RCW 58.17.170.

Other than freezing law in place as of a certain date, this approach does not resemble either of the standard rationales for the vested rights doctrine. Cf. supra Figures 1 and 2. Under this approach, the law in effect on the date that certain officials approve a formal (not a 'short ') subdivision apparently controls the laws that will shape land uses within the platted subdivision for a period of five years. (Prelim. = preliminary; appl. = application; engr. = engineering)

This conflicts with RCW 19.27.095(1), the vested rights statute for building permits. If a developer files a complete building permit application after receiving final subdivision approval, which law guides consideration of that application: (1) the law in effect on the date that the local health department and the local municipal engineer approved the final subdivision

application, as dictated by RCW 58.17.170; or (2) the law in effect on the date of the building permit application, pursuant to RCW 19.27.095(1)?

Taken together, the four vested rights rules established by the legislature that affect subdivisions [FN209] paint the confusing picture illustrated in Figure 8. Ways may exist to reconcile these seemingly inconsistent rules, but only with a certain amount of creativity or selectivity. [FN210] The vested rights doctrine should foster more certainty and require less creativity.

RCW 19.27.095(1) and All Three Rules from RCW Chapter 58.17

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Figure 8. The conflicting vested rights rules established by RCW 58.17 and RCW 19.27.095(1).

This combines Figures 5-7 to illustrate the apparent conflict inherent in the legislature's approach to the vested rights doctrine in the context of multiple-permit subdivision projects. (Prelim. = preliminary; appl. = application; dec. = decision; engr. = engineering; bldg. = building)

**\*906 3. Noble Manor's Distortion of the Doctrine**

In the case of Noble Manor Co. v. Pierce County, [FN211] the Washington Supreme Court broke new ground unnecessarily while ostensibly interpreting the legislature's codification of the vested rights doctrine. The legal basis for the decision is wrong and the holding of the decision is elusive. It will continue to thwart attempts to easily or fairly define how the vested rights doctrine applies in the context of multipermit developments.

a. Bad Facts Can Make Bad Law

The facts presented in the Noble Manor appeal were unfortunate. [FN212] They made the developer's situation very sympathetic despite the dearth of law supporting its legal position. This may have caused the court to focus more on the result than on the rationale for the result. The story began when the developer submitted an application to divide an existing lot into three lots for the express purpose of building duplexes. Two weeks later, the developer submitted a building permit application for three duplexes. The county accepted the short subdivision application, but accepted only one building permit application, noting that only one legal lot existed at that time because the county had not yet processed the developer's subdivision application.

While the county was considering the subdivision application, it enacted an ordinance that increased the minimum lot size for duplexes. If applied to the developer's property, this new law would have allowed only two lots. Nevertheless, applying the old lot size requirement, the county approved the subdivision into three lots, and the resulting plat showed three duplex building sites.

The developer then tried to submit two more building permit applications. Applying the new minimum lot size requirement, the county denied the building permits. Two weeks later, the developer tried again to submit the two additional building permit applications. This time, an unwary counter technician issued the permits and the developer immediately started con-

struction. After the developer made substantial progress on the construction, the county issued stop-work orders for two of the buildings. The developer appealed to the county hearing examiner, who reversed the county's orders and allowed construction to proceed. The developer sued the county for damages for \*907 the four months of delay that occurred while the stop-work orders were in effect.

#### b. Division Two's Reliance on Dicta

The Washington Court of Appeals, Division Two, ruled in favor of the developer. [FN213] The court relied on its earlier decision in *Adams v. Thurston County*, [FN214] in which the court indulged in an inaccurately sweeping description of the vested rights doctrine:

Under Washington law, property development rights vest at the time a developer files a complete and legally sufficient. . . preliminary plat application. The date on which development rights vest determines which land use laws, rules, and policies will apply to that land development. [FN215]

The description of the vested rights doctrine in *Adams* lacked foundation. Until *Adams*, no fairness/certainty-rationale decision had suggested that a preliminary subdivision or other application locks in the law for all subsequent 'land development' in perpetuity. Furthermore, the *Adams* description of the doctrine was unnecessary. At issue in *Adams* was whether a county impermissibly delayed developers from completing their preliminary plat application. [FN216] The *Adams* dispute did not involve the question of whether a complete preliminary plat application freezes in place laws applicable to subsequent permit applications for the same development.

Nevertheless, in its treatment of *Noble Manor*, Division Two transformed the *Adams* dicta into a holding. Citing *Adams*, the court claimed that that case 'held that development rights vest upon compliance with either RCW 58.17.033 or RCW 19.27.095.' [FN217] No court, even the *Adams* court, had ever reached such a conclusion. Nevertheless, Division Two sent the ball rolling with sufficient, if misguided, momentum to the supreme court.

#### c. Where the Washington Supreme Court Went Wrong

The supreme court affirmed Division Two, finding that the vested rights doctrine, as codified in RCW 58.17.033(1), [FN218] means that \*908 the filing of a preliminary subdivision application freezes some laws applicable to some later applications for permits for that land. The court committed a number of errors in reaching its decision.

First, the court jumbled the mandamus and the fairness/certainty rationales for the vested rights doctrine. On the one hand, the court noted that the doctrine could be invoked by filing applications for authorizations other than building permits, consistent with the application-by-application approach supported by fairness/certainty rationale case law. [FN219] The court, however, failed to acknowledge that the application-by-application approach does not allow the application for one permit to affect the law applicable to a different application. [FN220] On the other hand, the court also suggested that the filing of one application could have an effect on the law applicable to subsequent applications, consistent with the statement of the mandamus rationale that speaks of a right 'to develop' or 'to use.' [FN221] But the court ignored that part of mandamus-rationale case law that consistently applied the vested rights doctrine only to building permit applications, expressly because those applications arise only at the end of the development process. [FN222]

Second, the court imported its own vision of fairness, putting words in the mouth of the legislature: 'If all that the Legislature was vesting under the statute was the right to divide land into smaller parcels with no assurance that the land could be developed, no protection would be afforded the landowner.' [FN223] This is incorrect. While the legislature did not protect the developer from changes that might apply to later applications, that does not amount to 'no protection.' If the legislature considered the challenges presented in the context of multiple-permit projects, it apparently decided to stick to an application-by-application approach. [FN224] If the legislature did not consider these challenges, the court should not have concocted an intent that the legislature never articulated. [FN225]

\*909 Third, the court rendered meaningless the relevant language of RCW 58.17.170, which maintains that final subdivisions are to be approved only if in accord with laws 'in effect at the time of preliminary plat approval' and that a subdivision 'shall be governed' for five years by 'the statutes, ordinances, and regulations in effect at the time of approval' of the subdivision application by the local health department and the local municipal engineer. [FN226] Even though this language calls into question the significance of filing the preliminary subdivision application, not only for the overall subdivision approval process but also for later permit applications, the court refused to be distracted by this language. The court noted that RCW 58.17.170 pre-dates RCW 58.17.033, a provision that expressly attempted to codify the vested rights doctrine, [FN227] but the court cited no authority for why that fact limits the importance of RCW 58.17.170. Focusing on the five-year limit in RCW 58.17.170, but overlooking the section's more relevant language, [FN228] the court characterized the section as merely a 'divesting statute.' [FN229] Relying on *Friends of the Law v. King County*, [FN230] a case involving a short subdivision (which the Noble Manor Court had earlier noted was not subject to RCW 58.17.170 because that statute applies only to formal subdivisions), the court somehow reasoned that RCW 58.17.170 was irrelevant to its view of the vested rights doctrine. [FN231]

Finally, the court ignored the relevance of RCW 19.27.095(1), which uses language nearly identical to RCW 58.17.033(1), to force local governments to consider building permit applications under the law in effect on the date of application for that permit—not on the date of application for some earlier permit. [FN232] The court did not \*910 explain how this building permit language can remain relevant if, as the court held, some laws applicable to a building permit application are frozen as of the date of the preliminary subdivision application, not the date of the building permit application. The court improperly rendered RCW 19.27.095(1) meaningless. [FN233]

#### d. The Elusive Holding of Noble Manor

Not only did the Noble Manor court employ questionable legal reasoning, it also failed to state its holding with sufficient clarity. What is clear is that Noble Manor held that a preliminary subdivision application freezes at least some law as of that date, and that this law remains frozen beyond the date of final subdivision approval so as to control subsequent applications for the same development. [FN234] Figure 9 illustrates this 'Noble Manor Freeze' in comparison to the statutory rules that the court purported to interpret.

The question mark at the far end of Figure 9 indicates the uncertainty regarding the duration of this freeze. In the case of formal, 'long' subdivisions, which were not at issue in Noble Manor, the court suggested that this law remains frozen only for five years after final subdivision approval. [FN235] This suggestion was based on the court's reading of RCW 58.17.170 as merely constituting a 'divesting' statute. [FN236] The court acknowledged that RCW 58.17.170 does not apply any such 'divesting' to 'short' subdivisions, [FN237] and so the 'freeze' for those subdivisions stays in effect in perpetuity, even though they are subject to less scrutiny and public process than formal subdivisions. The court merely suggested that the legislature

address the disparate 'divesting' of short and long subdivisions. [FN238]

#### \*911 Noble Manor and the Statutory Rules

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Figure 9. The Noble Manor vested rights rule in comparison to the statutory vested rights rules.

Although attempting to apply the vested rights rule of RCW 58.17.033(1), see supra Figure 5, the Noble Manor court adopted a rule that extends the time during which the law remains frozen in place far beyond what the legislature intended. The question mark at the far right indicates that the Noble Manor 'freeze' apparently lasts forever in the case of 'short' subdivisions. (Prelim. = preliminary; appl. = application; dec. = decision; engr. = engineering; bldg. = building)

More crucial than the duration of the 'freeze' is the function of the 'freeze.' For what purposes or for what other permit applications does the law remain frozen in time as of the date of preliminary subdivision application? Language in Noble Manor arguably supports two alternate answers to this question—one more favorable to municipalities and the other more favorable to developers.

The first way to interpret the nature of the right extended by Noble Manor is to limit the scope of the right earned by the developer to the use disclosed by the developer in the subdivision application. Under this interpretation, a subdivision application gives the developer only a right to develop the property to realize the use identified in the application. In other words, the local government would be able to impose all new land use laws that would not prevent the developer \*912 from realizing the overall type or intensity of use that he or she described in the subdivision application. This interpretation comports most narrowly with the facts of Noble Manor, where the court ruled only that the county could not apply a new minimum lot size requirement that would prevent the developer from building the three duplexes it disclosed. This interpretation also comports with the court's conclusion that 'what is vested is what is sought in the application.' [FN239]

The other, more developer-friendly way to interpret Noble Manor is to view the use disclosure requirement as a procedural step that, once taken, allows the developer to freeze all laws that might apply to any aspect of development within the subdivision. Under this interpretation, a local government would be unable to apply any new land use law within the boundaries of the subdivision as long as the developer used or developed that land in a manner consistent with the type of land use disclosed in the subdivision application. Although not necessary under the facts of Noble Manor, this interpretation finds support in many of the court's more sweeping statements of the law. [FN240]

#### 4. The Fruits of Noble Manor

The improper reasoning and elusive holding of Noble Manor will continue to hinder attempts to define the vested rights doctrine fairly in the context of multiple-permit developments. The decision's short lineage suggests that it might soon stand for a proposition more favorable to developers than what is supported by the narrow facts and language of that case. Four families of Noble Manor offspring merit note.

First, the Washington State Supreme Court has applied the language and reasoning of Noble Manor to a permit application that is 'linked to' or 'coupled with' a subdivision application. In *Associa-tion of Rural Residents v. Kitsap County*, [FN241] the court determined whether an application for a planned unit development (PUD) [FN242] should be considered under the law in effect on the date of that application. The court reached the right result by holding that the PUD application had

to be considered under the county law in effect on the date of that application. [FN243] But the court could have simply extended the application-by-application approach and found that the PUD application, on its own, froze in time the law applicable to that application. Instead, the court relied on Noble Manor. [FN244] Even though Noble Manor interpreted a statute that had nothing to do with PUDs, the court found it relevant. The court reasoned that Noble Manor 'addressed the issue of development of land, as opposed to merely dividing land, in the context of the vested rights doctrine,' and from this premise it leaped to the conclusion that '[s]ince a PUD is a land use technique that can be used to divide land as well as develop it, the Noble Manor reasoning is helpful here.' [FN245] The supreme court then followed a court of appeals decision [FN246] to hold that when a PUD application is 'inextricably linked to' or 'coupled with' a subdivision application, it triggers the vested rights doctrine. [FN247] Decisions like these signal the court's willingness to apply the rationale of Noble Manor outside of the statute and facts at issue in that case.

Second, the court of appeals has eliminated the need for a 'link' to a subdivision application by applying the reasoning and language of Noble Manor directly to a conditional use permit (CUP) application in a case that did not involve a subdivision application. In *Weyerhaeuser v. Pierce County*, [FN248] the developer applied for a CUP to establish a \*914 landfill. The county ultimately approved the CUP, but imposed a condition that the developer apply for a wetlands permit under an ordinance that became effective after the developer submitted its complete CUP application. [FN249] The court held that the county could not impose the new wetlands ordinance, [FN250] but it did not merely rely on authority extending the vested rights doctrine to CUP applications. [FN251] Instead, the court based its decision on Noble Manor and found that the developer disclosed its intended 'uses' of the wetlands. [FN252] The court paraphrased Noble Manor, ruling that 'a vested right for the [CUP], but not for land use and development, would be 'an empty right' as wetland development was an integral component of the project.' [FN253] Developers will likely invoke this language in the future to assert that any application has the same lasting effect on other permit applications as did the subdivision application in Noble Manor. [FN254]

Third, the appellate courts have moved to relegate Noble Manor's use disclosure requirement [FN255] to a mere procedural trigger that, once pulled, becomes irrelevant. Some courts omit the use disclosure requirement altogether when summarizing the holding of Noble Manor. [FN256] Taking a different path around the use disclosure requirement, the *Weyerhaeuser* court deflected any argument that the application of later-enacted wetlands regulations would not prevent the developer from realizing its disclosed landfill use. [FN257] The court ruled \*915 that the developer disclosed the 'use' of the wetlands for its landfill (as though 'wetlands filling' were the primary use of the land, rather than an accessory detail of the primary landfill use) and that the new ordinance would prevent that use. [FN258] In *Westside Business Park, LLC v. Pierce County*, [FN259] the court evaded an argument by the county that application of a later-enacted county drainage ordinance through a subsequent permit would not interfere with the use disclosed by the developer during its subdivision process. The court treated the use disclosure requirement as some kind of affirmative defense rather than as an essential part of the developer's burden to invoke the reasoning of Noble Manor, and refused to entertain the county's argument because the county had failed to raise it below. [FN260]

Finally, while reducing the use disclosure requirement to a procedural trigger, the court of appeals ruled that a local jurisdiction may not prevent a developer from pulling that trigger by rendering the intended use irrelevant to the consideration of a particular application. In *Westside*, the county's short subdivision application requirements did not require a developer to disclose the intended use of the property, [FN261] presumably because the intended use was not relevant to the county's decision on a short subdivision application. The developer therefore filed a two-lot short subdivision application that 'showed only two vacant lots with no structural improvements, storm drainage facilities, roads or utilities.' [FN262] However, during a preapplication conference with county permitting staff, the developer reported 'that it planned a two-lot commercial short plat

with an office building and parking on one lot and four mini storage buildings and a small office on the other lot.' [FN263] A new drainage ordinance took effect shortly after the developer filed its application, and the county issued an administrative determination that the developer would have to comply with the new ordinance when the developer applied for a site development permit (which the developer could do at any time in the development process). [FN264] The court held that Noble Manor prevented application of the drainage ordinance to the eventual development slated for the two \*916 lots because the county had actual knowledge of the developer's proposed use from the preapplication conferences: 'where the County invites vague information in the application and declares it to be complete, the only resort may be to other communications.' [FN265] The Westside court has essentially invited developers to blurt out a proposed 'use' to a local planner (even if declaring a use is unnecessary for the permit for which they are applying) in the hope of using that disclosure to stave off any new land use laws (even ones that do not prevent realization of the proposed use). The court has also invited a slew of evidentiary disputes about what developers actually said in conversations with municipal permitting staff.

The trajectory of Noble Manor's progeny is toward a rule that finds little support in the roots of the vested rights doctrine--that any land use application 'vests' the right to freeze in time the law that will control all aspects of later development or use of that land, as long as that development or use is consistent with the type of use disclosed, even verbally, by the developer. This rule threatens the essential balance at the heart of Washington's unique vested rights doctrine. To justify incursions into the public's ability to apply new development regulations that meet changing conditions and avoid nonconforming uses, Washington chose a bright-line date-- the date of permit application--on which we could presume that the developer possessed the good faith intent to diligently complete a development project. [FN266] The headlong slide triggered by Noble Manor, if left unchecked, portends a doctrine in which a developer need no longer manifest such good faith. He or she need only file some preliminary application that manifests an intent to pursue some use at some point in the future, after obtaining other permits. This is not a fair price for the right to hold the public interest at bay.

### III. How Can We Repair the Doctrine? Toward a Statutory 'Applicable Law Rule'

In its current form, the details of the vested rights doctrine provide neither certainty nor fairness in sufficient measure. The final part of this Article calls on the legislature to repair these details and reclaim the doctrine in three ways. First, the legislature can reestablish certainty relatively easily. It should replace the vested rights \*917 doctrine with an 'applicable law rule' that is codified with the other state land use permitting procedures and that expressly resolves the questions left unanswered by case law. Second, the legislature should strive for fair answers, even at the risk of failing. The easier part of this step will be articulating a set of principles that can help shape the rule's details. Applying those principles will prove more contentious. Finally, the legislature should not be deterred by naysayers. Reform should not be left to the judiciary, which must focus on one narrow fact pattern at a time. Only the legislature is positioned to provide a comprehensive solution to the addled vested rights doctrine. Because the legislature need not change the essential framework of the doctrine to reform it, the effort should not be doomed to end in political gridlock. Because the doctrine is not dictated by constitutional provisions, the legislature is not constrained by those provisions.

#### A. The Legislature Can Reestablish Certainty

If nothing else, the legislature should reintroduce clarity and certainty to the vested rights doctrine. Lawyers and clients spend needless time and money trying to interpret and manipulate the doctrine's vagaries. Courts, which are limited to exploring these uncertainties on a case-by-case basis, have deepened the confusion.

The legislature can restore clarity to this body of law in three ways. First, abandon the term 'vested rights doctrine,' override the common law on which it is based, and replace it with a statutory 'applicable law rule.' Second, centralize the rule in RCW 36.70B, which has controlled local land use permitting procedures since 1995. Finally, clearly resolve the questions left unanswered by the common law, even at the risk of providing the wrong answers.

#### 1. Replace the Common Law 'Vested Rights Doctrine' with a Statutory 'Applicable Law Rule'

The legislature would clarify the law by striking 'vested rights' from the legal lexicon of this state and replacing it with something more descriptive, like an 'applicable law rule.' 'Vested' is an unnecessary appendage to 'rights.' If a person truly has a 'right,' rather than some privilege or expectation, the government cannot deprive the person of that right. Dressing the right up in a 'vest' adds nothing to the right, except perhaps to underscore that we really, really mean that the right is, in fact, a right.

'Vested' is also a confusing appendage to 'rights.' To say that a right has 'vested' implies that 'vesting' sheds light on the nature of the right at issue. It sends people searching for meaning in the 'vest' \*918 rather than in the 'right' itself. Unfortunately, 'vesting' does not answer crucial questions such as what right accrues at what point, for what purposes, or for how long.

To fix the vested rights doctrine, the legislature should adopt a statute that supplants the doctrine and the case law on which it rests. Any attempt to codify the existing doctrine will only lead to debates about the case law that the legislature had in mind. Instead of codifying the doctrine, the legislature should enact a 'rule' that cleanly replaces the details of any common law 'doctrine.' Selecting a more descriptive name for that rule--like the 'applicable law rule'--will further help the legislature distance itself from a confused body of law that, unfortunately, does not merit codification.

#### 2. Centralize the Applicable Law Rule in RCW 36.70B

It is currently impossible to put a finger on 'the law' of vested rights. Vested rights case law is diffuse, spread over decisions stretching back to the 1950s. To the extent that the legislature has already attempted to codify some discrete aspects of the vested rights doctrine, it has sprinkled that law over a number of statutes. [FN267]

To foster certainty and clarity, we should be able to find the law in one place. The most logical place to consolidate an applicable law rule is in RCW 36.70B. The legislature adopted this chapter in 1995 to simplify the number of required land use permits, hearings, and appeals, and to enhance predictability and reduce unnecessary duplication. [FN268] This chapter now sets uniform standards for reviewing land use permit applications to which local governments must conform. [FN269] This is where one would expect to find a rule that establishes what version of local development regulations controls the review of each application.

Consolidating an applicable law rule in RCW 36.70B would mean removing attempts to codify the vested rights doctrine from other parts of the code, such as the building permit, subdivision, and growth management chapters. [FN270] One rule should apply to all land use \*919 applications, and that one rule should be found in one place. Other parts of the code that either authorize local governments to require certain types of permits or require local governments to plan for growth may alert the reader through cross-references to the location of the applicable law rule. Scattering a rule around the code--even if merely

repeating it--only leads to confusion.

### 3. Resolve the Unanswered Questions Clearly, Even at the Risk of Being Wrong

The common law vested rights doctrine does not adequately resolve a host of questions. [FN271] A statutory rule that replaces this doctrine must answer those questions expressly. We may never know if the legislature has provided the right answers, but we will know if the legislature has provided clear answers. We should hope for the former and ensure the latter.

#### B. The Legislature Should Strive for Fairness

Adding clarity will be the relatively easy part. Achieving fairness will be much more difficult. The legislature should nevertheless strive for fairness, no matter how elusive. One way to enhance fairness is to articulate a set of principles to help resolve choices among alternatives, using those principles to resolve the questions left unanswered by the common law vested rights doctrine. [FN272] This section of the Article outlines the author's personal attempt to achieve fairness. Others will disagree. The legislature will ultimately have to find its own way.

##### 1. Establish Guiding Principles

Two principles should guide any attempt to reform the vested rights doctrine through a statutory applicable law rule. First, when in doubt, keep it simple. Second, do not reward real estate speculation, but allow those who are actually ready to develop to lock in the applicable law.

###### a. When in Doubt, Keep It Simple

With any attempt to codify a rule comes the temptation to tailor exceptions to the rule to protect certain interests. In many cases, tailoring enhances fairness. In every case, however, tailoring adds \*920 complexity, rendering seemingly simple statements subject to a host of provisos.

In the case of a statutory applicable law rule, the legislature should err on the side of clarity and simplicity. When trying to choose between two courses of action, the legislature should keep in mind that it is attempting to add clarity to a body of law that has become needlessly confusing.

Where possible, the legislature should harmonize a statutory applicable law rule with the GMA [FN273] and the land use permitting statute. [FN274] These statutes have already resolved most fundamental principles of Washington land use law. The legislature should continue to build on these principles as clearly and simply as possible.

###### b. Protect Diligent Development and Discourage Speculation

Washington abandoned the majority, estoppel-based vested rights doctrine in the 1950s for good reason. The Washington rule obviates the litigation inherent in the majority rule, which forces parties to debate whether and when a developer substantially changed his or her position in good faith reliance on a given set of land use laws. [FN275]

Nevertheless, the Washington rule remains grounded in a notion that, at some point in time, we may presume that a developer has proceeded so far in good faith that it would be unfair to change the rules of the game. At first, courts found this point in time to be the date on which a developer submits a complete building permit application. [FN276] Washington courts later looked to indicia of a developer's good faith commitments to decide whether to extend the doctrine to other types of permit applications. [FN277]

Washington should continue to insist on a rule that does not allow a developer to freeze relevant development regulations unless the developer files a complete permit application that necessarily manifests a good faith willingness and ability to complete a development. If a developer is ready and willing to complete a development with \*921 reasonable diligence, we should allow the developer to lock in the law and proceed accordingly.

We should not indulge speculation, however. Real estate is a risky investment. One way to hedge that risk is to prevent the local government from changing the land use laws applicable to the investment. [FN278] But that hedge necessarily comes at the expense of the public's interest in revising and applying land use laws to keep pace with the demands of growth and new ecological challenges. We should therefore allow the developer to hedge his or her risk only when the developer is actually ready and willing to develop.

Insisting on a rule that rewards diligent development and discourages speculation comports with another principle of Washington land use law-- discouraging piecemeal review of projects. Most local governments must 'establish a permit review process that provides for the integrated and consolidated review and decisions on two or more project permits relating to a proposed project action.' [FN279] Local governments must also integrate environmental review under the State Environmental Policy Act [FN280] with a review of the underlying permit, [FN281] and should avoid piecemeal review of any given project. [FN282] Given this policy of encouraging consolidated review of any development, we should not adopt an applicable law rule that allows a developer to race to a local planning department and submit one preliminary permit application just to lock in the law that will apply to all subsequent permit applications for the same project.

**\*922 2. Use the Principles to Define the Contours of an Applicable Law Rule That Resolves the Questions Left Unanswered by the Vested Rights Doctrine**

In light of these principles--simplicity and protecting only diligent development--four essential elements of an applicable law rule could replace the vested rights doctrine and resolve its unanswered questions clearly and fairly. First, apply the rule to all 'project permit applications' as defined by existing law. Second, freeze in time those 'development regulations' (within the meaning existing law) that affect the type, degree, or physical attributes of new developments or uses. Third, for any one application, freeze the relevant law--including SEPA policies--in effect on the date an application is deemed complete pursuant to existing law. Finally, for multiple-permit projects, protect only consolidated applications or prompt, sequential applications.

a. The Applicable Law Rule Should Apply to All 'Project Permit Applications' as Defined in RCW 36.70B.020(4)

A crucial shortcoming of the vested rights doctrine is the haphazard way that it has been extended to some, but not all, types of land use applications. [FN283] An applicable law rule, by contrast, should apply to all local land use authorizations that are not legislative in nature. In other words, the rule should apply to all 'project permit applications,' as defined by the statute, that

already govern land use permitting procedures:

'[P]roject permit application' means any land use or environmental permit or license required from a local government for a project action, including, but not limited to, building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection. [FN284]

This definition divides the potential universe of land use decisions made by local government into two categories: quasi-judicial and legislative. Quasi-judicial decisions remain subject to RCW 36.70B, and therefore would be subject to an applicable law rule. Legislative \*923 decisions, by contrast, should not be encumbered by existing laws, and so an applicable law rule should not apply to them.

This distinction explains the sleight of hand executed by applying this statutory definition not to all site-specific rezone requests, but only to those 'authorized by a comprehensive plan or subarea plan.' [FN285] If a rezone request is not consistent with the comprehensive plan, the local government presumably cannot grant the request until the local government makes the legislative decision to amend the plan. [FN286] If a developer believes that she presents a rezone request that is consistent with the applicable plan, the developer should be allowed to present that request as a 'project permit application' and attempt to avail herself of the applicable law rule. If the local government decides that the request is inconsistent with the plan, the developer will either have to challenge that decision or wait for the local legislative body to change that plan before having a chance to freeze the law applicable to her rezone request.

Selecting this definition of 'project permit application' should also exclude from the applicable law rule formal interpretations by local government officials regarding the applicability of a given set of local land use laws to a particular property. [FN287] Interpretations do not constitute permits or authorizations. Although they are rendered under the law as it exists on a particular day, they cannot constitute a promise that the law will remain unchanged. An interpretation allows a developer to resolve an issue in advance of submitting an application, and that resolution may allow the developer to properly tailor a project application or to avoid submitting a futile one. Because an interpretation occurs before we can presume a developer's good faith commitment to proceed with a project to its completion, [FN288] an application for an interpretation should not freeze the law that will apply to some later application for a project permit application.

**\*924 b. The Applicable Law Rule Should Freeze in Time Those 'Development Regulations' Within the Meaning of the GMA That Affect the Type, Degree, or Physical Attributes of New Developments or Uses**

Courts have generally agreed that the vested rights doctrine freezes in time 'zoning ordinances' and most ordinances requiring a host of other land use authorizations. Courts have struggled, however, with laws that might not fit neatly within this body of law. [FN289]

The GMA provides a useful starting point for defining this body of law more precisely. That statute defines 'development regulations' as

the controls placed on development or land use activities by a county or city, including, but not limited to, zoning

ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. [FN290]

This definition is useful because it focuses on those ordinances that 'control' development or uses. Unfortunately, the phrase 'including, but not limited to' might inappropriately expand the universe of laws embraced by the definition.

