Bowker, Kristina J.

From: DCLongwell <DCLongwell@comcast.net>
Sent: Friday, January 19, 2024 12:24 PM
To: Bowker, Kristina J.
Subject: HE-23-PL-023 and HE-23-PL-022 Written Public Comment
Attachments: B'ham HE-23-PL-023 Cov Ltr.pdf; Exhibit A - Clarification of Hearing Examiner's Jurisdicti..pdf; Exhibit B Building Permit Limitations per HB-1110.pdf; Exhibit C - Binding Covenant Requirements.pdf; Exhibit D - LAUER v Pierce County - 2011.pdf; Exhibit E - Hearing Examiner Errors.pdf; Exhibit F - Legislative Intent of RCW 19_27_095.pdf; Exhibit G - HB-1110 Enforcement Requirements.pdf; Exhibit H - Weyerhaeuser v Pierce County.pdf

MS, Kristina Bowker,
Bellingham Hearing Examiner's Clerk

Re Case # HE-23-PL-023 and Case # HE-23-PL-022 - Written Public Comment Distribution

I am snowed in so I could not make it to City Hall to give you hard copy of the attached PDF files.
Please make sure the Hearing Examiner, City staff and the applicants get the attached before the Public Hearing at 6:00 PM on January 24th 2024.

I will be at the Public Hearing to clarify the following attachments.

The attached PDF files contain:
A Public Comment Cover letter. (This letter contains legal questions for the Hearing Examiner)
Exhibit "A"- Clarification of Hearing Examiner's Jurisdiction (Per City Council email .)
Exhibit "B" - Building Permit Limitations per House Bill "HB-1110 Sections 10, 11,12 and 13. (This Exhibit's cover letter includes legal questions for the Examiner.)
Exhibit "C" - Legal Lot Determination Submittal Requirements.
Exhibit "D" - Lauer v. Pierce County (2011). (This Exhibit's cover letter includes legal questions for the Examiner.)
Exhibit "E" - Errors in Hearing Examiner's HE-23-PL-014 Decision for 830 Briar Road
Exhibit "F" - Legislative Intent of RCW 19.27.095
Exhibit "G"- HB-1110 Enforcement Requirements (Contains statutory requirements for enforcement).
Exhibit "H"- Weyerhaeuser v. Pierce County (1999). (This Exhibit's cover letter includes legal questions for the Examiner.)

Please confirm that you got this email and have distributed the attached as requested.

Thanks,

Dean Longwell (Architect – Retired)
621 Linden Road
Bellingham Washington

January 19, 2024

To: Hearing Examiner
City of Bellingham

This public comment packet also applies to:
Case # HE-23-PL-022, Project # SUB022-0031

Re: Conditional Use Permit at 2460 Lakeway Drive,

Case # HE-23-PL-023 Project # USE 2023-0028 / ADU 2023 – 0042

Applicants: Nichols Brown and Brenda Beehler JT

Request for a clear Hearing Examiner decision with respect to:

> When issuing a Building Permit can the Planning Department ignore the limits of the City's jurisdictional authority, State Law "HB-1110" Sections 10, 12 and 13 and Bellingham's Municipal Code BMC 17.10.020 Section 102.2 Other Laws?

This legal question applies to this Condition Use Permit (CUP) and all other permits in the City.
See Exhibit "A" - Clarification of Hearing Examiner's Jurisdiction.
See Exhibit "H"- Weyerhaeuser v. Pierce County (1999) "Land use decision outside the authority or jurisdiction of the body or officer making the decision."

The Planning Department is ignoring a new State Law by using out-of-date forms, checklists, procedures and protocols for determining "permit application validity".

The key issues are:

1. Violation of City of Bellingham's "Construction Administration Code BMC 17.10.020 Section 102.2 "Other Laws".

   > "The provision of this code shall not be deemed to nullify any provision of local, State or Federal law".

2. Violation of State Law "HB-1110" Sections 10, 12 and 13 where the Legislature has stated a private covenant created before July 23rd 2023 "may" actively or effectively prohibit construction, development and the use of additional housing. ***See Exhibit "B"- Building Permit Limitations per House Bill "HB-1110" Sections 10, 11, 12 and 13.***

3. Can the Planning Department knowingly ignore a "City published" permit application submittal requirement? ***See Exhibit "C"- Legal Lot Determination Submittal Requirements and Exhibit "D"- Lauer v. Pierce County, (2011).***

4. Can the Planning Department use a "misleading statement" to ignore the limits of the City's jurisdictional authority and State Law "HB-1110" Sections 10, 12 and 13?

   > "The City lacks authority to enforce a private covenant" is a misleading statement. "The City lacks authority to issue a permit without a variance" is a whole truth statement. This statement complies with every ethics standard for public and private situations where the City has no authority to authorize construction without a variance.

See Exhibit "H"- Weyerhaeuser v. Pierce County (1999). "Land use decision outside the authority or jurisdiction of the body or officer making the decision".

5. Can the City nullify a binding covenant on a permit applicant's property that provides the adjoining property owner(s) with a "protective land use benefit" without due process?
See Exhibit "H"- Weyerhaeuser v. Pierce County (1999). "Land use decision violates the constitutional rights of the party seeking relief.

6. Can the Planning Department knowingly burden an adjoining property owner with the expense of having an invalid building permit revoked by court order?
See acting in "good faith" and "valid permit" requirements in Exhibit "D"- Lauer v. Pierce County, (2011) and Exhibit "H"- Weyerhaeuser v. Pierce County (1999). "Land use decision violates the constitutional rights of the party seeking relief."

The Planning Department uses a denial of facts and the following misleading statements to evade responsibility for verifying "permit application validity".

1. "The City lacks authority to enforce a private covenant" is a misleading statement when the whole truth is "the City lacks authority to issue a permit without a variance." when a land use restriction is not created by the City.

2. "The burden of proof falls on the applicant / homeowner to be aware of covenants and deed restrictions on a title report" to evade the City's responsibility for verifying permit application validity.

These statements coupled with a lack of understanding of "common sense" are being used by City staff to act in bad faith.

See Exhibit "D"- Lauer v. Pierce County, (2011). "The requirement that a building permit is "valid" assures that good faith is not only one way."

The Legislative Intent of State Law "HB-1110" Sections 10, 12, and 13 is "remedial and curative in nature" with respect to municipalities abusing their limits of authority with respect to private land use restrictions. This is why the Examiner needs to inform the City, the applicant and the public "why" the City cannot issue a permit when a vested covenant prohibits development.

Yours truly,

Dean Longwell (Architect – Retired)
621 Linden Road, Bellingham WA 98225

Attachments:
Exhibit "A" Clarification of Hearing Examiner's Jurisdiction
Exhibit "B" Building Permit Limitations per House Bill, "HB-1110" Sections 10, 11, 12 & 13
Exhibit "C" Legal Lot Determination Submittal Requirements
Exhibit "D" Lauer v. Piece County, 173 Wn. 2d 242 (2011)
Exhibit "E" Errors in Hearing Examiner's HE-23-PL-014 Decision for 830 Briar Road
Exhibit "F" Legislative Intent of RCW 19.27.095
Exhibit "G" HB-1110 Enforcement Requirements
Exhibit "H" Weyerhaeuser v. Pierce County 976 P.2d 1279 (1999)

Exhibit "A"

Clarification of Hearing Examiner's Jurisdiction

The following is City Councilman Michael Lilliquist response when I asked "What is the Council's expectation of the Hearing Examiner with respect to ensuring permit application validity?"

I asked Mr. Lilliquist this question because I wanted the Examiner to address a problem with City staff not following the guidance of BMC 17.10.020 "Other Laws" and new State Law "HB-1110" Sections 10, 12 and 13 which "allows a "date valid" private covenant to actively and effectively prohibit construction.

The Examiner's HE-23-PL-014 decision validated my concerns at 830 Briar Road but failed to supply reasoning based in law for her decision. As a result the public, the applicant and the City do not know her reasoning for the decision. *See Exhibit "E" Errors in Hearing Examiner's HE-23-23-014 Decision for 830 Briar Road.*

"Her job is to address the legal question or decision that comes before her. Her efforts to address those issues may of may not involve an inquiry of the staff's review of the validity of a permit. If the Examiner's felt it would help her work she is fully empowered to do so. But she is under no obligation to look further than she needs to in order to do her own work".

