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LAND USE CASE LAW UPDATE

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About your Speaker

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Summer Fun (& water rights)

What's Ahead

1. Following Up on Vested Rights – *Potala*
2. Signs and Vested Rights – *Total Outdoor v. Seattle*
3. Water Rights – *Whatcom County v. WWGMHB*
4. It's Fair! – *Durland v. San Juan County*
5. Arbitration Clauses – *Naumes v. City of Chelan*

Potala Village Kirkland LLC v. City of Kirkland, 334 P.3d 1143 (2014)

The End of Common Law Vested Rights?

Facts:

- Potala Village seeks mixed-use project in the Neighborhood Business ("BN") Zone of the City.
- Small portion of project is in shoreline jurisdiction, so applicant files a complete application for shoreline substantial development permit.
- Neighbors upset over residential density so Council adopts moratorium after filing of shoreline permit..
- While moratorium in place, Council amends BN density regulations and number of units allowed for mixed use project are reduced from the requested 143 to 60.

Issue:

Does the Vested Rights Doctrine apply to shoreline substantial development permits?

Ruling

Shoreline substantial development permit applications no longer confer vested rights. Vested rights are set by the legislature.

Potala Village Kirkland LLC v. City of Kirkland, ____ P.3d _____ (2014)

The End of Common Law Vested Rights?

Potala Declines to Continue to Apply Vested Rights Doctrine to Shoreline Permits Because not Based on Statute:

"[w]hile it [vested rights doctrine] originated at common law, ***the vested rights doctrine is now statutory.***"

"....the legislature intended that the vested rights doctrine would not extend to such [shoreline] permits."

Current Vesting Status of Permits

It's Vested!: Subdivisions and Building Permits (by state law in 1987)

It's Not Vested!: Shoreline Permits (Potala); site plans (Bonney Lake); master use permits (Erickson).

It at least Used to Be Vested! (but probably not anymore): Conditional use permits, shoreline permits, grading permits and septic permits.

?! (but probably not): All other permits.

What Do You Vest To?

RCW 19.27.095:

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.**

HB 1391

RCW 19.27.095:

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. In accordance with RCW 4.04.010, neither this subsection (1) nor any other statutory codification of the vested rights doctrine limits the common law interpretation and application of such doctrine.

ESB 5921 – AWB Bill

An application for a binding site plan, planned unit development, conditional or special use permit, shoreline substantial development permit, site plan review, or a permit or approval required for development pursuant to local critical area ordinances, shall be considered under those zoning and land use control ordinances in effect at the time of a submittal of a complete application as defined in RCW 36.70B.070; however, such protection shall only extend to those zoning and land use control ordinances that the approval authority is required to consider in reviewing the application for the underlying permit, review, or approval, inclusive of any review that may be required under the state environmental policy act, chapter 43.21C RCW. Further, such protection shall no longer be in effect if: (1) the application for permit, review, or approval expires as provided for by local ordinance; or (2) if once issued, the permit, review, or approval is allowed to expire as provided for by local ordinance. Nothing in this section shall alter or modify the provisions of RCW 58.17.033 or RCW 19.27.095 pertaining to subdivisions and building permits."

What to Do?

Prior decision authorizes cities to add to vested rights created by legislature and/or common law.

To lessen confusion, cities and counties may want to consider regulations that specify what permits are subject to vesting. Critical area and shoreline vesting are timely issues.

Vesting ordinance should be very clear about what regulations vest, i.e. would shoreline regulations vest you to zoning regulations, etc.

Core Issues:

1. Predictability
2. Fairness
3. Control

Speaking of Vested Rights

If someone built a legal sign 20 years ago that was 1000 square feet in size, then rebuilt it to 500 square feet ten years ago, can they claim they're grandfathered to the 1000 square foot size if regulations today limit sign size to 500 square feet?

Speaking of Vested Rights

Facts:

In 1926, the city of Seattle (City) issued a permit to build an illuminated rooftop sign atop the Centennial Building in downtown Seattle. The size and content of the sign was changed several times over the years.

In 1974, the City adopted an ordinance prohibiting all rooftop signs in the downtown zone from exceeding 30 feet above the roofline or nearest parapet.

In 1975, the sign face was changed to a 26 foot by 60 foot display surface, used to advertise Alaska Airlines. The 1975 permit reflects the sign frame was lowered to 30 feet "to make it conforming to exist[ing] sign code."

Effective October 24, 1975, the City prohibited any rooftop signs in the downtown zone.

