LAND USE
CASE LAW UPDATE

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Standing
Thompson v. City of Mercer Island, Court of Appeals No. 72809-1-I

Facts:

- Applicant files for short plat amendment in order to make paved driveway a separate easement to avoid impervious surface limitations
- Mercer Island administratively approves short plat
- Thompson, neighbor, submitted written comments on Notice of Application and appealed approval of the amendment to the planning commission.
- Thompson testified at public hearing before planning commission along with his neighbor, Misselwitz.
- Misselwitz did not submit any written comments.
- Planning Commission sustained approval.
- Thompson and Misselwitz both appealed to superior court under Land Use Petition Act

Standing
Thompson v. City of Mercer Island, Court of Appeals No. 72809-1-I

Ruling: Misselwitz Lacks Standing to Appeal Because he Failed to Exhaust Administrative remedies

-- He didn't appeal administrative approval to planning commission.

-- He didn't submit written comment to qualify as a party of record under Mercer Island regulations.

Standing
Thompson v. City of Mercer Island, Court of Appeals No. 72809-1-I

A person who claims to be aggrieved or adversely affected by a land use decision has standing to bring a land use petition only if he has exhausted his administrative remedies to the extent required by law. RCW 36.70C.060(2)(d).

"*The Legislature sensibly confined the category of non-owners eligible to seek judicial review of such decisions to those who participated in the administrative process to the extent allowed. This approach vests greatest discretion in local decisionmakers, and is thus consistent with the Legislature's policy to accord deference to local government and allow only limited judicial interference*." *Ward v. Bd. of Skagit County Comm'rs*, 86 Wash.App. 266, 271–72, 936 P.2d 42 (1997).

Standing
Thompson v. City of Mercer Island, Court of Appeals No. 72809-1-I

Mercer Island Standing Rules (since amended):

Only people who submit written comments will be parties of record and only parties of record will receive notice of the decision and have the right to appeal. MICC 19.15.020(E)(2)(e).

The planning commission's decision may be appealed "*by a party of record with standing to file a land use petition in King County Superior Court*." MICC 19.15.020(J)(5)(g).

Misselwitz failed to submit comments or appeal to pc, therefore no standing.

Standing
Thompson v. City of Mercer Island, Court of Appeals No. 72809-1-I

But, sign-in sheet said following:

"*Only those persons who submit written comments or testify at the open record hearing will be parties of record; and only parties of record will receive a notice of the decision and have the right to appeal*." (emphasis added).

Ruling: Incorrect sign-in sheet notice doesn't override code requirements.

Standing
Thompson v. City of Mercer Island, Court of Appeals No. 72809-1-I

Ruling: Thompson also doesn't have standing because he showed no injury to him caused by plat approval.

An allegedly aggrieved person has standing to file a land use petition only if he shows that the land use decision has prejudiced him, or is likely to. RCW 36.70C.060(2)(a).

To satisfy the prejudice requirement, a petitioner must show that he would suffer injury in fact as a result of the land use decision. To show an injury in fact, the petitioner must allege a specific and perceptible harm. If the petitioner alleges a threatened rather than an existing injury, he must also show that the injury will be immediate, concrete and specific; a conjectural or hypothetical injury will not confer standing.

Standing
Thompson v. City of Mercer Island, Court of Appeals No. 72809-1-I

Examples of sufficient injury to confer standing:

- Evidence showing development will increase traffic around appellant's property.

- Evidence that development would draw limited water from aquifer and deprive appellant of ability to exercise her senior water rights.

Standing
Thompson v. City of Mercer Island, Court of Appeals No. 72809-1-I

Example of insufficient injury to confer standing:

- Preserving zoning protection.

Court: To have standing, a petitioner's interest must be more than simply the abstract interest of the general public in having others comply with the law.

Standing
Thompson v. City of Mercer Island, Court of Appeals No. 72809-1-I

Thompson argued that the ultimate result of the proposed short plat will be houses that are inconsistent with the zone and neighborhood, overcrowd land, create a negative effect on open space, air, light, comfort and aesthetics, and diminish the value of surrounding properties like his own.