DCLongwell

From: Lilliquist, Michael W. <mlilliquist@cob.org>
Sent: Tuesday, January 2, 2024 2:51 PM
To: DCLongwell
Cc: Lyon, Blake G.; Anderson, Lisa A.
Subject: RE: Hearing Examiner Responsibilities Question?

Dean,

I am not sure I can answer your question with expertise and certainty. I can only tell you what I understand to be the cas[illegible]but don't take my word as definitive.

As I ur[illegible]stand it, the Hearings Examiners' job is to assess and adjudicate the legal issue before her. That may or may not inv[illegible]e any evaluation of the permit or its completeness or its accuracy. Her job is not to review the staff's work. Her job is to address the legal question or decision that comes before her. Her efforts to address those issues may or may not involve an inquiry of the staff's review of the validity of the permit. If the Examiner felt it would help her work, then she is fully empowered to do so. But she is under no obligation to look any further than she needs to in order to do her own work.

Best regards,

Michael Lilliquist
Bellingham City Council president,
and Ward 6 Representative
mlilliquist@cob.org

Per state law RCW 42.56, my incoming and outgoing email messages are public records and are therefore subject to public disclosure requirements.

Engage Bellingham

Check out Engage Bellingham, the City's online venue for public feedback about key projects.

An approved "variance" from the beneficiaries of a covenant is required whenever a permit applicant violates a "Land Use Control Regulation" created by the Legislature. It does not matter how the Legislature creates the regulation as long as the Legislature does it and it is clear the regulation prohibits construction. This is what the Legislature did with "HB-1110" Sections 10, 12 and 13 which means the City and the Examiner are required to enforce the Legislative Intent of "HB-1110" as follows:

- A variance is required if an applicant proposes a land use activity that is prohibited by a "date valid" covenant.

  City law states adjacent property owners are to be notified when permit applications propose a "non-conforming land use" and that there be a public hearing.

- A variance is required if an applicant violates a setback or buffer requirement created by a "date valid" covenant.

  City law states adjacent property owners are to be notified when permit applications request a "setback or buffer reduction" and that there be a public hearing.

2 Types of Cases Heard by the Bellingham Hearing Examiner

The Bellingham Hearing Examiner hears the following types of cases:

1. Subdivisions of land of nine or more lots.
2. Cluster subdivisions of land of five or more lots.
3. Density bonus applications for subdivisions of two or more lots.
4. Variances from subdivision regulations.
5. Conditional use permits.
6. Variances from land use regulations.
7. Oversize dwelling permits.
8. Reconstruction or expansion of Non-conforming Uses and Structures.
9. Co-housing developments.
10. Adaptive use permits for historic properties.
11. Variances from street and utility construction regulations.
12. Variances from Critical Areas regulations.
13. Shoreline conditional uses.
14. Appeals regarding Planned Developments.
15. Appeals regarding Design Review.
16. Appeals of Home Occupation Permits, Accessory Dwelling Units, and Short Plats.
17. Appeals of Critical Areas permits.
18. Appeals of tax and license decisions.
19. Appeals of certain determinations made by the City's Planning and Community Development, Public Works, and Parks and Recreation Departments.
20. Appeals from the Utility Hearings Board.
21. Contested vehicle tows and impounds initiated by the Bellingham Police Department
22. Appeals of Environmental Determinations.
23. Appeals regarding Binding Site Plans.
24. Appeals from Building Code determinations.
25. Appeals from certain Animal Control decisions.
26. Appeals of Nuisance or Litter Abatement Orders.
27. Appeals relating to Parade Permits.
28. Contested Property forfeitures.
29. Street Vacations (Recommendation to City Council).
30. Local Improvement Districts (Recommendation to City Council).

Exhibit "B"

Building Permit Limitations per House Bill, "HB-1110" Sections 10, 11, 12 and 13

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE ATTACHED IS TRUE AND CORRECT.

DATED this _____ day of _____, 2023 _____, Washington

_____
Dean C. Longwell

The attached "HB-1110" regulations are "remedial and curative in nature" with respect to municipalities nullifying the "protected property interests" of adjoining property owners without fairness or due process.

Hearing Examiner Questions regarding application of Washington's Vested Rights Doctrine to HB-1110 Sections 10, 12 and 13:

1. **Does HB-1110 transform a "Land Use Control Regulation" created by a pre-existing private covenant into a "Protected Land Use Control Regulation" that cannot be ignored by permit applicants or the City?**
    - State Law "HB-1110" Sections 10, 12 and 13 states a declaration (private covenant) created "after" the enactment of HB-1110 may not actively or effectively prohibit construction, development or the use of additional housing.
2. **Is the City allowed to issue a building permit without a variance when a vested covenant is authorized by State Law "HB-1110" to prohibit a land use activity or placement of construction?** **See attached covenant examples.**
    - Vesting "fixes the rules governing land development regardless of later changes in zoning or other land use regulations.
    - State Law "HB-1110" Sections 10, 12 and 13 vests covenant restrictions that were enacted before the enactment of HB-1110.
    - HB-1110 was enacted on July 23rd 2023
3. **Is the City required by BMC 17.10.020 Section 102.2 "Other Laws" to follow vested covenant's land use regulations before the Director of Planning has had time to reconcile the City's procedures and regulations with State Law "HB-1110" Sections 10, 12 and 13?**
    - The Director has a 6 month statutory deadline for updating the City's regulations but may do so before the deadline if desired or required.

House Bill "HB 1110", Sections 10, 11, 12 & 13 was enacted on July 23rd 2023:

These sections specifically define the conditions where a "declaration of an individual or the governing documents of an association or common interest group "may "actively or effectively prohibit construction and the issuance of a building permit.

NEW SECTION. **Sec. 10.** A new section is added to chapter 64.34 RCW to read as follows:

A declaration created after the effective date of this section and applicable to an area within a city subject to the middle housing requirements in section 3 of this act may not actively or effectively prohibit the construction, development, or use of additional housing units as required in section 3 of this act.

NEW SECTION. **Sec. 11.** A new section is added to chapter 64.32 RCW to read as follows:

A declaration created after the effective date of this section and applicable to an association of apartment owners located within an area of a city subject to the middle housing requirements in

section 3 of this act may not actively or effectively prohibit the construction, development, or use of additional housing units as required in section 3 of this act.

NEW SECTION. **Sec. 12.** A new section is added to chapter 64.38 RCW to read as follows:

Governing documents of associations within cities subject to the middle housing requirements in section 3 of this act that are created after the effective date of this section may not actively or effectively prohibit the construction, development, or use of additional housing units as required in section 3 of this act.

NEW SECTION. **Sec. 13.** A new section is added to chapter 64.90 RCW to read as follows:

Declarations and governing documents of a common interest community within cities subject to the middle housing requirements in section 3 of this act that are created after the effective date of this section may not actively or effectively prohibit the construction, development, or use of additional housing units as required in section 3 of this act.

Example #1 of a "DATE VALID" Restrictive Covenant per HB 1110 Section 10: 1953 covenant recorded in the public record without establishing an HOA organization to administer the covenant. This covenant is valid until it is rescinded in the public record and does not require an active HOA organization to administer the restrictions of the covenant.

➡ This covenant example meets the requirements for being transformed into a **"land use control ordinance"** by the State Legislature per House Bill HB-1110.

➡ This covenant restricts land use activity and the location of proposed structures.

VOL 389 PAGE 390

755690

BEULAH JOHNSON 1953 EXEMPT REAL ESTATE EXCISE TAX AUDITOR OF WHATCOM COUNTY WASHINGTON

CORRECTION WARRANTY DEED

THE GRANTOR, MARY B. LARRABEE, (sometimes designated as MARY BROWNLIE LARRABEE, a widow), individually and as Executrix of the estate of Charles F. Larrabee, deceased, of Orchard Terrace, Bellingham, Whatcom County, Washington, for and in consideration of furnishing a correction deed, conveys and warrants to CLARK A. HALLEY and LYLA B. HALLEY, his wife, of Bellingham, 2105 New Street. Washington, the following described real estate situate in the County of Whatcom, State of Washington, to-wit:

Tract E. A tract of land marked "Reserve" in the northwest corner of the Bartlett Estate Co.'s Subdivision, now a part of the consolidated City of Bellingham, Whatcom County, Washington, as per the map thereof, recorded in Book 6 of Plats, Page 15, in the Auditor's Office of said county and state.
ALSO, a tract of land in Section 12, Township 37 North, Range 2 East, W.M., described as follows, to-wit:

➡ 3. Grantees for themselves, their heirs and assigns, agree that said premises are to be used only for single detached private residential purposes and that the building line shall be at least twenty (20') feet from the nearest existing road boundaries with outbuilding lines at least eighty (80') feet from the nearest existing road boundaries.