Total Outdoor Corp. v. City of Seattle Planning and Development (Court of Appeals, 70957-7-I)

Facts:

- In 1981, Seattle issues a permit authorizing the installation of new sign components in place of the 26 foot by 60 foot Alaska Airlines sign face.
- The 1981 permit is the most recent permit for the rooftop sign.
- The 1981 permit allows a 5 foot by 54.5 foot Cameras West name and logo to be mounted at the top of the sign frame.
- A sketch attached to the 1981 permit depicts the top of the sign frame and the top of the Cameras West name and logo portion of the sign face both at 30 feet above the "roofline."
- In 2011 Total Outdoor subsequently replaced the Camera West content with a holiday greeting and replaced the sign frame with a new 20x60 foot display surface without obtaining a permit.
- The sign frame was 34 feet above the roof line.
- Seattle issues a stop work order.

Facts:

- Total Outdoor claims it had made a piece for piece replacement of rusted steel members and that the new frame was exactly the same size as before demolition.
- Photos taken during the recent construction suggested that a completed section of the new frame on one edge of the sign frame matches up with the height of a section of the old frame on the other edge of the sign frame.
- No precise "before" measurements were available and the photos do not include a precise frame of reference
- Seattle acknowledged that the new sign might have been the same size, but since Total Outdoor had removed the sign without a permit the exact dimensions of the previous sign were unknown.
- Seattle determines the dimensions depicted in the 1981 permit were the dimensions of the sign prior to replacement.

Total Outdoor Corp. v. City of Seattle Planning and Development (Court of Appeals, 70957-7-I)

Primary factual issue is whether sign was same size as prior dismantled sign.

Review Standard:

Under the "substantial evidence" standard, relief is warranted if the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court.

The Court considers all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.

This process entails acceptance of the fact finder's views regarding the weight to be given reasonable but competing inferences.

The Court must determine whether the record contains a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.

Court agrees with Seattle, sign is larger and taller than before:

Because the work completed under the 1981 permit received a final inspection and approval, the Department is allowed the reasonable inference that the work would not have been approved unless it complied with the dimensions depicted in the 1981 permit and sketch—a total height of 30 feet above the roofline.

2012 Photos were not determinative because no precise "before" measurements were taken and the photos do not include a precise frame of reference.

Even accepting that the photos may support a competing inference that the new sign frame is the same size as the sign frame it replaced, the Department was entitled to give greater weight to the competing reasonable inference arising from the final inspection and approval of the work completed under the 1981 permit.

Keep in mind….

Deference great for Cities and Counties, but only applies to highest fact finder.

City and County legislative body conducting closed record review is not highest fact finder.

Total Outdoor Corp. v. City of Seattle Planning and Development (Court of Appeals, 70957-7-I)

Right to Replace Nonconforming Structure:

SMC 23.42.112(A): "*A structure nonconforming to development standards may be maintained, renovated, repaired or structurally altered but may not be expanded or extended in any manner that increases the extent of nonconformity or creates additional nonconformity [with exceptions that do not apply here]*"

Total Outdoor tried to argue that it was "repairing" the sign back to the size it was in 1975. Court disagrees:

A repair of the corroded steel lattice frame could include a piece-for-piece replacement of corroded steel components but does not encompass rebuilding to dimensions larger than those permitted and approved by the Department in 1981. The sign face's size is also limited to the 1981 dimensions. Total Outdoor may not rebuild the sign frame or the sign face to the pre–1981 dimensions.

Total Outdoor Corp. v. City of Seattle Planning and Development (Court of Appeals, 70957-7-I)

Outdoor Corp Argues it Never Abandoned Grandfathered Rights to Larger signs, despite fact size of sign had been reduced over several decades.

Court analysis:

"Washington's common law abandonment doctrine applies to nonconforming uses. Specifically, the right to engage in a legal nonconforming use may be lost by abandonment or discontinuance, ***but a party so claiming has a heavy burden of proof.*** *Abandonment or discontinuance depends on two factors: (a) an intention to abandon; and (b) an overt act, or failure to act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use." (emphasis added)*

Court rules that abandonment doctrine doesn't save Total Outdoor, because it only applies to nonconforming uses, not nonconforming structures.

Whatcom Prequel – Kittitas County v. EWGMHB (2011)

Hearing Board petitioners present evidence on water shortages and "daisy-chaining" subdivisions.

Petitioners argue that because of this County should require disclosure of adjoining subdivision applications so County can prohibit "daisy-chaining".