An applicable law rule should therefore freeze in time only those GMA 'development regulations' that meet two criteria. First, the rule should freeze only those development regulations that affect the type, degree, or physical attributes of a development or use. This would exclude local ordinances such as those that impose GMA impact fees and that might be triggered by a development application but do not necessarily 'control' that development or use other than to potentially increase its cost. [FN291] It would also exclude ordinances that establish the procedures through which local governments process and consider permit applications. [FN292] Second, the rule should freeze only prospective regulations, which apply to new developments or uses--not retroactive regulations, which apply to both existing and new developments or uses. This would obviate any 'health and safety' \*925 exclusion, which has relevance only for the retroactive application of land use laws to existing, nonconforming uses. [FN293]

c. For Any One Application, the Applicable Law Rule Should Freeze the Relevant Law--Including SEPA Policies--in Effect on the Date an Application Is Deemed Complete Pursuant to RCW 36.70B.070

Although the common law vested rights doctrine focuses on the date a developer files a complete application for a permit, statutory authority provides a ready way to determine that date with greater certainty. [FN294] Pursuant to the statute governing local land use permitting procedures, a local government has twenty-eight days from the date a developer submits a facially complete application to render a determination as to whether that application was actually complete when submitted at the beginning of the twenty-eight-day period. [FN295] The local government must find that an application was complete within the meaning of that statute if the application 'meets the procedural submission requirements of the local government and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently.' [FN296] Silence from the local government at the end of the twenty-eight-day period constitutes a determination that the application was complete when submitted. [FN297] However, if, within the 28-day period, the government asks for more information to complete the application, the application cannot be deemed complete until the developer provides that information. [FN298]

Using this process to fix the date for an applicable law rule retains the essential framework of the vested rights doctrine and keeps the applicable law rule simple by relying on existing statutes. This approach leaves the local government in the relatively strong position of determining when an applicant has actually triggered an applicable law rule. It may also allow a local government to claim, inappropriately, that an application is incomplete simply to buy more time to change the underlying laws to prevent the proposal. These concerns should be moderated not only by the requirement that the local gov-\*926 ernment define procedural requirements, [FN299] but also by the developer's ability to challenge the local government for engaging in an unlawful procedure or for failing to follow its own procedures. [FN300]

The applicable law rule should also ensure that the date of complete application remains the relevant date for freezing SEPA policies in place. [FN301] Although SEPA provides a necessary overlay to local land use law [FN302] and derives its authority from its own statute, [FN303] that does not necessarily mean that the only way to properly further SEPA's goals in the context of land use decisions is by freezing the applicable SEPA policies at some point after the date of a complete application.

By using the point of complete permit application to freeze SEPA authority, we not only keep the rule simple, we also remove any temptation from the local government to adopt and apply SEPA policies to condition or deny a permit when the local government would not be able to reach the same result by amending its development regulations.

In a similar vein, the applicable law rule should remain consistent with the GMA by ensuring that a complete application freezes the applicable law, notwithstanding a later administrative or judicial finding that the frozen law violates the GMA. [FN304] Allowing a developer to \*927 lock into a law that violates the GMA invites developers to lobby local legislative bodies to adopt such laws just long enough for the developer to submit an application. [FN305] Such abuses are unfortunate, but they are best addressed through the political process by electing local legislators who will not bend to such lobbying. The alternative is to adopt an applicable law rule that allows a developer to freeze law on the date of complete application, but with the proviso that if any part of that law is later deemed to violate the GMA, a new law might apply at some later date if the developer has not already relied in good faith, to his or her detriment, on the former law. This would essentially reintroduce the majority vesting law to Washington's minority scheme, complicating and undermining the existing structure.

While conceding this measure of certainty to developers, we can limit their ability to abuse that concession. First, developers should not be allowed to submit a bare-bones application just to freeze the applicable law, only later to 'modify' or 'supplement' that application in a way that changes the essential type or scale of the original proposal. [FN306] Second, we should create a rule upon which all parties can rely--developers, government, and the public. The applicable law rule would freeze the law in effect on a particular date, and not allow a developer later to 'opt' to have some part of a subsequent law apply. \*928 If a developer wants to take advantage of some later law, he or she should refile the application so that all new laws apply, not just those portions most favorable to the developer.

d. For Multiple-Permit Projects, Protect Only Consolidated Applications or 'Prompt,' Sequential Applications

Like the common law vested rights doctrine, an applicable law rule would be easiest to craft for individual permit applications, but would be significantly more challenging in the context of projects that require multiple permits. This challenge is met most easily in local jurisdictions that provide for consolidated review of multiple permit applications pursuant to state statute, [FN307] and where developers take advantage of that provision to pursue one process covering a multitude of permit applications for the same project. In that situation, the local jurisdiction would consider all of the separate permit applications under the law in effect on the date that the developer completed the single, consolidated application. If Pierce County had allowed consolidated review when the facts of *Noble Manor Co. v. Pierce County* [FN308] arose, the supreme court would not have needed to entertain that case. The developer in *Noble Manor* attempted to file, nearly simultaneously, its short subdivision application (to create the new lots) and its building permit applications (to build the structures once the subdivision was complete), but the county refused to accept the building permit applications because they were for activities on lots that did not yet exist. [FN309] Moreover, the county changed the underlying law before accepting the eventual building permit applications, and applied that new law to deny the building permits. [FN310] If the county had allowed consolidated submission and review of both the subdivision and the building permit applications, the former law would have applied to all of the applications. [FN311]

Not all developers will see consolidated review as an attractive option in all cases. Many projects are much more complicated than the short subdivision and building permits required in *Noble Manor*. Developers may want to assess whether and how a local government approves a relatively preliminary application--such as a proposed sub-\*929 division, binding site plan,

or conditional use permit application--before investing in the design and other preparation necessary to submit applications for subsequent permits for the same development. This sequential permitting approach allows developers to hedge their bets, but at the risk that the underlying law will change between applications.

We should address multiple-permit projects under an applicable law rule in one of two ways. First, we could insist that local governments allow consolidated review (as RCW 36.70B.120 already requires) and that developers take advantage of that review to submit consolidated permit applications. Under this approach, if a developer submits one application after another, he or she cannot argue that the former application has any effect on the law applicable to the latter one. This would enhance simplicity and would protect those developers that are truly ready to develop, but it would not necessarily help those who are trying to manage their risks.

The other, more-developer friendly way to approach multiple-permit projects would be to allow developers to 'link' one permit application to the law applicable to an immediately preceding permit application, but only if the developer files the next permit application 'promptly.' [FN312] Promptness could be defined perhaps as submitting the next application either before a final decision is rendered on the preceding one, or within some period of time (such as twenty-eight days) after that decision. If developers stall between permit applications, they would run the risk that the law might change and result in denial of a subsequent permit. Although this approach would be more cumbersome and complicated, it would be consistent with the principle of protecting those who are actually ready to develop, but without forcing them to invest in potentially wasted permitting efforts.

Both of these approaches would involve complications. The applicable law rule would have to prevent developers from 'amending' or 'supplementing' their projects in ways that change the projects from what the developers originally proposed to lock in the applicable law. [FN313] Because both approaches might result in saddling a developer with a legally-created lot on which he cannot establish the use he originally anticipated, the applicable law rule may have to embrace some type of 'reasonable use' exception. [FN314]

#### \*930 C. Why Not? Answering the Potential Naysayers

Some will disagree with the particular solutions offered by this Article. Others likely will assail its fundamental premise. They will argue that the legislature should not, or cannot, attempt to reform the vested rights doctrine. The legislature should not be deterred by these arguments.

##### 1. Why Change Something That Is a 'Model' for the Rest of the Country?

This Article maintains that the details of Washington's vested rights doctrine fail in crucial respects to meet the mission of providing certainty and fairness. [FN315] This Article therefore counsels against viewing Washington's doctrine as some kind of model more worthy of emulation than reform. Overstreet and Kirchheim present no evidence in support of their claim that '[i]n 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.' [FN316] Indeed, given that California's statute predates Washington's by three years, [FN317] and that Texas enacted its original statute at nearly the same time that Washington adopted its vested rights statutes, [FN318] one must \*931 question the historical foundation of any claim that those states have followed Washington's lead.

This Article also suggests that other states should not necessarily look to Washington as a model of fairness. [FN319] From state to state, vested rights are largely a function of valid expectations shaped by state law. [FN320] For nearly half of a century, Washington has fostered an expectation that a permit application triggers the doctrine in some fashion. It would be politically difficult, and ultimately unfair, to alter that fundamental expectation in Washington now. Expectations in most other states are shaped by notions of estoppel that allow local jurisdictions to apply new land use laws as long as the developer has not made a substantial change of position in reliance on the current law. [FN321] Lawmakers in other states must assess prevailing expectations, how well their states have been served by those expectations, and how their states might be better served by altering those expectations. Likewise, the Washington legislature should keep its eyes fixed on what is fair in Washington without sensing some responsibility to lead the rest of the nation.

## 2. Why Not Leave It to the Judiciary?

Only the legislature is positioned to wipe the slate clean and provide a comprehensive solution to the muddled vested rights doctrine. We cannot expect the judiciary to offer that solution. Judges must remain constrained by the facts and issues presented to them in each case. It would be the rare case, indeed, that would allow one decision to address all of the questions that the doctrine currently answers inadequately. Even if a case did present a court with the opportunity to add clarity, that court would likely feel constrained by past precedent, which, as described above, too often provides either confusing or questionable answers.

### \*932 3. Won't the Legislature Be Paralyzed by Political Gridlock?

Supplanting the vested rights doctrine with a statutory applicable law rule will be a politically contentious endeavor. Contention need not mushroom into paralysis, however. The legislature should keep in mind that it does not have to change the basic framework of the doctrine to reform it. For nearly half a century, Washington has used a bright-line minority rule that emphasizes certainty by focusing on the date of application. Although the details of that rule have become confused, and although Noble Manor [FN322] and its progeny threaten to undermine fairness in the context of multiple-permit applications, the essential framework has remained intact. The goal of reform should be to restore the details of the basic framework clearly and fairly.

The legislature should not tolerate attempts by either side of the vested rights debate--those who favor stronger land use regulation and those who favor less regulation--to alter the doctrine's essential balance in the name of reforming the doctrine. If local governments or those who support more stringent land use regulation push to alter the doctrine's essential framework (either by selecting a different point in time at which to freeze applicable law or by adopting the majority rule), legislators should press those advocates to demonstrate how the current framework has failed to serve Washington.

On the other side of the debate, the legislature should not countenance complaints from developers about the Washington framework's essential balance. To put it bluntly, developers have a sweet deal in Washington. Compared to the rest of the country, the scales are tipped heavily in their favor. [FN323] Washington developers have enjoyed a right to lock in land use laws simply by filing a permit application. They should concede their favored status and not try to tip the scales further in their direction. [FN324]

Unfortunately, legislators should expect arguments from both sides that impugn the other's motives and cast its own side as needing special protection. According to Overstreet and Kirchheim, for example, local elected officials are too busy to give the requisite attention to land use permitting decisions, and, as a result, remain under \*933 the sway of rogue development staff who capriciously suggest permit conditions that increase the cost of a project. [FN325] In Overstreet and Kirchheim's view, local legislators--who would otherwise have little interest in changing land use laws or denying a development permit--cave to political pressure to block developments '[u]sing 'environmental protection' or 'growth management' as cover.' [FN326] For Overstreet and Kirchheim, land use is a game of politics stacked against developers. [FN327]

For every snapshot like the one offered by Overstreet and Kirchheim, others in this state could offer the negative. Developers frequently support local legislators financially, lobby them to enact plans and regulations that protect developers' relatively focused interests, and employ consultants and attorneys who have close working relationships with development planning staff and local officials who use those connections and that skill to permit projects with a minimum of public exposure or resistance.

\*934 Although infused with some factual foundation, neither picture fully captures reality. All stakeholders in every land use arena will use every legal means of persuasion available to shape laws to favor their view of the world. We should expect these battles and should enact procedural laws that ensure fair fights. We should not focus on the interests of only one set of stakeholders and warp the rules of the game to serve them.

In short, both sides of the debate should exercise some restraint. The Washington land use bar should find itself standing on a wide swath of common ground when considering the need to clarify the vested doctrine, even when discussing the principles that should shape the doctrine's details. Legislators should not hesitate to discount those who run too far out of bounds.

#### 4. Won't Constitutional Protections Limit the Legislature's Ability to Act?

The constitution does not block the legislature from reforming the vested rights doctrine. Washington's vested rights doctrine is not dictated by the constitution. If it were, one of two things would have to be true: (1) the other states that follow the majority rule violate constitutional guarantees; or (2) something unique about the Washington Constitution mandates the particular rule in this state. Neither is the case. Constitutional protections have not shaped the vested rights doctrine in the past and should not dictate an effort to reform it.

##### a. Takings

Constitutional protections against governmental takings of property without just compensation [FN328] do not dictate the contours of Washington's vested rights doctrine. Once established, a property right-- including a vested one--is subject to constitutional protections against governmental taking of property without just compensation. [FN329] But this truism says nothing about how one establishes a vested right in the first instance, or about the ultimate scope of that right. This explains why no Washington court has invoked constitutional takings protections to explain the details of Washington's vested rights \*935 doctrine. These protections should remain irrelevant to any effort to reform the doctrine.

##### b. Equal Protection

Equal protection concerns favor a rule that can be applied consistently and fairly. When announcing the vested rights doctrine in 1954, the Washington Supreme Court acknowledged this by pointing to state equal protection guarantees to justify mandamus as the foundation for the vested rights doctrine. [FN330] The basic idea was to preclude administrators, who presumably carried a ministerial duty to apply the law as written, from applying standards differently to different applicants. [FN331] Equal protection makes sense in the context of an assertion that the vested rights doctrine is available only to force performance of a ministerial duty. When a municipality has in place a truly nondiscretionary duty, it must apply that duty consistently to all persons.

But equal protection goes no further than that. It stands only for the proposition that a rule must apply consistently to everyone within a given class. It does not suggest what that rule must be. If, for example, every applicant were subject to the laws in effect on the date of permit issuance, equal protection would be guaranteed just as readily as it is under a rule in which every applicant is subject to the laws in effect on the date of application.

### c. Due Process

Due process likewise serves as a useful overlay to the vested rights doctrine without dictating its shape. Beginning in the mid-1980s, some Washington courts inserted due process as though it were the original motivation for the vested rights doctrine more than thirty years earlier. This has tended to take the form of assertions that the doctrine either provides 'a 'date certain' standard that satisfies due process requirements,' [FN332] or 'is based on constitutional principles of fundamental fairness.' [FN333] Statements like these only echo the fairness/ certainty rationale for the vested rights doctrine. To the extent that these statements attempt to invoke procedural due process, they merely underscore the need to fix a date upon which certain rights \*936 accrue--they do not dictate when that date must be. [FN334] To the extent that such statements attempt to invoke substantive due process concerns, they just underscore that the vested rights doctrine should be consistent with notions of fairness--they do not dictate the shape that a fair application of the doctrine must take.

Overstreet and Kirchheim point to a 'constitutional vested rights doctrine' premised on due process violations. [FN335] This assertion lacks historical and legal foundation. Overstreet and Kirchheim concede that no Washington court has ever recognized a distinct, constitutional vested rights doctrine, [FN336] and that to the extent Washington courts have mentioned due process concerns in vested rights cases, those courts have not explained whether they refer to the federal or state due process clauses. [FN337] In fact, no court mentioned due process in vested rights case law until the vested rights doctrine was more than a quarter-century old. For a Washington court to have shaped the doctrine through substantive due process, the court would have had to find that some alternative form of the doctrine amounted to an irrational or arbitrary interference with property rights. [FN338] No court has ever applied this test to the vested rights doctrine, and, even if one were to do so, there is no reason to think that the current common law doctrine is the only one that could pass muster. [FN339]

\*937 Overstreet and Kirchheim next conclude that a 'constitutional vesting doctrine' must exist because courts have allowed 'constitutional remedies' when local jurisdictions misapply the doctrine. [FN340] They reason, 'Of course, a constitutional remedy would not be necessary to cure violations of mere common-law or statutory rights, so one is forced to conclude a constitutional doctrine protects vested rights. . . .' [FN341] This reasoning is unsound. To find a violation of due process in land use permitting, a court need only determine that the local jurisdiction improperly interfered with land use permitting procedures. [FN342] Land use permitting procedures are shaped by statute and by local law, [FN343] however, the fact that a

constitutional remedy exists for a violation of such procedures does not prove that the procedures are constitutional in nature. Even the decision that Overstreet and Kirchheim use to illustrate their point demonstrates that the existence of a constitutional remedy does not mean that the underlying law is dictated by due process guarantees. [FN344] In *Mission Springs, Inc. v. City of Spokane*, the court explained that a due process violation may be premised on improper deprivation of a 'state-created property right' [FN345] and that '[p]roperty interests are not created by the constitution but are reasonable expectations of entitlement derived from independent sources such as state law.' [FN346] The *Mission Springs* court found that a city violated due process guarantees by flouting the vested rights doctrine and a local grading code. [FN347] This does not establish that the local grading code, which is driven by state statute and a uniform professional code, [FN348] is a 'constitutional' body of law. Like the grading \*938 code, the vested rights doctrine remains a creature of state law that the legislature may use to shape expectations about property interests.

Another reason to question Overstreet and Kirchheim's description of a 'constitutional vested rights doctrine' is the uncanny coincidence that this constitutional doctrine seems to mandate, 'at a minimum, the current (very broad) scope of Washington's common-law and statutory vested rights.' [FN349] Going even further, Overstreet and Kirchheim assert that this is just a minimum and that 'the parameters of the constitutional doctrine-- reflecting the legislature's and courts' unmistakable decision to favor property owners--must be broader than [sic] the common-law or statutory doctrines.' [FN350] That a 'constitutional vested rights doctrine' may, without citation to any authority, be so malleable as to necessarily result in Overstreet and Kirchheim's developer-sided vision should be reason enough to doubt that due process concerns have shaped the vested rights doctrine in the past or that they should shape the doctrine in the future.

Even the commentators to whom Overstreet and Kirchheim point to as authorities on the vested rights doctrine stress that the vested rights doctrine, whether in Washington or elsewhere, is not shaped by due process concerns. Richard Settle observes that '[t]he legal basis for Washington's vested rights doctrine never has been articulated.' [FN351] Settle discounts both substantive due process and takings as possible foundations for Washington's doctrine. [FN352] As a matter of federal law, John Delaney and Emily Vaias conclude that property interests, like vested rights, 'of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .' [FN353]

The contours of Washington's vested rights doctrine are not dictated by due process or any other constitutional provision. The actual foundation of the vested rights doctrine has remained a balance between private and public interests. The legislature is uniquely positioned to strike a balance that provides certainty and remains consistent with reasonable expectations.

#### D. The Bottom Line: We Must Reclaim Certainty and Fairness

Washington accepted an explicit trade-off when it abandoned the majority vested rights rule. In exchange for giving up the ability to probe the equities of each individual case, we gained a practical, bright-line rule to enhance certainty and predictability while ensuring a measure of fairness.

Unfortunately, in many key respects, we have eroded the certainty and fairness that justified our unique approach. A doctrine that should enhance certainty fails to answer the most crucial questions clearly, consistently, or accessibly. A doctrine that should ensure fairness is quickly tipping far to one side in the context of multiple-permit projects.

We need to reclaim certainty and fairness from amid the muddled details of the vested rights doctrine. The Washington legislature built a solid foundation for this effort by reforming local land use permitting procedures in 1995; today, most local jurisdictions concurrently follow a reasonably predictable and fair set of procedures to render permit decisions. [FN354] The legislature should complete that task by codifying an applicable law rule that replaces Washington's vested rights doctrine clearly and fairly.

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[FN1]. This Article uses 'developer' as a shorthand for those persons--often the owners of property--who must secure approval from a local jurisdiction as a condition of physically altering property or putting it to a particular use.

[FN2]. Brian Kelly, Developer, Foes Await Redmond Growth Ruling on 'Mini-City,' Seattle Times, Aug. 18, 1999, at B1.

[FN3]. Brian Kelly, Olympic Pipe Line Sues North Bend, Seattle Times, June 15, 1999, at B1.

[FN4]. James Bush, Illegal After the Fact, Seattle Weekly, May 4, 2000, at 2.

[FN5]. Wash. Rev. Code § 36.70A (2000).

[FN6]. See Wash. Rev. Code §36.70A.020(1) (2000) (goal of encouraging development in urban areas); Wash. Rev. Code § 36.70A.020(2) (2000) (goal of reducing 'the inappropriate conversion of undeveloped land into sprawling, low-density development'). See also City of Redmond v. Central Puget Sound Growth Hearings Bd., 136 Wash. 2d 38, 57-58, 959 P.2d 1091, 1100 (1998) (describing how 'the GMA changed the normal course' of land use planning in a way that thwarted the expectations of those who bought rural land hoping to develop it more intensely in the future); Eric S. Laschever, An Overview of Washington's Growth Management Act, 7 Pac. Rim L. & Pol'y J. 657, 664-65 (1998).

[FN7]. Time to Put Down County's 'Old Dogs,' The News Tribune (Tacoma, Washington), Sept. 27, 1999, at A8.

[FN8]. Id. A Seattle columnist echoed this sentiment, concluding that using the vested rights doctrine to allow dense development in rural areas of King County 'leads to the land mine effect: vested properties slumbering and waiting for the right market conditions.... Even if it is within the law, it corrodes belief [that] the county can maintain a boundary limiting sprawl.' James Vesely, 'The Land Mine Beside the Snoqualmie River,' Seattle Times, Apr. 24, 2000, at B1.

[FN9]. Brier Dudley, Sims Clamps Down on Loophole That Allows Rural Subdivisions, Seattle Times, Mar. 19, 1999, at B1.

[FN10]. Adams v. Ernst, 1 Wash. 2d 254, 264, 95 P.2d 799, 803 (1939).

[FN11]. This Article also serves as a moderating counterpoint to an article recently published in this Journal by the general counsel and a former staff attorney for the Building Industry Association of Washington, Gregory Overstreet & 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 (2000). This author drafted, submitted, and secured publication of this Article before reviewing the Overstreet and Kirchheim piece.

[FN12]. See *infra* Part II.

[FN13]. The vested rights doctrine is not limited to land use law. In its most generalized terms, the doctrine refers to a right to do something or acquire something in the future, and prohibits government from enacting a new law that impedes realization of that right. See In re F.D. Processing, Inc., 119 Wash. 2d 452, 463, 832 P.2d 1303, 1309 (1992) (bank obtained a vested right in a perfected security interest); Godfrey v. State, 84 Wash. 2d 959, 963, 530 P.2d 630, 632 (1975) (no vested right against statutory change to the common law of contributory negligence); Gillis v. King County, 42 Wash. 2d 373, 377, 255 P.2d 546, 548 (1953) (no vested right to the continuation of the law regarding abandonment of property); Adams, 1 Wash. 2d at 264-66, 95 P.2d at 803-04 (no vested right to old age benefits against a change in the law); Wells v. Miller, 42 Wash. App. 94, 97-98, 708 P.2d 1223, 1225 (1985) (holding that if a street vacation is not perfected, adjacent property owners obtain a vested right in the unvacated street).

[FN14]. See Wash. Rev. Code § 7.16.160 (2000); Department of Ecology v. State Finance Comm., 116 Wash. 2d 246, 252, 804 P.2d 1241, 1243-44 (1991).

[FN15]. State ex rel. Ogden v. City of Bellevue, 45 Wash. 2d 492, 495, 275 P.2d 899, 901-02 (1954) (citations omitted).

[FN16]. See, e.g., Wash. Rev. Code § 36.70B.020(4) (2000) (enumerating a nonexclusive list of examples of 'project permits'). See also Overstreet & Kirchheim, *supra* note 11, at 1053-54 (noting that since the Washington vested rights doctrine was first adopted, other permits have become vehicles through which to assess a project's consistency with local development regulations).

[FN17]. See, e.g., Wash. Rev. Code § 36.70A.060 (2000) (requiring local regulation of natural resource lands and critical areas); Wash. Rev. Code § 43.21C.030 (2000) (requiring local review pursuant to the State Environmental Policy Act); Wash. Rev. Code § 90.58.050 (2000) (requiring local implementation of the Shoreline Management Act of 1971).

[FN18]. Wash. Rev. Code § 43.21C.060 (2000).

[FN19]. See Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 63-65, 578 P.2d 1309, 1312-13 (1978).

[FN20]. See, e.g., Wash. Rev. Code § 36.70B.040 (2000) (requiring local governments to assess the consistency of proposed land use projects with local development regulations).

[FN21]. Wash. Rev. Code § 36.70C.130(b)-(c) (2000).

[FN22]. See Richard L. Settle, Washington Land Use and Environmental Law and Practice § 8.4(a) (1983).

[FN23]. See Wash. Rev. Code § 43.21C.060 (2000).

[FN24]. See, e.g., Wash. Rev. Code § 35.63.080 (2000) (allowing cities to appoint a 'board of adjustment, to make, in appropriate cases and subject to appropriate conditions and safeguards established by ordinance, special exceptions'); Wash. Rev. Code § 36.70A.090 (2000) (encouraging local governments to 'provide for innovative land use management techniques'); J. Richard Aramburu & Jeffrey M. Eustis, Zoning, in Washington State Bar Ass'n, Real Property Deskbook §§ 97.7(1)-(2) (3d ed. 1996) (discussing authority to issue conditional and special use permits).

[FN25]. A nonconforming use or structure is one that was legal when established, but that no longer conforms to later-enacted land use laws. See Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wash. 2d 1, 6-12, 959 P.2d 1024, 1027-30 (1998).

[FN26]. Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 873-74, 872 P.2d 1090, 1095-96 (1994). Overstreet and Kirchheim misread this identical passage as evidence that 'the Washington courts and legislature clearly recognize the two competing interests and have consciously chosen one side: that of the property owner.' Overstreet & Kirchheim, *supra* note 11, at 1072. Overstreet and Kirchheim further describe Erickson as evidence of 'Washington's deliberate choice in favor of the property owner.' See *id.* at 1072-73. They rely on this discussion to assert that 'the Washington legislature and our courts have intentionally and consistently balanced the vested rights doctrine in favor of the individual and against the government; accordingly interpretations of the vesting statute should tilt toward the property owner.' *Id.* at 1087. The language of Erickson does not support these interpretations.

[FN27]. Erickson & Assoc., 123 Wash. 2d at 868, 872 P.2d at 1093.

[FN28]. See, e.g., Hull v. Hunt, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958); State ex rel. Ogden v. City of Bellevue, 45 Wash. 2d 492, 495-96, 275 P.2d 899, 901-02 (1954).

[FN29]. See Hull, 53 Wash. 2d at 128-30, 331 P.2d at 858-59.

[FN30]. Id. at 130, 331 P.2d at 859 (citations omitted).

[FN31]. See West Main Assocs. v. City of Bellevue, 106 Wash. 2d 47, 53, 720 P.2d 782, 786 (1986) ('[A] vested right does not guarantee a developer the ability to build. A vested right merely establishes the ordinances to which a building permit and subsequent development must comply.').

[FN32]. Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 275, 943 P.2d 1378, 1381 (1997). Part II.D.3 of this Article criticizes the remainder of this decision.

[FN33]. Wash. Rev. Code § 19.27.095(1) (2000) (building permit applications); Wash. Rev. Code § 58.17.033(1) (2000)

(subdivision applications). Part II.D.2 of this Article explains how these and other statutory vested rights rules paint an inconsistent picture.

[FN34]. Norco Constr., Inc. v. King County, 97 Wash. 2d 680, 684, 649 P.2d 103, 106 (1982) (citing Hull, 53 Wash. 2d at 130, 331 P.2d at 859).

[FN35]. See, e.g., Lincoln Shiloh Assocs., Ltd. v. Mukilteo Water Dist., 45 Wash. App. 123, 127-28, 724 P.2d 1083, 1086 (1986), review denied, 107 Wash. 2d 1014 (1986); Burley Lagoon Improvement Ass'n v. Pierce County, 38 Wash. App. 534, 540, 686 P.2d 503, 507 (1984), review denied, 103 Wash. 2d 1011 (1985); Teed v. King County, 36 Wash. App. 635, 645, 677 P.2d 179, 185 (1984).

[FN36]. See, e.g., Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 867-68, 872 P.2d 1090, 1092-93 (1994) (citing Ogden, 45 Wash. 2d at 492, 275 P.2d at 899, and Hull, 53 Wash. 2d at 125, 331 P.2d at 856); Allenbach v. City of Tukwila, 101 Wash. 2d 193, 197, 676 P.2d 473, 475 (1984) ('Under Ogden, a building permit applicant has a vested right to processing of his application under the zoning in effect at the time his application is filed.').