➡ 7. All covenants on the part of the grantees herein contained shall run with the land hereby conveyed and shall bind all subsequent owners and occupants thereof in like manner as though the provisions of this instrument were recited and stipulated at length in each and every future deed or other instrument of grant or conveyance.

Example #2 of a "DATE VALID" Restrictive Covenant per HB 1110 Section 10:

There are "hundreds" of single lot conveyance documents similar to the following document where the Grantor applied a restrictive covenant as a condition of sale.

This covenant example meets the requirements for being transformed into a **"land use control ordinance"** by the State Legislature per House Bill HB-1110.

This covenant restricts a land use activity

1.10
1.00

BEULAH JOHNSON
TREASURER OF WHATCOM COUNTY, WASHINGTON

5158 DEC 8 1955

REAL ESTATE EXCISE TAX EXEMPT

WARRANTY DEED

THE GRANTOR, MARY B. LARRABEE, a widow, for and in consideration of the sum of SEVEN HUNDRED FIFTY ($750.00) DOLLARS, in hand paid, conveys and warrants to ARTHUR JOHNSON and ETHEL E. JOHNSON, his wife, GRANTEES, the following described real estate, situate in the County of Whatcom, State of Washington, to-wit:

Lot 1, except the Northwesterly Ten (10) feet thereof, Block 2, "Viewcrest", an Addition to the City of Bellingham, Whatcom County, Washington", as per the map thereof, recorded in Book 8 of Plats, page 5, in the Auditor's office of said county and state.

SUBJECT to all taxes and assessments accruing against said premises since September 1, 1949, and also subject to all liens and encumbrances accruing against said premises, by, through, or under Grantees.

4. Grantee for himself, his heirs and assigns, agrees that said premises are to be used only for single detached private residential purposes and that said premises shall not be subdivided.

9. All covenants on the part of the Grantee herein contained shall run with the land hereby conveyed and shall bind all subsequent owners and occupants thereof in like manner as though the provisions of this instrument were recited and stipulated at length in each and every future deed or other instrument of grant or conveyance.

Exhibit "C"

Legal Lot Determination Submittal Requirements

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE ATTACHED IS TRUE AND CORRECT.

DATED this _____ day of _____, 2023 _____, Washington

_____

Dean C. Longwell

The attached "Legal Lot Determination Submittal Requirements" requires a copy of any "binding covenant" that binds a permit applicant's property to an adjoining lot.

When a landowner, developer or builder create a restrictive covenant that runs with the land, it is settle law that the covenant is a "**binding covenant**" that provides certainty and other "protective benefits" for homeowners and their neighbors until the covenant is rescinded in the public record.

City staff claims this document does not exist and

does not apply to permit applicant's or City staff.

Permit Center
210 Lottie Street, Bellingham, WA 98225
Phone: (360) 778-8300 Fax: (360) 778-8301 TTY: 711 (WA Relay)
Email: permits@cob.org Web: www.cob.org/permits

LEGAL LOT DETERMINATION SUBMITTAL REQUIREMENTS

(PLEASE PRINT CLEARLY OR TYPE IN BLUE OR BLACK INK)

Application Requirements:

- ☐ A completed Land Use Application form
- ☐ All of the materials and information required by this form
- ☐ Application fee payment

Project Data:

1. Street address of Subject Property: _____
2. Size of Parcel (square feet): _____
3. Have you ever submitted a building permit application or other land use application for this property? _____ If so, please provide the application number: _____
4. Have any covenants been recorded to bind this lot to an adjoining lot? _____ If so, please attach a copy. (This information can be obtained at a title company)
5. Are there any structures located on the property or encroaching onto the property? _____ If so, provide a scaled site plan showing property lines, location, and use of structures.

Submittal Requirements:

Please attach the following information, which may be obtained through a title company

1. If the parcel is not a whole lot in an approved subdivision, provide a deed or sale contract dated prior to September 10, 1964 containing the same division of land as the subject property (the same legal description). If the land division was created after this date, provide a copy of the first deed that contains the current land description.
2. If the lot size is substandard, provide copies of deeds or sales contracts showing the ownership of the subject parcel and all abutting parcels on April 27, 1982. Provide a chain of deed or sale on contract showing the last transfer of ownership prior to April 27, 1982 and the first transfer after that date for the subject property and all abutting parcels.
3. The Planning and Community Development Department may request a survey to determine the location of structures.

Exhibit "D"

Lauer v. Pierce County, 173 Wn.2d 242 (2011)

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE ATTACHED IS TRUE AND CORRECT.
DATED this _____ day of _____, 2023 _____, Washington

_____
Dean C. Longwell

The attached Lauer v. Pierce County, 173 Wn.2d 242 (2011), Court Decision states permit applications must be "valid" and fully complete.

Hearing Examiner Questions regarding application of new State Law HB-1110 Regulations with respect to "the determination of permit application validity":

1. **Does HB-1110 transform a "Land Use Control Regulation" created by a pre-existing private covenant into a "Protected Land Use Control Regulation" that cannot be nullified or ignored by permit applicants or the City?**

    - State Law "HB-1110" Sections 10, 12 and 13 states a declaration (private covenant) created "after" the enactment of "HB-1110" may not actively or effectively prohibit construction, development or the use of additional housing.

2. **Is the City allowed to issue a building permit without a variance when a vested covenant is authorized by State Law "HB-1110" to prohibit a land use activity or the placement of construction?**

    - Vesting "fixes the rules governing land development regardless of later changes in zoning or other land use regulations.
    - State Law "HB-1110" Sections 10, 12 and 13 vests covenant restrictions that were enacted before the enactment of HB-1110.
    - HB-1110 was enacted on July 23rd 2023

3. **Is the City required by BMC 17.10.020 Section 102.2 "Other Laws" to follow vested covenant's land use regulations before the Director of Planning has had time to reconcile the City's procedures and regulations with State Law "HB-1110" Sections 10, 12 and 13?**

    - The Director has a 6 month statutory deadline for updating the City's regulations but may do so before that deadline if desired and/or required.

Supreme Court of Washington, En Banc.

Louise LAUER and Darrell de Tienne, Petitioners, v. PIERCE COUNTY; Mike and Shima Garrison and Betty Garrison, Respondents.

No. 85177–8.

Decided: December 15, 2011

Margaret Yvonne Archer, Attorney at Law, Tacoma, WA, for Petitioners. Gregory Austin Jacoby, Jennifer Anne Irvine Forbes, McGavick Graves PS, Jill Guernsey, Pierce County Prosecutor's Office, Tacoma, WA, for Respondents.

1. Louise Lauer and Darrell de Tienne separately own properties that neighbor a lot owned by Mike and Shima Garrison. Through a Land Use Petition Act (LUPA) petition, chapter 36.70C RCW, Lauer and de Tienne challenge a fish and wildlife variance granted to the Garrisons by Pierce County (the County) to build a single family residence within the protective buffer zone of a stream that runs across the Garrisons' property. The central issue before us is whether the Garrisons' rights vested in 2004 when they submitted their building application. The Garrisons also raise questions about the standing and timeliness of Lauer and de Tienne's claim, as well as whether the relevant critical area regulation even applies to the Garrisons' shoreline property. We hold that Lauer and de Tienne properly petitioned the superior court for review and that, because the Garrisons' building permit application contained misrepresentations of material fact, the Garrisons' rights did not vest in 2004.

FACTS

2. In December 2002, the Garrisons purchased a waterfront parcel of property on Henderson Bay in Gig Harbor, Washington. The property included an existing single-family residence. A Department of Natural Resources (DNR) Type 4 or Type 5 watercourse—specifically, a nonfish-bearing stream—runs southward across the southwest portion of the Garrisons' property. Petitioners Lauer and de Tienne are the Garrisons' neighbors to the east and west, respectively.

3. A few months after purchasing their property, the Garrisons illegally cleared vegetation from within the property's watercourse and its buffer. Former Pierce County Code (PCC) 18E.60.050(C), (D) (1997) required a 35–foot–wide buffer on both sides of "DNR Water Type 1 through 5" rivers and streams and an 8–foot–wide setback from the buffer for any construction over a certain size. See also Pierce County Ordinance 97–84, § 8 (Dec. 30, 1997). Current regulations require that the buffer be at least 65 feet wide. PCC 18E.40.060(B)(3).[1] Upon

receiving a complaint about the clearing, the County investigated and issued a stop work order on March 7, 2003, instructing the Garrisons to stop clearing and requiring that they revegetate the area. As part of that process, the Garrisons submitted a planting plan to the County, including a diagram of their property, which depicted the "existing drainage" and, north of that, an "existing trail." Clerk's Papers at 96–98.