Hearing Board finds duty to protect water resources and finds failure to require disclosure violates GMA because regulations "*allowed multiple subdivisions side by side, in common ownership, which then use multiple exempt wells*"

State Supreme Court upholds Board decision, rules GMA "*to at least require that the County's subdivision regulations conform to statutory requirements by not permitting subdivision applications that effectively evade compliance with water permitting requirements*."

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

FACTS: Whatcom County adopts comp plan and development regulation amendments that address water availability and water quality.

Western Washington Growth Management Hearings Board invalidates the water protection regulations. Board concludes:

A. County should have made its own determinations on water availability instead of just adopting DOE standards.

B. Board concluded that, based on DOE regulations, County development standards should have prohibited development in most parts of the county unless applicants first established acquiring water wouldn't adversely affect in-stream flows.

C. Board appeared to invalidate water quality protection standards on basis they didn't adequately address existing deficiencies.

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

GMA Duty to Protect Groundwater:

RCW 36.70A.020 GMA Goal: *"[p]rotect the environment and enhance the state's high quality of life, including air and water quality, and the* ***availability*** *of water.*"

RCW 36.70A.070: "*[c]ounties shall include a rural element.*" The rural element "*shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by ...* ***[p]rotecting ... surface water and groundwater resources....***" RCW 36.70A.030(15)(d) and (g) provide that *" 'Rural character' refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan*" that, among other things, "*are consistent with the* ***protection of natural surface water flows and groundwater and surface water recharge and discharge areas***."

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

Water Availability: Doesn't DOE Regulate That?

Role of DOE: In Kittitas case, Supreme Court ruled in prior decision that counties are preempted from appropriating groundwater permits separately from DOE, but are otherwise not preempted from enacting land use policies and regulations that protect water availability that are consistent with DOE regulations.

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

Adopting DOE Rules Satisfies Duty

Reliance Upon DOE Regulations: The Court of Appeals determined that a county could satisfy its duty to protect water availability by requiring compliance with DOE regulations. Counties are not required to make their own separate determinations on the adequacy of water availability.

Kittitas Distinguished: Whatcom County regulations prohibit daisy-chaining. WCC 21.01.040(3) provides that *"[a]ll contiguous parcels of land in the same ownership shall be included within the boundaries of any proposed long or short subdivision of any of the properties*" and that "*lots so situated shall be considered as one parcel…*"

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

City Duty to Protect Groundwater?

RCW 36.70A.070(1): "*…[t]he land use element shall provide protection for the quality and quantity used for public water supplies….*"

Hearings Board Ruling (quoted from Hearing Board digest): Under RCW 36.70A.070(1) a comprehensive plan must provide for protection of quality and **quantity** of groundwater used for public water supplies. Such protection is different than and separate from an ordinance for critical aquifer areas. The protection may be specifically included in the comprehensive plan by regulation or later implemented by development regulations. Compliance cannot be found until one or the other has been accomplished. *MCCDC v. Shelton* 96-2-0014 (FDO, 11-14-96)

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

Hearing Board Reversed on In-Stream Flows:

Court of Appeals concludes that the Board had erroneously interpreted DOE rules regulating groundwater withdrawals in WRIA 1.

The Hearings Board had interpreted WRIA 1 rules as prohibiting water rights permits and exempt wells unless an applicant can demonstrate that the water appropriation will not adversely affect in-stream flows.

Hearings Board concluded that County regulations should prohibit the approval of building and subdivision permits for areas within WRIA 1 unless the applicant could demonstrate that in-stream flows would not be adversely affected.

Court of Appeals disagreed, determining that the WRIA 1 prohibition only applies to water right permit applications and not exempt wells.

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

What is a extent of DOE role in water availability?

DOE is responsible for appropriation of groundwater by permit under RCW 90.44.050.

When a person seeks a permit to appropriate groundwater, Ecology must investigate the application pursuant to RCW 90.03.290 and affirmatively find: (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare.

Groundwater regulations recognize that surface waters and groundwater may be in hydraulic continuity. When DOE determines whether to issue a permit for appropriation of public groundwater, DOE must consider the interrelationship of the groundwater with surface waters, and must determine whether surface water rights would be impaired or affected by groundwater withdrawals.

RCW 90.44.050 exempts minor withdrawals from appropriation permits. Specifically, that statute provides an exemption for withdrawal of groundwater for domestic uses in an amount not exceeding 5,000 gallons a day. When the exemption applies, Ecology does not engage in the usual review of a permitting application under RCW 90.03.290.

