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Vested Rights – Now You Have Them, Now You Don't

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The vested rights doctrine in Washington has long provided developers a measure of certainty that the regulations in place at the time of their permit application would apply to the development even if subsequent regulations were adopted. At least that was the intent. Several court decisions recently declared that the common law vesting doctrine "is now statutory," thereby limiting both the types of development applications that vest under state law and the regulations to which they vest. These judicial attempts to "reconcile" the doctrine with 25-year old legislative enactments leave vesting in doubt for most pre-building permit development applications.

Washington's vested rights doctrine originated in the courts during the 1950s.[1] The "date certain" standard initially vested development to the land use regulations in effect at the time of a complete building permit application.[2] Courts subsequently extended the vested rights doctrine to other permit applications including: conditional use permits, grading permits, shoreline substantial development permits, and septic tank permits.[3] At times, the courts declined to extend vested rights for site-specific rezones, preliminary subdivisions, preliminary site plans, and binding site plans.[4]

In 1987, the Legislature codified the vested rights doctrine for building permits[5] and subdivisions,[6] stating that each would be considered under the "zoning or other land use control ordinances in effect" at the time of application. The Legislature had previously allowed vesting only for long plats (subdivisions of five or more lots) at the time of certain approvals by the local jurisdiction for a period of five years following approval of the final plat.[7] In 1995, the Legislature extended vested rights to

[1] *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 172-73 (2014) (citing *Hull v. Hunt*, 53 Wn.2d 125 (1958); *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492 (1954)).

[2] *Noble Manor v. Pierce County*, 133 Wn.2d 269, 275 (1997).

[3] *Beach v. Board of Adjustment*, 73 Wn.2d 343, 347 (1968) and *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883 (1999) (conditional use); *Juanita Bay Valley Comm'ty Ass'n v. Kirkland*, 9 Wn. App. 59, 84, *review denied*, 83 Wn.2d 1002 (1973) (grading); *Talbot v. Gray*, 11 Wn. App. 807, 811 (1974) (shoreline substantial development); *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709 (1977) (septic tank).

[4] *Teed v. King County*, 36 Wn.App. 635 (1984) (rezone); *Norco v. Construction Inc. v. King County*, 97 Wn.2d 680 (1982) (subdivision); *Burley Lagoon Improvement Ass'n v. Pierce County*, 38 Wn.App. 534 (1984) (subdivision and site plan); *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621 (1987) (binding site plan).

[5] RCW 19.27.095(1) ("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.")

[6] RCW 58.17.033(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.")

[7] Former RCW 58.17.170, which read in relevant part, "A subdivision shall be governed by the terms of approval of the final plat, and the statutes, ordinances, and regulations in effect at the time of approval under RCW 58.17.150 (1) and (3) 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.

development agreements.[8] Notwithstanding these enactments, the lower courts continued to recognize common law vesting principles and application.[9]

Through 2014, the Supreme Court provided limited guidance concerning the relationship between the common law and codified vesting doctrines. In *Erickson & Assocs. v. McLerran*[10] and *Abbey Road Group, LLC v. City of Bonney Lake*,[11] the Court declined to extend vested rights to master use permits and site plans, respectively. Both held that in the absence of a local vesting ordinance, only building permits broadly vest under state law to all "land use controls and ordinances" in effect. Then in *Town of Woodway v. Snohomish County*, the Supreme Court briefly described the vested rights doctrine as follows: "While it originated at common law, the vested rights doctrine is now statutory."[12]

Two courts recently seized upon this dicta from *Town of Woodway* to conclude that the Legislature's 1987 enactments preempt the common law vested rights doctrine that previously extended to a wider range of permits. In *Potala Village v. City of Kirkland*,[13] Division 1 of the Court of Appeals held that a shoreline permit required for part of a project did not vest the entire development to zoning regulations in effect at the time of the shoreline application. Despite earlier case law holding that a shoreline permit application insulated development against changes to zoning regulations, *Potala Village* concluded that only a building permit application now does so under state law.[14]

In *Alliance Investment Group v. City of Ellensburg*, Division 3 of the Court of Appeals relied on this same principle to narrow the scope of vesting for subdivision applications.[15] The developer argued that an approved short plat for a business park reviewed under a prior version of the city's critical area regulations vested future development within the plat to those earlier regulations. The developer relied on the Supreme Court's decision in *Noble Manor v. Pierce County*, issued long after the Legislature codified vested rights for subdivisions, which held that a short plat application vests rights both to subdivide and to develop or use property as identified in the application under the laws as they exist at the time.[16] Rejecting the developer's argument, *Alliance Investment Group* distinguished *Noble Manor* as limiting vesting under a subdivision application to zoning laws at "a very general level."[17] Without a building permit application, subdivisions do not vest future development within the plat to all "other land use control ordinances" in effect at time of application. A subdivision application only vests the right to subdivide under the current land use code.

