SUPREME COURT NO.

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KIRKLAND CITY
ATTORNEY'S OFFICE

No. 70542-3

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

THE CITY OF KIRKLAND, a Washington municipal corporation,

Appellant,

vs.

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

Respondents.

PETITION FOR REVIEW TO THE SUPREME COURT

Duana T. Koloušková, WSBA #27532
Vicki E. Orrico, WSBA #16849
JOHNS MONROE MITSUNAGA KOLOUŠKOVÁ PLLC
1601 – 114th Avenue S.E., Suite 110
Bellevue, WA 98004
T: 425-451-2812

COPY

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A. IDENTITY OF PETITIONER

Potala Village Kirkland, LLC, a Washington limited liability company, and Lobsang Dargey and Tamara Agassi Dargey, a married couple ("Potala Village").

B. COURT OF APPEALS DECISION

Potala Village seeks review of the Div. 1 Court of Appeals decision filed August 25, 2014, attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in abrogating the common law vested rights doctrine as a whole or for shoreline substantial development permit applications?

2. Whether the Court of Appeals decision conflicts with the constitutional due process rights afforded by the vested rights doctrine?

3. Whether the Court of Appeals decision was contrary to substantial public interest?

4. Whether vested rights applied to Potala Village's February 23, 2011 shoreline substantial development permit application?

5. Whether vesting of the shoreline substantial development permit application entitles Potala Village to review and issuance of building and other development applications based on zoning and land use regulations in effect on February 23, 2011?

D. STATEMENT OF THE CASE

Potala Village sought to construct a mixed-use project in the Neighborhood Business ("BN") Zone of the City of Kirkland.[1] The

[1] CP 372, *Declaration of Lobsang Dargey*, page 2.

project included 143 residential units, as well as retail, and commercial space, requiring multiple permits for the project. The BN-zone did not require Potala Village to obtain land use or design review approval before moving into the building permit stage.[2] Instead, land use and design review were addressed under a shoreline substantial development permit process, since a portion of the Potala Village property is within Kirkland's designated shoreline area. This process required Potala Village to obtain a shoreline substantial development permit before it could obtain building and other permits.[3]

On February 23, 2011, Potala Village filed its application for a shoreline substantial development permit.[4] Potala Village did not submit a building permit application because, as the City Planner explained, if Kirkland decided that any changes to the project were warranted after it approved the shoreline substantial development permit, the City could have required Potala Village to submit an entirely new building permit application.[5] Kirkland explained that even if Potala Village submitted a building permit application, Kirkland would not process it. Instead, Kirkland would "place the application on hold pending approval of the

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[2] CP 268-275, *Declaration of Duana Kolouskova*, Exhibit A.
[3] *See e.g.* CP 657, *Dargey Declaration*, Exhibit F, second page; *See also* CP 93, *Declaration of Swan*, page 3.
[4] CP 392-643, *Dargey Declaration*, Exhibit B.
[5] CP 953-956, *Declaration of Justin Stewart*, attached email with Tom Bradford, City of Kirkland Plans Examiner, citing Kirkland Municipal Code Section 21.06.240.

Shoreline Permit."[6] By doing so, Kirkland preserved an ability to require a new building permit application if it decided to substantially change the project through the shoreline substantial development permit process.

On May 11, 2011, Kirkland issued a letter of completeness that vested the shoreline substantial development permit application.[7] This determination that the shoreline permit vested was consistent with Kirkland's shoreline regulations: because the shoreline permit is the most environmentally protective regulation and takes into account *all applicable zoning and land use regulations*.[8] Further, Washington law required Kirkland to review the shoreline substantial development permit application based on the *entire* project, even though only a portion of the project falls within the designated shoreline area.[9]

After Kirkland deemed the shoreline application vested and began its review, it became apparent that there would be substantial public opposition to the project. Only then did Kirkland suddenly claim that the shoreline application did not vest. In response to neighborhood opposition

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[6] CP 90, *Declaration of Desiree Goble*, Exhibit A.
[7] CP 95, *Declaration of Teresa Swan*, page 5.
[8] CP 942, *Second Kolouskova Declaration*, Exhibit D, KZC 83.40.
[9] RCW 90.58.140 (2); WAC 173-27-180; Merkel v. Port of Brownsville, 8 Wn. App. 844, 851-852, 509 P.2d 390 (1973); Twin Bridge Marina Park v. Department of Ecology, Shoreline Hearings Board Case 01-016 & 01-017, Sections VI, X (2002), Sections VI, X (2002); Allegra Development Company v. Port of Seattle et al., Shoreline Hearings Board Case No. 99-08 & 99-09 Sections XIX and XX, (1999), *citing* Weyerhaeuser v. King County, 91 Wn.2d 721, 592 P.2d 1108 (1979) (a unified structure partially within shoreline and partially upland is considered "within" the shoreline under SMA and requires a Shoreline Permit for the entire structure).

to the project, Kirkland enacted an emergency moratorium on November 15, 2011, precluding all building permit applications in the BN zone.[10] The moratorium only affected Potala Village's property, because it was the only BN-zoned property in Kirkland that had not been developed as of the moratorium.

After lengthy attempts to address neighborhood concerns, on October 16, 2012, Potala Village attempted to file a building permit application, which the City declined to accept due to the existing moratorium.[11]

After maintaining the moratorium on Potala Village's property for more than a year, the City Council ultimately amended the BN zone to limit Potala Village's ability to develop its property to only 60 units, versus the 143 units it could have built under the BN zone in effect when Potala Village's shoreline application was deemed complete.[12] Only after this legislative zoning change did Kirkland lift the moratorium on Potala Village's property.

Despite the foregoing, Kirkland approved Potala Village's shoreline substantial development permit application on January 17, 2013.[13] Kirkland did not explain how it could approve the shoreline permit in light

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[10] CP 724-728, *Dargey Declaration,* Exhibit J; CP 137-140, *Swan Declaration*, Exhibit I.
[11] CP 730, *Dargey Declaration*, Exhibit K
[12] CP 379, *Dargey Declaration*, pg. 9; CP 287-346, *Kolouskova Declaration*, Exhibits C, D, E.
[13] CP 393-412, *Dargey Declaration*, Exhibit B (shoreline decision, pages 1-11).

of its position that such application had not vested. Confused by these mixed directives from the City, Potala Village attempted to file a building permit application consistent with that decision; Kirkland, however, refused to accept and process that application. Potala Village then filed this action in King County Superior Court.[14]

Potala Village argued that the filing of its completed shoreline substantial development permit application on February 23, 2011, was sufficient to vest rights to the zoning and other land use control ordinances in effect on that date for the entire project. It sought a writ of mandamus directing the City to accept and process a building permit application for the project. The trial court granted summary judgment to Potala Village and issued a writ of mandamus, finding that Potala Village's shoreline substantial development permit application is subject to the vested rights doctrine and "vested on February 23, 2011, to those zoning laws and land use regulations in force at the time of that application."[15] The trial court ordered Kirkland to accept Potala Village's building permit application and issue building and other land development permits based on the zoning and land use regulations in effect on February 23, 2011. The trial court denied the City's motion for reconsideration.[16]

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[14] CP 1-11, 102.
[15] CP 992-995.
[16] CP 996-1024, 1055-1056.