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

What is a WRIA?

Water Resource Inventory Area.

DOE has the exclusive authority to establish minimum in-stream flows or levels to protect fish, game, birds, other wildlife resources, and recreational and aesthetic values.

Under this exclusive authority, Ecology adopted a regulation dividing the state into 62 areas, the WRIAs. Ecology has adopted various rules governing new appropriations of water in these areas.

WRIA 1 covers most of Whatcom County and is called the Nooksack Rule. The Rule required the denial of water rights permits for streams closed to further appropriations.

The Nooksack Rule further provided that if there is significant hydraulic continuity between surface water and a proposed groundwater withdrawal, any water right permit or certificate issued shall be subject to the same conditions as affected surface waters.

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

Hearing Board Interpretation of Nooksack Rule Incorrect:

The Hearing Board determined the Nooksack Rule also applied to exempt wells, using an interpretation of the rules from another WRIA. Based on this interpretation, the Hearings Board concluded that development within the WRIA using exempt wells had to be denied unless it could be demonstrated that the withdrawal wouldn't affect in-stream flows

DOE submits amicus brief arguing that Hearing Board is misconstruing its WRIA rules and that the Nooksack Rule doesn't apply to exempt wells.

The Court of Appeals ruled the Nooksack Rule doesn't apply to exempt wells and that the Hearings Board erroneously applied the rules of one WRIA to another.

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

Official Notice:

Court of Appeals ruled that Hearings Board to took improper "official notice"

WAC 242–03–630(2): *The board or presiding officer may officially notice ... (2) Washington state law. The Constitution of the state of Washington; decisions of the state courts; acts, resolutions, records, journals, and committee reports of the legislature; decisions of administrative agencies of the state of Washington; executive orders and proclamations by the governor; all rules, orders, and notices filed with the code reviser; and codes or standards that have been adopted by an agency of this state or by a nationally recognized organization or association.*

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

Official Notice:

The Hearing Board took official notice of the following two documents:

The Puget Sound Partnership's *2012/2013 Action Agenda for Puget Sound;* and

the Washington State Department of Fish and Wildlife's *Land Use Planning for Salmon, Steelhead and Trout.*

Court of Appeals determined taking official notice was improper because documents above were not decisions of administrative agencies of the state of Washington or code or standards adopted by an agency of Washington or by a nationally recognized agency or association.

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

No Duty to Enhance Water Quality

Court of Appeals ruled Hearings Board erred to extent the Board required County to enhance water quality as opposed to just protecting it.

GMA Statutes:

RCW 36.70A.070(1): "*[t]he land use element shall provide* ***protection*** *for the quality and quantity used for public water supplies*."

RCW 36.70A.070(5))(c)(iv): "*Counties shall include a rural element*," which "shall include measures that apply to rural development and protect the rural character of the area ... by ... **[** ***p*** **]** ***rotecting ... surface water and groundwater resources****....*"

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

No Duty to Enhance Water Quality

GMA Statutes:

RCW 36.70A.030(15)(g): Rural character "*refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan*" that, among other things, "*are consistent with the* ***protection of natural surface water flows and groundwater and surface water recharge and discharge areas.***"

But: RCW 36.70A.010: *Protect the environment and* ***enhance*** *the state's high quality of life, including air and water quality, and the availability of water.*

Court of Appeals rules that RCW 36.70A.010 is a goal, not a duty. All other GMA statutes just require protection, not enhancement.

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

Invalidation Discretionary:

Hearings Board stated it only invalidates "*the most egregious noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act [GMA]*".

Court of appeals ruled that Hearings Board could implement this home-made standard because the invalidation statute made invalidation a discretionary call:

RCW 36.70A.302(1): "*The board* ***may*** *determine that part or all of a comprehensive plan or development regulations are invalid....*"

Whatcom County v. Western Washington Growth Management Hearings Board, 344 P.3d 1256 (2015)

Is water availability an issue we have to address in our comp plan update?

Probably not, unless maybe water availability conditions have changed since last addressed water availability:

A party may challenge a county's failure to revise a comprehensive plan only with respect to those provisions that are directly affected by GMA provisions that were adopted since the last update (or initial adoption if no prior update). *Gold Star Resorts, Inc. V. Futurewise,* 167 Wn.2d 723 (2009); *Thurston County v. WWGMHB*, 164 Wn.2d 329 (2008).