[FN37]. Overstreet & Kirchheim, supra note 11, at 1077. Neither of the two authorities that Overstreet and Kirchheim cite contains a useful or relevant 'general description of 'discretionary' versus 'ministerial' permits.' Id. at 1077 n.193 (citing Grayson P. Hanes & J. Randall Minchew, On Vested Rights to Land Use and Development, 46 Wash. & Lee L. Rev. 373 (1989), and Richard B. Cunningham & David H. Kremer, Vested Rights, Estoppel, and the Land Development Process, 29 Hastings L.J. 625 (1978)). In fact, both authorities underscore the difficulty of making a ministerial-discretionary distinction clearly or consistently. First, Hanes and Minchew, using an example from Virginia law, equate discretionary approvals with legislative ones and, unlike Overstreet and Kirchheim, suggest that conditional and special use permits are discretionary, not ministerial. Hanes & Minchew, supra, at 381. Cf. Overstreet & Kirchheim, supra note 11, at 1077-78. Second, far from endorsing the ministerial-discretionary distinction, Cunningham and Kremer complain that 'the choice of nomenclature[, 'ministerial' or 'discretionary,'] applied to the permit has the talismanic effect of dictating the outcome of the vested rights controversy.' Cunningham & Kremer, supra, at 638. Following circular logic, Cunningham and Kremer ultimately suggest that choosing to label a decision ministerial or discretionary 'is directly dependent on the degree of subjective discretion which is delegated by the legislature to the permit-issuing decisionmakers.' Id. This approach is different from Hanes and Minchew's legislative-ministerial distinction and, unlike Overstreet and Kirchheim, leads to labeling special, conditional use, and planned unit development permits discretionary. See id. at 636 n.48. Cf. Overstreet & Kirchheim, supra note 11, at 1077-78.

[FN38]. Limiting the universe of applications to ones for 'land use' permits necessarily excludes applications that, although they might relate indirectly to property, are not truly for 'land use' permits. See, e.g., Vashon Island Comm. for Self-Government v. King County Boundary Review Bd., 127 Wash. 2d 759, 767-68, 903 P.2d 953, 957-58 (1995) (doctrine does not apply to annexation proceedings). Cf. Wash. Rev. Code § 36.70B.020(4) (2000) (defining 'project permit application').

[FN39]. See, e.g., Ogden, 45 Wash. 2d at 496, 275 P.2d at 902; Hull, 53 Wash. 2d at 130, 331 P.2d at 859.

[FN40]. See Beach v. Board of Adjustment of Snohomish County, 73 Wash. 2d 343, 438 P.2d 617 (1968).

[FN41]. Id. at 347, 438 P.2d at 620. The issue in Beach was whether a local government had to prepare a transcript of a local hearing at which the local government denied a conditional use permit. Id. at 345, 438 P.2d at 619. The court held that a transcript was required and remanded the matter for a rehearing. Id. at 347, 438 P.2d at 620. The court noted that in oral argument, the local government stated that the local conditional use permit law had changed during the judicial appeal. Id. The court therefore added that on remand, 'the zoning code which was in force at the time of the filing of the application shall apply.' Id.

[FN42]. Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wash. App. 59, 84, 510 P.2d 1140, 1155 (1973), review denied, 83 Wash. 2d 1002, 1003 (1973).

[FN43]. Id. at 85, 510 P.2d at 1156.

[FN44]. See Talbot v. Gray, 11 Wash. App. 807, 811, 525 P.2d 801, 803-04 (1974), review denied, 85 Wash. 2d 1001 (1975).

[FN45]. See Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wash. App. 709, 715, 558 P.2d 821, 826 (1977).

[FN46]. Thurston County Rental Owners v. Thurston County, 85 Wash. App. 171, 182, 931 P.2d 208, 214 (1997).

[FN47]. 97 Wash. 2d 680, 649 P.2d 103 (1982).

[FN48]. See Norco, 97 Wash. 2d at 682, 649 P.2d at 105.

[FN49]. See id. at 686-87, 649 P.2d at 107 (discussing Wash. Rev. Code § 58.17.140).

[FN50]. See id. at 683, 649 P.2d at 105-06.

[FN51]. See Norco Constr., Inc. v. King County, 29 Wash. App. 179, 190, 627 P.2d 988, 995 (1981), aff'd as modified, 97 Wash. 2d 680, 649 P.2d 103 (1982).

[FN52]. Norco, 97 Wash. 2d at 687, 649 P.2d at 108. See generally id. at 687-89, 649 P.2d at 108. Overstreet and Kirchheim incorrectly suggest that Norco was based on a distinction between 'discretionary' and 'ministerial' permits. Overstreet & Kirchheim, *supra* note 11, at 1077 n.193, 1078 n.195. The Norco court expressly ruled that any such distinction is irrelevant to the vested rights doctrine. See Norco, 97 Wash. 2d at 684, 649 P.2d at 106; supra Part I.C (discussing Norco's treatment of this issue).

[FN53]. See, e.g., Erickson, 123 Wash. 2d at 872, 872 P.2d at 1095; Friends of the Law v. King County, 123 Wash. 2d 518, 522, 869 P.2d 1056, 1059 (1994); Lincoln Shiloh Assocs. v. Mukilteo Water Dist., 45 Wash. App. 123, 128, 724 P.2d 1083, 1086 (1986), review denied, 107 Wash. 2d 1014 (1986). These descriptions of Norco are ironic because both appellate courts in Norco left in place the trial court's order applying the vested rights rule directly to the subdivision application. See Norco, 29 Wash. App. at 192, 627 P.2d at 996; Norco, 97 Wash. 2d at 690-91, 649 P.2d at 109. The trial court ordered the council to consider the preliminary subdivision application under the law in effect at the start of the statutory 90-day period (in other

words, on the date of application), consistent with the fairness/certainty rationale for the vested rights doctrine. See Norco, 29 Wash. App. at 192, 627 P.2d at 996. The appellate courts presumably upheld the trial court's order because the law in effect at the end of the period remained unchanged from the law that was in effect at the start of the period. See id. at 188 n.4, 627 P.2d at 993 n.4. Therefore, even though the supreme court asserted that it was applying its own rule that was not related to the vested rights doctrine, the factual outcome of Norco was to uphold an application of the vested rights doctrine to a preliminary subdivision application. See Norco, 97 Wash. 2d at 684, 649 P.2d at 106.

[FN54]. See Burley Lagoon, 38 Wash. App. at 540, 686 P.2d at 507. The court applied the mandamus rationale to reach this result, reasoning that 'processing a building permit [that is subject to the vested rights doctrine] is a ministerial act, whereas processing a preliminary site plan for approval is a discretionary act.' Id.

[FN55]. See Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 639, 733 P.2d 182, 193 (1987). The court dispensed with the issue in one sentence and with no citation to authority: 'As a general principle, we reject any attempt to extend the vested rights doctrine to site plan review.' Id. Cf. Overstreet & Kirchheim, supra note 11, at 1083 n.233 (asserting that RCW 58.17.033 arguably covers binding site plans in addition to plat applications without acknowledging Valley View).

[FN56]. Act of Apr. 20, 1987, ch. 104, § 2, 1987 Wash. Laws 317 (enacting Wash. Rev. Code § 58.17.033). See infra Part II.D.2 (discussing application of this statute).

[FN57]. See Erickson & Assocs. v. McLerran, 123 Wash. 2d 864, 872, 872 P.2d 1090, 1095 (1994).

[FN58]. Id. at 866, 872 P.2d 1092.

[FN59]. Id. at 874-75, 872 P.2d 1096.

[FN60]. Id. at 875, 872 P.2d 1096.

[FN61]. See id. The Erickson court did not reverse an earlier court of appeals ruling that, while not acknowledging it was extending the doctrine to MUPs, held that filing a complete MUP application freezes applicable SEPA policies in time. See Victoria Tower Partnership v. City of Seattle, 49 Wash. App. 755, 756, 760-61, 745 P.2d 1328, 1331 (1987). Instead, the Erickson court distinguished the facts of Victoria Tower on the grounds that in Erickson, the city adopted its vesting ordinance after the relevant facts of Victoria Tower occurred. See Erickson, 123 Wash. 2d at 872, 872 P.2d at 1095.

[FN62]. See Wash. Rev. Code § 58.17.033 (2000). For a fuller discussion of this provision in the context of multiple-permit projects, see infra Part II.D.2.

[FN63]. See Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 639, 733 P.2d 182, 193 (1987). See supra Part II.A.2.

[FN64]. See Erickson, 123 Wash. 2d at 874-75; supra Part II.A.2.

[FN65]. 36 Wash. App. 635, 643-44, 677 P.2d 179, 184 (1984).

[FN66]. See id. at 637, 677 P.2d at 181.

[FN67]. Id. at 637-39, 677 P.2d at 181-82.

[FN68]. Id. at 645, 677 P.2d at 185.

[FN69]. Id.

[FN70]. See Norco Constr., Inc. v. King County, 97 Wash. 2d 680, 684, 649 P.2d 103, 106 (1982).

[FN71]. See Teed, 36 Wash. App. at 644-45, 677 P.2d at 184-85.

[FN72]. Areawide rezones are legislative acts subject to initial review for consistency with the Growth Management Act only by the Growth Management Hearings Board. See Wash. Rev. Code § 36.70A.280(a) (2000) (Growth Management Hearings Board shall hear petitions alleging that development regulations violate the GMA); Wash. Rev. Code § 42.36.010 (adoption of an area-wide rezoning ordinance is a legislative act, not a quasi-judicial one, and as such is not subject to the appearance of fairness doctrine); Buckles v. King County, Cent. Puget Sound Growth Management Hearings Bd. No. 96-3-0022c, Final Decision and Order, at 23 (Nov. 12, 1996) (the Board will review areawide rezones, which are legislative acts). Cf. Citizens for Mount Vernon v. City of Mount Vernon, 133 Wash. 2d 861, 867-68, 947 P.2d 1208, 1211-12 (1997) (Growth Management Hearings Board has no jurisdiction over quasi-judicial, site-specific rezone decisions).

[FN73]. Site-specific rezones are now subject to review only pursuant to the Land Use Petition Act, Wash. Rev. Code § 36.70C. See, e.g., Wash. Rev. Code § 36.70B.020(4) (2000) (including site-specific rezone applications among the 'project permits' subject to the procedural requirements of Wash. Rev. Code § 36.70B (2000)); Wash. Rev. Code § 36.70C.030(1) (2000) (providing exclusive means of review of land use permit decisions); Wash. Rev. Code § 36.70C.130(1) (2000) (applicable standard of review). See also Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wash. 2d 169, 172-73, 178-79, 4 P.3d 123, 124, 127 (2000) (site-specific rezone must be appealed only pursuant to the Land Use Petition Act, not the GMA); Citizens for Mount Vernon, 133 Wash. 2d at 874-75, 947 P.2d at 1215 (treating planned unit development applications like site-specific rezones, which are quasi-judicial); City of Bellevue v. East Bellevue Community Council, 138 Wash. 2d 937, 947-48, 983 P.2d 602, 607-08 (1998) (site-specific rezone decisions are subject to writ actions under an arbitrary and capricious standard of review); Pleas v. City of Seattle, 112 Wash. 2d 794, 805 n.1, 774 P.2d 1158, 1164 n.1 (1989) ('A rezone action is quasi judicial in nature....'); Barric v. Kitsap County, 84 Wash. 2d 579, 587, 527 P.2d 1377, 1381 (1974) (finding that 'rezone proceedings conducted by county planning commissions and boards of county commissioners are quasi-judicial in character.');

Bassani v. Board of County Commissioners, 70 Wash. App. 389, 393, 853 P.2d 945, 948 (1993); Concerned Organized Women and People Opposed to Offensive Proposals, Inc. v. City of Arlington, 69 Wash. App. 209, 216 n.9, 847 P.2d 963, 967-68 n.9 (1993).

[FN74]. 88 Wash. App. 764, 946 P.2d 1192 (1997).

[FN75]. See id. at 766-67, 946 P.2d at 1193. Cf. Wash. Rev. Code §§ 58.17.070-.110 (2000) (describing subdivision approval process).

[FN76]. See Hale, 88 Wash. App. at 766-67, 946 P.2d at 1193. The Board is the administrative tribunal with exclusive, initial jurisdiction over challenges alleging that a local comprehensive plan or development regulation is inconsistent with the GMA. Wash. Rev. Code § 36.70A.280 (2000).

[FN77]. Wash. Rev. Code § 36.70A.302(2) (2000). See Hale, 88 Wash. App. at 772, 946 P.2d at 1195.

[FN78]. See Hale, 88 Wash. App. at 771, 946 P.2d at 1195.

[FN79]. Id. at 771-72, 946 P.2d at 1195.

[FN80]. Id. at 772, 946 P.2d at 1195.

[FN81]. Making no mention of Teed, the court of appeals in a subsequent decision used different grounds to reject an effort to apply the doctrine to a site-specific rezone request. In Donwood, Inc. v. Spokane County, 90 Wash. App. 389, 397-98, 957 P.2d 775, 779-80 (1998), the court simply held that because the developer never completed its rezone application by submitting the requisite final site plan, the developer was not able to invoke the vested rights doctrine.

[FN82]. The Washington State Supreme Court has held that a developer may invoke the vested rights doctrine by filing an application for a planned unit development (PUD) that is 'linked' to a preliminary subdivision application; the court did not address whether filing a PUD application alone is sufficient. See infra Part II.D.4 (discussing Association of Rural Residents v. Kitsap County, 141 Wash. 2d 185, 192-95, 4 P.3d 115, 118-20 (2000)).

[FN83]. See, e.g., Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 271, 943 P.2d 1378, 1380 (doctrine freezes in time 'zoning and land use laws'); State ex rel. Ogden v. City of Bellevue, 45 Wash. 2d 492, 495, 275 P.2d 899, 901-02 (1954) (early vested rights decision referring to 'zoning ordinance'); New Castle Investments v. City of LaCenter, 98 Wash. App. 224, 232, 989 P.2d 569, 573 (1999) (noting that the doctrine is generally limited to what can loosely be called 'zoning' ordinances), review denied, 140 Wash. 2d 1019, 5 P.3d 9 (2000).

[FN84]. 78 Wash. 2d 929, 481 P.2d 9 (1971).

[FN85]. Id. at 930-31, 481 P.2d at 10.

[FN86]. Id.

[FN87]. See id. at 931, 481 P.2d at 10.

[FN88]. Id.

[FN89]. 40 Wash. 468, 82 P. 747 (1905).

[FN90]. Id. at 471, 82 P. at 748, quoted in Hass, 78 Wash. 2d at 931-32, 481 P.2d at 11.

[FN91]. See Hass, 78 Wash. 2d at 932-34, 481 P.2d at 11-12.

[FN92]. See Hinckley, 40 Wash. at 469-70, 82 P. at 748.

[FN93]. Id. at 470, 82 P. at 748.

[FN94]. See Hass, 78 Wash. 2d at 932-34, 481 P.2d at 11-12.

[FN95]. 'Appellant suggests that the Hass case may signal an end to the 'vested rights' doctrine. We do not so interpret Hass, nor do we regard it as an erosional retreat from the 'vested right' doctrine....' Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wash. App. 59, 84, 510 P.2d 1140, 1155 (1973), review denied, 83 Wash. 2d 1002-03 (1973).

[FN96]. West Main Assocs. v. City of Bellevue, 106 Wash. 2d 47, 53, 720 P.2d 782, 786 (1986).

[FN97]. 'Having based our holding on the 'vested rights doctrine,' we do not reach the more basic issue of whether in the first instance anyone can ever have a vested right to imperil the health or otherwise impair the safety of the community.' Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wash. App. 709, 715, 558 P.2d 821, 826 (1977).

[FN98]. 136 Wash. 2d 1, 959 P.2d 1024 (1998).

[FN99]. Id. at 4, 959 P.2d at 1026. A nonconforming use is one that was legal when established but that no longer conforms to later-enacted land use laws. See id. at 6-12, 959 P.2d at 1027-30.

[FN100]. Id. at 6, 959 P.2d at 1027. See also id. at 9, 15, 20, 959 P.2d at 1028, 1031, 1034.

[FN101]. Id. at 16, 959 P.2d at 1032.

[FN102]. Id. at 16 n.1, 959 P.2d at 1032 n.1.

[FN103]. See Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wash. App. 59, 84-85, 510 P.2d 1140, 1155-56 (1973), review denied, 83 Wash. 2d 1002-03 (1973).

[FN104]. Ironically, the Rhod-A-Zalea court does not heed this distinction between zoning and police powers. The court describes police powers as protecting 'health, safety and welfare,' and describes zoning ordinances as also protecting 'health, safety, morals, or welfare.' Rhod-A-Zalea, 136 Wash. 2d at 7, 959 P.2d at 1027.

[FN105]. In *Hass v. City of Kirkland*, the court stated, '[e]ven if, arguendo, the [developer] had a vested right to a building permit, this right would have been extinguished through the exercise of the [city's] police power in enacting [the] ordinance....' 78 Wash. 2d at 931, 481 P.2d at 11. The court also pointed to the body of law exploring the constitutionality of municipal exercise of police powers to further the public health and welfare. Id. at 932-34, 481 P.2d at 11-12. In *Rhod-A-Zalea*, the court characterized police power regulations as ones 'enacted for the health, safety and welfare of the community.' 136 Wash. 2d at 6, 959 P.2d at 1027. The vested rights doctrine cannot prevent application of 'later enacted police power regulations.' Id. at 16 n.1, 959 P.2d at 1032 n.1. See also *West Main Assocs. v. City of Bellevue*, 106 Wash. 2d 47, 53, 720 P.2d 782, 786 (1986) ('Municipalities can regulate or even extinguish vested rights by exercising the police power reasonably and in furtherance of a legitimate public goal.').

[FN106]. See *Overstreet & Kirchheim*, *supra* note 11, at 1047 n.20, 1058-59.

[FN107]. *Id.* at 1047 n.20.

[FN108]. See, e.g., *City of Tacoma v. Boutelle*, 61 Wash. 434, 444, 112 P. 661, 664 (1911) ('In its broadest acceptance [police power] means the general power of the state to preserve and promote the public welfare. '); *State v. Buchanan*, 29 Wash. 602, 604, 70 P. 52, 52 (1902) (defining police power as 'that power which enables the state to promote and protect the health, welfare, and safety of society.'). See generally Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 Wash. L. Rev. 857, 880-88 (2000) (historical treatment of police power case law in Washington).

The statute that provides damages for certain unlawful land use permitting 'acts' exempts from the definition of 'acts' those 'lawful decisions of an agency which are designed to prevent a condition which would constitute a threat to the health, safety, welfare, or morals of residents in the area.' Wash. Rev. Code § 64.40.010(6) (2000) (emphasis added). Inclusion in this statute of 'health, safety, welfare, or morals' is more likely the result of political compromise rather than some back-door attempt to rewrite case law to carve out certain types of regulations from 'police power' authority or the vested rights doctrine. Although the Washington House of Representatives version of the bill for this statute was completely supplanted by the Senate version, the House sponsors were evidently motivated, in part, by a desire to shield local governments from adult businesses that might otherwise use this law to seek damages as a result of the then-pending federal case involving a Washington city. See *House Journal*, 47th Leg., 2d Spec. Sess., Point of Inquiry, at 514 (1982) (discussing the case that was eventually resolved as *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)). Even though the legislature shielded certain decisions motivated by 'health, safety, welfare, or morals' from financial liability, 'police power' regulations otherwise remain synonymous with 'health, safety, and welfare' regulations.

[FN109]. See *Overstreet & Kirchheim*, *supra* note 11, at 1059 n.15.

[FN110]. See *supra* at Part II.B.1.a.

[FN111]. *City of Seattle v. Hinckley*, 40 Wash. 468, 82 P. 747 (1905).

[FN112]. *Hass v. City of Kirkland*, 78 Wash. 2d 929, 481 P.2d 9 (1971).

[FN113]. Id. at 931, 481 P.2d at 11.

[FN114]. 83 Wash. 322, 145 P. 462 (1915).

[FN115]. See id. at 326-27, 145 P. at 463-64.

[FN116]. 16 Wash. App. 709, 714-15, 558 P.2d 821, 826 (1977).

[FN117]. Id. at 715, 558 P.2d at 826.

[FN118]. Id.

[FN119]. See Thurston County Rental Owners v. Thurston County, 85 Wash. App. 171, 182, 931 P.2d 208, 214 (1997).

[FN120]. Overstreet & Kirchheim, supra note 11, at 1057.

[FN121]. See Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 943 P.2d 1378 (1997) (holding that the vested rights doctrine precludes application of new minimum lot size requirement).

[FN122]. Overstreet & Kirchheim, supra note 11, at 1047 n.20. Even if lacking a foundation in law, this distinction at least provides Overstreet and Kirchheim a platform from which to argue that the scales of the vested rights doctrine should tip further toward the side of developer interests. Citing to their own distinction between 'police power' and 'health, safety, and welfare' regulations, Overstreet and Kirchheim offer the following rationale for swinging the scales in favor of developers:

Given that local governments retain a wide assortment of regulatory powers immune from the vested rights doctrine [namely, their ability to regulate 'health, safety, and welfare'], it is perfectly reasonable to provide property owners all the certainty and fairness of strong vesting protection. To do otherwise would dramatically tip the balance of interests one-sidedly in favor of the government.

Id. at 1074. See also id. at 1057-60 (casting health, safety, and welfare as the only policy interest of local government, and suggesting that a fair vested rights doctrine need only protect that interest). Having asserted that local governments lack a justifiable interest in preserving their police power through the vested rights doctrine, Overstreet and Kirchheim further tip the scales toward developers by pointing out that the doctrine preserves only a limited range of 'health, safety, and welfare' laws. See, e.g., id. at 1058-59 nn.73-74 (only 'reasonable' health, safety, and welfare laws may trump vested rights); id. at 1059 n.74 ('There are strict limits on what qualifies as a valid health, safety, and welfare regulation,' and courts will 'carefully scrutinize' any attempt to impose such regulations in derogation of vested rights.). The necessary debate about the vested rights doctrine deserves a more balanced approach that recognizes the valid interests of both developers and local government. See *infra* Part III.C.

[FN123]. See generally Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wash. 2d 1, 7-13, 959 P.2d at 1024, 1027-31 (1998); Settle, *supra* note 22, § 2.7(d). 'Local governments, of course, can terminate nonconforming uses but they are constitutionally required to provide a reasonable amortization period.' Rhod-A-Zalea, 136 Wash. 2d at 10, 959 P.2d at 1029. For a useful discussion of the distinction between the vested rights doctrine and the law of nonconforming uses, see Skamania

County v. Woodall, 104 Wash. App. 525, 536-38, 16 P.3d 650 (2001).

[FN124]. See Wash. Rev. Code § 36.70B.060 (2000) (requiring local jurisdictions planning under RCW 36.70A.040 to adopt certain land use permitting procedures).

[FN125]. See Godfrey v. State, 84 Wash. 2d 959, 961-65, 530 P.2d 630, 631-33 (1975) (involving a statutory change to the common law of contributory negligence). The presumption that procedural rules apply retroactively is especially strong when the legislative body has manifested some intent that new procedures apply retroactively, even if that expression is as simple as noting that the procedural rule applies to 'all appeals' without distinguishing between existing and subsequent appeals. See Nelson v. Dept. of Labor & Industries, 9 Wash. 2d 621, 627, 115 P.2d 1014, 1017 (1941).

[FN126]. See Godfrey, 84 Wash. 2d at 961, 530 P.2d at 631; Pape v. Dep't of Labor & Industries, 43 Wash. 2d 736, 741, 264 P.2d 241, 244 (1953) (disability benefits law).

[FN127]. See Tellier v. Edwards, 56 Wash. 2d 652, 654, 354 P.2d 925, 926 (1960) (procedure related to tort action); In re Marriage of Hawthorne, 91 Wash. App. 965, 968, 957 P.2d 1296, 1297 (1998) (divorce action). For a discussion of vested rights beyond the context of land use law, see *supra* note 13.

[FN128]. 11 Wash. App. 807, 525 P.2d 801 (1974), review denied, 85 Wash. 2d 1001 (1975).

[FN129]. *Id.* at 811, 525 P.2d at 803.

[FN130]. *Id.*

[FN131]. Hull v. Hunt, 53 Wash. 2d 125, 331 P.2d 856 (1958).

[FN132]. Talbot, 11 Wash. App. at 811, 525 P.2d at 803.

[FN133]. 29 Wash. App. 179, 627 P.2d 988 (1981), *aff'd* as modified, 97 Wash. 2d 680, 649 P.2d 103 (1982).

[FN134]. *Id.* at 191, 627 P.2d at 995 (emphasis added).

[FN135]. See Norco Constr., Inc. v. King County, 97 Wash. 2d 680, 684, 649 P.2d 103, 106 (1982).

[FN136]. See Wash. Rev. Code § 36.70B.090(1)(b)-(c) (2000) (exempting environmental review and administrative appeals from the time limits otherwise bounding local review of land use permit applications). See, e.g., Weyerhaeuser v. Pierce County, 95 Wash. App. 883, 885-88, 976 P.2d 1279, 1281-82 (1999), review granted sub. nom. Weyerhaeuser v. Land Recovery, Inc., 139 Wash. 2d 1001, 989 P.2d 1139 (1999). In Weyerhaeuser, the application issued over six years after the date of application, and the judicial appeal process was not complete for nearly ten years after the date of application. The appeal to the Washington Supreme Court was dismissed as moot on February 10, 2000. See Overstreet & Kirchheim, *supra* note 11, at 1044 n.2. RCW 36.70B.090, which generally requires local governments to adopt local procedures to render a permit decision within

120 days of permit application, expired on June 30, 2000. See *Implementing Land Use Study Commission Recommendations*, ch. 286, § 8, 1998 Wash. Laws 1421, 1429. Municipalities originally agreed to adopt such procedures ‘[i]n exchange for suspending certain claims of municipal liability’ that were under consideration when the legislature reformed land use permitting procedures in 1995. Kenneth S. Weiner, *Relearning the Ropes: The Changing Landscape of Environmental Law*, Wash. State Bar News, Mar. 1997, at 17. See *Integration of Growth Management Planning and Environmental Review*, ch. 347, § 433, 1995 Wash. Laws 1556, 1617 (original sunset provision that would have caused expiration of the section on June 30, 1998). Even though RCW 36.70B.090 has expired, the land use codes of many Washington jurisdictions feature 120-day timelines that are consistent with that section. See, e.g., Everett Municipal Code §§15.12.090-100 (1998); King County Code § 20.20.100 (2000); Pierce County Code § 18.100.010 (1998); Skagit County Code § 14.01.059 (1996); Snohomish County Code § 2.02.150 (1997) and § 32.50.110 (1998); Whatcom County Code § 2.33.090 (1996).

[FN137]. *Growth Management Act*, 1st Spec. Sess., ch. 17, §§ 42, 43-44, 46-48, 1990 Wash. Laws 1972, 1994-1996, 1996-1998, 1999-2001 (§ 42 codified as amended at Wash. Rev. Code § 82.02.020, §§ 43-44, 46-48 codified at Wash. Rev. Code §§ 82.02.050-.090 (2000)).

[FN138]. 98 Wash. App. 224, 989 P.2d 569 (1999), review denied, 140 Wash. 2d 1019, 5 P.3d 9 (2000).

[FN139]. Id. at 226-27, 989 P.2d at 571.

[FN140]. See id. at 236, 237-38, 989 P.2d at 575, 576.

[FN141]. Id. at 229-31, 236, 989 P.2d at 572-73, 575. In light of balancing the interests at the heart of the Washington vested rights doctrine, the court was intent on limiting its review to the Washington law at issue: ‘With these concerns [of the Washington legislature about balancing the interests of municipalities and developers] in mind, it is important that the vested rights doctrine not be applied more broadly than its intended scope.’ Id. at 232, 989 P.2d at 573. Given the court’s deliberate focus on Washington law, it is no wonder that the court did not bother to discuss California case law based on a California vested rights statute. See *Kaufman & Broad Central Valley, Inc. v. City of Modesto*, 30 Cal. Rptr. 2d 904 (1994). Cf. *Overstreet & Kirchheim*, supra note 11, at 1068 & nn.142-43 (arguing that the New Castle court erred by ignoring Kaufman).

[FN142]. See New Castle, 98 Wash. App. at 232, 989 P.2d at 573.

[FN143]. Id. at 232, 989 P.2d at 573.