4. In March 2004, the Garrisons filed a building permit application for a single-family residential dwelling between their existing home and the shoreline. The site plan diagram submitted with the application did not label the watercourse or its buffer and mislabeled the trail as an "existing drive."[2] Administrative R. (AR) at 263. The proposed residence was squarely within the 35–foot buffer of the watercourse. The County approved the permit, and the Garrisons began construction. In October 2004, the County conducted another site visit and issued another cease and desist order because the Garrisons were building within the drainage buffer. The building permit was suspended, and the Garrisons were directed to apply for a fish and wildlife variance within 60 days.

5. Instead, the Garrisons challenged the cease and desist order, and the County held a hearing on the matter. The Garrisons specifically claimed that a stream did not exist on their property and, alternatively, if it did, it was actually drainage that was illegally directed onto their parcel by de Tienne. A hearing examiner denied the Garrisons' claim, upholding the cease and desist order. The hearing examiner found that "[t]he drainage course [on the Garrisons' property] meets the definition of a DNR Type 4 or 5 watercourse and therefore requires a 35 foot wide, undisturbed buffer." AR at 90. The hearing examiner also found that the 2003 site plan prepared by the appellants in response to a Pierce County enforcement action regarding illegal clearing shows a "trail" alongside the drainage course in the same location as the "existing drive." Numerous exhibits and substantial testimony show that a trail and not a "drive" existed historically along the east side of the drainage course. Appellants cannot, therefore, assert that they justifiably relied upon the Pierce County inspector's approval of the footing location.

Id. at 98 (emphasis added). The Garrisons' motion for reconsideration was denied.

6. The Garrisons appealed the hearing decision to the superior court in a LUPA petition. According to the Garrisons, they voluntarily withdrew the petition based on an agreement with the County that they could "seek a variance and the County would process the variance under the regulations that were in effect in 2004." Br. of Appellants Garrison at 8–9. Neither the LUPA petition nor the supposed agreement is part of the record before us, and therefore, we do not consider them.

7. Effective on March 1, 2005, the County changed the required buffer for streams like the one on the Garrisons' property from 35 feet to 65 feet. Pierce County Ordinance 2004–56s, § 4 (Oct. 19, 2004) (codified as PCC 18E.40.060(B)(3)). Besides the buffer increase, the County's requirements for acquiring a variance also became more stringent. Compare former PCC 18E.10.070(D)(4) (1997), with PCC 18.40.060(C)(2).

8. On August 9, 2007, over two years after the buffer and variance criteria changes, the Garrisons filed for a fish and wildlife variance. Lauer and de Tienne participated in the hearing, opposing the variance. In particular, Lauer and de Tienne argued that the applicable provisions for determining whether to grant the variance were the current regulations, not those in effect when the building permit was submitted in 2004. At the hearing, the County supported the Garrisons' efforts to get a variance, agreeing that the Garrisons' rights vested in 2004.

9. Following the hearing, a county deputy hearing examiner applied the 2004 regulations, finding that the Garrisons' rights had vested in March 2004, and approved the variance in December 2007. Lauer and de Tienne filed a request of reconsideration of the variance decision, which was denied on March 4, 2008.

10. Lauer and de Tienne then filed a LUPA petition on March 27, 2008, with the Pierce County Superior Court, pursuant to chapter 36.70C RCW. In August 2008, the superior court reversed the hearing examiner's decision to grant the Garrisons' variance based on regulations in effect at the time the building permit was submitted. The superior court held that Lauer and de Tienne were not barred from bringing the suit and that the hearing examiner erroneously applied the law to the facts when he found the Garrisons' March 2004 building permit application to be complete. The Garrisons appealed. The Court of Appeals held that the building permit application was complete as a matter of law under RCW 36.70B.070(4)(a). Lauer v. Pierce County, 157 Wash.App. 693, 709, 238 P.3d 539 (2010). Lauer and de Tienne sought, and we granted, discretionary review. Lauer v. Pierce County, 171 Wash.2d 1008, 249 P.3d 182 (2011).

ANALYSIS

11. Judicial review of land use decisions is governed by LUPA. Abbey Rd. Grp., LLC v. City of Bonney Lake, 167 Wash.2d 242, 249, 218 P.3d 180 (2009). LUPA authorizes the reversal of a local land use decision if the party seeking relief carries the burden of establishing one of six statutorily enumerated standards. RCW 36.70C.130(1).

12. In this case, the following three standards are implicated:

(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;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts.

Id. Whether a decision involves an erroneous interpretation of the law under standard (b) is a question of law that courts review de novo. Abbey Rd. Grp., 167 Wash.2d at 250, 218 P.3d 180.

The substantial evidence standard of review, under standard (c), requires the court to determine whether a fair-minded person would be persuaded by the evidence of the truth of the challenged findings. Id. Under this standard, the court "consider[s] 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." Id. Finally, under standard (d), a decision is clearly erroneous if, "although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed." Phoenix Dev., Inc. v. City of Woodinville, 171 Wash.2d 820, 829, 256 P.3d 1150 (2011).

13. We now sit in the same position as the superior court and generally confine our consideration to the administrative record before the hearing examiner. HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs., 148 Wash.2d 451, 468, 61 P.3d 1141 (2003). We hold that Lauer and de Tienne have carried their burden of establishing that the land use decision to grant a variance involved an erroneous interpretation of the law, pursuant to RCW 36.70C.130(1)(b).

I. Standing

14. The Garrisons challenge whether Lauer and de Tienne have standing to file a LUPA petition and whether, once challenged in Pierce County Superior Court, Lauer and de Tienne were permitted to support their standing with facts that were not already contained in the administrative record. We affirm the superior court's finding that Lauer and de Tienne have standing.

15. Under LUPA, a person other than the owner of the property that is the subject of the land use decision has standing if that person is or would be "aggrieved or adversely affected" by the decision. RCW 36.70C.060(2). A person is "aggrieved or adversely affected" when (1) the person is prejudiced or likely to be prejudiced by the decision, (2) the local jurisdiction was required to consider

that person's asserted interests in making its decision, (3) a favorable judgment would redress or substantially eliminate the prejudice, and (4) the person has exhausted her administrative remedies. Id.

16. As a preliminary matter, the Garrisons argue that the superior court erred in considering evidence of Lauer and de Tienne's standing that was not in the administrative record. This challenge is easily rejected based on the plain statutory language of LUPA. First, a LUPA petitioner must establish facts supporting standing. RCW 36.70C.070(6). This requirement plainly indicates that the legislature anticipated later consideration of facts related to judicial standing. Moreover, while judicial review of factual issues under LUPA is generally limited to the administrative record, the statute expressly provides that this limitation applies only when "the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues." RCW 36.70C.120(1). Lauer and de Tienne participated in the administrative hearing, but the Garrisons never challenged their standing before the hearing examiner.

As such, no record was developed on the question of standing; it simply was not a relevant issue at the hearing. Because there was no opportunity to make a record on the issue, "the record for judicial review may be supplemented byevidence of material facts that were not made part of the local jurisdiction's record." RCW 36.70C.120(3).

17. The Garrisons also challenge each of the conditions necessary for standing. Lauer and de Tienne satisfy each of the conditions and therefore have standing. First, Lauer and de Tienne have established that they have been or would be prejudiced. An adjacent landowner who alleges the proposed project will injure his or her property has standing. Chelan County v. Nykreim, 146 Wash.2d 904, 934–35, 52 P.3d 1 (2002). Here, Lauer and de Tienne own properties adjacent to the Garrisons' property, and they allege that the clearing and development within the buffer zone that have already occurred and that would be permitted by the variance, have already caused specific injuries and will further injure their properties.

18. Second, Lauer and de Tienne's interests are those that the local government is required to consider. Local law provides that adjacent property owners are to be notified about an application for a variance allowing a buffer reduction and that there be a public hearing. PCC 18.80.020. This indicates that the local government is committed to considering Lauer and de Tienne's interests as neighboring property owners when considering the request for a variance. Thus, the second condition is met.