Court ruled this was insufficient to establish standing, because it failed to show any immediate, concrete, and specific injury.

WSDOT RULES!
WSDOT v. City of Seattle, Court of Appeals No. 7271902-I

Facts:

- SR 520 Bridge Replacement Project
- WSDOT gets temporary easement for "construction bridges" to build Mountlake Interchange portion of bridge replacement
- Seattle issues stop work requiring grading permit
- WDOT acquires permits under protest then sues claiming Seattle had no right to require permits

WSDOT RULES!
WSDOT v. City of Seattle, Court of Appeals No. 7271902-I

Issue:

Whether the following SMC grading exemption applies in the temporary easement:

"[d]evelopment undertaken by the Washington State Department of Transportation in state highway **right-of-way** that complies with standards established pursuant to Chapter 173–270 Washington Administrative Code, the Puget Sound Highway Runoff Program;....

Specifically, does the temporary easement qualify as state highway "right of way"?

WSDOT RULES!
WSDOT v. City of Seattle, Court of Appeals No. 7271902-I

Rules of Construction:

Our objective is to ascertain and give effect to legislative intent.

We look first to the text of a statute to determine its meaning.

When the meaning of statutory language is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent.

If the plain language is subject to only one interpretation, our inquiry is at an end.

When interpreting a statute, we must not add words where the legislature has chosen not to include them.

We must construe the statute so that all the language used is given effect, with no portion rendered meaningless or superfluous.

We must also avoid an interpretation that results in unlikely or strained consequences.

We consider a provision within the context of the regulatory and statutory scheme as a whole.

WSDOT RULES!
WSDOT v. City of Seattle, Court of Appeals No. 7271902-I

Deference:

RCW 36.70C.130(1) – LUPA grounds for reversal include:

"(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;"

Court: *This standard does not require a court to give complete deference, but rather, such deference as is due. We do not defer to an interpretation that conflicts with the plain language of the grading code exemption*

Practical Tip: Establish consistent historical interpretation.

WSDOT RULES!
WSDOT v. City of Seattle, Court of Appeals No. 7271902-I

Seattle's Interpretation:

"Right of Way" = "a strip of land, any portion of which is open as a matter of right to public vehicular travel.

Based on land use code and traffic code:

Land use code: "right of way" = a strip of land platted, dedicated, condemned, established by prescription or otherwise legally established for the use of pedestrians, vehicles or utilities.

Traffic code: "highway" = the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

WSDOT RULES!
WSDOT v. City of Seattle, Court of Appeals No. 7271902-I

Ruling:

Court adopts state statute definition of state highway. **RCW 47.14.020(1) broadly defines "right-of-way" to mean "*the area of land designated for transportation purposes.*"** The temporary easements are used for transportation purposes, therefore they are state highway.

Reasoning:

Plain meaning and every word has meaning -- City ignores "state" in "state right of way".

Land use code definitions specifically state only applies to land use code.

Regulatory context – WSDOT has exclusive authority to regulate

Regulatory Context

RCW 47.01.260(1):

The department of transportation shall exercise all the powers and perform all the duties necessary, convenient, or incidental to the planning, locating, designing, constructing, improving, repairing, operating, and maintaining state highways, including bridges and other structures, culverts, and drainage facilities and channel changes necessary for the protection of state highways .

More Rules of Construction:

Specific statutory language will prevail over conflicting general language.

More recent language prevails over conflicting earlier language.

Declarations of policy are interpretive aids, but are not enforceable in themselves.

Statutes are construed as a whole to harmonize and give effect to all provisions when possible.

For those of you who still miss school:
A Multiple Choice Exam!

A subdivision application is returned to the applicant for further information 60 days after it was deemed complete. Once the requested information is submitted, what is the deadline for a final decision by the City Council?:

A. 30 days.

B. 90 days.

C. 60 days.

D. A reasonable amount of time.

E. 10 days after the close of the hearing

RCW 64.40.040

(1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, **or relief from a failure to act within time limits established by law**….