Kirkland appealed to Division 1 of the Court of Appeals. The Court accepted briefing in its regular course, following standard rules of appellate procedure. Just weeks before oral argument and after briefing was completed, this Court issued the Town of Woodway decision.[17] As a result, the Court of Appeals never received any substantive briefing on Town of Woodway. As is discussed herein, that timing and lack of briefing led directly to the Court's unprecedented decision in this case.

The Court of Appeals reversed the trial court, holding that Potala Village's completed application for a shoreline substantial development permit did not vest rights to the zoning or other land use control ordinances for the entire project that existed on that date. The Court determined that, to vest, Potala Village would have had to file a complete building permit application before Kirkland imposed an emergency moratorium as a means to change its BN zone.[18]

E. ARGUMENT

1. The Court of Appeals Decision Is Unprecedented in Its Effect of Abrogating the Common Law Vested Rights Doctrine.

The vested rights doctrine is deeply established as a fundamental land use tenet in Washington State. The doctrine's common law roots reach back 60 years, entitling property owners to "a vested right to have their

[17] Town of Woodway v. Snohomish County, 180 Wn.2d 165, 169, 322 P.3d 1219 (2014).
[18] Potala Village. Kirkland, LLC v. City of Kirkland, 70542-3-I, 2014 WL 4187807 at *24 (Wash. Ct. App. Aug. 25, 2014).

development proposals processed under land use plans and development regulations in effect at the time a complete permit application is filed."[19] The rule promotes a 'date certain vesting point' to ensure that "'new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law.' This 'date certain' standard is critical for constitutional due process requirements."[20] Those due process considerations require that governments treat their citizens in a fundamentally fair manner, including protection from fluctuations so that they can plan their conduct with reasonable certainty as to the legal consequences.[21]

In 1987, the legislature enacted two statutes codifying the vested rights doctrine with respect to two specific permit types: building permit applications and subdivisions.[22] As evidenced by a long string of cases after those statutory enactments, these statutes did not, and were never intended to, encompass all of the land use permits to which Washington courts have applied common law vesting rights. Following enactment of these statutes, this Court explained that vested rights are now found in *both* common and statutory law.

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[19] Town of Woodway, 180 Wn.2d at 169.
[20] Abbey Rd. Group, LLC v. City of Bonney Lake, 167 Wn.2d 242, 251, 218 P.3d 180 (2009), citing Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 637, 733 P.2d 182 (1987).
[21] Valley View, 107 Wash. 2d at 636.
[22] RCW 19.27.095 and 58.17.033, respectively.

> The [vested rights] doctrine at common law was extended to a number of different types of permits, but it was never extended to applications for preliminary plat approval or short plat approval. In 1987, the Legislature (1) codified the traditional common law vested rights doctrine regarding vesting upon application of building permits, and (2) enlarged the vesting doctrine to also apply to subdivision and short subdivision applications.[23]

After the 1987 selective legislative enactments, this Court and several Court of Appeals decisions have uniformly recognized the validity and applicability of established common law vested rights, including conditional use and special use permit applications;[24] stormwater drainage ordinances;[25] and planned unit development applications combined with preliminary plat applications.[26] Many cases that *preceded* the adoption of the vested rights statutes applied the common law vested rights doctrine to other permits such as SEPA policies;[27] grading permits;[28] and, most notably for this case, shoreline substantial development permit applications.[29] Washington courts have continued to consistently and routinely rely on those cases as part of the vested rights doctrine.

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[23] Noble Manor v. Pierce County, 133 Wn.2d 269, 279, 943 P.2d 1378 (1997) (citations omitted).

[24] Beach v. Board of Adjustment, 73 Wn.2d 343, 347, 438 P.2d 617 (1968), and Weyerhaeuser v. Pierce County, 95 Wash. App. 883, 976 P.2d 1279 (1999).

[25] Phillips v. King County, 136 Wn.2d 946, 963, 968 P.2d 871 (1998).

[26] Schneider Homes v. City of Kent, 87 Wn. App. 774, 779-80, 942 P.2d 1096 (1997), review denied, 134 Wn.2d 1021 (1998).

[27] Victoria Tower P'ship v. City of Seattle, 49 Wn. App. 755, 761-62, 745 P.2d 1328 (1987).

[28] Juanita Bay Valley Comm'ty Ass'n v. Kirkland, 9 Wn. App. 59, 84, 510 P.2d 1140, review denied, 83 Wn.2d 1002 (1973).

[29] Talbot v. Gray, 11 Wn. App. 807, 811, 525 P.2d 801 (1974).

Neither this Court nor any division of the Court of Appeals has ever rescinded or abolished applications of the vested rights doctrine as already recognized under common law. Since legislative adoption of RCW 19.27.095 and 58.17.033, Washington Courts have refused to expand the vested rights doctrine to new types of land development applications. "[T]his Court will not *extend* the vested rights doctrine by judicial expansion."[30] Thus, Washington courts have refused to expand the doctrine to such considerations as impact fees;[31] master use permit applications;[32] and rezones.[33] Each of these decisions was based on a valid set of considerations specific to the type of permit, and each consistently preserved the well-established scope of the doctrine. In this way, Courts have preserved the certainty established regarding the sphere of long established common law vested rights.

Without apparently realizing the ramifications of its decision, the Court of Appeals has now acted in direct contradiction to the consistent precedent of preserving common law vested rights in ruling for the first time that the vested rights doctrine is only available on a statutory basis. In this way, the Court of Appeals, Division 1, unilaterally reversed 60

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[30] Noble Manor, 133 Wn.2d at 280 (emphasis added).
[31] New Castle Invs. v. City of La Center, 98 Wn. App. 224, 989 P.2d 569 (1999), review denied, 140 Wn.2d 1019 (2000).
[32] Erickson & Assocs., Inc. v. McLerran, 123 Wn.2d 864, 876-77, 872 P.2d 1090 (1994).
[33] Hale v. Island County, 88 Wn. App. 764, 946 P.2d 1192 (1997).

years of common law doctrine. Such an unprecedented decision demands review by this Court.[34]

In reaching its novel conclusion, Division 1 relies almost exclusively on this Court's recent Abbey and Town of Woodway decisions, stating "in Abbey and Woodway . . . the supreme court *appears* to have rejected the notion that the vested rights doctrine is based on both common law and statutes."[35]

Nothing in Town of Woodway indicates that the Supreme Court intended to completely abolish the common law vested rights doctrine and its decades of consistent treatment based on critical and fundamental due process tenets. Town of Woodway did not involve common law vesting; rather the case addressed whether a subdivision application submitted pursuant to RCW 58.17.033 and in accordance with local regulations survived a SEPA challenge of those local regulations. Nonetheless, Division 1 misunderstood one isolated piece of dicta in Town of Woodway to conclude that this Supreme Court intended to overturn and

[34] The ripple effect of the Court of Appeals' decision beyond shoreline permits is evident: when shepardizing vested rights cases in Westlaw.com, Potala Village is cited as negative treatment for seven common law vested rights cases, including Weyerhaeuser v. Pierce County. Westlaw.com now cites to Potala Village as negative authority contradicting the Weyerhaeuser decision that the common law vested rights doctrine applies to conditional use permits, even though Potala Village never addressed such permits.
[35] Potala Village, 2014 WL 4187807 at *22 (emphasis added).

abandon the vested rights doctrine's long judicial history of common law application.[36]

Similarly, the Court of Appeals misread Abbey Road, in which this Court addressed a request to *expand* the vested rights doctrine to other land use cases.[37] This Court rejected the request to expand the vested rights doctrine to all land use applications, leaving further *expansion* to the legislature.[38] However, the Abby Road Court never retracted the vested rights doctrine from prior applications under common law. Division 1 incorrectly took this Court's comments in Abbey Road out of context. This Court never stated that it was abolishing the common law vested rights doctrine, nor did this Court overrule any of the long-standing vested rights cases on which courts, cities, counties, property owners, interested neighborhoods and interest groups have relied for decades.