[FN144]. See id. at 232-36, 989 P.2d at 573-75.

[FN145]. Id. at 232, 989 P.2d at 573. The court found support by making an analogy to the holding in *Lincoln Shiloh Assocs. v. Mukilteo Water Dist.*, 45 Wash. App. 123, 128-29, 724 P.2d 1083, 1086-87 (1986), concluding that utility connection fees were not subject to the vested rights doctrine. Criticizing New Castle’s reliance on *Lincoln Shiloh*, *Overstreet* and *Kirchheim* complain that ‘[i]n fact, the entire purpose of the vesting protection is to protect property owners from changes affecting the cost of developing, thus making the rationale for *Lincoln Shiloh* very questionable.’ *Overstreet & Kirchheim*, supra note 11, at 1081 n.221. *Overstreet* and *Kirchheim* cite no authority for their assertion that the ‘entire purpose’ of the doctrine is to protect de-

velopers. No such authority exists because Washington's doctrine is intended to balance the interests of developers and municipalities alike. See *supra* Part I.B. Allowing the doctrine to freeze development regulations that affect the physical aspects of development, while not affecting local government's taxing authority, is a reasonable part of that balance.

[FN146]. See, e.g., *Hull v. Hunt*, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958) (rejecting the majority, estoppel-based rule). When the legislature attempted to codify some version of the vested rights doctrine for subdivisions and building permit applications in 1987, it selected this same point in time. See *Wash. Rev. Code* § 19.27.095(1) (2000) (building permits); *Wash. Rev. Code* § 58.17.033(1) (2000) (divisions of land).

[FN147]. *Wash. Rev. Code* § 19.27.095(1) (2000); *Wash. Rev. Code* § 58.17.033(1) (2000).

[FN148]. See *Friends of the Law v. King County*, 123 Wash. 2d 518, 524 n.3, 869 P.2d 1056, 1060 n.3 (1994).

[FN149]. *Wash. Rev. Code* § 19.27.095(1) (2000); *Wash. Rev. Code* § 58.17.033(1) (2000).

[FN150]. See *Wash. Rev. Code* § 36.70B.070(1) (2000).

[FN151]. *Wash. Rev. Code* § 36.70B.070(2) (2000).

[FN152]. Snohomish County apparently employs a two-step process: land use permitting staff first determine whether a short subdivision application is 'complete for regulatory purposes'--which means complete enough to trigger the vested rights doctrine--and then consider whether it is 'complete for processing.' See *Schultz v. Snohomish County*, 101 Wash. App. 693, 698, 5 P.3d 767, 769-70 (2000).

[FN153]. See, e.g., *Valley View Indus. Park v. City of Redmond*, 107 Wash. 2d 621, 639, 733 P.2d 182, 193 (1987); *West Main Assocs. v. City of Bellevue*, 106 Wash. 2d 47, 52-53, 720 P.2d 782, 786 (1986); *Adams v. Thurston County*, 70 Wash. App. 471, 479, 855 P.2d 284, 289-90 (1993). Cf. *Erickson & Assocs., Inc. v. McLerran*, 123 Wash. 2d 864, 871, 989 P.2d 1090, 1094 (1994) (noting that this was not a case of bad faith by the government). Part III.C.4 of this Article discusses the relevance of constitutional limitations to the vested rights doctrine.

[FN154]. See *Parkridge v. City of Seattle*, 89 Wash. 2d 454, 464-66, 573 P.2d 359, 365-66 (1978).

[FN155]. See *Friends of the Law*, 123 Wash. 2d 518, 524-25, 869 P.2d 1056, 1060 (1994).

[FN156]. See *Hull v. Hunt*, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958).

[FN157]. *West Main*, 106 Wash. 2d at 51, 720 P.2d at 785. See *Erickson*, 123 Wash. 2d at 867-68, 872 P.2d at 1992-93; *Valley View*, 107 Wash. 2d at 638, 733 P.2d at 192; *Noble Manor Co. v. Pierce County*, 81 Wash. App. 141, 144, 913 P.2d 417, 419 (1996), *aff'd*, 133 Wash. 2d 269, 943 P.2d 1378 (1997); *Victoria Tower Partnership v. City of Seattle*, 49 Wash. App. 755, 760-61, 745 P.2d 1328, 1331 (1987).

[FN158]. See, e.g., Allenbach v. City of Tukwila, 101 Wash. 2d 193, 196, 676 P.2d 473, 474-75 (1984) (relying on State ex rel. Hardy v. Superior Court, 155 Wash. 244, 248-49, 284 P. 93, 95 (1930), in which the court held that a permit applicant was entitled to process his application under the ordinance in effect at the time of application); Victoria Tower, 49 Wash. App. at 761-62, 745 P.2d at 1331-32. See also State ex rel. Kuphal v. Bremerton, 59 Wash. 2d 825, 371 P.2d 37 (1962) (finding that an application filed after the effective date of new zoning code text but before the city adopted a new zoning map was subject to the zoning classification applicable to the property on the date of application).

[FN159]. Fredrick D. Huebner, Comment, Washington's Zoning Vested Rights Doctrine, 57 Wash. L. Rev. 139, 143 n.21, 144 (1981).

[FN160]. Id. at 144 n.29.

[FN161]. Statutory authority for moratoriums is found in a number of sections, depending on the type of municipality or planning enabling act at issue. See, e.g., Wash. Rev. Code § 35.63.200 (2000) (under planning commission statutes, moratorium adopted by council or board); Wash. Rev. Code § 35A.63.220 (2000) (under the Planning Enabling Act, moratorium adopted by a legislative body); Wash. Rev. Code § 36.70.795 (2000); Wash. Rev. Code § 36.70A.390 (under GMA, moratorium adopted by a board) (2000).

[FN162]. See Allenbach, 101 Wash. 2d at 200, 476 P.2d at 476 ('Throughout the history of the vested rights doctrine,... this court has rejected any 'pending zoning change' exception to the vested rights doctrine.').

[FN163]. See Matson v. Clark County Bd. of Comm'rs, 79 Wash. App. 641, 647-48, 904 P.2d 317, 320-21 (1995).

[FN164]. See id. at 647, 904 P.2d at 320 ('This potential to frustrate long-term planning is of particular concern in a state such as Washington where vesting occurs upon application for a building permit.'). See also Jablinske v. Snohomish County, 28 Wash. App. 848, 851, 626 P.2d 543, 545 (1981).

[FN165]. While ignoring this procedural issue, the Matson court acknowledged that substantively, a municipality 'may not change the rules applicable to an already submitted application.' Matson, 79 Wash. App. at 649, 904 P.2d at 321.

[FN166]. See supra note 136 discussing the effect of the now-expired Wash. Rev. Code § 36.70B.090.

[FN167]. See Parkridge v. City of Seattle, 89 Wash. 2d 454, 464-66, 573 P.2d 359, 365-66 (1978) (ruling that under the vested rights doctrine, the municipality must process the application 'promptly, diligently and in good faith').

[FN168]. Hull v. Hunt, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958).

[FN169]. See, e.g., Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 638, 733 P.2d 182, 192 (1987); West Main Assoc. v. City of Bellevue, 106 Wash. 2d 47, 51, 53, 720 P.2d 782, 785, 786 (1986); Allenbach, 101 Wash. 2d at 200, 676 P.2d at 476. Overstreet and Kirchheim also recite 'compliance with existing laws' as an element of the doctrine. Overstreet & Kirchheim, supra note 11, at 1079-80.

[FN170]. Huebner, *supra* note 159, at 150-58 (1981) (discussing Mercer Enterprises v. City of Bremerton, 93 Wash. 2d 624, 611 P.2d 1237 (1980)).

[FN171]. See Mercer Enterprises, 93 Wash. 2d at 634, 611 P.2d at 1243 (Utter, C.J., dissenting) ('In order to gain vested rights, the developer's application for a building permit must comply with the applicable building code as well as the applicable zoning ordinance.').

[FN172]. See Huebner, *supra* note 159, at 143-44 nn. 22-27 (1981); Mercer Enterprises, 93 Wash. 2d at 634 (Utter, C.J., dissenting) (citing Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash. 2d 475, 479, 481-84, 513 P.2d 36 (1973)). Because the Mercer Enterprises majority invoked the mandamus rationale, it was a difficult decision from which to examine the vested rights doctrine at a time when the fairness/certainty rationale was attaining dominance. In Mercer Enterprises, no one disputed that the law in effect on the date of permit application controlled the city's review of the application. See Mercer Enterprises, 93 Wash. 2d at 625-26, 611 P.2d at 1238-39. In this respect, the case did not involve any vested rights issue, at least under the fairness/certainty rationale. The real issue was whether the city properly denied the permit under the law in effect on the date of application. See *id.* Because the court applied the mandamus rationale--and because one of the key questions under that rationale is whether an application complies with the law in effect on the date of application--the court characterized its review of the merits of the city's decision as a vested rights issue. See *id.* at 628, 631, 611 P.2d at 1240, 1241.

[FN173]. See Friends of the Law v. King County, 123 Wash. 2d 518, 525 n.4, 869 P.2d 1056, 1060 n.4 (1994).

[FN174]. See Erickson & Assoc., Inc. v. McLerran, 123 Wash. 2d 864, 868, 872 P.2d 1090, 1093 (1994).

[FN175]. See Wash. Rev. Code § 43.21C.060 (2000).

[FN176]. See Victoria Tower Partnership v. City of Seattle, 49 Wash. App. 755, 761, 745 P.2d 1328, 1331 (1987).

[FN177]. The court did not have to resolve this issue because the effective date of the SEPA policy at issue occurred after both the date of application and the date of the draft environmental impact statement, which, as discussed below, is the other possible date on which to freeze SEPA policies. See *id.* at 757, 745 P.2d at 1329.

[FN178]. Adams v. Thurston County, 70 Wash. App. 471, 481 n.11, 855 P.2d 284, 291 n.11 (1993).

[FN179]. See Wash. St. Reg. 84-05-020 (1984) (adopting Wash. Admin. Code § 197-11 (1999)).

[FN180]. Wash. Admin. Code § 197-11-660(1)(a) (1999). A DNS is issued for projects that are not likely to impose significant adverse environmental impacts and so do not require the preparation of a full environmental impact statement (EIS). Wash. Admin. Code § 197-11-340 (1999). For projects deemed likely to impose significant adverse environmental impacts, the DEIS is the formal draft of the EIS that is circulated for public comment. Wash. Admin. Code § 197-11-455 (1999).

[FN181]. See Wash. Rev. Code § 43.21C.060 (2000); Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 63-65, 578 P.2d 1300,

1312-13 (1978). See also Wash. Rev. Code § 19.27.095(6) (2000) (exempting the exercise of SEPA substantive authority from the statutory vested rights rule); Wash. Rev. Code § 58.17.033(3) (2000) (same). For a discussion of the statutory vested rights rules, see *infra* Part II.D.2.

[FN182]. That the vested rights doctrine is relevant to SEPA (without resolving timing issues) at least undermines mandamus as a rationale for the vested rights doctrine. Washington courts agree that SEPA authorizes local governments to make discretionary, nonministerial decisions about land use proposals. See, e.g., Polygon, 90 Wash. 2d at 63-65, 578 P.2d at 1312-13; Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wash. App. 59, 73, 510 P.2d 1140, 1149 (1973). If this is true, then a mandamus-based vested rights doctrine (under which a local government carries a non-discretionary, ministerial duty to issue a land use authorization) could not apply to the exercise of SEPA substantive authority. The fact that the vested rights doctrine is relevant to SEPA, therefore, strikes at mandamus as a foundation for the doctrine.

[FN183]. Juanita Bay, 9 Wash. App. at 83-84, 510 P.2d at 1155. See Mercer Enterprises, 93 Wash. 2d 624, 630, 611 P.2d 1237, 1241 (1980) (The application was valid 'even if it did require some further information to complete the processing before a permit could be issued.'). But see *id.* at 635, 611 P.2d at 1243 (Utter, C.J., dissenting) (noting that the permit application lacked required storm, sewer, foundation, and water plans). See also Parkridge, 89 Wash. 2d at 458, 573 P.2d at 362 (noting that the developer modified its proposal from 60 to 50 units and changed access, but not mentioning any effect such changes had on application of the vested rights doctrine).

[FN184]. See, e.g., Wash. Rev. Code § 19.27.095(1) (2000); Wash. Rev. Code § 58.17.033(1) (2000).

[FN185]. Overstreet and Kirchheim, by contrast, believe that this body of law is clear. See Overstreet & Kirchheim, *supra* note 11, at 1082 ('While Washington's common-law vesting doctrine is fairly coherent, the 1987 passage of a vesting statute further clarified the law.'). Far from allowing parties to avoid lengthy and costly court battles, (see Overstreet & Kirchheim, *supra* note 11, at 1047), the scores of reported vested rights decisions are testament to the doctrine's inability to forestall litigation.

[FN186]. See generally Hull v. Hunt, 53 Wash. 2d 125, 331 P.2d 856 (1958); State ex rel. v. City of Bellevue, Ogden, 45 Wash. 2d 492, 275 P.2d 899 (1954).

[FN187]. Ogden, 45 Wash. 2d at 496, 275 P.2d at 902 (emphasis added).

[FN188]. *Id.* (emphasis added).

[FN189]. Hull, 53 Wash. 2d at 130, 331 P.2d at 859.

[FN190]. See, e.g., Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 637-38, 733 P.2d 182, 192 (1987); Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash. 2d 475, 480-81, 513 P.2d 36, 40-41 (1973); Bishop v. Town of Houghton, 69 Wash. 2d 786, 795, 420 P.2d 368, 374 (1966); Ilale v. Island County, 88 Wash. App. 764, 771, 946 P.2d 1192, 1195 (1997); Jablinske v. Snohomish County, 28 Wash. App. 848, 851, 626 P.2d 543, 545 (1981); Mayer Built Homes, Inc. v. Town of Steilacoom, 17 Wash. App. 558, 565, 564 P.2d 1170, 1174 (1977). See also West Main Assocs. v. City of Bellevue, 106 Wash. 2d 47, 53, 720 P.2d 782, 786 (1986) ('A vested right merely establishes the ordinances to which a building permit

and subsequent development must comply.').

Even the decisions that extend the doctrine beyond the realm of building permit applications are consistent with the view that, to the extent the mandamus rationale conveys a right 'to develop,' the right arises only at the point an application for the last permit necessary to develop is filed. See generally *supra* Part II.A.1. The decision that extended the doctrine to conditional use permit applications did not identify the right at issue. See Beach v. Board of Adjustment of Snohomish County, 73 Wash. 2d 343, 347, 438 P.2d 617, 620 (1968). The decisions that extended the doctrine to grading permit applications, Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wash. App. 709, 715, 558 P.2d 821, 826 (1977), and septic permit applications, Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wash. App. 59, 83-84, 510 P.2d 1140, 1155 (1973), review denied, 83 Wash. 2d 1002-03 (1973), actually limited the right at issue to only 'the permit.' Although the court that extended the doctrine to applications for shoreline substantial development permit applications spoke of a right 'to develop,' the case involved a permit that, like a building permit, must be obtained by the property owner just prior to actual construction. Talbot v. Gray, 11 Wash. App. 807, 811, 525 P.2d 801, 803-04 (1975).

[FN191]. See generally *supra* Part I.B.

[FN192]. 16 Wash. App. 709, 558 P.2d 821 (1977).

[FN193]. *Id.* at 711, 558 P.2d 823-24.

[FN194]. *Id.*

[FN195]. *Id.* at 710, 558 P.2d at 826.

[FN196]. *Id.* at 715, 558 P.2d at 826.

[FN197]. *Id.* at 714-15, 558 P.2d at 825-26.

[FN198]. 85 Wash. App. 171, 931 P.2d 208 (1997).

[FN199]. *Id.* at 176, 931 P.2d at 211.

[FN200]. *Id.* at 182-83, 931 P.2d at 214-15.

[FN201]. Wash. Rev. Code § 58.17.033(1) (2000) (emphasis added). A 'plat' is the map that depicts a 'subdivision' of land into distinct lots. Wash. Rev. Code § 58.17.020(2) (2000). Although this Article attempts to use 'plat' only when referring to the actual map, common practice is to use the terms almost interchangeably.

[FN202]. Wash. Rev. Code § 19.27.095(1) (2000) (emphasis added).

[FN203]. Even though the legislature mistakenly pointed to *Ogden* (a mandamus-rationalc case; see *supra* Part I.A) as the source for these provisions, the legislature intended to manifest the fairness/certainty rationale: 'The [common law] doctrine

provides that a party filing a timely and sufficiently complete building permit application obtains a vested right to have that application processed according to zoning, land use and building ordinances in effect at the time of the application.' Final Legislative Report, 50th Legis., 1st Reg. Sess. 255 (1987) (quoted in Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 277, 943 P.2d 1378, 1383 (1997)).

[FN204]. See Subdivision Approval Act, ch. 293, sec. 10, § 17, 1981 Wash. Laws 1242, 1251 (codified as amended at Wash. Rev. Code § 58.17.170).

[FN205]. Formal subdivisions are large; land is divided into five or more lots, depending on the local jurisdiction's land use laws. See Wash. Rev. Code § 58.17.020(1). These are distinct from smaller, 'short' subdivisions that, depending on the local jurisdiction, create four or fewer lots. See Wash. Rev. Code § 58.17.020(6) (2000). See also Wash. Rev. Code §§ 58.17.060-.065 (2000) (less formal review procedures for short subdivisions).

[FN206]. Wash. Rev. Code § 58.17.170 (2000) (emphasis added).

[FN207]. RCW 58.17.150 (2000) reads in relevant part,

Each preliminary plat submitted for final approval of the legislative body shall be accompanied by the following agencies' recommendations for approval or disapproval:

- (1) Local health department or other agency furnishing sewage disposal and supplying water as to the adequacy of the proposed means of sewage disposal and water supply; [and]
- (3) City, town or county engineer.

[FN208]. Wash. Rev. Code § 58.17.170 (2000) (emphasis added).

[FN209]. At least one other provision is relevant to this issue: 'No plat or short plat may be approved unless the city, town, or county makes a formal written finding of fact that the proposed subdivision or proposed short subdivision is in conformity with any applicable zoning ordinance or other land use controls which may exist.' Wash. Rev. Code § 58.17.195 (2000) (adopted by Subdivision Approval Act, ch. 293, § 14, 1981 Wash. Laws 1244, 1252). Because this provision does not dictate the point in time at which the relevant local laws exist, it does not directly address the issue of the vested rights doctrine.

[FN210]. One practitioner reports that because of the conflict between these provisions, most local jurisdictions simply chose to follow RCW 58.17.033, such that RCW 58.17.170 is 'routinely ignored.' Richard U. Chapin, Subdivision of Land, in Washington State Bar Ass'n, Real Property Deskbook § 89.5(2) (3d ed. 1996). As to any relevancy of RCW 58.17.170 after the local government approves a subdivision, he suggests: 'In this writer's opinion, 'a valid land use' means that the lot must be permitted some use which is reasonable given all of the attendant circumstances, including the type of development in the general area.' Id. § 89.5(3), at 89-11.

[FN211]. 133 Wash. 2d 269, 943 P.2d 1378 (1997).

[FN212]. See *id.*, 133 Wash. 2d at 271-73, 943 P.2d at 1380-81.

[FN213]. Noble Manor Co. v. Pierce County, 81 Wash. App. 141, 142, 913 P.2d 417, 418 (1996), *affd*, 133 Wash. 2d 269, 943 P.2d 1378 (1997).

[FN214]. 70 Wash. App. 471, 855 P.2d 284 (1993).

[FN215]. *Id.* at 475, 855 P.2d at 287 (citations omitted).

[FN216]. See *id.* at 472-73, 855 P.2d at 286.

[FN217]. Noble Manor, 81 Wash. App. at 146, 913 P.2d at 420.

[FN218]. As discussed above, this provision reads: 'A proposed division of land... 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....' Wash. Rev. Code § 58.17.033(1) (2000). See *supra* Part II.D.2; Figure 5.

[FN219]. See Noble Manor, 133 Wash. 2d at 275, 943 P.2d at 1381. Cf. *supra* Figures 4-5.

[FN220]. Cf. *supra* Part II.D.1.b; *supra* Figures 4-5.

[FN221]. See Noble Manor, 133 Wash. 2d at 271, 280, 281, 283, 943 P.2d at 1380, 1384, 1385, 1385. Cf. *supra* Figure 3.

[FN222]. See *supra* Part II.D.1.a.

[FN223]. Noble Manor, 133 Wash. 2d at 278, 943 P.2d at 1383.

[FN224]. See *supra* Part II.D.1.b; *supra* Figure 5.

[FN225]. Overstreet and Kirchheim should likewise refrain embracing this version of legislative intent. See, e.g., Overstreet & Kirchheim, *supra* note 11, at 1085 ('By specifying a preliminary plat--an application encompassing so many regulatory topics--as the trigger for statutory vesting, the legislature intentionally extended vesting protection to all the many kinds of development standards contained therein.').

[FN226]. See Wash. Rev. Code §58.17.170. See generally *supra* Part II.D.2; *supra* Figures 6-7.

[FN227]. See Noble Manor, 133 Wash. 2d at 281-82, 943 P.2d at 1384-85.

[FN228]. The provision states that the law in effect on the date of approval of a formal, final subdivision by the local health department and the local municipal engineer--not the law in effect on the date of preliminary subdivision application--apparently controls land uses for five years after the approval of the final subdivision. See Wash. Rev. Code § 58.17.170;

supra Part II.D.2; supra Figure 7.

[FN229]. See Noble Manor, 133 Wash. 2d at 282, 943 P.2d at 1385. 'The Legislature did not consider RCW 58.17.170 to be an application of the vested rights doctrine because it did not vest any rights at the time of application, but only acted to divest rights which do not accrue under that statute until the time of approval of the subdivision.' Id. at 282 n.8, 943 P.2d at 1385 n.8.

[FN230]. 123 Wash. 2d 518, 869 P.2d 1056 (1994).

[FN231]. See Noble Manor, 133 Wash. 2d at 281-82, 943 P.2d at 1384-85.

[FN232]. See supra Part II.D.2; supra Figure 5. Overstreet and Kirchheim also ignore the import of this statute. Although they include RCW 19.27.095 among Washington's vested rights statutes, see, e.g., Overstreet & Kirchheim, supra note 11, at 1046 n.16, 1066 n.127, 1067 n.133, they examine only the subdivision vesting statute '[b]ecause the building permit statute is rarely invoked and is almost identical to the plat vesting statute.' Id. at 1046 n.16. See also id. at 1082 n.229 ('The building permit vesting statute will not be analyzed separately in this Article.').

[FN233]. Statutes related to the same subject matter must be read together in a way that harmonizes them and renders no provision of either one meaningless. See Waste Management, Inc. v. Washington Utilities and Transp. Comm'n, 123 Wash. 2d 621, 630, 869 P.2d 1034, 1039 (1994).

[FN234]. See Noble Manor, 133 Wash. 2d at 283-84, 943 P.2d at 1385-86.

[FN235]. See id. at 281-82, 943 P.2d at 1384-85. The court did not mention that it might take as long as seven years or more from preliminary subdivision application submittal to final subdivision approval. This timeframe is based on the local jurisdiction taking two years to process and issue a preliminary subdivision approval with associated environmental review, and the developer returning within five years to file an application for final subdivision approval. See Wash. Rev. Code § 58.17.140 (2000) (setting relevant timelines).

[FN236]. See Noble Manor, 133 Wash. 2d at 281-82, 943 P.2d at 1384-85.

[FN237]. See id. at 281-82, 943 P.2d at 1385.

[FN238]. See id. at 282, 943 P.2d at 1385.

[FN239]. Id. at 284, 943 P.2d at 1386. The developer contended 'that it should be vested for the uses disclosed to the County in its application and considered by the County when approving the plat.' Id. at 274-75, 943 P.2d at 1381. The court concluded, 'If a landowner requests only a division of land without any specified use revealed, then the county, city or town may consider the application to see if any legal use can be made of the land so divided, and no particular development rights would vest at that time.' Id. at 285, 943 P.2d at 1387.

[FN240]. The court framed the issue as whether 'the filing of a complete application for a short subdivision vest[s] the right to

develop the property under the land use and zoning laws in effect on the date of the application. ' Id. at 274, 943 P.2d at 1381. The court later stated, 'the Legislature has made the policy decision that developers should be able to develop their property according to the laws in effect at the time they make completed application for... subdivision of their property.' Id. at 280, 943 P.2d at 1384. A developer obtains 'a vested right to develop its land in accord with the [subdivision] application.' Id. at 285, 943 P.2d at 1386.

[FN241]. 141 Wash. 2d 185, 4 P.3d 115 (2000).

[FN242]. "Planned Unit Development' is a generic term for a regulatory technique which allows a developer to be excused from otherwise applicable zoning regulations in exchange for submitting to detailed, tailored regulations.' Schneider Homes, Inc. v. City of Kent, 87 Wash. App. 774, 775-76, 942 P.2d 1096, 1097 (1997), review denied, 134 Wash. 2d 1021, 958 P.2d 316 (1998).

[FN243]. See Association of Rural Residents v. Kitsap County, 141 Wash. 2d 185, 193-95, 4 P.3d 115, 119-20 (2000). The court turned away an argument that a PUD is like a rezone and, as such, is not subject to the vested rights doctrine. Id. at 193, 4 P.3d at 119. This was likely the right result. See *supra* Part II.A.3 (critiquing case law holding that rezones are not subject to the vested rights doctrine).

[FN244]. See Rural Residents, 141 Wash. 2d at 193-94, 4 P.3d at 119.

[FN245]. Id. at 194, 4 P.3d at 119.

[FN246]. Schneider Homes, 87 Wash. App. at 774, 942 P.2d at 1096.

[FN247]. See Rural Residents, 141 Wash. 2d at 195, 4 P.3d at 120. The court did not explain why, if a PUD is indeed so much like a subdivision application, it needed to be linked to a subdivision application to trigger the vested rights doctrine. Whether a PUD application alone is sufficient remains unanswered by case law.

[FN248]. 95 Wash. App. 883, 976 P.2d 1279 (1999), review granted sub nom., Weyerhaeuser v. Land Recovery, Inc., 139 Wash. 2d 1001, 989 P.2d 1139 (1999).

[FN249]. See id. at 887-88, 976 P.2d at 1282.

[FN250]. See id. at 894, 976 P.2d at 1285.

[FN251]. See id. at 892-93, 976 P.2d at 1284-85 (noting Beach v. Board of Adjustment of Snohomish County, 73 Wash. 2d 343, 347, 438 P.2d 617, 620 (1968).)

[FN252]. See id. at 894, 976 P.2d at 1285.

[FN253]. Id. at 895, 976 P.2d at 1286 (quoting, but not citing, Noble Manor, 133 Wash. 2d at 280, 943 P.2d at 1384). See Noble

Manor, 133 Wash. 2d at 283-84, 943 P.2d at 1385-86 (defining the vested 'development rights'-- and so likely limiting their scope--in terms of the 'uses disclosed' in the application).

[FN254]. Bucking the trend toward a headlong expansion of Noble Manor beyond the facts of that case, the court of appeals has since held that lots created by devise, which does not require submission of a subdivision application (see Wash. Rev. Code § 58.17.040(3) (2000)), are still subject to land use regulations in effect on the date the developer applies for an application to develop the land. See Dykstra v. Skagit County, 97 Wash. App. 670, 678-79, 985 P.2d 424, 428-29 (1999), review denied, 140 Wash. 2d 1016, 5 P.3d 3 (2000). The court, appropriately, did not even cite Noble Manor.

[FN255]. See Noble Manor, 133 Wash. 2d at 283-84, 943 P.2d at 1385-86. See generally supra Part II.D.3.d.

[FN256]. See, e.g., Association of Rural Residents v. Kitsap County, 95 Wash. App. 383, 391-92, 974 P.2d 863, 868 (1999) (pursuant to Noble Manor, developers obtain 'a vested right to have their project considered only under the land use statutes and ordinances in effect' on the date of their preliminary subdivision applications), rev'd on other grounds, 141 Wash. 2d 185, 192-95, 4 P.3d 115, 118-20 (2000) (also omitting the use disclosure requirement).

[FN257]. Weyerhaeuser v. Pierce County, 95 Wash. App. 883, 894, 976 P.2d 1279, 1285 (1999).

[FN258]. See id.

[FN259]. 100 Wash. App. 599, 5 P.3d 713 (2000).