19. Third, the requested relief would eliminate or redress the prejudice asserted by Lauer and de Tienne. Consideration of the variance under the current variance standards would assure that Lauer and de Tienne's interests are more protected, again because the new standards are stricter and look to more

factors. Compare former PCC 18E.10.070(D)(4) (1997), with PCC 18E.40.060(C)(2).

20. Finally, Lauer and de Tienne have exhausted their administrative remedies. The Garrisons specifically argue that Lauer and de Tienne failed to exhaust administrative remedies when they did not challenge the "final determination" that the building permit application was complete, which the Garrisons allege happened in 2004. See RCW 36.70C.020(2) (" 'Land use decision' means 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."). However, Lauer and de Tienne only had to exhaust the administrative remedies that were available to them. See Citizens for Mount Vernon v. City of Mount Vernon, 133 Wash.2d 861, 868–71, 947 P.2d 1208 (1997) (holding that where the only administrative remedy available was participation in a public hearing, and where the petitioners participated, they satisfied the exhaustion requirement). "The [LUPA] statute states nothing of the degree of participation or the specificity with which issues must be raised to seek judicial review." Id. at 868, 947 P.2d 1208. There is no indication that Lauer and de Tienne were given notice of the building permit application or its approval. They did, however, participate in the hearing where the Garrisons appealed the cease and desist order. At that point, the determination of whether the application was complete was not a relevant issue. Lauer and de Tienne participated at the administrative level regarding the relevant issues.

21. The administrative process affirmed the cease and desist order, which prevented the Garrisons from building within the buffer zone without a variance. Ultimately, there was no further administrative action for Lauer and de Tienne to take; their position prevailed. The Garrisons suggest that Lauer and de Tienne were required to intervene in the Garrisons' LUPA petition, but this is not an administrative remedy. "The rationale for the exhaustion requirement is that the administrative officer or agency may possess special expertise necessary to decide the issue, and that an administrative remedy may obviate the need for judicial review." Valley View Indus. Park v. City of Redmond, 107 Wash.2d 621, 633, 733 P.2d 182 (1987). This does not require parties to participate in litigation. Once they learned of the Garrisons' construction plan, Lauer and de Tienne fully participated in every step of administrative review related to this case, exhausting all remedies.

II. Timeliness

22. The LUPA petition was timely filed. To be timely, a petition must be filed within 21 days of the relevant land use decision, including a ruling on a motion for reconsideration. RCW 36.70C.040(3); Mellish v. Frog Mountain Pet Care, 172 Wash.2d 208, 257 P.3d 641 (2011). This petition was filed 20 days after the motion for reconsideration was denied. Therefore, the petition was timely.

III. Equitable Estoppel

23. The Garrisons assert that Lauer and de Tienne are equitably estopped from raising the claims asserted in their LUPA petition because they did not intervene in the Garrisons' LUPA petition, appealing the cease and desist order. This is another claim related to the failure of Lauer and de Tienne to take further action prior to the variance hearing. The Garrisons misunderstand the doctrine of equitable estoppel, and we hold that Lauer and de Tienne are not equitably estopped from arguing the claims in their LUPA petition.

To establish equitable estoppel requires proof of (1) an admission, statement or act inconsistent with a claim later asserted; (2) reasonable reliance on that admission, statement, or act by the other party; and (3) injury to the relying party if the court permits the first party to contradict or repudiate the admission, statement or act.

Dep't of Ecology v. Theodoratus, 135 Wash.2d 582, 599, 957 P.2d 1241 (1998). It is not clear what statement that Lauer and de Tienne allegedly made that the Garrisons relied on. Rather, the Garrisons seek to bind Lauer and de Tienne to the County's statement, though not in the record, that the variance request would be considered under 2004 law.

24. Lauer and de Tienne are not equitably estopped from making their claims herein because they made no statement that the Garrisons could have relied on. The alleged statement made by the County is not even included in the record. Moreover, "where the representations allegedly relied upon are matters of law, rather than fact, equitable estoppel will not be applied." Id. Whether rights pursuant to a land use application vest is a question of law as raised in this case. No major factual disputes exist—only questions of statutory interpretation. Accordingly, equitable estoppel does not apply.

IV. Futurewise

25. The Garrisons also preliminarily assert that Lauer and de Tienne's claim is moot as a result of this court's decision in Futurewise v. Western Washington Growth Management Hearings Board, 164 Wash.2d 242, 189 P.3d 161 (2008). In Futurewise, a plurality of this court held that critical areas within the jurisdiction of the Shoreline Management Act of 1971, chapter 90.58 RCW, are governed only by that act, not by local critical area regulations adopted pursuant to the Growth Management Act, chapter 36.70A RCW, or those still pending approval by the Department of Ecology (Department). Id. at 244–45, 189 P.3d 161. "A plurality opinion has limited precedential value and is not binding." In re Pers. Restraint of Isadore, 151 Wash.2d 294, 302, 88 P.3d 390 (2004). Thus, Futurewise was never binding.

26. Since Futurewise, the legislature amended the law, clarifying its intent that critical area regulations apply to shoreline properties pending action by the Department. Laws of 2010, ch. 107, § 1. The Garrisons allege that the regulations do not apply, absent approval by the Department, which did not occur until after the variance hearing. The legislature stated that it "intends for this act to be remedial and curative in nature, and to apply retroactively to July 27, 2003." Laws of 2010, ch. 107, § 1(4).[3] With the new legislative amendments, Futurewise does not render Lauer and de Tienne's claim moot. The County's critical area regulations applied to the Garrisons even prior to the Department's approval of the local shoreline regulations.

V. Vesting

27. Washington recognizes a "date certain" standard for vesting. Abbey Rd. Grp., 167 Wash.2d at 251, 218 P.3d 180. Developers are entitled to the benefit of "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." Id. at 250, 218 P.3d 180. In Washington, the vesting rule originated as a common law doctrine and was later codified by the legislature. Erickson & Assocs. v. McLerran, 123 Wash.2d 864, 867–68, 872 P.2d 1090 (1994).

28. Regarding building permits, RCW 19.27.095 provides in relevant part:

(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.

(2) The requirements for a fully completed application shall be defined by local ordinance.

The common law required only that an application be "sufficiently complete," while the legislature decided that the application must be "fully complete." Compare id., with Valley View Indus. Park, 107 Wash.2d at 638, 733 P.2d 182. The legislature abrogated the common law rule when it substituted "fully" for "sufficiently," "taking a 'zero tolerance' approach to completeness." Friends of the Law v. King County, 123 Wash.2d 518, 524 n. 3, 869 P.2d 1056 (1994).

29. The legislature made the definition of "a fully completed application" contingent upon local law. RCW 19.27.095(2). Since at least 1999, Pierce County has defined completeness for vesting purposes related to a building permit application as follows: "Pursuant to RCW 19.27.095, a fully complete building permit application shall be any application including payment of all required fees and containing all the components that are applicable in Table 17C.10–1–H. Incomplete applications shall not be accepted." PCC 17C.10.140;

see also Pierce County Ordinance 99–24s, Ex. "C" (Sept. 28, 1999) (codified as former PCC 17C.20.160 (1999)). The referenced table requires, in relevant part, that a building permit application include a site plan that in turn includes "all set backs from buildings." PCC 17C.10.140, Tbl. 17C.10–1–H; accord former PCC 17C.20.160, Tbl. 17.20–1–A–9. The same table also requires that "[a]ny land use permits required to approve the building permit application shall be applied for prior to or with the building permit application." PCC 17C.10.140, Tbl. 17C.10–1–H.

30. Looking just to the definition of "a fully completed application" in Pierce County law, the Garrisons' application was not fully completed. The site plan in their building permit application omitted required elements and falsely represented the site where they proposed to build the new house. The site plan did not include the stream running through their property, the required buffer on both sides of the stream, or the required setback from the buffer of the residence that they proposed building.[4] In fact, they proposed building a new home within the buffer zone but without indicating the protected nature of the site. The Garrisons, while they may have disputed the determination of the waterway as a protected stream, knew or should have known of the requirement for the buffer based on previous rulings by the County. The Garrisons also falsely represented in their site plan that there was an "existing drive" where in fact there was only a trail. This is significant in that the existing development regulation at the time the building permit was submitted reduced the buffer requirement starting at the point of existing development. Former PCC 18E.60.050(A)(2). Accordingly, even if the County officials who reviewed the building permit application were aware of the stream and need for a buffer, the existence of a drive would have eliminated that concern.