Multiple Choice Exam
The 30, 90 or "reasonable time" answer

RCW 58.17.140:

(1) Preliminary plats of any proposed subdivision and dedication shall be approved, disapproved, or returned to the applicant for modification or correction within ninety days from date of filing thereof unless the applicant consents to an extension of such time period or the ninety day limitation is extended to include up to twenty-one days as specified under RCW 58.17.095(3): PROVIDED, That if an environmental impact statement is required as provided in RCW 43.21C.030, the ninety day period shall not include the time spent preparing and circulating the environmental impact statement by the local government agency. (1969)

Multiple Choice Exam
The 60 day answer

RCW 36.70B.080:

(1) Development regulations adopted pursuant to RCW 36.70A.040 must establish and implement time periods for local government actions for each type of project permit application …. The time periods for local government actions for each type of complete project permit application or project type **should not exceed one hundred twenty days**, unless the local government makes written findings that a specified amount of additional time is needed to process specific complete project permit applications or project types. (1994)

Multiple Choice Exam
The 60 day answer

RCW 36.70B.020:

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

Multiple Choice Exam
The 10 day answer

RCW 35A.63.170

(3) Each final decision of a hearing examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision. Such findings and conclusions shall also set forth the manner in which the decision would carry out and conform to the city's comprehensive plan and the city's development regulations. Each final decision of a hearing examiner, unless a longer period is mutually agreed to in writing by the applicant and the hearing examiner, shall be rendered within ten working days following conclusion of all testimony and hearings.

Facts (Regulatory Background):

The federal Clean Water Act (CWA) prohibits any discharge of pollutants into the nation's waters, unless the discharge is made according to the terms of a permit issued under the National Pollution Discharge Elimination System (NPDES). 33 U.S.C. §§ 1311(a), 1342.

The federal Environmental Protection Agency (EPA) may issue NPDES permits, but it may also delegate the authority to issue permits to a state agency. 33 U.S.C. § 1342(a)(1), (b).

In Washington, EPA has delegated the authority to issue NPDES permits to Ecology. See RCW 90.48.260.

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

Facts (DOE Issues NPDES Permit):

In August 2012, Ecology issued the 2013–2018 Phase I Municipal Stormwater Permit.

The 2013–2018 Permit authorizes and regulates the discharge of stormwater to surface waters and to ground waters from large and medium municipal separate storm sewer systems, referred to as MS4s.

Snohomish County, King County, Pierce County, Clark County, and the cities of Seattle and Tacoma are among the entities that are permittees under the 2013–2018 Permit.

The 2013–2018 Permit is effective from August 1, 2013 through July 31, 2018.

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

Facts (NPDES Permit):

The 2013–2018 Permit requires all permittees to create a stormwater management program.

That program must include the enactment of local ordinances or other governing documents regulating development within each permittee's jurisdiction.

The 2013–2018 Permit requires several conditions that permittees must implement through their ordinances. Condition S5.C.5 is one such condition.

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

Facts (NPDES Permit Condition S5.C.5.):

Condition S5.C.5 includes a lengthy set of minimum performance measures that vary according to type of development, including preparing stormwater site plans; drafting stormwater pollution prevention plans; maintaining natural drainage patterns to the maximum extent practicable; and implementing on-site stormwater management best management practices to the extent feasible, constructing stormwater treatment facilities to treat stormwater runoff, implementing flow control standards to reduce the impacts of stormwater runoff, ensuring that projects draining into wetlands comply with various guide sheets and construction restrictions, and maintaining an operation and maintenance manual.

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

Facts (The Problem):

NPDES Permit Condition S5.C.5a.iii:

"...The local program adopted to meet the requirements of S5.C.5.a.i through ii shall apply to all applications submitted after July 1, 2015 ***and shall apply to projects approved prior [to] July 1, 2015, which have not started construction by June 30, 2020…"***

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

Issue:

Does Condition S5.C.5aiii violate the vested rights doctrine by applying to permits that vested prior to the adoption of local stormwater ordinances?