Prior to the Court of Appeal's decision in the instant case, no Washington Court had ever ruled that the common law vested right doctrine should be abrogated as a whole. Given the underlying premise of the vested rights doctrine – to bring certainty, fairness and due process to

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[36] In comparison to shepardizing the instant case as discussed in footnote 34 above, Westlaw shepardizing for cases that Town of Woodway negatively impacts is totally distinct: Town of Woodway is not used as negative treatment for cases such as Weyerhaeuser v. Pierce County, *supra,* or Talbot, *supra,* confirming their reliance on the common law vested rights doctrine, while Town of Woodway is cited as negative authority for Victoria Partnership, which case dealt with building permit applications and was superseded by RCW 19.27.095.

[37] Abbey Road, 167 Wn.2d at 252 (emphasis added).

[38] Id., 167 Wn.2d at 254.

property rights – abolishing it would run counter to its very essence. More than 25 years have elapsed since legislative adoption of vested rights for two isolated types of permit applications. It makes no sense for the Court of Appeals to suddenly decide that the vested rights doctrine is solely statutory and thereby overrule decades of consistent common law application of the doctrine.

2. The Court of Appeals Decision Conflicts With the Constitutional Due Process Protections that are Foundational to the Vested Rights Doctrine.

While the legislature has the power to codify or expand due process rights, neither the legislature nor the Courts have the power to abrogate constitutional due process protections. As noted above, Washington's approach to the vested rights doctrine is based on "constitutional principles of fairness and due process." Abolishing the protections accorded by the common law vested rights doctrine eviscerates the constitutional protections that doctrine was designed to provide.

These due process considerations were at the core of this Court's decision in West Main, which held that unfettered discretion in changing the rules during the application process violates due process rights by interfering with the vested rights doctrine:

> The vesting rule of the Bellevue ordinance does not meet the due process standards of the Fourteenth Amendment. We acknowledge that some commentators advocate that governments legislatively establish vesting guidelines. In this case, however, Bellevue has

> gone beyond merely establishing guidelines. The City denies a developer the ability to vest rights until after a series of permits is obtained. The ordinance thus is unduly oppressive upon individuals. As the trial court noted, the preapplication procedures established by the ordinance are vague and discretionary. The City delays the vesting point until well after a developer first applies for City approval of a project, and reserves for itself the almost unfettered ability to change its ordinances in response to a developer's proposals. The ordinance completely upsets our vesting doctrine's protection of a citizen's constitutional right to develop property free of the "fluctuating policy" of legislative bodies.[39]

The Court of Appeals distinguished West Main from the case at hand, stating "Here, Potala Village fails to cite any law that prevented it from filing a building permit application before the November 2011 moratorium."[40] However, the Court of Appeals overlooked the fact that, had Potala Village filed a building permit application, the City had the authority to require Potala Village to submit a *new* building permit application if Kirkland unilaterally decided that the shoreline substantial development permit warranted any changes to the project.[41] In fact, Kirkland informed Potala Village that if it did file a building permit application, the City would merely "place the application on hold pending approval of the Shoreline Permit," and would not process any building permit application until after its determination on the shoreline substantial

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[39] West Main Associates v. City of Bellevue, 106 Wn.2d 47, 52-53, 720 P.2d 782 (1986) (citations omitted).
[40] Potala Village, 2014 WL 4187807 at *24.
[41] CP 953-956, Declaration of Justin Stewart, attached email with Tom Bradford, City of Kirkland Plans Examiner.

development permit.[42] Of course, that left the Potala Village project in the same place it is today: subject to land use control ordinances that were adopted *after* it filed a land use application.

Just like the City of Bellevue had in West Main, Kirkland unilaterally reserved the right to change the project's vesting date even if Potala Village had submitted a building permit application at the same time as the shoreline substantial development permit application. Thus, while there is no ordinance or regulation that precluded Potala Village from filing a building permit application at the same time as the shoreline substantial development permit, such an act would have been futile. Even if Potala Village had submitted a building permit application concurrently with its shoreline substantial development permit application, the City still had the unfettered ability to require a new building permit application to be filed under the new zoning restrictions imposed by the moratorium.

Thus, as in West Main, Kirkland

> reserves for itself the almost unfettered ability to change its ordinances in response to a developer's proposals. The ordinance completely upsets our vesting doctrine's protection of a citizen's constitutional right to develop property free of the "fluctuating policy" of legislative bodies.[43]

In this case, Kirkland's process also unconstitutionally frustrates the vested rights doctrine.

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[42] CP 90, Declaration of Desiree Goble, Exhibit A.
[43] West Main, 106 Wn.2d at 52-53.

The instant case also bears a striking resemblance to Valley View, in which the City of Redmond attempted to frustrate a developer's project by changing the zoning of the property during the developer's attempt to meet unclear city permitting requirements. In Valley View, city planning staff told the developer he was required to file a shoreline substantial development permit before they would consider approving his site plan and building permit application. In the meantime, the city council rezoned the developer's property in response to public pressure. The Valley View court held that, while in the ordinary course of events developers normally filing a building permit application to trigger vesting,

> Due process considerations of fundamental fairness require this court to look beyond these four requirements to the conduct of the parties only in the rare case where city officials clearly frustrate a developer's diligent, good faith efforts to complete the permit application process.[44]

The court then considered whether, despite lack of a building permit application, a development right had vested because the developer's good faith conduct merited recognition of the vested right. The court found that, because the city frustrated the building permit process through the mixed messages it gave to the developer, and the developer made a good faith effort to comply with the city's contradictory policies and directions, the

[44] Valley View, 107 Wash. 2d at 638.

developer had vested in and had a right to develop the property under the land use regulations in effect prior to the rezone.

Similarly, in the case at hand, Potala Village attempted to comply with the City's confusing policies and directives which purportedly (a) require Potala Village to file a building permit to vest the project while (b) reserving the right after issuance of the shoreline substantial development permit to nonetheless require Potala Village to submit a new building permit under the new land use ordinances then in effect.

3. Abrogation of the Common Law and Constitutional Protections of the Vested Rights Doctrine Would Have Substantial Impacts on the Public, Municipalities, and Property Owners.

The Court of Appeal's unprecedented abrogation of 60 years of common law and constitutional protections will have far reaching impacts on property owners, municipalities and neighborhoods. The Court failed to take into account the broad public ramifications of its novel approach. The Court of Appeals' decision raises a matter of substantial public interest that requires review by this Court.