[FN260]. Id. at 608, 5 P.3d 718. Overstreet and Kirchheim cite Westside as 'an example of how Washington's date certain vesting rule can be easily applied even to seemingly complicated questions concerning which uses an application contemplated.' Overstreet & Kirchheim, supra note 11, at 1070 n.156. This ease of application may come at the cost of fairness.

[FN261]. See Westside, 100 Wash. App. at 605, 5 P.3d 717.

[FN262]. Id. at 601, 5 P.3d 715.

[FN263]. Id.

[FN264]. See id. at 601-02, 606 n.4, 5 P.3d 715, 717 n.4.

[FN265]. Id. at 605, 5 P.3d 717.

[FN266]. See Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 873-74, 872 P.2d 1090, 1095-96 (1994); Hull v. Hunt, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958). See generally supra Part I.B (discussing the fairness/certainty rationale for Washington's vested rights doctrine).

[FN267]. See, e.g., Wash. Rev. Code § 19.27.095(1) (2000); Wash. Rev. Code § 36.70A.302(2) (2000); Wash. Rev. Code § 58.17.033(1) (2000); Wash. Rev. Code § 58.17.170 (2000).

[FN268]. See Weiner, *supra* note 136, at 16-17.

[FN269]. For example, the statute requires local governments to provide each applicant with a determination that an application is complete, to give certain types of public notice of applications, to consolidate review of multiple permit applications and environmental issues for the same project, and to subject applicants to no more than one open-record hearing and one closed-record administrative appeal. See Wash. Rev. Code § 36.70B.060 (2000).

[FN270]. See Wash. Rev. Code § 19.27.095(1) (2000) (building permit); Wash. Rev. Code § 58.17.033(1) (2000) (plat subdivision); Wash. Rev. Code § 36.70A.302(2) (2000) (GMA).

[FN271]. See *supra* Part II.

[FN272]. This section relies heavily on the critique of the doctrine in Part II. Rather than repeat those critiques, this section generally relies on references to them.

[FN273]. Wash. Rev. Code Chap. 36.70A (2000).

[FN274]. Wash. Rev. Code Chap. 36.70B (2000).

[FN275]. See Hull v. Hunt, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958).

[FN276]. See *id.* See also Allenbach v. City of Tukwila, 101 Wash. 2d 193, 199, 676 P.2d 473, 476 (1984) (applying the same rationale in a building permit case).

[FN277]. See, e.g., Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 874-75, 872 P.2d 1090, 1096 (1994) (refusing to extend the doctrine to master use permit applications because 'the necessary indicia of good faith and substantial commitment are lacking at the outset of the master use permitting process.').

[FN278]. Overstreet and Kirchheim assert that 'Washington courts realize that permit speculation is not a problem in the real world.' Overstreet & Kirchheim, *supra* note 11, at 1078-79 n.201 (citing Hull, 53 Wash. 2d at 130, 331 P.2d at 859; Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash. 2d 475, 484, 513 P.2d 36, 43 (1973); Allenbach, 101 Wash. 2d at 199, 676 P.2d at 476). This is not accurate. All three of the decisions Overstreet and Kirchheim cite in support of this assertion stand only for the proposition that building permit speculation is not a problem in the real world, because courts have focused on that permit as the lynchpin for the mandamus rationale-- a developer usually seeks a building permit after investing considerable time in a project and at the point that the developer is ready to break ground. See *supra* Part II.D.1 (discussion of how the mandamus rationale provides one approach for dealing with multiple permits). When developers rely on earlier permits to freeze applicable development regulations, permit speculation is a very real possibility. See, e.g., *supra* notes 2-4, 7-9 (newspaper articles discussing use of the vested rights doctrine); Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 281-82, 943

P.2d 1378, 1384-85 (1997) (finding that 'short' subdivision applications allow developers to freeze applicable land use laws in perpetuity); New Castle Investments v. City of LaCenter, 98 Wash. App. 224, 237, 989 P.2d 569, 576 (1999) ('[T]he time lag between the application for preliminary plat approval and the issuance of the permit application may be many years. '), review denied, 140 Wash. 2d 1019, 5 P.3d 9 (2000).

[FN279]. Wash. Rev. Code § 36.70B.120(1) (2000).

[FN280]. Wash. Rev. Code § 43.21C (2000).

[FN281]. See Wash. Rev. Code § 36.70B.060(6) (2000).

[FN282]. See Wash. Admin. Code § 197-11-060(3)(b) (1999).

[FN283]. See *supra* Part II.A.

[FN284]. Wash. Rev. Code § 36.70B.020(4) (2000).

[FN285]. *Id.*

[FN286]. See Wash. Rev. Code § 36.70A.130 (2000) (procedures for amending plans).

[FN287]. Compare Wash. Rev. Code § 36.70C.020(1)(a) with Wash. Rev. Code § 36.70A.130 (b) (2000).

[FN288]. See Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 874-75, 872 P.2d 1090, 1096 (1994).

[FN289]. See *supra* Part II.B.

[FN290]. Wash. Rev. Code § 36.70A.030(7) (2000).

[FN291]. See *supra* Part II.B.3.

[FN292]. See *supra* Part II.B.2. At the risk of complicating the rule, the legislature may want to ensure that developers and local governments are not required to comply with new procedural rules if they have already completed the procedure at issue. See *id.*

[FN293]. See *supra* Part II.B.1.

[FN294]. See *supra* Part II.C (describing how the common law vested rights doctrine addresses this issue).

[FN295]. Wash. Rev. Code § 36.70B.070(1) (2000).

[FN296]. Wash. Rev. Code § 36.70B.070(2) (2000).

[FN297]. See Wash. Rev. Code § 36.70B.070(4)(a) (2000).

[FN298]. See Wash. Rev. Code § 36.70B.070(1)(b); Wash. Rev. Code § 36.70B.070(4)(b) (2000).

[FN299]. See Wash. Rev. Code § 36.70B.070(2) (2000).

[FN300]. Wash. Rev. Code § 36.70C.130(1)(a) (2000). Read literally, this provision might apply only to the 'body or officer' with the 'highest level of authority to make the determination' on the ultimate application, and might not apply to lower-level staff responsible for rendering a determination of completeness. See *id.*; Wash. Rev. Code § 36.70C.020(1) (2000). This author takes no position on whether the legislature should explicitly allow appeals of determinations of completeness in the context of an applicable law rule.

[FN301]. See *supra* Part II.C.6 (discussing the treatment of SEPA substantive authority under the common law vested rights doctrine and the Washington State Department of Ecology's rules). To the extent that we accept the common law application of the vested rights doctrine to SEPA rather than the Department of Ecology's treatment of SEPA regulations, this approach would also retain the doctrine's existing framework. See *id.*

[FN302]. See, e.g., *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 65, 578 P.2d 1309, 1313 (1988); *Sisley v. San Juan County*, 89 Wash. 2d 78, 83, 569 P.2d 712, 715-16 (1977).

[FN303]. See Wash. Rev. Code § 43.21C (2000).

[FN304]. The GMA grants Growth Management Hearings Boards the authority to enter an order invalidating local development regulations that fail to comply with the GMA. See Wash. Rev. Code § 36.70A.300(3)(b) (2000); Wash. Rev. Code § 36.70A.302(1) (2000). In 1997, the legislature declared that the invalidated regulations should still govern those applications submitted while the development regulations were still valid. See Wash. Rev. Code § 36.70A.302(2) (2000) (enacted by Growth Management Act, ch. 429, § 16, 1997 Wash. Laws 2615, 2633-34). This rule is consistent with an early vested rights case that noted that a court must defer to vested rights when voiding a zoning ordinance. See *Bishop v. Town of Houghton*, 69 Wash. 2d 786, 793, 420 P.2d 368, 373 (1966) ('If vested rights have not intervened, the court may also judicially declare when the regulations become void.'). The supreme court has enforced this rule. See *Association of Rural Residents v. Kitsap County*, 141 Wash. 2d 185, 192, 4 P.3d 115, 118-19 (2000). But see *Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wash. 2d 475, 484-85, 513 P.2d 36, 43 (1973) (asserting that those who commence development in the face of a legal challenge to the validity of the permit run the risk of a court ordering the work to be stopped).

Even when developers have not submitted a complete permit application, the legislature has dictated that certain applications will still be controlled by the now-invalidated law, such as applications for building permits for single-family homes, permits for remodeling or expansions on an existing lot, and certain boundary line adjustments. See Wash. Rev. Code § 36.70A.302(3)(b) (2000). Where the board refuses to issue an order of invalidity for a provision that fails to comply with the GMA, that provision continues to remain in effect, and the local jurisdiction may apply it to permit applications. See Wash.

Rev. Code § 36.70A.302(1)(b) (2000); King County v. Central Puget Sound Growth Management Hearings Bd., 138 Wash. 2d 161, 180-82, 979 P.2d 374, 384-85 (1999).

[FN305]. A state commission found insufficient information to determine whether vesting during a period of time a comprehensive plan is on appeal results in the approval of projects that are inconsistent with a comprehensive plan that is found in compliance with the GMA.

Some Commission members and environmental community representatives expressed disappointment with the data collected. They suggest a further general study of the vesting issue should be considered. The environmental community believes there is anecdotal evidence that Washington's vesting law, which grants vesting at the time a complete application is submitted, creates problems for implementation of the GMA. However, there has been no systematic study to indicate whether vesting in general is a problem.

Study of the Impact of Vesting During GMHB Appeals, Washington State Land Use Study Commission Final Report (Dec. 1998) (visited Feb. 1, 2001) <http://www.ocd.wa.gov/info/lgd/landuse/report/chapter14.html>.

[FN306]. Cf. Wash. Admin. Code §§ 173-27-100(1) - (2) (1999) (allowing amendments to shoreline substantial development permits that are still within the 'scope and intent' of the original permit).

[FN307]. See Wash. Rev. Code § 36.70B.120 (2000).

[FN308]. 133 Wash. 2d 269, 943 P.2d 1378 (1997) (discussed in detail *supra* Part II.D.3).

[FN309]. See id. at 271-73, 943 P.2d at 1380-81.

[FN310]. See id. at 272-73, 943 P.2d at 1380-81.

[FN311]. In *Noble Manor*, an amicus by the Building Industry Association of Washington urged the supreme court to rule against the county on the basis of the county's refusal to accept the tendered building permit applications with the subdivision application. See id. at 272 n.1, 943 P.2d at 1380 n.1. The court refused to consider issues raised only by amicus. See *id.*

[FN312]. This approach would not go as far as Overstreet and Kirchheim's proposal to codify the 'inextricably linked' case law. Overstreet & Kirchheim, *supra* note 11, at 1095. See *supra* Part II.D.4 (discussing the 'inextricably linked' case law).

[FN313]. See *supra* Part II.C.7.

[FN314]. Many local land use codes provide that if strict application of a particular body of land use law precludes all 'reasonable use' of property, the local government may issue certain types of conditional use permits or variances to allow some reasonable use. See, e.g., King County Code § 21A.24.070.B (2000); Pierce County Code § 18E.20.040 (1998); Seattle Municipal Code § 22.808.010.C.3 (2000); Snohomish County Code § 32.10.610 (1998); Spokane Municipal Code §§ 11.02.0175, 11.19.3093.C (1996). See also Wash. Rev. Code § 36.70A.090 (2000) (encouraging local governments to 'provide for innovative land use management techniques').

[FN315]. See generally *supra* Part II.

[FN316]. Overstreet & Kirchheim, *supra* note 11, at 1068-69. Overstreet and Kirchheim cite no authority with respect to California. For an analysis of Texas law, Overstreet and Kirchheim point only to David Hartman, Comment, Risky Business: Vested Real Property Development Rights--The Texas Experience and Proposals for the Texas Legislature to Improve Certainty in the Law, 30 Texas Tech. L. Rev. 297 (1999). See Overstreet & Kirchheim, *supra* note 11, at 1068 n.144. Hartman's Comment discusses Virginia's estoppel-based vesting legislation (Hartman, *supra*, at 321) and California and Hawaii's contractual vesting legislation (*id.* at 324-26), but no Washington legislation or case law.

[FN317]. Compare Act of Sept. 13, 1984, ch. 1113, § 8, 1984 Cal. Stat. 3744-45 (adopting the California vested rights statute codified at Cal. Gov't Code §§ 66498.1 et seq.) with Act of Apr. 20, 1987, ch. 104, §§ 1-2, 1987 Wash. Laws 317 (codified at Wash. Rev. Code §§ 19.27.095(1), 58.17.033(1)) (the vested rights statutes for building permits and subdivisions, respectively, discussed *supra* at Part II.D.2).

[FN318]. Compare Act of May 30, 1987, 70th Leg., R. Sess., ch. 374, 1987 Tex. Gen. Laws 1838-89 (adopting the original Texas vested rights statute, as cited in Hartman, *supra* note 316, at 312 n.107) with Act of Apr. 20, 1987, ch. 104, §§ 1-2, 1987 Wash. Laws 317 (codified at Wash. Rev. Code §§ 19.27.095(1), 58.17.033(1)) (the vested rights statutes for building permits and subdivisions, respectively, discussed *supra* at Part II.D.2).

[FN319]. Cf. Overstreet & Kirchheim, *supra* note 11, at 1095 ('[W]e wholeheartedly urge other states to adopt, by case law or statute, the Washington rule.').

[FN320]. See John J. Delaney & Emily J. Vaia, Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims, 49 Wash. U. J. Urb. & Contemp. L. 27, 27-33 (1996).

[FN321]. See generally E.C. Yokley, 2 Zoning Law and Practice §§ 14-5 to 14-7 (4th ed. 1978 & Supp. 2000); Linda S. Tucker, Annotation, Activities in Preparation for Building as Establishing Valid Nonconforming Use or Vested Right to Engage in Construction for Intended Use, 38 A.L.R.5th 737 (1996); Lynn Ackerman, Comment, Searching for a Standard for Regulatory Takings Based on Investment-Backed Expectations: A Survey of State Court Decisions in the Vested Rights and Zoning Estoppel Areas, 36 Emory L.J. 1219 (1987).

[FN322]. 133 Wash. 2d 269, 943 P.2d 1378 (1997).

[FN323]. See generally *supra* note 321 (authority explaining the majority rule).

[FN324]. Overstreet and Kirchheim applaud this favored status. See, e.g., Overstreet & Kirchheim, *supra* note 11, at 1047 n. 18 ('Washington's vested rights doctrine is, indeed, the most protective of constitutional rights in the nation.');

*id.* at 1095 ('Washington should be proud. Our state's vested rights doctrine is the most protective in the nation.'). They push for an even sweeter deal for developers. See, e.g., *id.* at 1095 ('In general, we suggest that the guiding principles for future interpretation of the doctrine should be certainty and fairness, with all doubts resolved in favor of the property owner.').

[FN325]. See *id.* at 1050 n.32.

[FN326]. *Id.* at 1052. See also *id.* at 1052 (describing a hypothetical council 'caving in to political pressure from a handful of neighbors'); *id.* at 1057 n.66 ('The common reason local governments sometimes radically change their land use standards, despite their obvious interest in stable planning, is the political pressure asserted on local politicians. '); *id.* at 1090 n.287 ('[S]ometimes--legal liability or not--elected officials will bow to political pressure to stop unpopular projects.'). Overstreet and Kirchheim also attempt to paint developers as having to overcome incredible odds. As an example of 'how multiple approvals can affect vested rights' in the context of residential development, Overstreet and Kirchheim quote a professor who describes how one project 'required 65 permits from 12 separate agencies,' and how the odds are against a developer successfully obtaining all of those permits. *Id.* at 1054. But Overstreet and Kirchheim relegate to a footnote the concession that the professor was describing the permitting of a petrochemical plant, not a residential development. See *id.* at 1054 n.51.

[FN327]. See *id.* at 1052 ('Perhaps in the old days, when local governments generally wanted growth, politics favored property owners. This is not the case any more. Now politics usually work against property owners. '). Overstreet and Kirchheim confuse the exercise of legislative authority (which is not bounded by the vested rights doctrine) with the exercise of quasi-judicial authority (which is bounded by the doctrine). For example, they present Donwood, Inc. v. Spokane County, 90 Wash. App. 389, 395, 957 P.2d 775, 778 (1998) as

describing local governments' land use regulatory power as a 'broad constitutional grant of political authority.' The fact that a Washington court has characterized the land use approval process as being part of a local government's 'political authority' should dispel any myths that politics plays no role in the development approval process.

Overstreet & Kirchheim, *supra* note 11, at 1051 n.40 (emphasis in original). The clause from Donwood was not directed at the quasi-judicial function of 'the land use approval process.' Instead, the court was explaining why a county had the legislative authority to adopt a particular transitional zoning code provision. See Donwood, 90 Wash. App. at 392-93, 957 P.2d at 777 (describing the transitional zoning code); *id.* at 395-96, 957 P.2d at 778-79 (full context for the excerpt selectively quoted by Overstreet & Kirchheim). The Donwood court in no way suggested that application of that code provision through the permitting process was some kind of political exercise.

[FN328]. See U.S. Const. amend. V; Wash. Const. art. I, § 16.

[FN329]. See, e.g., Department of Ecology v. Grimes, 121 Wash. 2d 459, 478, 852 P.2d 1044, 1054-55 (1993) ('A vested water right is a type of private property that is subject to the Fifth Amendment prohibition on takings without just compensation. '); Island County v. Dillingham Dev. Co., 99 Wash. 2d 215, 224, 662 P.2d 32, 37-38 (1983) (holding that without compensation, government may not impair vested rights of riparian owners in submerged lands).

[FN330]. State ex rel. Ogden v. City of Bellevue, 45 Wash. 2d 492, 275 P.2d 899 (1954).

[FN331]. See *id.* at 495, 275 P.2d at 902.

[FN332]. Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 870, 872 P.2d 1090, 1094 (1994).

[FN333]. Vashon Island Comm. for Self-Government v. King County Boundary Review Bd., 127 Wash. 2d 759, 768, 903 P.2d 953, 957 (1995). See also Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 636, 733 P.2d 182, 191 (1987); West Main Assocs. v. City of Bellevue, 106 Wash. 2d at 47, 51, 53, 720 P.2d 782, 785-86 (1986).

[FN334]. It is within this context that one must critique Overstreet and Kirchheim's conclusion that 'Washington's constitution provides broad due process protections and [that] vested rights are the quintessential expression of due process; the government cannot change the law midstream and apply the new law retroactively.' Overstreet & Kirchheim, *supra* note 11, at 1091. See also *id.* ('The 'process' of 'law' that is 'due' under the Washington or United States Constitution is to have the legal standards in effect at a specific point applied to a person....'). Even if one were to accept the premise that vested rights are an expression of due process, no authority exists for asserting that due process protections dictate where a state must fix the 'midstream' point.

[FN335]. See *id.* at 1090-91 ('Washington courts, at least indirectly, have been deciding vesting cases on constitutional grounds, both before and after the enactment of the 1987 vesting statute.').

[FN336]. See *id.* at 1090 ('[N]o Washington case directly holds that there is a separate constitutional doctrine....').

[FN337]. See *id.* at 1072 n.161, 1091 n.290.

[FN338]. See *Sintra, Inc. v. City of Seattle*, 119 Wash. 2d 1, 21, 829 P.2d 765, 776 (1992). To probe whether a regulation crosses this due process threshold, Washington courts ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner. *Id.* See generally Talmadge, *supra* note 108, at 894-901 (historical treatment of due process constraints on the police power in Washington).

[FN339]. Proffering other case law, Overstreet and Kirchheim mistakenly conclude that 'Washington cases...address the constitutional purpose of Washington's vested rights doctrine by equating vesting protections with yet another due process concept, the prohibition against retroactive legislation.' Overstreet & Kirchheim, *supra* note 11, at 1072. Overstreet and Kirchheim premise this conclusion on *State ex rel. Hardy v. Superior Court*, 155 Wash. 244, 248, 284 P. 93, 95 (1930). Overstreet & Kirchheim, *supra* note 11, at 1072 n.165. Although Hardy speaks to the prohibition against retroactive legislation, it does not mention the due process clause, and speaks of constitutional protections only in contrast to vested rights: 'If an ordinance relates to a subject-matter within the competency of the municipal corporation and is enacted in the manner prescribed, the general rule is that the courts will not interfere unless it appears on its face that it is arbitrary, oppressive, or impairs some vested right or contravenes some constitutional provision.' *Hardy*, 155 Wash. at 250, 284 P. at 95 (quoting McQuillin on Municipal Corporations (2d ed.), § 840) (emphasis added). Furthermore, as Overstreet and Kirchheim themselves point out in a different context, Hardy is not a land use vested rights decision and does very little to illuminate the land use doctrine announced nearly a quarter-century later. See Overstreet & Kirchheim, *supra* note 11, at 1074 n.173, 1075 n.179.

[FN340]. Overstreet & Kirchheim, *supra* note 11, at 1092-93.

[FN341]. *Id.* at 1093.

[FN342]. See *Mission Springs, Inc. v. City of Spokane*, 134 Wash. 2d 947, 965, 954 P.2d 250, 258 (1998).

[FN343]. See generally Wash. Rev. Code § 36.70B (2000) (establishing parameters for local land use permitting procedures).

[FN344]. See Mission Springs, 134 Wash. 2d at 947, 954 P.2d at 250. See Overstreet & Kirchheim, supra note 11, at 1092-92 n.299 & 302 (invoking Mission Springs).

[FN345]. Mission Springs, 134 Wash. 2d at 962, 954 P.2d at 257 (emphasis added).

[FN346]. Id. at 962 n.15, 954 P.2d at 257 n.15 (emphasis added).

[FN347]. See id. at 962-69, 954 P.2d at 257-60.

[FN348]. See Int'l Conference of Building Officials, 1 Uniform Building Code app. §§ 3302-3318, at 1-407 to 1-412 (1997) (excavation and grading); Wash. Rev. Code § 19.27.031 (2000) (adopting Uniform Building Code as state standard); Wash. Admin. Code § 51-40 (1999) (tailoring Uniform Building Code to Washington).

[FN349]. Overstreet & Kirchheim, supra note 11, at 1094.

[FN350]. Id.

[FN351]. Settle, supra note 22, § 2.7(b), at 42.

[FN352]. Id. at 42-43. Overstreet and Kirchheim laud Professor Settle as 'undisputedly one of the most prominent commentators on Washington land use law.' Overstreet & Kirchheim, supra note 11, at 1076.

[FN353]. Delaney & Vaias, supra note 320, at 29 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1992)). See Overstreet & Kirchheim, supra note 11, at 1045 n.6 ('This outstanding piece of scholarship is one of the most important articles ever written about vested rights.').

[FN354]. See Integration of Growth Management Planning and Environmental Review, ch. 347, 1995 Wash. Laws 1556 (codified at Wash. Rev. Code § 36.70B).

# APPENDIX 3

archaeological sites but neglected to consult with DAHP on the potential for an archaeological finding. The landform at issue displayed the exact same environmental qualities as the major find in Port Angeles. The consultant, not being an archaeological expert, did not make the determination for a potential archaeological finding. The project impacted both cultural material and human remains resulting in additional expense for the local PUD and its customers. An archaeological survey in advance of the project would have identified the cultural materials and human remains early, allowing the agency and the PUD to avoid areas of concern. The project would have stayed on time and within the original budget.

Some projects have impacted archaeological sites but continued as if they did not exist. This has been a major mistake. Our agency often receives reports of archaeological sites and human remains on construction sites. We have been contacted by construction workers, passersby, local archaeologists and tribal members who have noticed cultural material in construction spoils or in trenches. Ignoring cultural material in a construction site is not just illegal, it can have severe financial repercussions in time, money, and local and tribal relations.

## V. Conclusion

Archaeology is the study of our past, all our past. The cultural and paleo-environmental data that we retrieve from archaeological sites, whether they are from the nineteenth century, or ten thousand years ago, are individually unique and can never be replicated. It is this individuality and distinctiveness that makes their careless loss so difficult for the tribes, the scientific community and often, the general public. Archaeological sites are found all over our state's landscape although some areas, such as proximity to water systems, increase the likelihood for both finding a site and finding a site that is considered culturally and scientifically significant. Consultation with state Department of Archaeology and Historic Preservation, local historical organizations and tribal governments is not only required under federal and state laws [which state laws?; last paragraph of Section III says consultation with tribes is not required under state law], it is critical to preventing surprises during construction. Finally, it is important to remember that preservation of our archaeological and historic heritage is not only very popular with the public, it is simply the right thing to do to further our cultural, educational and scientific endeavors.

For further reading on the history of the National Historic Preservation program, archaeology in Washington state and the River Basin Surveys, see: *Keeping Time: The History and Theory of Preservation in America* by William J. Murtagh; *Middle Missouri Archaeology* by Donald J. Lehmer; and *Archaeology in Washington* by Ruth Kirk and Richard Daugherty. For further information on federal and state laws, see: [www.achp.gov](http://www.achp.gov) and [www.dahp.wa.gov](http://www.dahp.wa.gov).

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## Abbey Road: Not a Road Out of Our Vested Rights Thicket

*By Roger Wynne, Seattle City Attorney's Office*

### I. Introduction

At the heart of Washington's half-century-old vested rights doctrine is a simple-sounding rule: a developer enjoys the right to have local government consider a land use permit application under the law in effect on the date the developer submits a complete application. This, the theory goes, strikes a balance between the public's interest in being able to amend and apply development regulations to meet changing circumstances, and developers' interest in having a measure of certainty about the rules with which they must comply. Furthermore, by focusing on the bright line of the complete application date, the doctrine is designed for easy application, even if it results in a rule that is more favorable to developers than the vested rights doctrine adopted by most other states, where equitable principles may allow governments to apply new development regulations even into a project's construction phase.

That's the theory. In practice, Washington's vested rights doctrine has given rise to a host of questions that neither the judiciary nor the Legislature has resolved cleanly. We are left with a doctrine that, although designed to provide clarity and fairness, remains confusing and contentious.<sup>1</sup>

The Washington Supreme Court's latest foray into the vested rights thicket is *Abbey Road v. City of Bonney Lake*, \_\_\_ Wn.2d \_\_\_, 218 P.3d 180, 2009 WL 3210388 (Oct. 8, 2009). Although the case did not present an opportunity to untangle the doctrine, it allowed the Court to address two persistent questions that plague this body of law: (1) to what permit applications does the doctrine apply; and (2) what role does due process play in the doctrine? This article summarizes the historical background of these

questions, explains how they shaped the resolution of *Abbey Road*, and offers reasons for remaining skeptical about the simplicity of the lessons *Abbey Road* offers for the future. This article concludes, as does *Abbey Road*, with a call for legislative reform of the vested rights doctrine.

## II. The Background: Two Persistent Questions

### A. To what permit applications does the doctrine apply? The on-again-off-again extension of the doctrine beyond building permit applications.

The Washington Supreme Court articulated our vested rights doctrine in the 1950s, when developers faced a narrower array of potential land use permits than they do today. As originally conceived, the doctrine applied only to applications for building permits because that was the point the Court felt best demonstrated the developer's substantial change in position to commit to the project. *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958); *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 495-96, 275 P.2d 899 (1954).

From 1968 through 1977, as land use regulations became more complex, the judiciary consistently extended the doctrine to applications for other types of permits without much discussion. *Beach v. Board of Adjustment of Snohomish County*, 73 Wn.2d 343, 438 P.2d 617 (1968) (conditional use permits); *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 84, 510 P.2d 1140 (1973) (grading permits); *Talbot v. Gray*, 11 Wn. App. 807, 811, 525 P.2d 801 (1974) (shoreline substantial development permits); *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 715, 558 P.2d 821 (1977) (septic tank permits).

The judiciary then hit the brakes. From 1982 through 1987, courts refused to extend the doctrine to applications for site-specific rezones, *Teed v. King County*, 36 Wn. App. 635, 643-44, 677 P.2d 179 (1984), or to a number of applications related to the division of land: preliminary subdivisions, preliminary site plans, and binding site plans. *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 649 P.2d 103 (1982); *Burley Lagoon Improvement Ass'n v. Pierce County*, 38 Wn. App. 534, 540, 686 P.2d 503 (1984); *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 639, 733 P.2d 182 (1987).

The Washington Legislature intervened in 1987 with amendments that codified the vested rights doctrine for applications for building permits and certain types of subdivisions. Laws of 1987, ch. 104 (adding RCW 19.27.095 and RCW 58.17.033).<sup>2</sup> The Final Bill Report inaccurately summarized the then-existing common law doctrine as applying only to building permit applications (even though courts had extended the doctrine to applications for other types of permits), and then described the amendments' purpose: "The vested rights doctrine established by case law is made statutory, with the additional requirement that a permit application be fully completed for the doctrine to apply. The vesting of rights doctrine [sic] is extended to applications for preliminary or short plat approval."