Durland v. San Juan County, 182 Wn.2d 55 (2015)

Facts:

Building permit issued to Heinmiller and Stameisen to add a second story to a garage.

No notice of permit issuance required or provided to Durland, adjoining property owner.

Durland not aware of permit issuance until 34 days later. Durland files appeals of the building permit to superior court (Durland 1) and the hearing examiner (Durland 2). 21 day appeal period applied to both appeals.

Durland v. San Juan County, 182 Wn.2d 55 (2015)

Durland 1 (direct appeal to superior court):

State Supreme Court dismisses appeal since Durland had not acquired a "final land use decision" as required by LUPA.

RCW 36.70C.020(2): A final land use decision = "*a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on: ... (a) [a]n application for a project permit....*"

Court noted that where a permitting authority creates an administrative review process, a building permit does not become "final" for purposes of LUPA until administrative review concludes.

Court declined to adopt equitable exceptions to the LUPA requirement to exhaust administrative remedies, because the exhaustion requirement furthers LUPA's stated purposes of promoting finality, predictability and efficiency.

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Durland v. San Juan County, 182 Wn.2d 55 (2015)

Durland 2 (appeal to examiner dismissed by examiner as untimely):

Durland argues that he is entitled to damages because holding him to an appeal deadline for a decision to which he doesn't receive notice violates his due process rights.

Supreme Court finds no cause for damages based on due process violations, because Durland had no constitutionally protect property interest.

Durland v. San Juan County, 182 Wn.2d 55 (2015)

Durland 2 (appeal to examiner dismissed by examiner as untimely):

Durland argues that he is entitled to damages because holding him to an appeal deadline for a decision to which he doesn't receive notice violates his due process rights.

Durland based his claim on the Civil Rights Act, 42 U.S.C. § 1983, which provides a federal cause of action for the deprivation of constitutional rights.

To prevail in a § 1983 action alleging deprivation of procedural due process, a plaintiff must prove that the conduct complained of deprived the plaintiff of a cognizable property interest without due process.

Supreme Court finds no cause for damages based on due process violations, because Durland was not deprived of a constitutionally protect property interest.

Durland v. San Juan County, 182 Wn.2d 55 (2015)

Durland 2 (appeal to examiner dismissed by examiner as untimely):

What is a constitutionally protected property interest?

A constitutionally protected property interest may be created either through (1) contract, (2) common law, or (3) statutes and regulations.

Durland didn't claim contractual or common law interest. He claimed his views were impaired. The pertinent issue, therefore, was whether San Juan County regulations protected Durland's views.

The Court determined Durland's views were not protected by San Juan County regulations. Height requirements of the SJCC were designed to protect public views, not private views. County conditional use permit criteria authorized buildings to exceed the height limit if public (as opposed to private) views were not adversely affected. Another code provision further evidenced a focus on public as opposed to private views by regulating "public/visual access" with regard to subdivisions.

Durland v. San Juan County, 182 Wn.2d 55 (2015)

Attorney Fees:

Court rules Heinmiller/Stameisen entitled to attorney fees, County not.

RCW 4.84.370 authorizes attorney fees in Court of Appeals or Supreme Court if:

Private parties: prevailing party on building permit applications in a judicial appeal is entitled to attorney fees if the party also prevailed before the city or town and all prior judicial appeals.

Cities and counties: Decision is "upheld" at superior court and on appeal.

Supreme Court rules that "upheld" language means merits of decision upheld whereas private parties just need to "prevail" which includes prevailing on procedural grounds.

Durland v. San Juan County, 182 Wn.2d 55 (2015)

Ramifications:

NO EXPRESS PROTECTION OF ADJOINING PROPERTY OWNERS.

Avoid creating protected private rights in your development code. Can lead to liability in both 42 USC Section 1983 claims as well as tort claims.

Naumes, Inc. v. City of Chelan, 182 Wn.2d 55 (2015).

Facts:

City approves a planned development rezone and general binding site plan (GBSP) for Naumes' property. Property also subject to a development agreement.

Development agreement included an arbitration clause, **which provided that any dispute of matters set out in the agreement would be resolved by arbitration.**

In 2012, Naumes submitted a specific binding site plan (SBSP) for a particular lot within the GBSP showing a road plan deviating from the GBSP. The City rejected what it considered an SBSP that failed to conform to the GBSP.

Naumes then sued for declaratory judgment and breach of contract in superior court asking for an order compelling arbitration to resolve the issue of whether the City could reject the SBSP.