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

What is the vested rights doctrine?

The vested rights doctrine generally provides that certain land development applications must be processed under the land use regulations in effect when the application was submitted, regardless of subsequent changes to those regulations.

Development rights “vest” on a date certain—when a complete development application is submitted.

The purpose of the vested rights doctrine is to provide certainty to developers and to provide some protection against fluctuating land use policy.

What permits are subject to the vested rights doctrine?

Building permits

Subdivisions

Development Agreements

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

What exactly do these permits vest to?

RCW 19.27.095(1): valid and complete building permit 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*."

RCW 58.17.033(1) provides that a proposed division of land "*shall be considered under the subdivision or short subdivision ordinance, and zoning* ***or other land use control ordinances****, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official*."

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

What exactly do these permits vest to?

RCW 36.70B.180 provides that a development agreement is not subject to an amended or new "*zoning ordinance or* ***development standard*** *or regulation adopted after the effective date of the agreement*."

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

So more precisely, issue of whether building/subdivision/development agreement vests against NPDES permit requirements is whether NPDES requirements qualify as

"**other land use control ordinances**" under building and subdivision vesting statutes, or

"**development standard**" under developer agreement statute.

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

What is a land use control ordinance?

Prior case law: A land use control is one that that "exercises a restraining or direction influence over land use". *New Castle v. LaCenter*, 98 Wn. App. 224 (1999).

New Castle held that a transportation impact fee was not a land use control and therefore not subject to vesting because it did not affect the physical aspects of development, i.e. *"[the developer] is not being forced to use its land or build differently from that which [the developer] was able to do at the time its plans were approved.*"

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

What is a land use control ordinance?

In Westside Business Park, LLC v. Pierce County, 100 Wn. App. 599 (2000), the court ruled that stormwater control ordinances are land use controls.

What parts of Condition S5.C.5 would be considered land use controls:

Examples: Source control best management practices, stormwater best management practices and flow control standards all exert a restraining and directing influence over the development of land.

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

Ruling:

"Development regulation" for development agreement vesting will be construed same as land use control.

Condition S5C.5.a.iii conflicts with the building permit, subdivision and developer agreement vesting statutes because it subjects vested permit applications and developer agreements to subsequently adopted stormwater controls.

Condition S5C.5.a.iii is invalid because DOE does not have the authority to force municipalities to violate state vesting laws.

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

Does Condition S5C.5.a.iii preempt state vesting statutes?

Supremacy Clause: Federal law preempts state law.

Conflict Preemption Occurs when:

(1) federal and state laws conflict, making compliance with both an impossibility, or

(2) state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

Vested rights doctrine doesn't conflict with CWA because

(1) CWA does not mandate specific standards, those are left to DOE.

(2) NPDES permit reflects DOE's implementation choices, not mandates of Congress.

(3) CWA has no set deadline for compliance.

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

Vested rights statutes don't stand as obstacle to objectives of congress:

Goal of CWA is "*restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters" and achieving or maintaining "water quality which provides for the protection and propagation of fish, shellfish, and wildlife*." 33 USC Section 1311.

Key stormwater provision is 33 USC Section 342(p)(3)(B)(iii), which requires NPDES permits "*shall require controls to reduce the discharge of pollutants to the maximum extent* ***practicable***."

Use of term "practicable" instead of "possible" signifies an intent to allow for some flexibility. DOE itself exercised this flexibility by allowing vesting through 2020. Congress also didn't require immediate compliance and delegated the NPDES permit program to the states.

Vested Rights and the Feds

Snohomish County v. Pollution Control Hearings Board, Court of Appeals No. 46378-4-II

Ruling:

CWA doesn't preempt Washington's vested rights doctrine because the vested rights doctrine does not conflict with the CWA and the flexibility involved in the delegation of NPDES implementation to the states enables the application of the vested rights doctrine without standing as an obstacle to the objectives and purposes of Congress.