The vested rights doctrine gives cities and developers the time to thoroughly review a development application without the haste produced by ever-changing land use regulations during the permit review process. Because zoning regulations are 'frozen', cities and neighborhoods have the time to fully consider proposed projects. As a result of Washington's

vesting doctrine, local jurisdictions have developed detailed application processes requiring broad disclosure of information to enable planning staff, neighborhood residents and interested organizations to thoroughly review projects. This is particularly true of substantial shoreline development permit applications, which require significantly detailed information and complete extensive analyses of numerous technical considerations.[45] Project applicants recognize that the detailed and lengthy project review system is, in large part, the trade-off for the certainty of the vested rights doctrine.

A withdrawal of the vested rights doctrine from applications which it previously protected will result in highly unpredictable review processes across the state. The effect of the Court of Appeals' decision is uncertainty and a legislative 'free for all' during the project review process. Without vesting, developers and project opponents alike will lobby the local legislative body for zoning and land use changes throughout the permit process. Certainty and thorough project review will be replaced by pressures for abbreviated review processes to reduce the risk that a local legislative body will adopt legislation to either block or change the project based on public perception - exactly what happened in Potala Village's case. City council members will be pressured by their constituents to become intimately involved in permit review processes,

[45]WAC 173-27-180.

stepping into the shoes of planning departments. Cities and counties will be pressured to seek zoning changes midstream to derive more public benefits such as fees or design changes based on political pressures, replacing a deliberate and predictable permit review process with a haphazard and deeply political one.

Since there is no legal limit on legislative changes to zoning codes, it will now be possible to legislate innumerable changes to a property's zoning during the project review process. The burden on municipalities to process permits under ever-changing rules will be enormous. City staff will now have to track whether each legislative change to land use codes applies to a given application and require repeated changes to that application. As a result, planning departments and applicants will seek to minimize application requirements so that they can reach a decision on an application quickly, rather than thoroughly.

Cities and counties have never before been faced with judicial abrogation of a vesting doctrine on which they relied for decades. The Court of Appeals' decision creates a major unanswered question for Washington's approximately 300 towns and cities and 39 counties, all of whom have relied on the stability of common law vesting. Cities and counties have designed their land use regulations based on the vested rights doctrine as it exists as *both* statutorily and under common law.

These cities and counties now have absolutely no guidance as to how they are to treat pending shoreline substantial development permits if they have been relying on this long-standing common law, not to mention other permits heretofore protected by the common law doctrine such as conditional use permits.

The Court of Appeals simplistically imagines that applicants such as Potala Village can submit a building permit application at the same time as a shoreline substantial development permit application (or other permit covered by the vested rights doctrine) and thereby freeze zoning. As discussed above, the Court's theory does not work in practice. Kirkland would postpone review of the building permit application pending the decision on shoreline substantial development permit, which it has the discretion to deny or condition. To take away the project's vesting, Kirkland simply will require substantial project changes in approving the shoreline permit and thereby revoke the project's vesting by requiring a new building permit application for the newly designed project. *Even if a city wished to maintain the building permit application as vested, project opponents can pressure the City to require a new building permit application if the shoreline permit required substantial project changes.* In this way, the vested rights doctrine would be well and truly eviscerated.

In contrast, the Court of Appeals did not identify any public interest basis for its decision. The Court of Appeals was purely driven by what it perceived to be a mandate from this Supreme Court under Town of Woodway. The Court of Appeals not only abrogated the date-certain vested rights doctrine upon which Washington relied for decades, but failed to replace it with any meaningful alternative. Abrogating a doctrine that has been fundamental to permit processing without providing even an analysis of the effects of such a decision is virtually unprecedented and appears to be a call from the Court of Appeals for review by this Court.

F. CONCLUSION

Petitioners respectfully request that this Court accept review for the reasons indicated herein.

DATED this 24th day of September 2014.

JOHNS MONROE MITSUNAGA
KOLOUŠKOVÁ, PLLC

By _____
Duana T. Koloušková, WSBA #27532
Vicki E. Orrico, WSBA #16849
Attorneys for Appellants
Potala Village Kirkland, LLC, and
Lobsang Dargey and Tamara Agassi Dargey

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RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

August 25, 2014

Duana Theresa Kolouskova
1601 114th Ave SE Ste 110
Bellevue, WA, 98004-6969
kolouskova@jmmlaw.com

Roger D. Wynne
PO Box 94769
Seattle, WA, 98124-4769
roger.wynne@seattle.gov

Tim Trohimovich
816 2nd Ave Ste 200
Seattle, WA, 98104-1535
tim@futurewise.org

Jeffrey M Eustis
720 3rd Ave Ste 2000
Seattle, WA, 98104-1825
eustis@aramburu-eustis.com

Stephanie Ellen Croll
800 5th Ave Ste 4141
Seattle, WA, 98104-3175
scroll@kbmlawyers.com

Robin Jenkinson
123 5th Ave
Kirkland, WA, 98033-6121
rjenkinson@kirklandwa.gov

CASE #: 70542-3-I
Potala Village Kirkland, LLC, Respondents v. City of Kirkland, Appellant

King County, Cause No. 12-2-18714-2.SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "We reverse the order granting Potala Village's motion for summary judgment. We remand with direction to the trial court to grant the City's cross-motion for summary judgment and dismissal."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh
Enclosure
c: The Honorable Monica Benton

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

POTALA VILLAGE KIRKLAND, LLC, a Washington limited liability company, and LOBSANG DARGEY and TAMARA AGASSI DARGEY, a married couple,	)	No. 70542-3-I
	)	DIVISION ONE
Respondents,	)	
v.	)	
CITY OF KIRKLAND, a Washington municipal corporation,	)	PUBLISHED
	)	FILED: August 25, 2014
Appellant.	)	

Cox, J. — Washington's vested rights doctrine originated at common law but is now statutory.[1] Under RCW 19.27.095(1), vesting occurs on the filing of a "valid and fully complete building permit application." In such an event, the "zoning or other land use control ordinances in effect on the date of the application" shall control.[2]

Here, Lobsang Dargey, Tamara Agassi Dargey, and Potala Village Kirkland, LLC (collectively "Potala Village") sought to develop certain real

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[1] Town of Woodway v. Snohomish County, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014).

[2] RCW 19.27.095(1).

property in the City of Kirkland. Potala Village filed a complete application for a shoreline substantial development permit on February 23, 2011. But it did not file an application for a building permit before the City imposed a moratorium on the issuance of certain permits. The filing of the application for the shoreline substantial development permit is not a building permit application. Thus, it did not vest on February 23, 2011 rights to then-existing zoning or other land use control ordinances. We reverse the grant of summary judgment to Potala Village and remand with directions to grant summary judgment to the City.

The material facts are undisputed, as all parties expressly acknowledge in their appellate briefing.[3]

Potala Village sought to construct a large mixed-use project in the Neighborhood Business ("BN") Zone of the City. The project is to include residential, retail, and commercial space.

Potala Village had two meetings with the City in 2009 and 2010. These meetings resulted in a determination that multiple permits for the project would be required. Because a small portion of the project is to be located within an area subject to state and local shoreline laws, Potala Village was required to file an application with the City for a shoreline substantial development permit.