Final Bill Report, SSB 5519 (Laws of 1987, ch. 104). Because the Legislature said nothing expressly about the types of applications to which the doctrine does *not* apply, rules of statutory construction could support conflicting conclusions. On the one hand, had the Legislature intended to extend the doctrine beyond building permit and subdivision applications, it would have said so.<sup>3</sup> On the other hand, the Legislature presumably knew of the judicial extension of the doctrine beyond those two types of permits, so by not correcting the judiciary, the Legislature implicitly approved those extensions.<sup>4</sup>

In 1994, in *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994), the Washington Supreme Court appeared to read the 1987 amendments as endorsing recent judicial reluctance to extend the doctrine and limiting the vested rights doctrine to applications for building permits. In *Erickson*, a city required developers to obtain a master use permit ("MUP") before the city would issue a building permit. The city's land use code provided that the MUP application would be decided on the basis of the law in effect *not* on the date of the complete MUP application, but on the earlier date of either: (1) the city's MUP decision; or (2) the complete building permit application, which the developer could submit at any time during the MUP process. A developer argued that the vested rights doctrine applied to the MUP application directly, even before the developer submitted a building permit application. The Court disagreed and upheld the local code. The Court noted the vested rights doctrine's origin in the context of building permits, deferred to the Legislature's codification of the doctrine in that context, and cited the fact that the local code left the developer able to submit a building permit application, and thus to trigger the doctrine, at any time in the process.

But since *Erickson*, Washington courts have continued to extend the doctrine to applications for permits other than building permits. For example, courts have followed the doctrine's pre-legislation and pre-*Erickson* extensions of the doctrine to conditional use<sup>5</sup> and septic tank permits,<sup>6</sup> and have further extended the doctrine to applications for shoreline variances,<sup>7</sup> an "unclassified use permit,"<sup>8</sup> and certain planned unit developments.<sup>9</sup> Indeed, the Washington Supreme Court has continued, if perhaps only in *dicta*, to describe the doctrine as applying generically to *all* land use permit applications, not just building permit applications.<sup>10</sup>

### B. What's the Constitution got to do with it? The confusing creep of due process into the doctrine.

When first articulating the vested rights doctrine in 1954, the Washington Supreme Court pointed to state equal protection guarantees to support a common-sense rationale for the new doctrine: local officials should apply the law as written when an application is submitted, rather than invent new standards for each application. *Ogden*, 45 Wn.2d at 495. Beyond that one reference to equal protection, no

reported decision mentioned constitutional protections as a reason for Washington's doctrine or its parameters in the first three decades of the doctrine's existence.

The Washington Supreme Court injected due process considerations into the doctrine through a pair of decisions in the late 1980s. *Valley View*, 107 Wn.2d at 639; *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51-53, 720 P.2d 782 (1986). In both, the Court began from the premise that the vested rights doctrine would be triggered only by the filing of a building permit application. At issue in both cases were attempts by cities to erect obstacles to filing that application – obstacles that took the form of requirements to obtain a number of other permits for a project before submitting a complete building permit application. In both instances, the Court invoked notions of due process to invalidate those obstacles.

Unfortunately, subsequent case law cited these decisions incorrectly for the proposition that due process concerns shaped the origins and parameters of the doctrine itself, not just the manner in which the doctrine, once created, is applied. These *dicta* take the form of assertions that the doctrine either provides “a ‘date certain’ standard that satisfies due process requirements,” *Erickson*, 123 Wn.2d at 870, or “is based on constitutional principles of fundamental fairness.” *Vashon Island Comm. for Self-Government v. King County Boundary Review Bd.*, 127 Wn.2d 759, 768, 903 P.2d 953 (1995). Because of such *dicta*, the role of due process in the vested rights doctrine remains a source of confusion.

### III. How the Questions Shaped the Result in *Abbey Road*

In *Abbey Road*, the Court wrestled with the questions of the reach of the doctrine to permits other than building permits and of the role due process plays in the doctrine. The developer in *Abbey Road* applied for approval of a site plan for a large residential project that would ultimately require building permits as well. The developer, who believed that the local city required developers to obtain site plan approval before submitting building permit applications, did not submit a building permit application. The City denied the application on the basis of development regulations adopted after the developer applied for site plan approval. See *Abbey Road*, 218 P.3d at 181-82, 185.

The five-member *Abbey Road* majority rejected the developer's argument that the vested rights doctrine should extend to an application for site plan approval.<sup>11</sup> Rather than rely on pre-vesting-legislation case law that directly refused to extend the doctrine to applications for site plan approvals,<sup>12</sup> the majority focused on two other sources of authority. First, the Court pointed to RCW 19.27.095(1) – the 1987 statute that codified the doctrine in the context of building permit applications. The majority concluded that the statute “codified ... judicially recognized principles” that the building permit application is the appropriate juncture to invoke the vested rights doctrine for a project, and that certain attempts “to expand the common law vesting doc-

trine” to other applications have been “superseded” by the statute. *Abbey Road*, 218 P.3d at 183-84. Second, the majority looked to *Erickson*, the 1994 decision that first applied the 1987 statute, to conclude that, “in the absence of a local vesting ordinance specifying an earlier vesting date... then RCW 19.27.095(1) is the applicable vesting rule” regardless of the size and complexity of the project and the regulations applicable to it. *Id.* at 183. *Accord id.* at 187.

The *Abbey Road* majority also rejected the argument that the city denied the developer due process by preventing the developer from filing a building permit application until after the site plan approval process was complete. *Id.* at 184-87. The developer relied on *West Main*, the 1986 decision that invoked due process concerns to deem unconstitutional a local land use code that required a developer to obtain a number of permits before submitting a building permit application. See 106 Wn.2d at 51-53. The majority distinguished the code in *West Main* because the code challenged in *Abbey Road* had no provision precluding the developer from filing a building permit application along with the site plan application, and city officials testified that the city offered an integrated permit processing option that would have incorporated a building permit application – an option the developer did not follow. *Abbey Road*, 218 P.3d at 185, 186-87. To the majority, the developer “elected to proceed by obtaining site plan approval before applying for a building permit and cannot argue that its interpretation of the process it chose makes that process unconstitutional.” *Id.* at 187.<sup>13</sup>

### IV. *Abbey Road's* Lessons for the Future

#### A. The doctrine applies only to building permit applications. Maybe.

*Abbey Road* articulates Washington's statutory vesting rule in simple terms: no matter the number of permits required for a project, and unless a local ordinance allows an earlier opportunity, the developer may lock in the law applicable to that project only by filing a complete building permit application. *Id.* at 187.

If only it were that simple. *Abbey Road* provides no clarity on at least three issues that will continue to cloud this rule. First, does *Abbey Road* overrule pre- and post-*Erickson* case law that extended the common law doctrine to applications for permits other than building permits? On the one hand, *Abbey Road* suggests that *Erickson* itself overruled such case law, and that the 1987 statute, by focusing on the building permit application, superseded any case law that purported to expand the common law doctrine to other types of applications.<sup>14</sup> Indeed, contrary to a slew of doctrine-expanding case law, *Erickson* proclaimed: “Our vested rights doctrine is not a blanket rule requiring cities and towns to process all permit applications according to the rules in place at the outset of the permit review.” *Erickson*, 123 Wn.2d at 873. On the other hand, *Erickson* did not expressly overrule prior case law; it merely distinguished

two earlier cases on their facts. *Id.* at 871-73. Furthermore, even if the 1987 statute and *Erickson* effectively superseded or overruled pre-*Erickson* case law, Washington courts did not appear to understand that point until *Abbey Road* – as discussed above, in the 15 years from *Erickson* to *Abbey Road* – courts continued to follow prior case law, to expand the doctrine further, and to describe the doctrine as applying to all types of permits. *Abbey Road* could have provided much-needed clarity by overruling contrary authority. Instead, it added another piece to a confusing and often contradictory patchwork of law.

Second, how does the vested rights doctrine apply where no building permit is required, such as a proposal to change an existing structure from one type of use to another without any construction? Although that question was not presented in *Abbey Road*, the rule the decision announces seems to suggest that applicants for use-only permits may never freeze the law in place for government consideration of their proposals.

Finally, the rule announced in *Abbey Road* is consistent with one amendment adopted in 1987 (RCW 19.27.095(1), which codified the vested rights doctrine in the context of building permit applications), but it takes no account of the other amendment adopted at the same time (RCW 58.17.033(1), which codified the doctrine in the context of subdivision applications). See Laws of 1987, ch. 104. It is difficult to reconcile the language of the two amendments, and the subdivision amendment has given rise to a line of cases that threatens to freeze all law governing applications for all permits required for a project at the time of a complete subdivision application.<sup>15</sup> *Abbey Road* had no reason to tackle the issue of subdivision vesting, but that issue will continue to complicate attempts to extract and apply a simple rule from *Abbey Road*.

If nothing else, *Abbey Road* underscores judicial deference to the Legislature's shaping of Washington's vested rights doctrine, even though the judiciary bore and raised the doctrine for more than three decades as common law without any statutory interference. See *Abbey Road*, 218 P.3d at 183, 184. Even the *Abbey Road* dissent expressed no quarrel with the majority's premise that RCW 19.27.095(1) creates the default vesting rule and may supersede a contrary common law rule. See, e.g., *id.* at 191 (Sanders, J., dissenting; arguing that the majority misapplied the details of RCW 19.27.095(1)).

#### B. Due process has something to do with it, and may provide a safe harbor for some situations.

*Abbey Road* highlights, even if it does not clearly resolve, two of the constitutional dimensions of the vested rights doctrine. One of those dimensions is the role due process should play in the doctrine. On this question, *Abbey Road* equivocates. On the one hand, the decision relegates due process concerns to their proper place: as a limitation on the application of any vested rights rule that has been adopted, not on the parameters of the rule that must be adopted in

the first instance. As played out in *Abbey Road*, the right to lock in the law through a building permit application flows from a statute, and the due process clause is relevant only to the question of whether a local jurisdiction has unduly oppressed a developer trying to exercise that statutory right. See *id.* at 184-87.

On the other hand, *Abbey Road*'s introduction to the vested rights doctrine repeats unsupported platitudes from 1980s case law – that the doctrine “ensures” due process under the law and “recognizes” a standard that satisfies due process requirements – suggesting that due process concerns prompted or shaped the doctrine in the first instance and continue to do so. *Id.* at 183.<sup>16</sup> Judicial clarity on the proper role of due process concerns in the vested rights doctrine therefore remains elusive.

The other constitutional dimension of the doctrine tackled by *Abbey Road* is the line dividing local land use codes that run afoul of due process protections from those that do not. *Abbey Road* seems to recognize a safe harbor: as long as a local jurisdiction allows a developer to file a building permit application at any time in the permitting process, there is no due process violation. As illustrated by the facts of *Abbey Road*, a local jurisdiction may find shelter in the safe harbor by showing only that its regulations do not prevent simultaneous filing of multiple permit applications for a project, and offering testimony from staff that the jurisdiction allows an integrated permit review process.

But what about projects for which only a use permit, but no building permit, is required? In those situations, are local codes unconstitutional *per se* if they do not allow a way to freeze the law under which applications for non-building permits will be assessed? Or does the due process clause offer no protection to developers who need not file a building permit application? *Abbey Road* had no reason to address these questions because a building permit was ultimately required for the development at issue there. Nevertheless, questions like these will continue to complicate a doctrine designed to provide clarity.

#### V. Conclusion: Can the Legislature Reform the Doctrine?

*Abbey Road* concludes by directing arguments for changing the vested doctrine to the Legislature, which is better suited than the judiciary to reform the doctrine. *Id.* at 187-88. We should take the Court up on this invitation.

There are many ways that the Legislature could reform the doctrine.<sup>17</sup> Focusing just on the questions presented in *Abbey Road*, one reform could be to allow each complete permit application to lock in the law applicable to assessing that application (but not to future applications for the same project) and require all local jurisdictions to allow consolidated review of all types of permit applications required for the same project.<sup>18</sup>

This reform would enhance certainty for all land use decisions and would leave actual developers, but not speculators, largely in control of their own fate. To the

extent a developer is ready to proceed to actual development, the developer could submit multiple applications for the same project and lock in the law applicable to all of them. But to the extent a developer is attempting to speculate by securing only preliminary permits before sitting on the project to await better market conditions to sell or complete the project, the developer would have to run the risk that local law might change in a way that thwarts his or her speculation.

As a practical matter, this reform would retain the traditional focus on the building permit as the key event – because a building permit is usually required at the end of the permitting process, the law applicable to that permit will usually be the law that ultimately controls the development. As a legal matter, this approach would provide an answer to use-permit-only developments, where no building permit is required – the last use permit application submitted would lock in the law for the development.

This reform would supplant due process case law with clear statutory language. If the Legislature required all jurisdictions to conduct consolidated permit review at a developer's request, failures to heed that requirement could be reviewed by courts as questions of clear statutory rights, not relatively murky constitutional ones.

This reform would be only part of what should be a broader vested rights reform effort. As with any change, this would engender debate. But to achieve a better measure of the certainty and fairness that the vested rights doctrine was created to provide, we should welcome that debate.

*Roger Wynne is an Assistant City Attorney in the Land Use Section of the Seattle City Attorney's Office. Roger began his career with Preston Gates & Ellis LLP, where he first wrestled with Washington's vested rights doctrine. Roger has served on the Executive Committee of the WSBA Environmental and Land Use Law Section and chaired the WSBA Court Rules and Procedures Committee. He is currently Vice President of the Board of the Northwest Justice Project, and is a frequent speaker on land use and court rules topics. After graduating from Yale University with a degree in history, Roger earned a master's degree in environmental policy and a law degree from the University of Michigan. The views expressed in this article are Roger's, not necessarily those of his clients or colleagues.*

1 This article will not attempt to explain the details of Washington's muddled vested rights doctrine. For that explanation, please see Roger Wynne, *Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, 24 Seattle U.L.Rev. 851, 855-916 (2001) ("Wynne").

2 For a fuller explanation of these amendments, and the confusing picture they paint, see Wynne at 899-905.

3 See *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993) ("Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded.")

4 See *State v. Bobic*, 140 Wn.2d 250, 264, 996 P.2d 610 (2000) ("absent an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions"). The Final Bill Report's inaccurate summary of the common law doctrine as applying only to building permits could suggest that, contrary to this rule of construction, the Legislature was unaware of judicial extension of the doctrine beyond building permit applications.

- 5 *Caswell v. Pierce County*, 99 Wn. App. 194, 197, 992 P.2d 534 (2000) (noting that the local hearing examiner and the Superior Court determined that the doctrine applied to conditional use permits, but not facing that issue on appeal).
- 6 *Thurston County Rental Owners v. Thurston County*, 85 Wn. App. 171, 182, 931 P.2d 208 (1997).
- 7 *Buechel v. Department of Ecology*, 125 Wn.2d 196, 206-07 n.35, 884 P.2d 910 (1994).
- 8 *North Kitsap Coord. Council v. Screpn*, 108 Wn. App. 1028, 2001 WL 1155774 (unpublished).
- 9 *Association of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 192-95, 4 P.3d 115 (2000); *Schneider Homes, Inc. v. Kent*, 87 Wn. App. 774, 942 P.2d 1096 (1997). The courts in these decisions extended the doctrine to planned unit development applications "linked" to a preliminary subdivision application. This flowed from the courts' interpretation of RCW 58.17.033(1), which extended the doctrine to subdivision applications.
- 10 See, e.g., *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 240, 110 P.3d 1132 (2005) ("The vested rights doctrine establishes that land use applications vest on the date of submission and entitle the developer to divide and develop the land in accordance with the statutes and ordinances in effect on that date."); *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 275, 943 P.2d 1378 (1997) ("In Washington, 'vesting' refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission.")
- 11 Three justices joined the majority opinion and three dissented. As described below, the two concurring justices agreed with the majority in all relevant respects, but wrote separately only to acknowledge the developer's concern about the lack of clarity in the local permitting process.
- 12 *Valley View*, 107 Wn.2d at 639 (binding site plans); *Burley Lagoon*, 38 Wn. App. at 540 (preliminary site plans).
- 13 The two concurring justices agreed that the developer's "failure to submit a building permit application is fatal to providing relief," but wrote separately to acknowledge the developer's "legitimate concern" about the clarity of the city's permitting process. 218 P.3d at 188.
- 14 See, e.g., *id.* at 184 n.8 ("[The developer] argues that we should expand the vested rights doctrine based on case law [both pre- and post-*Erickson* that extended the doctrine to applications for permits other than building permits]. Again, in *Erickson*, we considered and rejected similar arguments..."); *id.* at 184 ("Even if *Victoria Tower (P'Ship v. City of Seattle)*, 49 Wn. App. 755, 745 P.2d 1328 (1987) can be read to expand the common law vesting doctrine to MUP applications, it has been superseded by RCW 19.27.095(1) and our analysis in *Erickson*.").
- 15 See generally Wynne at 899-916.
- 16 For an argument that the vested rights doctrine is not shaped, either historically or legally, by due process concerns, see Wynne at 934-39.
- 17 For a fuller exploration of potential legislative reform of the doctrine, see Wynne at 916-39.
- 18 Adopted in 1995, RCW 36.70B.120(1) requires most Washington jurisdictions to allow developers to submit multiple permit applications for a given project simultaneously and to process them in a consolidated manner. See Laws of 1995, ch. 347, § 418. But the requirement applies only to the largest and fastest-growing counties and cities, see RCW 36.70A.040(1), and allows local jurisdictions to exempt a number of permit types – including building permits – from the consolidated permit review process. See RCW 36.70B.140.

## "Wet Growth": Exploring the Intersection Between Water Resources and Land Use Law in Washington

By Tadas Kisielius, GordonDerr LLP

### I. Introduction

It is a generally accepted principle that use and development of property depend on water supply. To some degree, all uses of land, whether residential, commercial, industrial or agricultural, require water. Similarly, those uses of land have the potential to adversely impact water

# APPENDIX 4



## CITY OF KIRKLAND

Planning and Community Development Department  
123 Fifth Avenue, Kirkland, WA 98033 - (425) 587-3225  
[www.kirklandwa.gov](http://www.kirklandwa.gov)

### CITY OF KIRKLAND NOTICE OF DECISION SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT

**Permit Application:** City File SHR11-00002 – Potala Village Mixed Use Development

**Location:** 1006 and 1020 Lake Street South and 21-10<sup>th</sup> Ave South (Parcel Nos. 9354900220, 9354900240 and 0825059233) within the Urban Mixed Shoreline Environment Designation.

**Applicant:** Lobsang Dargey

**Project Description:** Mixed use development containing 6,000 square feet of commercial space on the ground floor and 143 residential units on the upper floors with parking underground and behind the ground floor commercial space at a building height of 30 feet above average building elevation. Approximately 53 feet of the western portion of the site is within 200 feet of the ordinary high water mark of the Lake Washington. The site does not abut the Lake and is separated from the Lake by a major arterial and existing residential development. Five residential units, a portion of commercial space, up to 25 feet of the building, a sidewalk and landscaping would be located in the shoreland area. The site contains contaminated soil and underground storage tanks, possibly within the shoreland area, from the existing dry cleaners and a prior gas station.

**Review Process:** Process I, Planning Director decision

**Project Planner:** Teresa Swan, [tswan@kirklandwa.gov](mailto:tswan@kirklandwa.gov), 425-587-3258

**SEPA Determination:** A Determination of Non-Significance (DNS) was issued on 06/15/2011. The DNS was withdrawn and a Determination of Significance was issued on 08/04/2011. The project was placed on hold for six months until the applicant decided to move forward with preparation of a Draft Environmental Impact Statement (EIS). A Draft EIS was issued on 07/12/12, and a Final EIS was issued on 11/02/12.

**Department Decision: Approval with Conditions**



Eric Shields, Director  
Department of Planning and Community Development

Decision Date:	January 17, 2013
Appeal Deadline:	21 days after Department of Ecology receives this decision (date of filing)

Pursuant to RCW 36.70B.130, affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.

**Shoreline Permit and Relationship to Other Codes and Ordinances and to EIS**

A Shoreline Substantial Development Permit (SDP) is issued under the authority of the Shoreline Management Act (SMA) of Chapter 90.58 RCW and Chapter 173-26 WAC. A SDP must be consistent with the Shoreline Management Act (SMA) as implemented in the City's Shoreline Master Program (SMP). The City's SMP consists of the following documents:

- Shoreline Area Chapter of the Kirkland Comprehensive Plan
- Chapters 83 and 141 of the Kirkland Zoning Code (KZC)
- Kirkland Restoration Plan

A SDP must be found to be consistent with these three documents, where applicable. The Restoration Plan does not apply since the proposal does not abut the Lake. Other development regulations, construction codes and chapters of the Comprehensive Plan are not under the authority of the SMA and local SMP so a decision on a SDP does not include a review of those for consistency or compliance. Any future building permit application associated with an approved SDP is subject to all applicable regulations in the KZC and Kirkland Municipal Code (KMC). Pursuant to RCW 19.27.095(1), the building permit application will be subject to the zoning and land use control ordinances in effect on the date that a fully complete application is submitted.

As stated in Chapter 90.58.RCW and KZC 83.20, the SMA and the City's SMP applies only to those lands or portions of land extending landward 200 feet from the ordinary high water mark of Lake Washington and those lands within wetlands that drain into the Lake called "associated wetlands." The City does not have the authority to apply its SMP to those portions of a property that are outside of the shoreland area, except in the following limited circumstances:

- (1) Temporary erosion control measures, storm water detention, water quality treatment and storm water conveyance facilities apply to the entire site;
- (2) Pursuant to KZC 83.190.1.b, density within the shoreland area may be based on the total square footage of the units within the shoreland area using the average unit size in the development;
- (3) Pursuant to KZC 83.190.4.a.2., the portion of the building within the shoreland area must meet the maximum allowable height regulation in KZC 83.180 based on calculating the average building elevation for the entire site;
- (4) Pursuant to KZC 83.190.3.a.3., the lot coverage calculation may be based on the entire site or only the portion of the land within the shoreland area; and
- (5) Parking stalls required for the uses within the shoreland area may be located within the development that is outside of the shoreland area.

The Potala Village EIS was issued under Title 24 KMC and the State Environmental Policy Act (SEPA) Chapter 43.21C RCW. The Final EIS identified many mitigating measures. Only those mitigating measures that address issues under the authority of the City's SMP, however, can be a condition of the SDP permit and addressed in this decision. The SEPA Responsible Official may impose any of the mitigating measures identified in the Final EIS on any future building permit associated with the SDP.

## **Appeals**

Appeals of the City's decision may be filed with the State Shorelines Hearings Board as set forth in RCW 90.58.180. A 21-day appeal period begins on the date that the Department of Ecology receives the City's decision, referred to as the "filing date." In the event of an appeal, the Department of Ecology will notify the City and the applicant of the appeal. Construction pursuant to a permit shall not begin or be authorized until 21 days from the date of filing as defined in RCW 90.58.140 or until appeal proceedings are terminated if there is an appeal.

### **I. CONDITIONS OF APPROVAL**

1. This application is subject to the applicable requirements contained in the shoreline regulations of KZC Chapters 83 and 141. In addition, for the building permit associated with the SDP, the applicant is also subject to the applicable requirements of the Municipal Code, the building and construction codes, including the fire code, and the Zoning Code. Attachment 24, Development Regulations, is provided in this report to familiarize the applicant with some of the shoreline regulations. It is the responsibility of the applicant to ensure compliance with all applicable provisions contained in KZC Chapter 83. When a condition of approval conflicts with a development regulation in Attachment 24, the condition of approval shall be followed.
2. With the building permit submittal, the applicant shall provide the following:
  - a. Final plans that reflect the lot size shown on the survey (see Conclusion II. B below).
  - b. Final calculations for meeting the maximum allowable density within the shoreland area, lot coverage and building height as regulated under KZC 83.180 (see Conclusion V.B.2. below).
  - c. Final building material details with no reflective or mirrored materials for any portion of the building within the shoreland area as regulated under KZC 83.390.3 (see Conclusions IV.B.4. and V.B.1. below).
  - d. Parking plan that shows a reduction in the number of on-site parking stalls to the minimum required for the proposed uses pursuant to KZC 105.45 and/or 105.103 and based on the parking analysis in Section 3.4 of the Final EIS. A reduction in the number of parking stalls is identified as a mitigating measure in the Final EIS, Section 1.6 in Attachment 25 (see Conclusion V.B.3).
  - e. Screening plans for any outdoor storage and garbage and recycling receptacles to be located within the shoreland area and which would be visible from any street or public area defined in KZC 83.80.94, or public park as regulated under KZC 83.450 (see Conclusions IV.B.4. and V.B.1. below).
  - f. Screening plan for roof top mechanical equipment located within the shoreland area and visible from Lake Washington or a public use area defined in KZC 83.80.94 and as regulated under KZC 83.450 (see Conclusions IV.B.4. and V.B.1. below).

- g. Lighting plan and photometric site plan for all exterior lights located within the shoreland area as regulated under KZC 83.470. The plan shall show the lighting directed downward and have "fully shielded cut off" fixtures as defined by the Illuminating Engineering Society of North America or other appropriate measures. Exterior illumination of building façade within the shoreland area to enhance architectural features is not permitted (see Conclusions IV.B.4. and V.B.1. below).
  - h. Temporary lighting plan for the construction phase meeting KZC 83.470 to reduce glare on adjacent properties and as identified as a mitigating measure in the Final EIS, Section 1.6 in Attachment 25 (see Conclusions IV.B.4. and V.B.1. below).
  - i. Final storm water plan with provisions for temporary erosion control measures, storm water detention, water quality treatment and storm water conveyance facilities as regulated under KZC 83.480 and in accordance with the City's adopted Surface Water Design Manual (see Conclusions IV.B.3. and V.B.1. below).
3. The applicant shall take the following actions to ensure that site remediation meets the Washington Department of Ecology's Model Toxics Control Act (MTCA) rules and underground storage tanks removal regulations (see Conclusions IV.B.5. and V.B.4. below, and Draft EIS, pages 3.2-10 through 3.2-13 and Final EIS, Section 1.6 in Attachment 25).
- a. The applicant shall hire a consulting firm qualified in site remediation pursuant to WAC 173-340 and certified by the State to remove underground storage tanks pursuant to WAC 173-360 to develop the cleanup action plan, perform the site cleanup work and prepare the compliance documentation under the Department of Ecology's Voluntary Compliance Program.
  - b. Prior to issuance of the land surface modification permit for site remediation, the applicant shall:
    - 1) Enter into a three-party contract with the City and the City's designated consultant to pay for the consultant's charges to perform a peer review of the clean-up action plan, compliance reports and other documentation prepared by the applicant's consulting firm to confirm that site remediation is in compliance with the Department of Ecology's rules.
    - 2) Submit the cleanup action plan prepared by the applicant's consulting firm for City approval. The City may require changes to the clean-up action plan if the City determines that the plan is not in compliance with the Department of Ecology's rules on remediation.
  - c. Prior to issuance of the building permit, but excluding a shoring permit for site remediation, the applicant shall provide the City with the compliance report and other documentation affirmatively demonstrating that the cleanup complies with the Department of Ecology's rules for remediation and removal of underground storage tanks. The City may require additional site remediation and/or changes to the documentation if it determines that the work and/or documentation do not meet the Department of Ecology's rules for remediation and removal of underground storage.
  - d. A copy of the No Further Action opinion from the Department of Ecology shall be provided to the City as soon as it has been issued.
  - e. The Best Management Practices listed in Section 1.6 of the Final EIS shall be reflected in the site cleanup plan and implemented in the site remediation work. See Attachment 25.