Current Vesting Status of Subdivisions

Alliance Investment Group of Ellensburg v. Ellensburg, Court of Appeals, No. 32370-6-III

Facts:

Alliance files short plat application for nine lot industrial park. City is generally aware that Alliance plans for industrial development of the industrial park. The park was located in a floodplain area and the plat was reviewed for compliance with applicable flood plain regulations. The year following approval of the plat, the City amended its floodplain regulations.

Alliance asked for a statement of restrictions confirming that the new floodplain regulations didn't apply. The City disagreed and Alliance appealed to superior court.

Current Vesting Status of Subdivisions

Alliance Investment Group of Ellensburg v. Ellensburg, Court of Appeals, No. 32370-6-III

RCW 19.27.095(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.

Alliance Ruling: Plats and their future development only vest to extent use disclosed (applying Noble Manor v. Pierce County). In this case, the floodplain regulations were only applied to the plat design so vesting only applies to plat design but not building design. The City was aware of the general industrial use contemplated for the lots, so vesting also applies to the types of uses allowed but not their specific development.

Save Our Scenic Area v. Skamania County
Washington Supreme Court (NO. 90398-1, June 11, 2015)

1. "Failure to act" GMA claim can be brought at any time.
2. Limitations period for 60-day Planning Enabling Act claim that development regulation is inconsistent with comprehensive plan doesn't commence until adoption of final development regulation.
3. Moratoria can, at least in conjunction with other factors, operate to toll appeals period for adoption of development standards.

Save Our Scenic Area v. Skamania County
Washington Supreme Court (NO. 90398-1, June 11, 2015)

Facts:

Skamania County is 90% publicly owned forest lands with only 3% open for private development.

Skamania County is not a GMA county and only has to adopt resource and critical area regulations.

Save Our Scenic Area v. Skamania County
Washington Supreme Court (NO. 90398-1, June 11, 2015)

Facts:

In 1986 Skamania County adopts an “unmapped” zoning designation. The designation allows anything that isn’t a nuisance.

In 2005 Skamania County adopted Resolution 2005-35, designating resource lands. The resolution declared that the resolution “…meets the requirements of the GMA for the conservation of forest, agricultural and mineral resource lands”.

Save Our Scenic Area v. Skamania County
Washington Supreme Court (NO. 90398-1, June 11, 2015)

Facts:

In 2007 Skamania County revised its original 1977 comprehensive plan to designate much of the County's private forest area "Conservancy" in order to protect forest resources. This Conservancy designation comp plan designation was inconsistent with the unclassified zoning designations.

The same day the County adopted a six month moratorium in order to maintain status quo pending implementing development regulations for the 2007 comp plan amendments and also adoption of critical area regulations.

Save Our Scenic Area v. Skamania County
Washington Supreme Court (NO. 90398-1, June 11, 2015)

Facts:

The moratorium was extended in six month increments up to 2012.

In 2012 Skamania County again extended the moratorium but reduced its scope from 15,000 acres to 4,500 acres.

Skamania County then approved a wind farm in the 4,500 acre area (???).

Save Our Scenic Area v. Skamania County
Washington Supreme Court (NO. 90398-1, June 11, 2015)

Facts:

In 2012 Plaintiffs challenge wind farm on basis that Skamania County never completed GMA critical area updates and that the County violated the Planning Enabling Act by failing to ensure consistency between its 1986 zoning ordinance and its 2007 comprehensive plan.

Superior court dismissed the claims as untimely. It determined that the update claim should have been filed in 2005 when the natural resource resolution was adopted and that the 2007 comprehensive plan inconsistency should have been challenged in 2007 when the comp plan was adopted.

Save Our Scenic Area v. Skamania County
Washington Supreme Court (NO. 90398-1, June 11, 2015)

Ruling: (GMA Failure to Act Claim)

- RCW 36.70A.130(1)(b) required Skamania County to update its natural resource and critical areas ordinance by December 1, 2008. Skamania County adopted its resource resolution on August 2, 2005.
- The SOL for filing a GMA claim for partially planning counties is 60 days by analogy to fully planning counties.