On February 23, 2011, Potala Village filed an application for a shoreline substantial development permit for the portion of the proposed development

[3] Appellant City of Kirkland's Opening Brief at 5-6; Respondents' Opening Brief at 3.

within the shoreline area.[4] It did not file an application for a building permit for the entire proposed development, although no law prohibited it from doing so. On May 11, 2011, the City issued a letter of completeness for the shoreline substantial development permit application.

An organized group of neighbors publicly voiced objections to the proposed development. The group particularly objected to the proposed residential density for Potala Village. It appears that surrounding residential properties are zoned for a maximum density of 12 units per acre.

On November 15, 2011, the City enacted an ordinance imposing an emergency development moratorium on the BN zone. The moratorium temporarily precluded the issuance of permits in the BN zone. As of the date of the moratorium, Potala Village still had not filed an application for a building permit.

On May 1, 2012, the City Council extended the moratorium for six months. Shortly thereafter, Potala Village commenced this action against the City, alleging multiple causes of action and seeking declaratory and other relief.

Potala Village attempted to file a building permit application on October 16, 2012. The City declined to accept it because of the existing moratorium. Later that same day, the City extended the moratorium for the final time.

On December 11, 2012, the City Council amended the city zoning code in a number of ways. For purposes of this action, the code changes to the BN zone placed a limit on residential density of 48 units per acre. As amended, the code

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[4] Respondents' Opening Brief at 6.

limits Potala Village's project to 60 units instead of the 143 units that it sought to construct.

The City approved Potala Village's shoreline substantial development permit application on January 17, 2013.

All parties to this litigation moved for summary judgment. The City argued that Potala Village's failure to file a completed building permit application before the building permit moratorium of November 15, 2011 precluded vesting of rights to zoning or other land use control ordinances in effect prior to that date. It argued that the filing of the shoreline substantial development permit application on February 23, 2011 did not vest such rights.

Potala Village disagreed. It took the position that the filing of its completed shoreline substantial development permit application on February 23, 2011 for a portion of the project was sufficient to vest rights to the zoning or other land use control ordinances in effect on that date for the entire project. It sought a writ of mandamus directing the City to accept and process a building permit application for the project.

The trial court granted summary judgment to Potala Village and issued a writ of mandamus. The court denied the City's motion for reconsideration.

The City appeals.

VESTED RIGHTS DOCTRINE

The City argues that Potala Village did not file an application for a building permit and, thus, it had no right to vest to the zoning or other land use control

ordinances that existed at the time it filed its shoreline substantial development permit application on February 23, 2011. We agree.

This court reviews the grant of summary judgment de novo.[5] Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.[6] This case presents a question of law, which this court reviews de novo.[7]

Background

The vested rights doctrine "originated at common law."[8] "Washington's vested rights doctrine strongly protects the right to develop property."[9] This doctrine uses a "date certain" standard.[10] "Under the date certain standard, developers are entitled '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.'"[11]

A date certain standard "ensures that 'new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to

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[5] Snohomish County v. Rugg, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002).

[6] CR 56(c).

[7] Town of Woodway, 180 Wn.2d at 172.

[8] Id. at 173.

[9] Id. at 172.

[10] Id.

[11] Id. at 172-73 (quoting Abbey Road Group, LLC v. City of Bonney Lake, 167 Wn.2d 242, 250, 218 P.3d 180 (2009)).

due process under the law.'"[12] This is the minority approach within the United States, and "'it offers [greater] protection of [developers'] rights than the rule generally applied in other jurisdictions.'"[13]

In the 1950s, the supreme court first adopted the common law vested rights doctrine. In Ogden v. City of Bellevue[14] and Hull v. Hunt,[15] the supreme court explained that the right to construct in accordance with the "zoning ordinances and building codes in force at the time of application for the permit" vests when a party applies for a "***building permit***."[16]

In cases that followed, Washington courts applied the vested rights doctrine to permit applications other than building permit applications.[17] They included conditional use permit applications,[18] grading permit applications,[19]

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[12] Abbey Road, 167 Wn.2d at 251 (quoting Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 637, 733 P.2d 182 (1987)).

[13] Town of Woodway, 180 Wn.2d at 173 (alterations in original) (quoting Abbey Road, 167 Wn.2d at 250).

[14] 45 Wn.2d 492, 496, 275 P.2d 899 (1954).

[15] 53 Wn.2d 125, 130, 331 P.2d 856 (1958).

[16] Id.; see also Ogden, 45 Wn.2d at 496 ("The right accrues at the time an application for a ***building permit*** is made." (emphasis added)).

[17] See Roger D. 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, 866-67 (2001).

[18] Beach v. Bd. of Adjustment of Snohomish County, 73 Wn.2d 343, 347, 438 P.2d 617 (1968).

[19] Juanita Bay Valley Cmty. Ass'n v. City of Kirkland, 9 Wn. App. 59, 84, 510 P.2d 1140 (1973).

shoreline substantial development permit applications,[20] and septic permit applications.[21]

In 1987, the legislature enacted legislation regarding the vested rights doctrine. The session laws added two new sections to chapter 19.27 RCW and chapter 58.17 RCW, which were later codified at RCW 19.27.095(1) and RCW 58.17.033(1) respectively.[22] The session laws provide in relevant part as follows:

> NEW SECTION. Sec. 1. A new section is added to chapter 19.27 RCW to read as follows:
>
> (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.
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> . . .
>
> NEW SECTION. Sec. 2. A new section is added to chapter 58.17 RCW to read as follows:
>
> (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.[23]

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[20] Talbot v. Gray, 11 Wn. App. 807, 811, 525 P.2d 801 (1974).

[21] Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wn. App. 709, 715, 558 P.2d 821 (1977); Thurston County Rental Owners Ass'n v. Thurston County, 85 Wn. App. 171, 182, 931 P.2d 208 (1997).

[22] Laws of 1987, ch. 104, §§ 1–2.

[23] Id. (emphasis added).

As shown by the emphasized language, these statutory sections only refer to building permit applications and subdivision applications.[24]

In 1994, the supreme court considered whether the vested rights doctrine applied to master use permit (MUP) applications.[25] In Erickson & Associates, Inc. v. McLerran, a developer filed a completed MUP application.[26] After the application filing, a city ordinance became effective, which adversely impacted the proposed project that was the subject of the application.[27] The developer argued that the vested rights doctrine applied to the MUP application.[28] The supreme court disagreed, holding that the doctrine did not apply to the filing of MUP applications.[29]

In its analysis, the court referred to the 1987 legislation that codified the common law doctrine, at least to the extent specified in the statutes.[30] The developer argued that the doctrine was not limited to building permit applications.[31] In support, the developer cited a 1974 case from this court, Talbot

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[24] Id.

[25] Erickson & Assocs., Inc. v. McLerran, 123 Wn.2d 864, 867, 872 P.2d 1090 (1994).

[26] 123 Wn.2d 864, 866, 872 P.2d 1090 (1994).

[27] Id. at 866-67.

[28] Id. at 867.

[29] Id. at 877.

[30] Id. at 868.