**II. SITE AND NEIGHBORHOOD CONTEXT**

**A. Facts:**

The following is a summary of the site and neighborhood context:

Shoreline Designation	Urban Mixed Shoreline Environment Designation
Location (abuts Lake or not)	Does not abut Lake Washington
Property Size	54,509 SF based on survey and 52,601 SF based on project plan sheet A1.1
Current Upland Land Use and Improvements	Pavement and part of a covered parking area are located within the shoreland area. The remainder of the site contains a single-family residence, restaurant and dry cleaners.
Current In-Water Structures	N/A
Shoreline Condition (bulkhead, natural or other)	N/A
Terrain	Slopes down to the west towards Lake Street South approximately 14 feet along the south boundary and 22 feet along the north boundary. About 10 feet of this grade change is contained within a steep slope that roughly bisects the site into east and west portions.
Vegetation in Shoreline Setback	N/A
Neighboring Shoreline Designation and Development	See below. Many of the pre-existing developments exceed the allowable residential density and thus are nonconforming.
<ul style="list-style-type: none"> <li>• North</li> </ul>	Residential – Medium to High Shoreline Environment Designation. Developed with multifamily structures at three stories in height. Residential density standard is 3600 SF of land area per unit/12 units per acre.
<ul style="list-style-type: none"> <li>• South</li> </ul>	Residential – Medium to High Shoreline Environment Designation. Developed with multifamily structures at three stories in height. Residential density standard is 3600 SF of land area per unit/12 units per acre.
<ul style="list-style-type: none"> <li>• East</li> </ul>	Outside of shoreland area. Developed with multifamily and single family structures at heights varying from one to three stories. Residential density standard is 3600 SF of land area per unit/12 units per acre for multifamily area and 8500 SF for single family area.
<ul style="list-style-type: none"> <li>• West</li> </ul>	Residential – Medium to High, Urban Conservancy (parks) and Aquatic (lake) Shoreline Environment Designations. Developed with multifamily and single family structures, and Marsh Park and Settler's Landing Park. Lake Washington is west of these developments. Residential height varies from one to three stories. Residential density standard is 3600 SF of land area per unit/12 units per acre.

B. **Conclusions:**

With the building permit application, the applicant should indicate the property size noted on the survey for the final plans.

**III. CRITERIA FOR APPROVAL OF SUBSTANTIAL DEVELOPMENT PERMIT**

A. **Fact:** KZC 141.70 states that Shoreline Substantial Development permits must meet WAC 173-27-140 and WAC 173-27-150. The approval criteria are discussed below:

1. **WAC 173-27-140** establishes the following general review criteria that must be met:
  - a. No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is consistent with the policy and provisions of the Shoreline Management Act and the master program.
  - b. No permit shall be issued for any new or expanded building or structure of more than thirty-five feet above average grade level on the shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines, except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.
2. In its approval of the City's Shoreline Master Program (SMP) on July 26, 2010, the Department of Ecology determined that the City's SMP, including the shoreline regulations in Chapter KZC 83, implement the goals and policies of the State Shoreline Management Act (SMA) established in Chapter 90.58 RCW and implemented in WAC 173-26-176. Developments that meet or can be conditioned to meet the City's shoreline regulations and are consistent with the City's shoreline policies are then found to be consistent with the SMA.
3. The proposed building height is 30 feet above building elevation (see Attachment 5). The term "average grade" under WAC 173-27-140 is equivalent to the City's measurement for average building elevation as regulated under KZC 83.190.4.a.2.
4. **WAC 173-27-150** establishes that a substantial development permit may only be granted when the proposed development is consistent with all of the following:
  - a. The policies and procedures of the Shoreline Management Act (WAC 173-26-176) that outline the general goals that must be reflected in the local master plan.
  - b. The provisions of WAC 173-27 that outline the permit review process for Shoreline Development Permits.
  - c. Chapter 83 Kirkland Zoning Code (KZC).
5. **WAC 173-27-110**, Notice Required, states that notice of application shall be given within 14 days of when the application is considered complete and a 30-day public comment period shall be provided. WAC 173-27-110 references RCW 36.70B.070, Determination of Completeness and Notice to Applicant, which states that an application is complete if it meets the procedural submission requirements of the local government and is sufficient for continued processing even though additional information may be required.

The application was submitted on February 23, 2011. The City mailed a letter to the applicant requesting corrected and additional information was mailed on March 18, 2011, and then again on April 13, 2011. The applicant provided the information and the application was deemed to be complete on May 11, 2011 (see Attachment 26).

A notice of application with a 30-day comment period was provided from May 19, 2011, through June 20, 2011.

6. Concerns were raised after the end of the comment period that the application should not have been determined to be complete because Mr. Dargey has a 100-year lease on the southern property (Parcel No. 0825059233) and the property owner did not sign the SDP application. Pursuant to WAC 173-27-180, Application Requirements for Substantial Development Permits, Subsection (1) states that "the applicant should be the owner of the property or primary proponent of the project."

The City determined that Mr. Dargey is a primary proponent of the southern property since he has a 100-year lease agreement.

7. Concerns were raised after the end of the comment period that the application should not have been determined to be complete because the application did not provide information about uses adjacent to the property. Pursuant to WAC 173-27-180, Application Requirements for Substantial Development Permits, Subsection (8) states that "a general description of the vicinity of the proposed project including identification of the adjacent uses, structures and improvements, intensity of development and physical characteristics" is to be included in the application.

The application materials include a close-up aerial map extending 200 feet surrounding the site showing the adjacent structures and improvements, intensity of development and physical characteristics. Based on the aerial map, staff noted on the application that the adjacent uses are single and multifamily residential and parks.

#### **B. Conclusions:**

1. As discussed further below, the project is consistent with WAC 173-27-140 and WAC 173-27-150. The project is consistent with the applicable policies of the City's SMP found in the Shoreline Area Chapter of the Comprehensive Plan and is consistent with the shoreline regulations in Chapter 83 KZC or can be made consistent through conditions placed on the SDP as discussed below in Sections V and VI.
2. The City determined that the information provided in the application materials was sufficient to make a determination of completeness and to continue with processing of the application. The application form is complete with the applicant signing as the proponent for the southern property and property owner of the northern two properties. The applicant provided information on the adjacent structures and intensity of the surrounding area.
3. The City met the requirements for processing of the application to date and providing public notice consistent with WAC 173-27-110, WAC 173-27-180 and RCW 36.70B.070. WAC 173-27-110 does not provide for a second comment period following completion of the requirements for SEPA or if an application is placed on hold.

#### **IV. Shoreline Policies**

Below is an analysis of the shoreline policies applicable to a mixed use development in an Urban Mixed Environment across the street from the Lake. WAC 173-27-140 requires that a proposal be consistent with the local shoreline master program which includes these policies.

A. **Fact:**

1. The following are the City shoreline policies found in the Shoreline Area Chapter of the Comprehensive Plan that are applicable to the project:
  - ***Policy SA-2.5:*** *Designate properties as Urban Mixed to provide for high-intensity land uses, including residential, commercial, recreational, transportation and mixed use developments.*
    - a. *Manage development so that it enhances and maintains the shorelines for a variety of urban uses, with priority given to waterdependent, water-related and water-enjoyment uses. Nonwater-oriented uses should not be allowed except as part of mixed-use developments, or in limited situations where they do not conflict with or limit opportunities for water-oriented uses, or on sites where there is no direct access to the shoreline.*
    - b. *Visual and physical access should be implemented whenever feasible and adverse ecological impacts can be avoided. Continuous public access along the shoreline should be provided, preserved or enhanced.*
    - c. *Aesthetic objectives should be implemented by means such as sign control regulations, appropriate development siting, screening and architectural standards and maintenance of natural vegetative buffers.*

**Staff comments:** Concerning Subsection a., the project may have nonwater-oriented uses since the property has no direct access to the Lake.

Subsection b. does not apply to the application since it does not have direct access to the Lake and is separated from the Lake by existing developments and a major arterial.

Concerning Subsection c., the shoreline regulations of Chapter 83 KZC contain regulations on prohibition of reflective or mirrored materials and the screening of garbage receptacles, roof top mechanical equipment and storage areas that should be met for any portion of the site within the shoreland area. The regulations on development siting and signage do not apply to the application since the project is upland of the Lake and does not have a required shoreline setback.

- ***Policy SA-3.4:*** *Incorporate low-impact development practices, where feasible, to reduce the amount of impervious surface area.*

See Shoreline Area Chapter in the Comprehensive Plan for supporting text, on Page XVI-12 in the Plan.

**Staff comments:** The project will be required to meet the 2009 King County Surface Water Design Manual, Section 5.2.1.3, if feasible, as determined by the City Public Works Department.

- **Policy SA-3.5:** *Limit parking within the shoreline area.*

*Facilities providing public parking are permitted within the shoreline area as needed to support adjoining water-oriented uses. Private parking facilities should be allowed only as necessary to support an authorized use. All parking facilities, wherever possible, should be located out of the shoreline area.*

**Staff comments:** Proposed parking is either outside of the shoreland area or underground. The project has no surface parking.

- **Policy SA-3.6:** *Minimize the aesthetic impacts of parking facilities.*

*Parking areas should be placed, screened, and buffered to mitigate impacts through use of design techniques, such as location, lidding, landscaping or other similar design features to minimize the aesthetic impacts of parking facilities...*

**Staff comments:** The parking for the project is fully enclosed within a structure. There is no surface parking.

- **Policy SA-3.7:** *Limit outdoor lighting levels in the shoreline to the minimum necessary for safe and effective use.*

See Shoreline Area Chapter of the Comprehensive Plan for supporting text, on Page XVI-12 in the Plan.

**Staff comments:** The shoreline regulations contain lighting standards to minimize impacts on neighboring developments and these regulations should be met for those portions of the project within the shoreland area. Some of the regulations will not apply to the project because they address lighting that affects the Lake or the shoreline pedestrian access easement. The project does not abut the Lake and is not required to have a pedestrian access easement.

- **Policy SA-7.7:** *Nonwater-oriented commercial development may be allowed if the site is physically separated from the shoreline by another property or right-of-way.*

*There are several commercial properties which do not have direct frontage on Lake Washington, either because they are separated by right-of-way (Lake Washington Boulevard NE, Lake Street, and 98th Avenue NE) or by another property. These properties should be allowed a greater flexibility of uses, given the physical separation from the waterfront area.*

**Staff comments:** The project may contain nonwater-oriented commercial uses, such as office, since the property is separated from the shoreline by other properties and the Lake Street South/Lake Washington Blvd right-of-way.

- **Policy SA-15.1:** *Manage storm water quantity to ensure protection of natural hydrology patterns and avoid or minimize impacts to streams.*

lighting and temporary construction lighting that meet KZC 83.390.3, 83.450 and 83.470 for those portions within the shoreland area.

5. To ensure that (a) the project does not degrade the water quality of the Lake, (b) site remediation is completed and (c) the underground storage tanks are removed in compliance with the Department of Ecology's rules, the applicant should:
  - a. Hire a consulting firm for the site cleanup that is qualified in site remediation and is certified by the State to remove underground storage tanks. This consulting firm should prepare a cleanup action plan prior to clean-up of the site, followed by a compliance report and any other documents once the remediation is completed. A building permit should not be issued, excluding a shoring permit related to site remediation, until the applicant has provided these documents to the City.
  - b. Sign a three party contract with the City and the City's designated consultant to pay the charges of that consultant to do peer review of the cleanup action plan and follow-up documents prepared by the applicant's consulting firm to ensure compliance.
  - c. Provide the City with a compliance report and other documentation affirmatively demonstrating that the cleanup complies with the Department of Ecology's rules for remediation and removal of underground storage tank prior to issuance of the building permit, but excluding a shoring permit for site remediation.
  - d. Make changes to the cleanup action plan and/or to the follow-up documentation after the clean-up work is completed if the City determines that they failed to show full compliance with the Department of Ecology's rules.
  - e. Reflect the Best Management Practices identified in Chapter 1 of the Potala Village Final EIS in the site cleanup plan and the remediation work. See Attachment 25.
  - f. Provide the City with a copy of the No Further Action opinion issued under the Voluntary Cleanup Program by the Department of Ecology once site cleanup is completed to confirm that the State requirements have been met.

**V. DEVELOPMENT REGULATIONS**

**A. Facts:**

The following is a review, in a checklist format, of compliance with the requirements in Chapter 83 KZC for mixed use developments in the Urban Mixed shoreline designation area.

Many of the regulations in Chapter 83 KZC do not apply since the project site is separated from the Lake by existing development and a major arterial, including but not limited to the requirements for a shoreline setback (KZC 83.180), shoreline vegetation (KZC 83.400), view corridor (KZC 83.410), public access (KZC 83.420) and signage (KZC 83.460).

Not Applicable	Complies as proposed	Complies as conditioned	Code Sections
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<p><input checked="" type="checkbox"/> <b>Permitted Uses:</b> Commercial and Stacked Dwelling unit uses require a SDP in Urban Mixed shoreline environment (KZC 83.170). Office is permitted if located on the east side of Lake Washington Blvd/Lake Street South or abutting the Lake in a mixed use development with a water-dependent use (KZC 83.170, Footnote 10). <i>Applicant has applied for SDP.</i></p> <p><input checked="" type="checkbox"/> <b>Maximum Allowable Density</b> is 1,800 square feet land area per unit for portion within 200 feet of shoreline (KZC 83.180 and 83.190). <i>Application is subject to the City's SMP approved on July 26, 2010, and not under the SMP as amended approved on May 25, 2011, which changed the density standard from 1,800 square feet to no density limit. The site has 10,368 square feet of land area in the shoreland area. At 1,800 SF per unit, 5.76 units (can round up to six units) are allowed. Five units are currently proposed, but six may be shown on the building permit. See Attachment 19.</i></p> <p><input checked="" type="checkbox"/> <b>Maximum Allowable Lot Coverage</b> (total impervious areas) is 80% (KZC 83.180). <i>Plan currently shows lot coverage at 80% for the entire site. See Attachment 19.</i></p> <p><input checked="" type="checkbox"/> <b>Maximum Allowable Height of Structure</b> is 41 feet above average building elevation (KZC 83.180). <i>Plan currently shows a building height of 30 feet above average building elevation. (Note: The associated building permit must meet both the shoreline regulations of Chapter 83 KZC and applicable regulations in other chapters of the KZC, including, Chapter 40 for the Neighborhood Business zone which has a height limit of 30 feet above average building elevation). See Attachment 5.</i></p>
<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<p><input checked="" type="checkbox"/> <b>General Development Standards apply to the portion of the site within shorelines jurisdiction :</b></p> <p><input checked="" type="checkbox"/> <b>Site and Building Design Standards:</b> Building shall not incorporate materials that are reflective or mirrored (KZC 83.390.3). <i>The applicant has provided building elevation showing the proposed exterior building design. The materials do not appear to be reflective or mirrored. See Attachments 6 through 8.</i></p>

			<p><input checked="" type="checkbox"/> <b>Parking</b> (KZC 83.440.1 and 2.). Allows commercial parking lots but parking may not be primary use. Number of parking stalls shall meet Chapters 40 KZC (BNA zone) and Chapter 105 KZC (Parking Areas). <i>The applicant has provided a parking plan and parking calculations for each use. The Final EIS identifies a mitigating measure in Section 1.6 to reduce the number of on-site parking stalls to the minimum required in KZC 105.45 and/or 105.103. See Attachments 5, 9-11 and 25.</i></p> <p><input checked="" type="checkbox"/> <b>Screening of Storage and Service Areas, Mechanical Equipment and Garbage Receptacles</b> (KZC 83.450). This section contains standards for screening of storage areas, mechanical equipment and garbage receptacles from adjacent uses. <i>Garbage receptacles are shown to be located outside of the shoreland area and within the building. Roof top mechanical equipment has not been identified on the plans at this time. No storage or service area is shown on the plans within the shoreland area. See Attachments 11 and 13.</i></p> <p><input checked="" type="checkbox"/> <b>Lighting</b> (KZC 83.470). Standards for direction and shielding, light levels, height of light fixture and other standards are provided to minimize glare onto adjacent properties. <i>The SDP application does not require that an exterior lighting plan be submitted, but a plan will be required with the building permit submittal. The Final EIS, Section 1.6, identifies a mitigating measure of reducing light and glare impacts on adjacent uses during construction. See Attachment 25.</i></p> <p><input checked="" type="checkbox"/> <b>Water Quality, Stormwater and Nonpoint Pollution</b> (KZC 83.480). This section contains provisions for prevention, control and treatment to protect and maintain surface and/or ground water quantity and quality. <i>The applicant has provided a preliminary Stormwater Prevention and Pollution Plan and drainage and water quality report. See Attachments 22 and 23. The Final EIS has identified a mitigating measure in Section 1.6 requiring the hiring of a consultant to oversee compliance with the Department of Ecology's MTCA rules for remediation of contaminated soils and groundwater and following the Best Management Practices for remediation. See Attachment 25.</i></p>
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B. **Conclusions:**

1. The City's SDP application does not require details on lighting fixtures, building materials or screening of certain elements, or a final storm water plan. Therefore, with the building permit submittal, the applicant must show compliance with the following SMP requirements:
  - Exterior lighting fixtures for both the permanent fixtures and temporary construction lighting that minimizes glare onto adjacent properties for any portion of the development within the shoreland area
  - Building materials with no reflective or mirrored elements for any portion of the development within the shoreland area

- Roof-top mechanical equipment, garbage and recycling receptacles, and service storage areas, if any, screened from adjacent properties and the street for any portion of the development within the shoreland area
  - Storm water plan for the entire site with provisions for temporary erosion control measures, storm water detention, water quality treatment and storm water conveyance facilities for the entire development in accordance with the City's adopted Surface Water Design Manual
2. The SDP plans show compliance with the provisions in Chapter 83 KZC for maximum residential density, lot coverage and building height. With the building permit, the applicant must show the final calculations on the plans for:
- Maximum allowable density of 1800 square feet of land area per unit within the shoreland area
  - Lot coverage for either the portion within the shoreland area or the entire development not exceeding 80%
  - Building height not exceeding 30 feet above average building elevation within the shoreland area
3. With the building permit, the applicant should show a reduction in the number of on-site parking stalls to the minimum required for the proposed uses, pursuant to KZC 105.45 and/or 105.103 based on the parking analysis in the Final EIS, Section 3.4, pages 3-11 through 3-18. See Attachment 25.
4. To ensure compliance with the SMP's requirement to protect surface and ground water quality, the applicant should:
- a. Hire a consulting firm for the site cleanup that is qualified in site remediation and is certified by the State to remove underground storage tanks. This consulting firm should prepare a cleanup action plan prior to clean-up of the site, followed by a compliance report and any other documents once the remediation is completed. A building permit should not be issued, excluding a shoring permit related to site remediation, until the applicant has provided these documents to the City.
  - b. Sign a three party contract with the City and the City's designated consultant to pay the charges of that consultant to do peer review of the cleanup action plan and follow-up documents prepared by the applicant's consulting firm to ensure compliance.
  - c. Provide the City with a compliance report and other documentation affirmatively demonstrating that the cleanup complies with the Department of Ecology's rules for remediation and removal of underground storage tank prior to issuance of the building permit, but excluding a shoring permit for site remediation.
  - d. Make changes to the cleanup action plan and/or to the follow-up documentation after the clean-up work is completed if the City determines that they failed to show compliance with the Department of Ecology's rules.
  - e. Reflect the Best Management Practices identified in Chapter 1 of the Potala Village Final EIS in the site cleanup plan and the remediation work. See Attachment 25.

- f. Provide the City with a copy of the No Further Action opinion issued under the Voluntary Cleanup Program by the Department of Ecology once site cleanup is completed to confirm that the State requirements have been met.

## VI. PUBLIC NOTICE AND COMMENT

- A. The public comment period for this application was held from May 19, 2011, through June 20, 2011. The SDP decision is based on the same proposal that was on file when the comment period was held.
- B. Written comments were received before and during the comment period (see Attachments 27 through 56). Below is a summary of the comments that pertain to the Shoreline Substantial Development Permit. Also, following this summary, are some comments regarding issues and concerns that are not under the jurisdiction of the City's Shoreline Master Program and the State Shoreline Management Act.

### 1. Comments within the Scope of the SDP Application:

- a. *There was a lack of notice specific to this property during the City's SMP Update process for changing the property's shoreline designation from Urban Residential 1 to Urban Mixed.*

Staff response: The opportunity to comment on or appeal the shoreline designation for the property has passed.

The Department of Ecology approved the City's SMP Update on July 26, 2010. The appeal period for challenging the City's SMP Update ended on October 7, 2010. The Department of Ecology approved the City's public outreach and participation program for the SMP Update in the early phase of the update process. The public notice and outreach included three mailed notices of the update to all property owners within shoreland area and one mailed notice to property owners located within 200 feet from the boundary of the shoreland area, posted notices for all meetings over a five-year period on large public notice sign boards located in all of the City shoreline parks facing the adjacent street, notices to neighborhood associations, boat tour of the shoreline, a shoreline property owner's workshop, public open houses, meetings with individual property owners, study sessions and public hearings before the Planning Commission and Houghton Community Council, and study sessions and a final meeting before the City Council. The Department of Ecology held a public hearing after the City forwarded the draft SMP Update to the Department. Those that provided comments received a copy of the hearing notice.

- b. *The change in the shoreline environment designation for the property during the City's SMP Update process should have followed the City's Citizen Initiated Request process in Chapter 140 KZC. The change was a "spot zoning."*

Staff response: The opportunity to comment on or appeal the shoreline designation for the property has passed.

The update to the City's Shoreline Master Program was an area-wide City initiated change and not a citizen initiated request (also known as the City's Private Amendment Request process). The State mandated that the City change the shoreline environment designation for all shoreline properties to be consistent with the new State Guidelines of WAC 173-26-176. The change to this property was not a "spot zoning." Numerous properties within five areas in the City are designated as Urban Mixed.

- c. *The shoreline designation of Urban Mixed is not correct for the property.*

Staff response: The opportunity to comment on or appeal the shoreline designation for the property has passed.

The Department of Ecology approved the City's Shoreline Environment Designation Map based on a required summary document explaining how the City's draft SMP update meets the State Guidelines, the City's Shoreline Use Analysis and the City's 2006 Shoreline Analysis Report.

The City determined that the site was appropriate for an Urban Mixed designation because the site contains commercial uses, is zoned Neighborhood Business and is designated in the Kirkland Comprehensive Plan as Commercial. Thus, the long range "planning" for the property is either a mixed use development or a commercial development. Given the existing uses and potential redevelopment options for commercial or mixed use, a shoreline designation of Residential – Medium/High is not appropriate for the property.

- d. *Staff did not highlight the designation change for this property during the City Council's review of the City's SMP Update.*

Staff response: The opportunity to comment on or appeal the shoreline designation for the property has passed.

The City Council held several study sessions and a final adoption meeting on the SMP update. Each City Council member was provided a copy of the draft Shoreline Environment Designation Map and the proposed regulations, including a description of the Urban Mixed designation, during these meetings. The staff memos to the City Council highlighted key policy issues and provided general information on the update. The Urban Mixed shoreline designation reflected the existing commercial uses, zoning and Comprehensive Plan designation for this property so staff concluded that it did not rise to the level of a key policy issue to be discussed in detail in the staff memos. The designation meets KZC 83.140 for both the purpose of and designation criteria for the Urban Mixed designation.

- e. *The entire project should be subject to the Shoreline Substantial Development Permit.*

Staff response: Jurisdiction of the Shoreline Management Act (SMA) is within 200 feet of the ordinary high water mark of Lake Washington and wetlands associated with the Lake which are wetlands that drain into or have a biological connection with the Lake. Lands outside of this area do not fall under the SMA.

- f. *There has been no opportunity for public input on this project and the SDP permit has already been issued.*

Staff response:

Following public notice, a 30-day comment period was provided from May 19, 2011, through June 20, 2011. The SDP application was placed on hold on October 20, 2011, waiting for the applicant to sign the EIS contract and submit the funds for the contract budget. It is incorrect to state that the permit has already been issued. A decision was not made on the SDP previously. The City's decision to issue the shoreline Substantial Development Permit is contained in this document.

- g. *The project will impact private and public views and the view corridor to Lake Washington.*

Staff response: Protection of private or public views is not applicable to this property. KZC 83.410 requires that a public view corridor be provided from Lake Washington Blvd/Lake Street South to the Lake. This property is east of the right-of-way. RCW 90.58.320 requires consideration of view blockage of a substantial number of residences for structures over 35 feet in height above average building elevation. The proposed building will only be 30 feet above average building elevation.

- h. *There is insufficient on-site parking for the proposal.*

Staff response: The proposed development provides the number of parking stalls required under Chapter 40 KZC, Neighborhood Business zone, for the proposed commercial and residential uses along with guest parking. However, the parking analysis in the Final EIS (Section 3.4, pages 3-13 through 3-18) concludes that the proposal has more parking than is needed based on the proposed uses, type of mixed use development and location of the site. The Final EIS identifies a mitigating measure in Section 1.6 of reducing the number of proposed parking stalls to the minimum required to serve the uses. See Attachment 25.

- i. *Removal of vegetation will cause various impacts.*

Staff response: Chapter 83 KZC regulates trees and tree removal within the required shoreline setback, but not trees or other vegetation outside of the shoreline setback. This property does not have a required shoreline setback since it does not abut the Lake and the depth of the intervening land between the property and the Lake is greater than 80 feet. With the building permit, the project will be required to include landscaped buffers and street trees under the regulations of Chapters 95 and 110 KZC.

- j. *Glare from lights will impact the surrounding residential uses.*

Staff response: For the portion of the building within 200 feet of the ordinary high water mark of the Lake, the lighting standards in KZC 83.470 will apply. These provisions will result in the reduction of glare on adjacent properties. The Final EIS identifies a mitigating measure to reduce glare on adjacent properties during construction. This lighting mitigation is a condition of this SDP decision. In addition, with the building permit, the project will be required to meet the lighting standards in the regulations of KZC 115.85.

- k. *Unfiltered water will go into Lake Washington. Contamination from the soil on the property will impact the Lake.*

Staff response: The project will be required to meet KZC 83.480 for water quality, stormwater and nonpoint pollution. The site is separated from the Lake by a major arterial and existing development so runoff from the project will not go directly into the Lake. All runoff from the underground parking lot will drain into the sanitary sewer and be treated. Runoff from the roof will be tight lined to the storm drains and runoff from the rest of the site will be filtered through on-site landscaping before going into the storm drains. The contaminated soil and underground storage tanks will be removed under the Department of Ecology's MTCA rules for remediation.

- l. *There should be increased setbacks from a nearby stream and a native growth protection area.*

Staff response: The nearest mapped streams are approximately 302 feet to the north and approximately 1,353 feet to the south. Neither of these streams drains directly into Lake Washington. KZC 83.510 concerning streams in shoreland areas does not apply to this property.

## **2. Issues not within the Scope of SDP Review**

The issues contained in the summary of comments below are not within the scope of the SDP so they are not addressed further in this decision. However, these issues are addressed in the Environmental Checklist, the Potala Village Draft and Final Environmental Impact Statements or are regulated in the City's Zoning Code or Municipal Code:

- Validity of the residential density for the Neighborhood Business (BN) zone
- Consistency with Comprehensive Plan policies not in Shoreline Area Chapter, including the "Residential Market" designation
- Traffic, speeding and pedestrian and bicycle safety, width of sidewalk and project impacts on 10<sup>th</sup> Ave South and Lake Street South
- Parking layout, access into parking garage, residents using on-street parking, and charging for on-site parking
- Bulk, mass, size, scale and design of the building, lack of a requirement to meet the City's design guidelines under Chapter 142 KZC, building setbacks, visual impact of building from the street or adjacent properties
- Small size of the residential units that will result in low rent apartments which will lead to party noise, crime, reduced property values and other impacts
- Change in character of neighborhood and quality of life
- Incompatibility of the project with the surrounding neighborhood
- Proposed commercial uses that are not neighborhood-oriented
- Width of and improvements in landscaped buffers
- Hard surfaces that may impact natural water flow on property
- Pooling of water on east property line from the proposed retaining wall
- Blocking westerly daylight to the properties east of the site
- Impact of eagles who sit in trees near the site
- Having part of the site owned and part of the site leased
- Construction impacts of noise, dust, runoff, and damage to roads

## **VII. SUBSEQUENT MODIFICATIONS**

WAC 173-27-100 establishes the procedures and criteria under which the City may approve a revision to a permit issued under the Shoreline Management Act and the City's Shoreline Master Program.

## **VIII. LAPSE OF APPROVAL**

As established under WAC 173-27-090, construction or activity must commence within two (2) years from the date that the Department of Ecology receives the City's decision on the permit (referred to as the date of filing). The City may grant a one (1) year extension based on reasonable facts if a request for the extension has been filed before the expiration date and notice of the proposed extension is given to parties of record on the SDP and the Department of Ecology.

## **IX. ATTACHMENTS**

Attachments 1 through 26 are the project documents. The Transpo Group Transportation Analysis and the proposed landscape plan are not included as they are not subject to the SDP, but they are available in the Potala Village Official City File.