Save Our Scenic Area v. Skamania County
Washington Supreme Court (NO. 90398-1, June 11, 2015)

Ruling: (GMA Failure to Act Claim)

- Although the 2005 resource resolution stated its intent was to satisfy GMA requirements for resource lands, it didn't mention or address critical areas or periodic update requirements for critical areas.
- Since the 2005 resource resolution didn't purport to satisfy GMA update requirements and the moratoria stated that one of its purposes was to complete the critical area update process, it was determined that the 2005 resource land resolution did not serve as the County's critical areas update.
- By analogy to regulations applicable to fully planning communities, **a challenge for failure to act can be brought at any time**. The plaintiffs challenge on failure to act was timely and they could argue the County failed to meet the 2008 update deadline.

Save Our Scenic Area v. Skamania County
Washington Supreme Court (NO. 90398-1, June 11, 2015)

Ruling: (PEA Claim)

RCW 36.70A.040 provides as follows:

"*Beginning July 1, 1992, the development regulations of each county that does not plan under RCW 36.70A.040 shall not be inconsistent with the county's comprehensive plan….*"

Ruling: (PEA Claim)

Court rules that only final development regulations are subject to an inconsistency challenge. Since the purpose clauses of the moratoria stated that the County was maintaining status quo in order to attune its development regulations with its 2007 comprehensive plan conservancy designations, the plaintiffs didn't have to file their claim in 2007 but could wait for the results of the concurrently adopted moratorium.

Save Our Scenic Area v. Skamania County
Washington Supreme Court (NO. 90398-1, June 11, 2015)

Moral of Story:

Be clear about the purpose of your ordinance.

If it's your entire GMA update, state it's your entire GMA update.

If you use a moratorium as a stop-gap to adopt final development regulations, be aware that the moratorium may delay GMA or PEA appeal periods.

Klineberger v. King County, Division I Court of Appeals, No. 71325-6-I (2015)
Building in a Floodway

Facts:

Klinebergers own property in a federally mapped floodway. The property contained a partially burned home and the Klineburgers worked to repair it.

On January 9, 2012, King County issued the Klineburgers a notice of code violation and order of abatements for working on the burned home. The Klineburgers timely appealed.

On October 22, 2012, DOE sent a letter to King County DPER explaining that DOE had determined that the Klineberger site did not meet most of the required criteria for rebuilding in a floodway. The letter concluded, “Ecology does *not* recommend the approval of the Klineberger residence placement at 9609–428th Avenue SE”

Facts:

On March 20, 2013, the King County hearing examiner heard the Klineburgers' code enforcement appeal. The Examiner concluded he had no jurisdiction to hear the appeal.

The Klineburgers appealed to superior court under LUPA, asserting, “King County is the final authority on the permit and should not abdicate to the Washington State Department of Ecology.” The superior court determined it had jurisdiction and ruled that the Klineburgers could repair the home.

Klineberger v. King County, Division I Court of Appeals, No. 71325-6-I (2015)

Rulings:

- State statute provides that nothing may be built within a floodway without DOE permission.
- Recommendation of DOE was final decision appealable to Pollution Control Hearings Board and then to court under Administrative Procedure Act.
- HE correctly concluded he had no authority to rule upon validity of DOE recommendation.
- Trial court incorrectly concluded it had authority to consider DOE recommendation under LUPA. Klineburgers failed to exhaust administrative remedies by appealing to Pollution Control Board, therefore couldn't be reviewed under judicial appeal.
- DOE recommendation was final recommendation despite failure to identify appeal rights as required by state statute.

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.

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?

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.

Facts:

Total Outdoor claimed 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. But 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. Therefore, Seattle determined the most recent (1981) permit was the best evidence of the prior sign size.

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 including the 4.5 foot tall sign base.

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.

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

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.

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

Fairness of Appeal Deadlines for No Notice Permits Finally Addressed!!!

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.

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.