Naumes, Inc. v. City of Chelan, 182 Wn.2d 55 (2015).

Court rules administrative appeal provisions and LUPA govern dispute, not arbitration:

Washington has strong public policy favoring arbitration. It must indulge every presumption in favor of arbitration.

The Court determined that Chelan's regulations mandated that the SBSPs could not modify the terms of GBSPs and that City administrator approval was required for the approval of GBSPs and that appeal of that determination was subject to judicial review.

The Court also noted that the development agreement expressly provided that the parties to the agreement desired "*that the future development of the Property be consistent with land use and development regulations of the City now existing or hereafter adopted*."

Finally, RCW 36.7C.030(1) states that LUPA shall be the exclusive means of judicial review of land use decisions. The Court noted that by establishing a uniform, expedited appeal process and uniform criteria for review, LUPA promotes consistent, predictable, and timely judicial review.

Graham Neighborhood Ass'n v. F.G. Associates, 162 Wn. App. 98 (2011).

Ha Ha, Not so funny.

Facts:

On April 25, 1996 FG submitted an application for a six lot subdivision to Pierce County.

In response to noise section of checklist Applicant writes "persons screaming from tedium of filling out checklist" and in response to suggested mitigation Applicant writes "sedative".

The application was deemed complete on May 23, 1996.

Graham Neighborhood Ass'n v. F.G. Associates, 162 Wn. App. 98 (2011).

Several years after application found complete, Pierce County adopts PCC 18.160.020,which provides as follows:

Any [land use permit] application ... that was pending on July 28, 1996, that does not contain all submittal items and required studies that are necessary for a public hearing or has not been reviewed by the Hearing Examiner in a public hearing shall become null and void one year after registered notice is mailed to the applicant and property owner. A one time, one year time extension may be granted by the Hearing Examiner after a public hearing if the extension request is submitted within one year of the effective date of this Chapter and [the] applicant has demonstrated due diligence and reasonable reliance towards project completion.

Graham Neighborhood Ass'n v. F.G. Associates, 162 Wn. App. 98 (2011).

Facts:

On June 26, 2005 a registered letter providing notice of PCC 18.160.020 was mailed to FG.

FG did not respond to the letter within the one year deadline, but the County continued to work with FG to get a critical area permit for the project as well as other supplemental approvals.

Because of this continuing activity, the County reactivated the permit even though PCC 18.160.020 didn't authorize the reactivation.

The application was approved by the Hearings Examiner in 2009. The Hearing Examiner refused to dismiss the case because it had been cancelled, holding that it would be unconscionable to do so while the County was still processing supplemental permits for the project.

Graham Neighborhood Ass'n v. F.G. Associates, 162 Wn. App. 98 (2011).

FG argues vesting:

58.17.033. Proposed division of land--Consideration of application for preliminary plat or short plat approval--Requirements defined by local ordinance

(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.

Graham Neighborhood Ass'n v. F.G. Associates, 162 Wn. App. 98 (2011).

Ruling:

- PCC 18.160.020 is neither a subdivision ordinance nor a zoning ordinance.

  Not all regulations relating to land use are land use control regulations.

  Land use control ordinances are those that exert a restraining or directing influence over land use.

  PCC 18.160.020 does neither a restraining or directing influence on land use projects, rather it limits the county's vesting ordinance itself.

Graham Neighborhood Ass'n v. F.G. Associates, 162 Wn. App. 98 (2011).

Vested rights shouldn't be too easily granted:

- Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.
- Indeed, when our Supreme Court adopted the vested rights doctrine, prior to the doctrine's legislative codification, the court balanced the private property and due process rights against the public interest by selecting a vesting point which prevents 'permit speculation,' and which demonstrates substantial commitment by the developer, such that the good faith of the applicant is generally assured. Erickson, 123 Wash.2d at 874, 872 P.2d 1090.

Graham Neighborhood Ass'n v. F.G. Associates, 162 Wn. App. 98 (2011).

Vested rights shouldn't go on forever:

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The purpose of the vesting doctrine is to allow property owners to proceed with their planned projects with certitude. The purpose is not to facilitate permit speculation. Extended project delay is antithetical to the principles underlying the vesting doctrine. The Pierce County Council's action in adopting PCC 18.160.080 is in conformance with the constitutional concerns underlying the vesting doctrine.

Suggestions for Permit Expiration

1. No automatic expiration.
2. Expiration should be based upon formal determination and issuance of expiration notice.
3. Preserve flexibility in extensions.