1. Vicinity Map
2. Aerial map of adjacent structures and intensities and physical characteristics
3. Survey - topographical and existing condition
4. Existing site features
5. Proposed site plan
6. Lake Street South building elevation
7. 10<sup>th</sup> Ave South building elevation
8. East building elevation
9. Basement Parking #1 Level Plan
10. Basement Parking #2 Level Plan
11. Commercial Ground Floor Plan
12. Residential 2nd Floor Plan
13. Residential 3rd Floor Plan
14. Residential 4th Floor Plan
15. Residential 5th Floor Plan
16. Cross Sections AA and BB
17. Cross Sections CC and DD
18. Cross Sections EE and FF
19. Shoreland density and lot coverage
20. Soil and groundwater assessment, dated October 15, 2010
21. Soil and groundwater sampling, dated February 27, 2008
22. Drainage and water quality report, dated November 15, 2010
23. Stormwater prevention and pollution plan, dated November 29, 2010
24. Shoreline Development Standards
25. Applicable Excerpts from the Potala Village Draft EIS, pp. 3.2-10 through 3.2-13, dated July 12, 2012, and Final EIS, dated November 2, 2012, (complete document is available in the City Official File and on the City's web page)
26. Letter of Completeness, dated May 11, 2011

Attachments 27 through 56 are written public comments received through the end of the comment period on June 20, 2011.

27. Atis Freimanis comments, dated 6/17/11 and 6/20/11
28. Brian Tucker comments, dated 3/23/11
29. Casey and Sam Silbert comments, dated 4/18/11
30. Chantelle Phillips comments dated 6/17/11
31. Charles Loomis comments, dated 3/24/11
32. Charlie and Shawn Greene comments, dated 6/17/11
33. Darlene Falk, comments, dated 4/10/11
34. Ginnie DeForest comments, dated 4/4/11 and 06/10/11
35. Hugh Levenson comments, dated 6/20/11
36. Jack Danforth comments, dated 4/13/11
37. Janelle and Nathan Brooling comments, dated 6/20/11
38. Judith and Steve Beto comments, dated 6/20/11
39. Karen Levenson comments, dated 4/10/11, 4/19/11, 4/22/11, 5/17/11, 6/2/11 and 6/20/11
40. Kirk Mathewson comments, dated 6/20/11
41. Laura and Charles Loomis comments, dated 6/16/11
42. Laura Loomis comments, dated 3/22/11, 3/24/11, 3/31/11 and 4/8/11
43. Lillo Way and Bill McNeill comments, dated 6/20/11

44. Maureen Kelly comments, dated 3/16/11 and 4/14/11
45. Michael Phillips comments, date 6/9/11
46. Michelle Sailor comments, dated 3/23/11
47. Mitka Gupta and Amit Fulay comments, dated 6/20/11
48. Neil Anderson comments, dated 6/20/11
49. Per Billgreen comments, dated 6/15/11
50. Randall Cohen comments, dated 6/20/11
51. Richard Satre comments, dated 3/24/11
52. Robin Herberger comments, dated 6/17/11
53. Sharon and Arlyn Nelson comments, dated 4/20/11 and 6/20/11
54. Stephen Cullen comments, dated 6/20/11
55. Thomas Grinn comments, dated 5/20/11
56. Web case comments from Charles Pilcher dated 6/16 and 6/18, 2011, Kathleen Dier dated 6/6/11 and 6/17/11, Larry Saltz dated 6/17/11

**X. PARTIES OF RECORD**

Applicant: Lobsang Dargey, Dargey Enterprises, PO Box 13261, Everett, WA 98201  
Atis Freimanis  
Brian Tucker  
Casey and Sam Silbert  
Chantelle Phillips  
Charles Loomis  
Charlie and Shawn Greene  
Chuck Pilcher  
Darlene Falk  
Ginnie DeForest  
Hugh Levenson  
Jack Danforth  
Janelle and Nathan Brooling  
Judith and Steve Beto  
Karen Levenson  
Kathleen Dier  
Kirk Mathewson  
Larry Saltz  
Laura Loomis  
Lillo Way and Bill McNeill  
Maureen Kelly  
Michael Phillips  
Michelle Sailor  
Mitka Gupta and Amit Fulay  
Neil Anderson  
Per Billgreen  
Randall Cohen  
Richard Satre  
Robin Herberger  
Sharon and Arlyn Nelson  
Stephen Cullen  
Thomas Grinn

City Department of Planning and Community Development  
City Department of Public Works  
City Department of Building and Fire Services

Department of Ecology and Muckleshoot Tribe

# APPENDIX 5

# Chapter 141 – SHORELINE ADMINISTRATION<sup>1</sup>

## Sections:

- 141.10 User Guide
- 141.20 Administrative Responsibilities in General
- 141.30 Review Required
- 141.40 Exemption from Permit Requirements
- 141.50 Pre-Submittal
- 141.60 Applications
- 141.70 Procedures
- 141.80 Enforcement Authority
- 141.90 Annexation

## **141.10 User Guide**

This chapter contains the provisions regarding the City's administration and enforcement of the Shoreline Management Act and Chapter 83 KZC, as well as the permit system applicable to the Shoreline Management Act and shoreline master program of the City.

## **141.20 Administrative Responsibilities in General**

Except as otherwise specifically established in this chapter or Chapter 83 KZC, the Department of Planning and Community Development of the City is responsible for the administration of the Shoreline Management Act and the shoreline master program of the City.

## **141.30 Review Required**

1. Within the shoreline jurisdiction, as described in KZC 83.90, development shall be allowed only as authorized in a shoreline substantial development permit, shoreline conditional use permit or shoreline variance permit, unless specifically exempted from obtaining such a permit under KZC 141.40.
2. Chapter 83 KZC specifies which permit is required. Enforcement action by the City or Department of Ecology may be taken whenever a person has violated any provision of the Shoreline Management Act or any City of Kirkland shoreline master program provision, or other regulation promulgated under the Shoreline Management Act. Procedures for enforcement action and penalties shall be as specified in WAC 173-27-240 through 173-27-310, which are hereby adopted by this reference.
3. Where a proposed development activity encompasses shoreline and non-shoreline areas, a shoreline substantial development permit or other required permit must be obtained before any part of the development, even the portion of the development activity that is entirely confined to the upland areas, can proceed.

## **141.40 Exemption from Permit Requirements**

1. General – Proposals identified under WAC 173-27-040 are exempt from obtaining a shoreline substantial development permit; however, a shoreline variance or shoreline conditional use may still be required. Proposals that are not permitted under the provisions of Chapter 83 KZC shall not be allowed under an exemption. Applicants shall have the burden to demonstrate that the proposal complies with the requirements for the exemption sought as described under WAC 173-27-040. A proposal that does

not qualify as an exemption may still apply for a shoreline substantial development permit.

2. Special Provisions – The following provides additional clarification on the application of the exemptions listed in WAC 173-27-040:

a. Residential Appurtenances

- 1) Normal appurtenances to a single-family residence, referred to in Chapter 83 KZC as a detached dwelling unit on one (1) lot, are included in the permit exemption provided in WAC 173-27-040(2)(g). For the purposes of interpreting this provision, normal appurtenances shall include those listed under WAC 173-14-040(2)(g) as well as tool sheds, greenhouses, swimming pools, spas, accessory dwelling units and other accessory structures common to a single-family residence located landward of the OHWM and the perimeter of a wetland.
- 2) Normal appurtenant structures to a single-family residence, referred to in Chapter 83 KZC as a detached dwelling unit on one (1) lot, are included in the permit exemption provided in WAC 173-27-040(2)(c) for structural and nonstructural shoreline stabilization measures. For the purposes of interpreting this provision, normal appurtenant shall be limited to the structures listed under WAC 173-14-040(2)(g).

b. Normal Maintenance or Repair of Existing Structures or Developments – Normal maintenance or repair of existing structures or developments, including some replacement of existing structures, is included in the permit exemption provided in WAC 173-27-040(2)(b). For the purposes of interpreting this provision, the following replacement activities shall not be considered a substantial development:

- 1) Replacement of an existing hard structural shoreline stabilization measure with a soft shoreline stabilization measure consistent with the provisions contained in KZC 83.300.
- 2) Replacement of pier or dock materials consistent with the provisions contained in KZC 83.270 through 83.290.

3. Authority – The Planning Official shall review the proposed development activity for compliance with the shoreline regulations contained in Chapter 83 KZC. All proposed uses and development occurring within shoreline jurisdiction must conform to Chapter 90.58 RCW, the Shoreline Management Act, and the provisions of Chapter 83 KZC, whether or not a permit is required.

4. Application

- a. As part of any request for a determination of exemption, the applicant shall show compliance with the regulations in Chapter 83 KZC by submitting an application on a form provided by the Planning Department. The application shall include all documents and exhibits listed on the application form. Alternatively, the applicant may use the joint aquatic resources permit application form and any other application forms deemed appropriate by the Planning Official. Applications may be deemed complete when required forms and attachments are provided consistent with a shoreline exemption development application checklist.
- b. The applicant shall identify whether the proposal requires an Army Corps of Engineers Section 10 or Section 404 approval. The Planning Official may waive the

application for any proposal that does not require an Army Corps of Engineers Section 10 or Section 404 approval. In these circumstances, the Planning Official shall conduct a review for compliance with the shoreline regulations contained in Chapter 83 KZC in conjunction with a related development permit.

5. Decision – The Planning Official may grant, deny, or conditionally approve the shoreline exemption request. The approval or conditional approval will become conditions of approval for any related development permit, and no development permit will be issued unless it is consistent with the shoreline exemption approval or conditional approval. A copy of the City's letter of exemption shall be filed with the Department of Ecology.
6. Appeal – Any person aggrieved by the Planning Official's determination on a shoreline exemption request may be appealed using, except as stated below, the applicable appeal provisions of Chapter 145 KZC. If a proposed development activity also requires approval through Process IIA or IIB (as described in Chapters 150 and 152 KZC, respectively), any appeal of a shoreline exemption request will be heard as part of that other process.
7. Lapse of Approval – The lapse of approval for the shoreline exemption approval shall be the same as the expiration date of the development permit and all conditions of the approval shall be included in the conditions of approval granted for that development permit. For a shoreline exemption that does not require a development permit, the expiration date shall be four (4) years from issuance of the exemption letter by the City.
8. Revisions to WAC 173-27-040 – With subsequent revisions to WAC 173-27-040, the Planning Director shall determine administratively whether a letter of exemption is required and, if so, issue the decision as an administrative interpretation under KZC 83.50.

### **141.50 Pre-Submittal**

1. General – Before applying for a permit or approval under this chapter, the applicant shall attend a pre-submittal meeting with the Planning Official consistent with the provisions of this section.
2. Scheduling – The Planning Department will arrange a time for the pre-submittal meeting as soon as is reasonably practicable after the meeting is requested by the applicant.
3. Purpose – The purpose of the pre-submittal meeting is for the Planning Official to provide information to the applicant regarding what information needs to be submitted for a complete application.
4. Time Limits – The City will not process an application under this chapter unless the applicant attended a pre-submittal meeting under this section, regarding the proposal for which application is made, within the six (6) months immediately prior to the date the application is submitted.

### **141.60 Applications**

1. Who May Apply – Any person may, personally or through an agent, apply for a decision regarding property he/she owns.
2. How to Apply – The applicant shall file the following information with the Planning Department:

- a. A complete application, with supporting affidavits, on forms provided by the Planning Department. Alternatively, the applicant may use the joint aquatic resources permit application form;
  - b. Any information or material that is specified in the provisions of Chapter 83 KZC; and
  - c. Any additional information or material that the Planning Official specifies at the pre-submittal meeting.
3. Fee – The applicant shall submit the fee established by ordinance with the application.

## **141.70 Procedures**

### **1. Substantial Development Permits**

#### **a. General**

- 1) Applications for a shoreline substantial development permit shall follow the procedures for a Process I permit review pursuant to Chapter 145 KZC, except as otherwise provided in this section.
- 2) If the proposal that requires a substantial development permit is part of a proposal that requires additional approval through Process IIA or Process IIB under Chapter 150 KZC or Chapter 152 KZC, respectively, the entire proposal will be decided upon using that other process.
- 3) If the proposal that requires a substantial development permit is part of a proposal that requires additional approval through the Design Review Board (DRB) under Chapter 142 KZC, the design review proceedings before the DRB shall be conducted in accordance with Chapter 142 KZC.

#### **b. Notice of Application and Comment Period**

- 1) In addition to the notice of application content established in Chapter 145 KZC, notice of applications for shoreline substantial development permits must also contain the information required under WAC 173-27-110.
- 2) The minimum notice of application comment period for shoreline substantial development permits shall be no fewer than 30 days. However, the minimum comment period for applications for shoreline substantial development permits for limited utility extensions and bulkheads, as described by WAC 173-27-120, shall be 20 days.

#### **c. Burden of Proof**

- 1) WAC 173-27-140 establishes general review criteria that must be met.
- 2) WAC 173-27-150 establishes that a substantial development permit may only be granted when the proposed development is consistent with all of the following:
  - a) The policies and procedures of the Shoreline Management Act;
  - b) The provisions of Chapter 173-27 WAC;
  - c) Chapter 83 KZC.

d. Decision

- 1) At the time of a final decision, the Planning Official shall mail a copy of the decision, staff advisory report and permit data transmittal sheet to the applicant and Department of Ecology, pursuant to RCW 90.58.140 and WAC 173-27-130. The permit decision shall be sent to the Department of Ecology by return receipt requested mail. The permit shall state that construction pursuant to a permit shall not begin or be authorized until 21 days from the date that the Department of Ecology received the permit decision from the City as provided in RCW 90.58.140; or until all review proceedings are terminated if the proceedings were initiated within 21 days from the date of filing as defined in RCW 90.58.140. "Date of filing" is the date that the Department of Ecology received the City's permit decision. The Department of Ecology must notify the City and the applicant of the actual date of filing.
- 2) When the City issues a permit decision on a substantial development permit along with a shoreline conditional use permit and/or a shoreline variance, the date of filing is the postmarked date that the City mails the permit decision to the Department of Ecology.
- 3) An appeal of a shoreline substantial development permit shall be to the State Shorelines Hearings Board and shall be filed within 21 days of the date of filing of the City's permit decision to the Department of Ecology as set forth in RCW 90.58.180.

e. Effect of Decision – For shoreline substantial development permits, no final action or construction shall be taken until the termination of all review proceedings initiated within 21 days after the filing date which is the date that the Department of Ecology received the permit decision from the City or unless otherwise noted in this section.

f. Complete Compliance Required

- 1) General – Except as specified in subsection (2) of this section, the applicant must comply with all aspects, including conditions and restrictions, of an approval granted under this chapter authorized by that approval.
- 2) Exception – Subsequent Modification – WAC 173-27-100 establishes the procedure and criteria under which the City may approve a revision to a permit issued under the Shoreline Management Act and the shoreline master program.

g. Time Limits – Construction and activities authorized by a shoreline substantial development permit are subject to the time limitations of WAC 173-27-090.

2. Conditional Use Permits

a. General – Applications for a shoreline conditional use permit shall follow the procedures for a Process IIA permit review pursuant to Chapter 150 KZC, except as otherwise provided in this section. If the proposal that requires a conditional use permit is part of a proposal that requires additional approval through a Process IIB, the entire proposal will be decided upon using that process.

b. Notice of Application and Comment Period

- 1) In addition to the notice of application content established in Chapter 150 KZC, notice of applications for shoreline conditional use permits must also contain the information required under WAC 173-27-110.
  - 2) The minimum notice of application comment period for shoreline conditional use permits shall be no fewer than 30 days.
- c. Notice of Hearing – The Planning Official shall distribute notice of the public hearing at least 15 calendar days before the public hearing.
- d. Burden of Proof
- 1) WAC 173-27-140 establishes general review criteria that must be met.
  - 2) WAC 173-27-160 establishes criteria that must be met for a conditional use permit to be granted.
  - 3) In addition, the City will not issue a conditional use permit for a use which is not listed as allowable in the shoreline master program unless the applicant can demonstrate that the proposed use has impacts on nearby uses and the environment essentially the same as the impacts that would result from a use allowed by the shoreline master program in that shoreline environment.
- e. Decision
- 1) Once the City has approved a conditional use permit it will be forwarded to the State Department of Ecology for its review and approval/disapproval jurisdiction under WAC 173-27-200.
  - 2) The permit shall state that construction pursuant to a permit shall not begin or be authorized until 21 days from the date that the Department of Ecology transmits its decision as provided in Chapter 173-200 WAC; or until all review proceedings are terminated if the proceedings were initiated within 21 days from the filing date as defined in RCW 90.58.140.
  - 3) Appeals of a shoreline conditional use permit shall be to the State Shoreline Hearings Board and shall be filed within 21 days of the filing date which is the postmarked date that the City mailed the permit decision to the Department of Ecology, as set forth in RCW 90.58.180.
- f. Effect of Decision – For shoreline conditional use permits, no final action or construction shall be taken until the termination of all review proceedings initiated within 21 days from the date Department of Ecology transmits its decision on the shoreline conditional use permit.
- g. Complete Compliance Required
- 1) General – Except as specified in subsection (2)(g)(2) of this section, the applicant must comply with all aspects, including conditions and restrictions, of an approval granted under this chapter in order to do everything authorized by that approval.
  - 2) Exception – Subsequent Modification – WAC 173-27-100 establishes the procedure and criteria under which the City may approve a revision to a permit issued under the Shoreline Management Act and this chapter.

- h. Time Limits – Construction and activities authorized by a shoreline conditional use permit are subject to the time limitations under WAC 173-27-090.

### 3. Variances

- a. General – Applications for a shoreline variance permit shall follow the procedures for a Process IIA permit review pursuant to Chapter 150 KZC, except as otherwise provided in this section. If the proposal that requires a shoreline variance is part of a proposal that requires additional approval through a Process IIB, the entire proposal will be decided upon using that other process.
- b. Notice of Application and Comment Period
  - 1) In addition to the notice of application content established in Chapter 150 KZC, notice of applications for shoreline variance permits must also contain the information required under WAC 173-27-110.
  - 2) The minimum notice of application comment period for shoreline variance permits shall be no fewer than 30 days.
- c. Notice of Hearing – The Planning Official shall distribute notice of the public hearing at least 15 calendar days before the public hearing.
- d. Burden of Proof
  - 1) WAC 173-27-140 establishes general review criteria that must be met.
  - 2) WAC 173-27-170 establishes criteria that must be met for a variance permit to be granted.
- e. Decision
  - 1) Approval by Department of Ecology. Once the City has approved a variance permit it will be forwarded to the State Department of Ecology for its review and approval/disapproval jurisdiction under WAC 173-27-200.
  - 2) The permit shall state that construction pursuant to a permit shall not begin or be authorized until 21 days from the date that the Department of Ecology transmits its decision as provided in WAC 173-27-200; or until all review proceedings are terminated if the proceedings were initiated within 21 days from the filing date as defined in RCW 90.58.140.
  - 3) Appeals of a shoreline variance permit shall be to the State Shoreline Hearings Board and shall be filed within 21 days of the filing date which is the postmarked date that the City mailed the permit decision to the Department of Ecology, as set forth in RCW 90.58.180.
- f. Effect of Decision – For shoreline variance permits, no final action or construction shall be taken until the termination of all review proceedings initiated within 21 days from the date the Department of Ecology transmits its decision on the shoreline variance permit.
- g. Complete Compliance Required

- 1) General – Except as specified in subsection (2) of this section, the applicant must comply with all aspects, including conditions and restrictions, of an approval granted under this chapter as authorized by that approval.
  - 2) Exception – Subsequent Modification – WAC 173-27-100 establishes the procedure and criteria under which the City may approve a revision to a permit issued under the Shoreline Management Act and the shoreline master program.
- h. Time Limits – Construction and activities authorized by a shoreline variance permit are subject to the time limitations under WAC 173-27-090.

#### 4. Request for Relief from Standards

- a. General – When shoreline stabilization measures intended to improve ecological functions result in shifting the OHWM landward of the pre-modification location, the City may propose to grant relief from additional or more restrictive standards and use regulations resulting from the shift in OHWM, such as but not limited to an increase in shoreline jurisdiction, shoreline setbacks, or lot coverage.
- b. Burden of Proof – Relief may be granted when:
  - 1) The proposed relief is the minimum necessary to relieve the hardship;
  - 2) The restoration project will result in a net environmental benefit; and
  - 3) The proposed relief is consistent with the objectives of the City's restoration plan and shoreline master program.
- c. Decision – Approval by Department of Ecology – Once the City has approved a permit it will be forwarded to the State Department of Ecology for its review and approval/disapproval. The application review must occur during the Department of Ecology's normal review of a shoreline substantial development permit, conditional use permit, or variance. If a permit is not required for the restoration project, the City shall submit separate application and necessary supporting information to the Department of Ecology.

### **141.80 Enforcement Authority**

Chapter 173-27 WAC contains enforcement regulations, including authority for the City to issue regulatory orders to enforce the Shoreline Management Act and the shoreline master program. In addition, the City shall have any and all other powers and authority granted to or devolving upon municipal corporations to enforce ordinances, resolutions, regulations, and other laws within its territorial limits. Upon determination that there has been a violation of any provision of the City's shoreline regulations, the City may pursue code enforcement and penalties in accordance with the provisions of the KMC.

### **141.90 Annexation**

The City may adopt shoreline environment pre-designations for shorelines located outside of city limits but within the urban growth area. In the event of annexation of a shoreline not pre-designated in the shoreline master program, the City shall develop or amend shoreline policies and regulations to include the annexed area. The policies and regulations for annexed areas shall be consistent with Chapter 90.58 RCW and Chapter 173-26 WAC and shall be submitted to the Department of Ecology for approval.

Department of Ecology approval: 7/26/10.

# APPENDIX 6

# KIRKLAND ZONING CODE

## Chapter 5 – DEFINITIONS

Sections:

5.05 User Guide

5.10 Definitions

### 5.05 User Guide

The definitions in this chapter apply for this code. Also see definitions contained in Chapter 83 KZC for shoreline management, Chapter 90 KZC for drainage basins, Chapter 95 KZC for tree management and required landscaping, and Chapter 113 KZC for cottage, carriage and two/three-unit homes that are applicable to those chapters.

### 5.10 Definitions

The following definitions apply throughout this code unless, from the context, another meaning is clearly intended:

\* \* \*

#### .210 Development Activity

– Any work, condition or activity which requires a permit or approval under this code or KMC Title 21, Buildings and Construction.

#### .215 Development Permit

– Any permit or approval under this code or KMC Title 21, Buildings and Construction, that must be issued before initiating a use or development activity.<sup>1</sup>

<sup>1</sup> - Code reviser's note: The Uniform Building Code reference formerly in this section has been updated to be to KMC Title 21, Buildings and Construction, pursuant to the intent of Ordinance O-4408.

# APPENDIX 7

# KIRKLAND ZONING CODE

## Chapter 83 – SHORELINE MANAGEMENT<sup>1</sup>

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### Authority and Purpose

#### **83.10 Authority**

This chapter is adopted as part of the Shoreline Master Program for the City. It is adopted under the authority of Chapter 90.58 RCW and Chapter 173-26 WAC.

#### **83.20 Applicability**

1. The requirements of this chapter apply to uses, activities and development within shorelines jurisdiction.
2. Designation – The waters of Lake Washington and shorelands associated with Lake Washington are designated as shorelines of statewide significance.
3. Shorelines Jurisdiction
  - a. The provisions of this chapter shall apply to all shorelines of the state, all shorelines of statewide significance, and shorelands.
  - b. Lake Washington, its underlying land, associated wetlands, and those lands extending landward 200 feet from its OHWM are within shorelines jurisdiction.
  - c. Shorelines jurisdiction does not include buffer areas for wetlands or streams that occur within shorelines jurisdiction, except those buffers contained within lands extending landward 200 feet from the OHWM of Lake Washington.

#### **83.30 Purpose and Intent**

It is the intent of the Kirkland Shoreline Master Program (SMP) to manage the use and development of the shorelines of Kirkland, giving preference to water-dependent and water-related uses, and encouraging shoreline development and uses to avoid, minimize and mitigate impacts. In addition, the SMP, consisting of this chapter, the Shoreline Area chapter of the Comprehensive Plan and the Restoration Plan, has the following purposes:

1. Enable current and future generations to enjoy an attractive, healthy and safe waterfront.
2. Protect the quality of water and shoreline natural resources to preserve fish and wildlife and their habitats.
3. Protect the City's investments as well as those of property owners along and near the shoreline.
4. Efficiently achieve the SMP mandates of the state.
5. In interpreting the provisions of this chapter, preference shall be given in the following order to uses that:
  - a. Recognize and protect the statewide interest over local interest;
  - b. Preserve existing natural areas along the shoreline;
  - c. Result in long-term over short-term benefit;
  - d. Protect the resources and ecology of the shoreline;
  - e. Increase public access to publicly owned areas of the shorelines;
  - f. Increase recreational opportunities for the public in the shoreline; and
  - g. Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

#### **83.40 Relationship to Other Codes and Ordinances**

1. The shoreline regulations contained in this chapter shall apply as an overlay and in addition to zoning, land use regulations, development regulations, and other regulations established by the City.
2. In the event of any conflict between these regulations and any other regulations of the City, the regulations that provide greater protection of the shoreline natural environment and aquatic habitat shall prevail.
3. Shoreline Master Program policies, found in the Shoreline Area chapter of the City's Comprehensive Plan, establish intent for the shoreline regulations.

#### **83.50 Interpretation**

1. General – The Planning Director may issue interpretations of any provisions of this chapter as necessary to administer the Shoreline Master Program policies and regulations. The Director shall base his/her interpretations on:
  - a. The defined or common meaning of the words of the provision; and
  - b. The general purpose of the provision as expressed in the provision; and
  - c. The logical or likely meaning of the provision viewed in relation to the Washington State Shoreline Management Act (the Act), including the purpose and intent as expressed in Chapter 90.58 RCW and the applicable guidelines as contained in Chapter 173-26 WAC, and the shoreline chapter of the Comprehensive Plan.

Any formal written interpretations of shoreline policies or regulations shall be submitted to the Department of Ecology for review.

2. Effect – An interpretation of this chapter will be enforced as if it is part of this code.
3. Availability – All interpretations of this chapter, filed sequentially, are available for public inspection and copying in the Planning Department during regular business hours. The Planning Official shall also make appropriate references in this code to these interpretations.

## 83.60 Liberal Construction

As provided for in RCW 90.58.900, the Shoreline Management Act is exempted from the rule of strict construction; the Act and this chapter shall therefore be liberally construed to give full effect to the purposes, goals, objectives, and policies for which the Act and this chapter were enacted and adopted, respectively.

## 83.70 Severability

1. The standards, procedures, and requirements of this chapter are the minimum necessary to promote the health, safety, and welfare of the residents of Kirkland. The City is free to adopt more rigorous or different standards, procedures, and requirements whenever this becomes necessary.
2. The Act and this chapter adopted pursuant thereto comprise the basic state and City law regulating use of shorelines. In the event provisions of this chapter conflict with other applicable City policies or regulations, the more restrictive shall prevail. Should any section or provision of this chapter be declared invalid, such decision shall not affect the validity of this chapter as a whole.

### Definitions

## 83.80 Definitions

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29. Development – A use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature that interferes with the normal public use of the surface of the waters overlying lands subject to Chapter 90.58 RCW at any state of water level.

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78. Ordinary High Water (OHW) Line – The OHW line is at an elevation of 21.8 feet for Lake Washington.
79. Ordinary High Water Mark (OHWM) – The mark that will be found on all lakes and streams by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation, as that condition exists on June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department; provided, that in any area where the OHWM cannot be found, the OHWM adjoining fresh water shall be the line of mean high water, or as amended by the state. For Lake Washington, the OHWM corresponds with a lake elevation of 18.5 feet, based on the NAVD 88 datum.

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106. Shorelands – Those lands extending landward for 200 feet in all directions as measured on a horizontal plane from the OHWM; floodways and contiguous floodplain areas landward 200 feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters that are subject to the provisions of the Shoreline Management Act; the same to be designated as to location by the Department of Ecology.

107. Shoreland Areas – See “Shorelands.”

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113. Shorelines – All of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them: except (a) shorelines of statewide significance; (b) shorelines on segments of streams upstream of a point where the mean annual flow is 20 cubic feet per second or less and the wetlands associated with such upstream segments; and (c) shorelines on lakes less than 20 acres in size and wetlands associated with such small lakes.

114. Shorelines of Statewide Significance – Those lakes, whether natural, artificial, or a combination thereof, with a surface acreage of 1,000 acres or more measured at the OHWM and those natural rivers or segments thereof where the mean annual flow is measured at 1,000 cubic feet per second or more. Definition is limited to freshwater areas in Western Washington.

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124. Substantial Development – As defined in the Washington State Shoreline Management Act (SMA) found in Chapter 90.58 RCW, and WAC 173-27-030 and 173-27-040.