31. Finally, in addition to the misrepresentations in the site plan, the Garrisons did not apply for a variance "prior to or with the building permit application." PCC 17C.10.140, Tbl. 17C.10–1–H; accord former PCC 17C.20.160, Tbl. 17.20–1–A–9. Because County regulations required a 35–foot buffer from the stream and an 8–foot setback from the buffer to a building, former PCC 18E.60.050(C), (D), and because the Garrisons proposed building their house within that buffer zone, a variance was legally required in order to approve the building permit application. Accordingly, a variance application was required prior to or at the time of the building permit application for that application to be complete under local law.

32. Looking just to the plain language of RCW 19.27.095, and in turn to local law defining a complete application, the Garrisons' building permit application is not fully complete. However, the Garrisons argue that another statute, RCW 36.70B.070, controls, and that their rights vested by operation of law. Chapter 36.70B RCW was passed by the legislature in order to address the regulatory burden created by increased land use permit requirements with separate review processes, which "has significantly added to the cost and time

needed to obtain local and state land use permits." RCW 36.70B.010(1), (3). This statute provides, in relevant part, that a project permit application will be deemed complete "if the local government does not provide a written determination to the applicant that the application is incomplete" within 28 days of receipt. RCW 36.70B.070(1), (4)(a). The Garrisons assert that their building application was made complete by operation of law. In other words, because the County did not inform them that their application was incomplete, it became complete, under RCW 36.70B.070(4)(a), sometime in April 2004. It is on this basis that the Court of Appeals reinstated the variance granted to the Garrisons. Lauer, 157 Wash.App. at 709, 238 P.3d 539.

33. Forcing this question of "completeness," however, ignores that under RCW 19.27.095, vesting requires more than full completeness. RCW 19.27.095(1) also requires that a building permit application be "valid" and "permitted under the zoning or other land use control ordinances in effect on the date of the application" in order to vest under the law at the date of the application. Cf. RCW 58.17.033 (vesting statute for subdivision plats, which requires only that the application be "fully completed" to vest); Friends of the Law, 123 Wash.2d at 525 n. 4, 869 P.2d 1056 (interpreting RCW 58.17.033 to not require compliance with existing zoning ordinances in order to vest).

34. The Garrisons' 2004 building permit application did not comply with then-existing ordinances because the proposed project was squarely within the required 35–foot buffer of a Type 4 or Type 5 DNR water type stream. Because the building permit submitted in 2004 did not comply with ordinances in effect at the time of the application, the Garrisons' rights did not vest. See Kelly v. Chelan County, 157 Wash.App. 417, 425, 237 P.3d 346 (2010).

35. A permit application must also be valid. "Valid" is not defined by statute or in case law. See Eastlake Cmty. Council v. Roanoke Assocs., 82 Wash.2d 475, 483, 513 P.2d 36 (1973) ("Since the permit grant itself was patently impermissible, we need not decide if the application was also defective."). The plain meaning of "valid" is "[l]egally sufficient" or "[m]eritorious." Black's Law Dictionary 1690 (9th ed.2009). It is clear that the Garrisons were in violation of an existing ordinance and that they made knowing misrepresentations in their application. See AR at 33–36, 98. It is hard to conceive of any meaning of the term "valid" that would include knowing misrepresentations. By way of comparison, this court has previously required governments to act in good faith and not subvert the legitimate efforts of a developer to vest his or her rights. See Valley

View Indus. Park, 107 Wash.2d at 638–39, 733 P.2d 18[illegible] citing Parkridge v. City of Seattle, 89 Wash.2d 454, 465–66, 573 P.2d 359 (1978)). The requirement that a building application be "valid" assures that the good faith requirement is not only one way. Accordingly, under RCW 19.27.095, the Garrisons' rights did not

vest because their building application, which contained knowing misrepresentations of material fact, was not valid.

36. Further, the Garrisons' interpretation of RCW 36.70B.070(4)(a) would yield a troubling result: building permit applicants could misrepresent facts on their application, and the County would have the daunting task of investigating every application to determine its accuracy within a 28–day period. Failure on the part of the County to do so would cause the dishonest applicants' rights to vest. This court has held "that statutes should receive a sensible construction to effect the legislative intent and to avoid unjust consequences." State v. Vela, 100 Wash.2d 636, 641, 673 P.2d 185 (1983). Under these unique facts, where the Garrisons have submitted knowing misrepresentations of fact, we hold that the Garrisons' building permit did not vest because it was not valid and did not comply with the regulations in place at the time it was submitted. Failure by the hearing examiner to consider these factors in his determination of when the Garrisons' rights vested was an erroneous interpretation of the law.

CONCLUSION

37. We hold that Lauer and de Tienne have standing under LUPA, that they timely filed their petition, and that the issues that they raised therein have not been rendered moot by this court's holding in Futurewise. Finally, we hold that the Garrisons' rights did not vest when their building permit was filed in 2004. A permit application that is not allowed under the regulations in place at the time it is submitted and is issued under a knowing misrepresentation or omission of material fact confers no rights upon the applicant. We reverse the decision of the Court of Appeals.

OWENS, J.

WE CONCUR: BARBARA A. MADSEN, Chief Justice, CHARLES W. JOHNSON, GERRY L. ALEXANDER, TOM CHAMBERS, MARY E. FAIRHURST, JAMES M. JOHNSON, DEBRA L. STEPHENS, and CHARLES K. WIGGINS, Justices.

Exhibit "E"

Errors in Hearing Examiner's HE-23-PL-014 Decision For 830 Briar Road

This exhibit is "only" being provided to avoid a repeat of errors.

The Hearing Examiner CUP Decision for 830 Briar Road contained the following errors:

1. The decision contained a half truth statement:

> 4. Addressing issues raised in public comment relating to private covenants and complete application status (see Finding 26), the City Council lacks jurisdiction to enforce private covenants and therefore cannot confer such authority on the Examiner. The Hearing Examiner only has those powers conferred by the City Council.

"City Council lacks jurisdiction to enforce private covenants" is a half truth statement used to enable development when the whole truth is as follows: "City lacks jurisdiction to interfere with a private covenant." This half truth statement is used by City staff to nullify a restrictive covenant on a permit applicant's property over the objections of neighbors that own a "protective benefit" provided by the covenant. This is done by City staff without the consent of neighbors or due process.

The correct approach should be: "City lacks the authority to interfere with a private covenant without the consent of the covenant beneficiaries". A variance is required and it does not matter whether the restrictive covenant is created by a private entity or a governmental entity, the position remains the same".

State Law "HB-1110" Sections 10, 12 & 13 stops this half truth practice by stating any covenant that existed "before" the enactment of HB-1110 "may" actively and effectively prohibit construction, development and the use of additional housing. These four sections of "HB-1110"are meant to be "remedial and curative in nature" for a known ethics problem in government. ***See Exhibit "B" Building Permit Limitations per House Bill "HB-1110" Sections 10, 11, 12 and 13.***

2. The Examiner's understanding of jurisdictional authority does not match those stated by the City Council:

> The Bellingham Hearing Examiner has been granted jurisdiction to hear and decide CUPs based on the criteria set forth in the code, but does not have jurisdiction to interpret and enforce private covenants, nor to make a complete application determination, nor to alter adopted code provisions that establish what is required for complete application.

Per the City Council: The Hearing Examiner's job is to address the legal question or decision that comes before her. Her efforts to address those issues may of may not involve an inquiry of the staff's review of the validity of a permit. ***See Exhibit "A" Clarification of Hearing Examiner's Jurisdiction..***

3. Completeness requirements require a complete CUP checklist per BMC 17.10.020 requirements:

Per BMC 21.10.190, the decision to deem an application complete is an administrative decision - not a Hearing Examiner decision - and in the instant case, the decision of application completeness was not appealed.

It does not matter that the application of completeness was "not" appealed because the application's "validity" has not been confirmed by City staff. Applications with misrepresentations or omissions of material fact that prohibit construction do not vest.

See Exhibit "D" Lauer v. Pierce County, 173 Wn. 2d 242 (2011).

It does not matter that the city's CUP application checklist does not require a title report because the Legislature has abrogated the common law rule of "sufficiently complete" with "fully" complete, taking a zero tolerance approach for completeness.

See Exhibit "D" Lauer v. Pierce County, 173 Wn. 2d 242 (2011).