[31] Id. at 871-72.

v. Gray, which applied the doctrine to a shoreline permit.[32] The developer also cited other case authority applying the doctrine to other types of permit applications.[33] Notably, all of the cited cases preceded the 1987 legislation codifying the doctrine to the extent specified in the statutes.[34]

The supreme court agreed with the developer in Erickson that prior cases applied the doctrine in other contexts besides building permits.[35] But it concluded that the vested rights doctrine was not a "blanket rule" requiring municipalities to process all permit applications according to the rules in place at the outset.[36] Rather, this doctrine was designed to place limits on the municipalities' discretion to allow developers to plan with "'reasonable certainty.'"[37]

Years later, in Abbey Road Group, LLC v. City of Bonney Lake, the supreme court further developed what it said in Erickson concerning the effect of the 1987 legislation.[38] There, the issue was whether the filing of a site plan

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[32] Id. at 871 (citing Talbot v. Gray, 11 Wn. App. 807, 811, 525 P.2d 801 (1974), review denied, 85 Wn.2d 1001 (1975)).

[33] Id. at 871-72 (citing Juanita Bay Valley Cmty. Ass'n, 9 Wn. App. at 83-84; Ford, 16 Wn. App. at 715; Norco Constr., Inc. v. King County, 97 Wn.2d 680, 649 P.2d 103 (1982)).

[34] See id.

[35] Id. at 872-73.

[36] Id. at 873.

[37] Id. (quoting West Main Assocs. v. City of Bellevue, 106 Wn.2d 47, 51, 720 P.2d 782 (1986)).

[38] 167 Wn.2d 242, 251, 218 P.3d 180 (2009) (citing RCW 19.27.095(1)).

without also filing a building permit application vested Abbey Road's development rights.[39] The supreme court affirmed the court of appeals' decision, which held that filing a building permit application was necessary.[40]

In reaching that result, the supreme court stated that Erickson largely controlled its decision.[41] The court confirmed that in the absence of a local vesting ordinance specifying an earlier vesting date, "RCW 19.27.095(1) is the applicable vesting rule."[42] Noting Abbey Road's failure to address this statute, the court rejected the request to overrule its decision in Erickson.[43] And the court expressly rejected the invitation to extend the vested rights doctrine to other situations, stating in a footnote:

> 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***

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[39] Id. at 249.

[40] Id. at 248, 261.

[41] Id. at 252.

[42] Id.

[43] Id. 252-53.

> ***similar arguments, and we are not persuaded to overrule our analysis or holding in Erickson.***[44]

The court then stated that it could not ignore the legislative directive set forth in RCW 19.27.095(1).[45] And it also said that this 1987 statute and the analysis in Erickson superseded a prior case to the contrary.[46]

Importantly, the Abbey Road court stated that the legislature, not the judiciary, is best suited to reform the vested rights doctrine:

> Abbey Road urges this court to establish a uniform vesting point "for every land use permit application regardless of the permit's name or what it does or does not do." ***We find that such a rule would eviscerate the balance struck in the vesting statute.*** While some of Abbey Road's arguments could support a change in the law, ***instituting such broad reforms in land use law is a job better suited to the legislature.***[47]

Most recently, in Town of Woodway v. Snohomish County, the supreme court reiterated that "[w]hile it originated at common law, ***the vested rights doctrine is now statutory.***"[48] This statement is fully consistent with the case law and statutes that we have discussed in tracing the development of the vested rights doctrine.

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[44] Id. at 253 n.8 (emphasis added).

[45] Id. at 253.

[46] Id. at 254 (citing Victoria Tower P'ship v. City of Seattle, 49 Wn. App. 755, 745 P.2d 1328 (1987)).

[47] Id. at 260-61 (emphasis added) (citations omitted) (citing Wynne, supra, at 916-17).

[48] 180 Wn.2d 165, 173, 322 P.3d 1219 (2014) (emphasis added) (citing Erickson, 123 Wn.2d at 867-68; RCW 19.27.095(1) (building permits); RCW 58.17.033(1) (subdivision applications); RCW 36.70B.180 (development agreements)).

Application

Here, the issue is whether, in the absence of filing a building permit application, the vested rights doctrine applies to vest rights to zoning or land use control ordinances for the project that existed at the time Potala Village filed its shoreline substantial development permit application on February 23, 2011. The validity of the moratorium on the issuance of permits that the City imposed before Potala Village attempted to file its building permit application is not at issue in this appeal.

To resolve the issue on appeal, we are guided by the supreme court's decisions in Erickson and Abbey Road and its most recent statement in Town of Woodway: "While it originated at common law, the vested rights doctrine is now statutory."[49]

With these points in mind, we hold that the filing of the application for the shoreline substantial development permit, without filing an application for a building permit, did not vest rights to zoning or other land use control ordinances.

We turn first to RCW 19.27.095(1), which states:

> 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.[50]

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[49] Id.

[50] (Emphasis added.)

As previously noted, the plain words of this statute include "building permits" but do not include shoreline substantial development permits. We must presume that the legislature was aware of the then-existing common law regarding the vested rights doctrine when it passed this legislation.[51] Yet the legislature only codified the vested rights doctrine to the extent of building permits in this section of the session laws.[52] Thus, we further conclude from the exclusion of shoreline substantial development permits that the legislature intended that the vested rights doctrine would not extend to such permits.[53]

The Final Bill Report for enactment of this legislation in 1987 reinforces our conclusion. It states as follows:

> FINAL BILL REPORT
>
> SSB 5519
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> . . .
>
> SYNOPSIS AS ENACTED
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> BACKGROUND:
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> Washington State has adhered to the current vested rights doctrine since the Supreme Court case on State ex rel. Ogden v. Bellevue, 45 Wn.2d 492 (1954). The doctrine provides that a party filing a

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[51] Woodson v. State, 95 Wn.2d 257, 262, 623 P.2d 683 (1980) ("[T]he legislature is presumed to know the existing state of the case law in those areas in which it is legislating.").

[52] Laws of 1987, ch. 104, § 1.

[53] Ellensburg Cement Prods., Inc. v. Kittitas County, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014) ("Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim expressio unius est exclusion alterius—specific inclusions exclude implication." (internal quotations marks omitted)).

> 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. The doctrine is applicable if the permit application is sufficiently complete, complies with existing zoning ordinances and building codes, and is filed during the period the zoning ordinances under which the developer seeks to develop are in effect. If a developer complies with these requirements, a project cannot be obstructed by enacting new zoning ordinances or building codes. West Main Associates v. Bellevue, 106 Wn.2d 47 (1986).
>
> . . .
>
> SUMMARY: 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 is extended to applications for preliminary or short plat approval. The requirements for a fully completed building permit application or preliminary on short plat application shall be defined by local ordinance.[54]

The background statement shows that the legislature was aware of the common law origins of this doctrine, citing Ogden. Notably, that was a case that applied the doctrine to a building permit.[55] Thus, the legislature chose to codify the vested rights doctrine, but only to the extent of building permits, as the plain language of the statute specifies.

We also note that the legislature also chose to extend the vested rights doctrine to completed applications for preliminary plat approval of subdivisions or short plat approval for short subdivisions at the same time it codified the doctrine to the extent of building permits. We conclude from this that the legislature considered a wider scope of permit types to which the doctrine might apply

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[54] FINAL B. REP. on S.S.B. 5519, 50th Leg., Reg. Sess. (Wash. 1987).