While *Potala Village* and *Alliance Investment Group* limit their holdings to the types of land use approvals before the court, it is only safe to conclude that building permit applications, approved long plats, and development agreements vest broad development rights under the land use code in effect. Moreover, these cases leave significant doubt as to vesting at the individual permit level outside of building permits and subdivisions. *Potala Village* did not address whether the shoreline application at issue vested against changes to the shoreline master program. In the absence of a local ordinance that specifies vesting for

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[8] RCW 36.70B.170(1) ("A development agreement must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement.)

[9] *See, e.g., Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 892 (1999) (conditional use permit); *Schneider Homes v. City of Kent*, 87 Wn. App. 774, 779 (1997) (PUD, combined with a preliminary plat); *Thurston County Rental Owners v. Thurston County*, 85 Wn.App. 171 (1997) (septic tank permits).

[10] 123 Wn.2d 864 (1994).

[11] 167 Wn.2d 242 (2009).

[12] 180 Wn.2d 165, 173 (2014). The Court in *Town of Woodway v. Snohomish County* addressed whether vested rights under a group of development permit applications (including a building permit and subdivision) could be superseded by a later determination that the comprehensive plan designation and zoning on the property failed to comply with SEPA. This case did not implicate the relationship between the common law vested rights doctrine and the vested rights statutory provisions for building permits, subdivisions, and development agreements.

[13] 183 Wn.App. 191 (2014).

[14] *Id.* at 209 (citing *Talbot v. Gray*, 11 Wn.App. 807 (1974)).

[15] __ Wn.App. __, No. 32370–6–III, 2015 WL 5022916 (Aug. 25, 2015).

[16] *Noble Manor v. Pierce County*, 133 Wn.2d 269, 283 (1997).

[17] __ Wn.App. __, 2015 WL 5022916 at *5.

other types of permits,[18] permit applications may be subject to change in the regulations governing that application adopted prior to approval of the permit.

These recent decisions also instruct that only the Legislature can extend (or re-establish) vesting for other types of permit application under state law and clarify the regulations to which an application will vest. During the 2015 legislative session, proposals to clarify the vested rights doctrine in the aftermath of *Potala Village* fell short. Nevertheless, state and local officials and the development community are likely to convene in an effort to compromise on a bill for the upcoming 2016 session to provide better legislative guidance on vesting.

Until the Legislature enacts further changes to vesting under state law, developers should heed the following when evaluate potential vesting for a project:

1. Carefully review the local code to determine whether the jurisdiction has a vesting ordinance applicable to the specific permits and regulations to which the development requires.

2. In the absence of local vesting, only a subdivision application or a building permit application will vest that approval to the code in effect at the time of the application. A development agreement should also vest the proposal as specified under the terms of the agreement.

    - Short plats: *Alliance Investment Group* instructs that a short plat application will only vest the right to subdivide and to the uses specified on the face of the plat in a very general zoning sense.

    - Long plats: Long plats vest to the statutes, ordinances, and regulations in effect at the time of plat approval by the local health department and the local municipal engineer. Vesting lasts for a period of five to ten years, depending on when the plat was approved, after final plat approval.[19]

    - Building permits: Only building permit applications vest future development to all land use regulations in effect at the time of the application.

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[18] Division 2 of the Court of Appeals is currently reviewing a parallel legal issue that could limit the effect of local vesting ordinances. *Snohomish County, et al., v. Pollution Control Hearings Board, et al.*, Case No. 43784-4. The appeal asks whether vesting provisions in the Department of Ecology's National Pollutant Discharge and Elimination System (NPDES) Phase I municipal stormwater permit regulations trump local vesting ordinances.

[19] RCW 58.17.170(3)