The CUP checklist is out of compliance with BMC 17.10.020 "Other Laws" because it does not contain a sensible construct of the Legislative Intent expressed in "HB-1110" Sections 10, 12 and 13. As a result a title report was not provided thus City staff and the public have no idea whether a building permit is prohibited by a "date valid" covenant.

4. Examiner's role includes ensuring compliances with State law per BMC 17.10.020 by City staff:

In addition, it should be noted that the BMC specifically grants the Planning Director - not the Hearing Examiner - jurisdiction to specify application requirements. *BMC 21.10.190.A.* In this case the CUP application checklist (see Exhibit 1.A1) does not include a title report as an application requirement.

> "BMC specifically grants the Planning Director – Not the Hearing Examiner – jurisdiction to specify application requirements".

This statement misses the point that the Examiner is required to correct a failure by the Planning Director to comply with Bellingham's Construction Administrative Code BMC 17.10.020 "Other Laws".

> "The provisions of this code shall not be deemed to nullify any provision of local, State or Federal law".

The Director's CUP checklists and Building Permit application requirements are not a sensible construct of the "Legislative Restrictions" expressed in "HB-1110" Sections 10, 12 and 13. These three sections refer to "existing covenant conditions" that can actively and effective prohibit construction right now. This is why the Hearing Examiner needs to address this issue with urgency. ***See Exhibit "A"- Clarification of Hearing Examiner's Jurisdiction, Exhibit "B" - Building Permit Limitations per House Bill "HB-1110" Sections 10, 11, 12 and 13 and Exhibit "G" - HB-1110 Enforcement Requirements.***

5. Examiner's conclusion based on false statement made by City staff:

27. Planning Staff addressed all known private restrictions on the property (those established in the underlying plat) in the staff report at section V(B) of the staff report and addressed tree retention in sections V and VI of the staff report. No other private covenants or deed restrictions are known to exist for the subject property. The City continues to maintain that it lacks legal authority to enforce private covenants. After hearing public testimony, the City maintained its recommendation of approval subject to the conditions set forth in the Staff Report. *Exhibit 1; Taylor Webb Testimony.* At hearing, Applicant representatives waived objection to the recommended conditions of approval. *Testimony of Brad Ingram and Curtis Krahm.*

Taylor Webb stated there were "no restrictive covenants on the 830 Briar Road property that would prohibit construction". To stay with a position of having "no responsibility to review and enforce a private covenant" Ms Webb provided an answer without knowledge of the covenant conditions at 830 Briar Road. ***See Taylor. Webb email below.***

The following email demonstrates the City's "See No Evil, Hear No Evil, Speak No Evil" policy in action:

1. The City does want to see or hear anything about a covenant that could put the City in jeopardy of knowingly issuing an invalid permit.
2. The City fails to inform permit applicants and the public that it cannot knowingly issue a Building Permit when a known covenant prohibits construction.

DCLongwell

From: Webb, Taylor K. <tkwebb@cob.org>
Sent: Thursday, December 14, 2023 8:32 AM
To: DCLongwell
Cc: Erb, James E.
Subject: RE: USE2023-0017 Re: More Testimony for Hearing Examiner

Hi Dean,

No, the applicant did not provide a title report with their application because, as I stated before, this is not a submittal requirement. The burden of proof falls on the applicant/ homeowner to be aware of covenants and deed restrictions on the title report. The public comment period for the conditional use permit at 830 Briar Rd is closed. Any further questions may be addressed to our City Attorney, James Erb.

Thank you,
Taylor

Taylor Webb, Planner II
City of Bellingham Planning and Community Development
210 Lottie Street Bellingham, WA 98225
Email: tkwebb@cob.org
Phone: (360)778-8311

Exhibit "F"

Legislative Intent of RCW 19.27.095

Legal analysis supplied by the Municipal Resource Service Center (MRSC). MRSC is funded by the State of Washington and the Cities and Counties of Washington State that use its services.

Washington State's Vested Right Doctrine:

The Legislature stated "the intent for this doctrine is to be remedial and curative in nature" over concerns that municipalities were abusing their discretion with respect to changing land use and zoning rules.

The Washington vested right approach according to the courts, is based on "constitutional principals of fairness and due process, acknowledging that development rights are valuable and protected property Interests"

See *Weyerhaeuser v. Pierce County (1999)*. Society suffers if property owners cannot plan developments with reasonable certainty, and carry out developments they begin.

Statutory Application of Doctrine

The legislature codified the vested rights doctrine as follows:

- Building permit applications (RCW 19.27.095):

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

The Legislature stated "the intent for this doctrine is to be "remedial and curative in nature" over concerns that municipalities were abusing their discretion with respect to changing land use and zoning rules. RCW 19.27.095 only clarifies "**which**" municipal ordinances are to be followed when municipal land use and zoning rules are in a constant state of flux.

- RCW 19.27.095 was meant to protect property owner rights from abusive City Officials. This RCW was NOT meant to harm the protective nature of a restrictive covenant. According to the courts, covenant protections are valuable and protected property interests of adjoining property owners that cannot be terminated without consent or due process.

- It appears City Officials have found a new way to be abusive by using selective ignorance and non-enforcement to nullify a neighbor's protected property interests. The Legislature's Intent for "HB-1110" Section 10, 12 and 13 is meant to be "remedial and curative in nature" for this exact situation.

Exhibit "G"

HB-1110 Enforcement Requirements

Enactment information supplied by the Municipal Resource Service Center (MRSC). MRSC is funded by the State of Washington and the Cities and Counties of Washington State that use its services.

HB-1110 Effective Date: July 23rd 2023:

HB-1110 "Middle Housing" and HB 1337 "Accessory Dwelling Units" were passed by the Washington State Legislature during the 2023 legislative session and signed into law by Governor Inslee on July 23, 2023. Both bills took effect on July 23, 2023, but local governments are not required to update their local regulations to be in compliance until six months after their periodic comprehensive update. However, local government may revise their regulations sooner than the statutory deadline if desired.

The Director of Planning knew about the covenant requirements of HB-1110 Sections 10, 11, 12 and 13 last spring and chose to do nothing to bring the City into compliance. As a result the Planning Department is voiding State Law "HB-1110" by using out-of-date forms, checklists, procedures and protocols for determining "permit application validity".

This lack of effort violates Bellingham's Municipal Code BMC 17.10.020 "Other Laws" because the Planning Department has out-of-date forms, checklists and procedures that actively and effectively violate a provision of a State Law.

The Director's lack of action also harms the public by:

1. A Failure to inform permit applicants of a new legislative regulation that states "a covenant enacted before July 23rd 2023 may actively and effectively prohibit construction, development and the use of additional housing".

    a. This failure exposes applicants to harm that can lead to an omissions on their permit applications which can lead to a building permit being revoked during or after completion of construction. ***See Exhibit "D" – Lauer v. Pierce County, 173 Wn. 2d 242 (2011).***

2. A Failure to apply the remedial and curative aspect of HB-1110 Sections 10, 12 and 13 that stops the removal of a "protected property interests" without consent or due process. A covenant's protective benefit is a protected property interests that cannot be removed without consent or due process. ***See Weyerhaeuser v. Pierce County (1999).***

HB-1110 Sections 10, 12 and 13 refers to existing covenant restrictions that are active and enforceable today per "HB-1110" which means the Director is required by BMC 17.10.020 Section 102.2 to acknowledge and enforce these restrictions "today" before the Director has reconciled the City's current regulations with State Law HB-1110.

Exhibit "H"

Weyerhaeuser v. Pierce County 976 P.2d 1279 (1999)

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE ATTACHED IS TRUE AND CORRECT.
DATED this _____ day of _____, 2023 _____, Washington

_____
Dean C. Longwell

The attached Weyerhaeuser v. Pierce County (1999) decision is based on the application of Washington State's "Vested Rights Doctrine".

"We cannot disregard the vested rights doctrine, which is well rooted in Washington case law, and cast aside due process rights in fairness and certainty."

Hearing Examiner Questions regarding application of Washington's Vested Rights Doctrine to HB-1110 Sections 10, 12 and 13:

1. **Does HB-1110 transform a "Land Use Control Restriction" created by a pre-existing private covenant into a protected "Land Use Control Regulation" that cannot be ignored by permit applicants or the City?**

    - State Law "HB-1110" Sections 10, 12 and 13 states a declaration (private covenant) created after the enactment of "HB-1110" may not actively or effectively prohibit construction, development and the use of additional housing.