[55] Ogden, 45 Wn.2d at 493, 496.

beyond building permits. Yet, the legislature chose not to include applications for shoreline substantial development permits within its 1987 codification of the vested rights doctrine. Because these statutes are essentially the same now as when first enacted, we conclude the extent of codification of the vested rights doctrine remains the same.

Potala Village ignores RCW 19.27.095(1). It also fails to persuasively address Town of Woodway, Abbey Road, and Erickson, all of which trace the supreme court's evolving views on whether and to what extent the vested rights doctrine applies.

The trial court granted Potala Village's motion for summary judgment and issued a writ of mandamus directing the City to accept and process Potala Village's building permit application.[56] In doing so, the trial court cited in its order this court's 2013 decision that preceded the supreme court's decision in Town of Woodway.[57] We view this citation as likely a reference to language in this court's opinion that cited Talbot in the discussion of the development of the vested rights doctrine over time.[58] Accordingly, we turn to this court's 1974 decision in Talbot to consider its effect on the question before us.

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[56] Clerk's Papers at 992-95.

[57] Id. at 995 (providing the citation, "Town of Woodway v. Snohomish County, 172 Wn. App. 643 (2013)").

[58] Town of Woodway v. Snohomish County, 172 Wn. App. 643, 652, 291 P.3d 278 (2013), aff'd, 180 Wn.2d 165, 322 P.3d 1219 (2014) (citing Talbot, 11 Wn. App. at 811).

There, the City of Seattle granted the Grays "a permit" authorizing them to construct a dock.[59] The Grays' neighbors, the Talbots and the Hartmans, brought an action to permanently enjoin the City from authorizing the construction of a dock in the shoreline area along Lake Washington.[60]

Primarily at issue was whether the City had correctly applied the provisions of its zoning ordinance in issuing the permit for construction of the dock.[61] This court construed the City zoning ordinance and rejected the contention that the dock was not permitted as an "accessory use."[62]

The court then considered the contention that the owners of the property where the dock was to be built had not given proper notice under the Shoreline Management Act of 1971, as implemented by Seattle's ordinance.[63] Specifically, the notice was given as required by the state statute and before the effective date of the Seattle implementing ordinance.[64] Thus, the question was which notice provision prevailed.[65]

This court answered the question as follows:

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[59] Talbot, 11 Wn. App. at 808-09.

[60] Id.

[61] Id.

[62] Id. at 811.

[63] Id.

[64] Id.

[65] Id.

> [The permit applicant's] obligations and rights to develop vested on November 18, 1971, when they applied for a ***substantial development permit***. The applicable rule adopted by the court in Hull v. Hunt, 53 Wn.2d 125, 331 P.2d 856 (1958) and recently approved in Eastlake Community Council v. Roanoke Assoc., Inc., 82 Wn.2d 475, 481, 513 P.2d 36 (1973) is
>
> "[T]he right vests when the party . . . applies for his ***building permit***, if that permit is thereafter issued. This 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."[66]

Potala Village argues that we should read Talbot to require applying the vested rights doctrine to this case, despite its failure to file an application for a building permit before passage of the moratorium. We decline to do so.

First, in that case, the property owners who sought to construct a dock in the shoreline area applied for and received what can properly be described as a building permit under the City's zoning ordinances.[67] Here, unlike that case, Potala Village failed to file any application for a building permit before the moratorium went into effect.

Second, as the above excerpt from Talbot shows, this court applied the common law rule regarding vested rights for ***building permit*** applications to the shoreline substantial development permit application under the facts of that case.[68] But we do not read that 1974 decision to support Potala Village's argument in this case—that the February 23, 2011 filing of an application for a

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[66] Id. (emphasis added) (quoting Eastlake Cmty. Council v. Roanoke Assocs., Inc., 82 Wn.2d 475, 481, 513 P.2d 36 (1973)).

[67] See id. at 809.

[68] Id. at 811.

shoreline substantial development permit for a portion of this project vests rights to the zoning or land use control ordinances for the entire project that existed as of that date. We simply cannot agree with this argument because it directly contradicts the development of the law in Erickson, Abbey Road, and Town of Woodway.[69]

Potala Village makes a number of arguments to support its assertion that the vested rights doctrine applies to shoreline substantial development permits. None are persuasive.

First, Potala Village cites a number of cases to support its assertion.

Two of these cases on which it relies were decided before the 1987 legislation that we discussed previously in this opinion.[70] Thus, they are not persuasive.

Potala Village also relies on the supreme court case, Buechel v. State Department of Ecology, which was decided after 1987.[71] But that case did not expressly consider the issue present in this case because the landowner applied for a building permit and a variance.[72] Thus, that case is unlike this case where there is no building permit application.

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[69] Town of Woodway, 180 Wn.2d at 173.

[70] Respondents' Opening Brief at 27 (citing Norco Constr., Inc., 97 Wn.2d at 684; Carlson v. Town of Beaux Arts Vill., 41 Wn. App. 402, 405, 704 P.2d 663 (1985)).

[71] Id. (citing Buechel v. State Dep't of Ecology, 125 Wn.2d 196, 884 P.2d 910 (1994)).

[72] Buechel, 125 Wn.2d at 199 n.2.

Two other cases that Potala Village cites are not supreme court cases and were decided before Abbey Road and Town of Woodway.[73] Thus, they are not persuasive.

Second, Potala Village contends that Abbey Road and Erickson recognize that statutes "supplement[] common law vesting."[74] It points to language in these opinions that it claims supports recognizing the common law vested rights doctrine.[75] Abbey Road points to Erickson, which stated,

> Erickson contends the Court of Appeals decision in this case conflicts with prior decisions applying the vested rights doctrine in other contexts. See, e.g., Talbot v. Gray, 11 Wn. App. 807, 811, 525 P.2d 801 (1974) (shoreline permit) . . . . We agree with Erickson that our prior cases apply the vested rights doctrine in other contexts besides building permits.[76]

But, as previously discussed, the supreme court also explained in those cases that the legislature "codified these judicially recognized principles" in 1987.[77] And most recently the supreme court expressly stated that "the vested rights doctrine ***is now statutory***."[78] Given the supreme court's statements in these cases, we reject Potala Village's arguments to the contrary.

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[73] Respondents' Opening Brief at 27 (citing Weyerhaeuser v. Pierce County, 95 Wn. App. 883, 893 n.12, 976 P.2d 1279 (1999); Westside Bus. Park, LLC v. Pierce County, 100 Wn. App. 599, 603, 5 P.3d 713 (2000)).

[74] Id. at 35-36.

[75] See Abbey Road, 167 Wn.2d at 253 n.8; Erickson, 123 Wn.2d at 871-73.

[76] Erickson, 123 Wn.2d at 871-73.

[77] Abbey Road, 167 Wn.2d at 251; see also Erickson, 123 Wn.2d at 868.

[78] Town of Woodway, 180 Wn.2d at 173 (emphasis added).

Third, Potala Village argues that "Abbey Road and Erickson are substantively irrelevant because both cases addressed permits which were exclusively created by cities, unlike the state's shoreline permit requirement."[79] It also asserts that the shoreline permit review process is rigorous and much like the building permit review process.[80] Whether or not these assertions are true, the legislature has not extended vested rights principles to shoreline permits. Potala Village points to no authority that allows this court to "ignore the legislative directive" that vested rights principles applies in specified circumstances, which do not include shoreline permits.[81] Thus, these arguments are not persuasive.

Fourth, Potala Village cites Noble Manor Co. v. Pierce County to assert that the "vested rights doctrine was originally established through common law, but now is based on both common law and statutory authority, depending on the type of permit application involved."[82]

There, the supreme court was concerned with the filing of a short plat application.[83] It explained the development of vested rights:

> At common law, this state's doctrine of vested rights entitled developers to have a land development proposal processed under the regulations in effect at the time a complete ***building permit***

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[79] Respondents' Opening Brief at 39-42.

[80] Id. at 23-27, 39-42.

[81] Abbey Road, 167 Wn.2d at 253; see also Town of Woodway, 180 Wn.2d at 173.

[82] Respondents' Opening Brief at 29 (citing Noble Manor Co. v. Pierce County, 133 Wn.2d 269, 943 P.2d 1378 (1997)).

[83] Noble Manor, 133 Wn.2d at 272, 274.

> application was filed. Erickson & Assocs., Inc. v. McLerran, 123 Wn.2d 864, 867-68, 872 P.2d 1090 (1994). The doctrine at common law was extended to a number of ***different types of permits***, but it was never extended to applications for preliminary plat approval or short plat approval.
>
> In 1987, the Legislature (1) codified the traditional common-law vested rights doctrine regarding vesting upon application of building permits, and (2) enlarged the vesting doctrine to also apply to subdivision and short subdivision applications. The two parts of that statute were codified at RCW 19.27.095 (in the state building code statute) and RCW 58.17.033 (in the plats and subdivision statute).[84]

Importantly, the supreme court did not consider whether these statutes replaced the common law doctrine for "different types of permits."[85] The court did not need to address this issue because the short plat permit application was addressed by the statutes.[86]

However, Noble Manor contains language that supports Potala Village's argument that the vested rights doctrine is now "based on both common law and statutory authority, depending on the type of permit application involved."[87] There, the Noble Manor court explained why Erickson did not extend the vested rights doctrine to master use permit applications:

> There was ***no case law or statutory authority*** to support extending the vested rights doctrine to MUP applications. This is in contrast to the present case where the Legislature has extended the doctrine to plat applications. The Erickson decision stands for the proposition that this Court will not extend the vested rights

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[84] Id. at 275 (some emphasis added) (some citations omitted).

[85] Id.

[86] Id.

[87] Respondents' Opening Brief at 29.

> doctrine by judicial expansion. However, the Court of Appeals decision in the present case is based not on common-law extension of the doctrine but on the legislative extension of the doctrine to subdivision applications in RCW 58.17.033.[88]

While this language from Noble Manor supports Potala Village's argument, this case came before Abbey Road and Town of Woodway, where the supreme court appears to have rejected the notion that the vested rights doctrine is based on both common law and statutes.

Similarly, Potala Village cites Weyerhaeuser v. Pierce County to assert that the "vested rights doctrine, and the protections it affords, are the same protections irrespective of whether the doctrine applies as a result of common law or statute."[89] But, as just discussed, that Division Two case also came before Abbey Road and Town of Woodway. Moreover, the Abbey Road court expressly rejected a similar argument regarding Weyerhaeuser.[90] Thus, that case is also not helpful.

Fifth, Potala Village contends that the City "improperly frustrated the building permit application process by asserting it could require a new building permit application in the event it required any changes to the project after shoreline review."[91] Potala Village asserts that this case is like West Main

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[88] Noble Manor, 133 Wn.2d at 279-80 (emphasis added).

[89] Respondents' Opening Brief at 29 (citing Weyerhaeuser, 95 Wn. App. 883).

[90] See Abbey Road, 167 Wn.2d at 253 n.8.

[91] Respondents' Opening Brief at 47-50.

Associates v. City of Bellevue.[92] But that case is distinguishable.

There, the supreme court explained that a person's right to develop property is "beyond question a valuable right in property."[93] And this right is partly protected by the vested rights doctrine.[94]

The court then considered whether a Bellevue ordinance met the due process standards of the Fourteenth Amendment.[95] That ordinance required a person to take a number of steps before filing a building permit application, which would give the person the ability to vest rights in the existing laws.[96] The court concluded that the ordinance violated due process:

> The City denies a developer the ability to vest rights until after a series of permits is obtained. The ordinance thus is unduly oppressive upon individuals. As the trial court noted, the pre-application procedures established by the ordinance are vague and discretionary. The City delays the vesting point until well after a developer first applies for City approval of a project, and reserves for itself the almost unfettered ability to change its ordinances in response to a developer's proposal. The ordinance completely upsets our vesting doctrine's protection of a citizen's constitutional right to develop property free of the "fluctuating policy" of legislative bodies.[97]

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[92] Id. at 49 (citing West Main Assocs., 106 Wn.2d 47).

[93] West Main Assocs., 106 Wn.2d at 50.

[94] Id.

[95] Id. at 52.

[96] Id. at 49, 52-53.

[97] Id. at 52-53.

Here, Potala Village fails to cite any law that prevented it from filing a building permit application before the November 2011 moratorium. Thus, West Main Associates does not support the argument.

The parties have expressly agreed that there are no genuine issues of material fact. Thus, we do not consider arguments to the extent they are based on alleged factual disputes over communications between Potala Village and the City regarding the possible filing of a building permit prior to the time Potala Village actually applied for one. And, as we stated previously in this opinion, the validity of the moratorium is not at issue in this appeal. Thus, there is no reason to apply the principles of West Main Associates to this case.

To summarize, Potala Village's failure to file a completed application for a building permit before enactment of the City's moratorium on certain permits bars the vesting of rights to zoning or other land use control ordinances for the entire project. The filing of Potala Village's completed application for a shoreline substantial development permit for a portion of the project on February 23, 2011 did not vest rights to the zoning or other land use control ordinances for the entire project that existed on that date.

The City states in its briefing that Talbot, the 1974 decision of this court, may support permit vesting to the "shoreline regulations in effect" at the time of its application for the shoreline substantial development permit.[98] Because that question is not before us, we express no opinion on it.

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[98] Appellant City of Kirkland's Opening Brief at 39.

Finally, we express no opinion on whether or to what extent the vested rights doctrine applies to permits other than shoreline substantial development permits. These questions are not before us.

DECLARATORY JUDGMENT

The City argues, in the alternative, that even if Potala Village's rights vested to zoning or other land use control ordinances for the project upon filing of the completed application for the shoreline substantial development permit application, it is not entitled to relief under the Uniform Declaratory Judgments Act.[99] Because the vested rights doctrine does not apply to shoreline substantial development permits permit, we need not address that argument.

We reverse the order granting Potala Village's motion for summary judgment. We remand with directions to the trial court to grant the City's cross-motion for summary judgment and dismissal.

Cox, J.

WE CONCUR:

Trickey, J

Leach, J.

[99] Id. at 41-43.