2. **If a pre-existing private covenant "Land Use Regulation" is vested by State Law "HB-1110" and exists at the time of permit application can the City ignore the regulation?**

    - Vesting "fixes the rules governing land development regardless of later changes in zoning or other land use regulations.
    - State Law "HB-1110" Sections 10, 12 and 13 vests covenant restrictions that were enacted before the enactment of HB-1110.
    - HB-1110 was enacted on July 23rd 2023

3. **Is the City required by BMC 17.10.020 Section 102.2 "Other Laws" to follow vested covenant's land use regulations before the Director of Planning has had time to reconcile the City's procedures and regulations with State Law "HB-1110" Sections 10, 12 and 13?**

    - The Director has a 6 month statutory deadline for updating the City's regulations but may do so before that deadline if desired or required.

976 P.2d 1279 (1999)

William and Gail WEYERHAEUSER, Respondents, v. PIERCE COUNTY, a political subdivision of the State of Washington, Respondent, v. Land Recovery, Inc., a Washington Corporation; Resource Investments, Inc., a Washington Corporation, and Norman Lemay, an individual, Appellants.

No. 21844-5-II.

Court of Appeals of Washington, Division 2.

May 28, 1999.

Noel J. Nightingale, Heller, Ehrman, White & McAuliffe, Daniel David Syrdal, Heller, Ehrman, White & McAuliffe, Seattle, for Appellants.

Melissa Kay Bryan, William Theodore Lynn, Gordon Thompson, Honeywell, Etal, Tacoma, Thomas Ross Bjorgen, Meeks, Morgan, Bauer, Olympia, for Respondents.

Clifford David Allo, Tacoma-Pierce County Health Dept., Tacoma, Other Party.

HOUGHTON, J.

Land Recovery, Inc. (LRI) seeks review of the superior court's ruling upholding a hearing examiner decision issuing LRI a conditional use permit to construct a landfill with certain conditions. LRI argues that the hearing examiner erroneously determined that LRI's application for the permit would be subject to county wetland regulations enacted after submission of its application. We hold that the "vested rights" doctrine applies and that the conditional use permit application is subject to the permitting statutes and ordinances in effect at the time the original application was submitted. Both the superior court and the hearing examiner erred in requiring LRI to comply with later enacted wetland management regulations. Therefore, we reverse the superior court and remand to the hearing examiner.

FACTS

Proposed Landfill Project

LRI collects and disposes of solid wastes in Pierce County, where it also operates the Hidden Valley Landfill. Because this landfill was expected to reach capacity by the end of 1998, under a contract between LRI and the Tacoma-Pierce County Health Authority, LRI began searching for a new solid waste disposal site in 1986.

LRI located a 320-acre site in southeast Pierce County adjacent to land owned by William and Gail Weyerhaeuser. In December 1989, LRI applied to Pierce County (County) for a conditional use permit[1] to construct a municipal solid waste landfill on this site. LRI expected to operate the landfill for 20 years, taking in 30 million cubic yards of solid waste. Portions of the site lie within a 100-year flood plain and there are about 70 acres of Category II wetlands[2] on the parcel. The project will result in the cutting and filling of about 30 acres of these wetlands, permanently destroying 21.6 wetland acres. To mitigate this environmental damage, the project provides for the creation, restoration, and enhancement of wetlands elsewhere on the site. A hearing examiner later determined there would be no net loss of wetlands due to the project's wetland creation and enhancement.[3]

On November 20, 1990, the County issued an environmental impact statement (EIS) for the proposed landfill project as required by the State Environmental Policy Act (SEPA). Appealing to the County, the Weyerhaeusers and other members of the community challenged the adequacy of the EIS. In December 1990, a County hearing examiner addressed the public's concerns and held hearings to address the adequacy of the EIS and LRI's conditional use permit application. During the hearings, the Weyerhaeusers and LRI presented extensive expert testimony. The hearing examiner released a report and decision on April 10, 1991, approved the conditional use permit application (subject to certain conditions), and dismissed the EIS appeals.

The hearing examiner's decision was appealed to the Pierce County Council (Council), which, following a public hearing and upon further review, remanded the hearing examiner's decision on November 8, 1991, for additional findings and conclusions. Upon remand, on January 31, 1992, the hearing examiner issued a second report and decision with additional findings and conclusions, once again approving the permit. Following an additional public hearing, the Council, in May 1992, approved the hearing examiner's decision and dismissed the EIS appeals. The Council also denied a motion for reconsideration.

The Weyerhaeusers then petitioned the superior court for a writ of review. Upon review, on February 12, 1993, the superior court reversed the Council's approval of the conditional use permit. Thereafter, LRI and the County petitioned the Supreme Court for direct review. The Supreme Court granted review, affirmed the lower court's reversal of the Council's approval of the permit, and remanded the case for additional hearings. *See* *Weyerhaeuser v. Pierce County*, 124 Wash.2d 26, 873 P.2d 498 (1994).[4]

The hearing examiner held the additional hearings[5] required by the Supreme Court and issued a final decision on January 2, 1996, approving LRI's request for a conditional use permit subject to certain conditions. The hearing examiner's decision required LRI to obtain a wetlands permit under Pierce County Wetland Management Regulations enacted in 1992. LRI appealed this decision to the superior court,[6] which reviewed the record before the hearing examiner under standards set forth under Washington's Land Use Petition Act (LUPA), RCW 36.70C. et seq. According to the superior court, however, under LUPA, "[n]one of the specific errors

or arguments by ... LRI provide[d] any basis for granting the relief requested." And thus, finding no reversible errors, the superior court affirmed the hearing examiner's decision.

History of Enactments

In 1989, when LRI submitted its application for a conditional use permit, the Pierce County Grading, Filling, and Clearing Ordinance regulated wetland activities. PIERCE COUNTY, WA., ORDINANCE 87-109 (1987). This ordinance expressly exempted solid waste disposal sites. *See* ORDINANCE 87-109 § 1.01(B). Thereafter, the County adopted the Site Development Ordinance, replacing the earlier Grading, Filling, and Clearing Ordinance. PIERCE COUNTY, WA., ORDINANCE 90-132 (1990).

In 1990, the Legislature adopted the Growth Management Act (GMA), RCW 36.70A, and instituted significant changes in land use laws. The GMA required counties and cities to adopt ordinances protecting wetlands and other critical areas. *See* RCW 36.70A.060 and 170. Accordingly, in 1992, the County adopted the Wetlands Management Regulations,[7] which categorized wetlands based upon their environmental value. *See* former Pierce County Code 17.12.030. Under these regulations, filling Category II wetlands was permitted only by the granting of a "Reasonable Use Exception," which required a public hearing and a decision by a hearing examiner. Former PCC 17.12.080(D).

LRI seeks review of the superior court's decision to the extent it affirms the hearing examiner's decision requiring LRI to obtain a wetlands permit under applicable county regulations enacted after LRI submitted its conditional use permit application.[8]

ANALYSIS, Standard of Review

LUPA provides a statutory standard for review of land use petitions. Under RCW 36.70C.130, an appellate court may grant relief from a land use decision if the petitioner carries its burden in establishing one of six standards of relief:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
(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;
(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
(d) The land use decision is a clearly erroneous application of the law to the facts;
(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
(f) The land use decision violates the constitutional rights of the party seeking relief.

King County v. Central Puget Sound Growth Management Hearings Bd., 91 Wash.App. 1, 26, 951 P.2d 1151, *review granted,* 136 Wash.2d 1020, 969 P.2d 1063 (1998). To grant relief under this chapter, an appellate court need not find that the local jurisdiction engaged in arbitrary and capricious conduct. RCW 36.70C.130(2). Furthermore, an appellate court applies these standards in reviewing a decision based upon the record created before the hearing examiner. *Central Puget Sound*, 91 Wash.App. at 26, 951 P.2d 1151 (citing RCW 36.70C.120(1); 36.70C.130(1)).

LRI contends the hearing examiner erroneously concluded, as a matter of law under RCW 36.70C.130(1)(b), that LRI was required to obtain a wetlands permit under the Pierce County Wetland Management Regulations. According to LRI, its conditional use permit application to construct a landfill should be reviewed and evaluated under the land development laws in effect at the time of its application in December 1989. The regulations governing wetlands that the hearing examiner concluded LRI must follow were not promulgated until 1992. LRI submits, therefore, that under the "vested rights doctrine," its application for a conditional use permit for the proposed landfill project should not be subjected to the later enacted wetland regulations.

We agree with LRI. Under RCW 36.70C.130(1)(b) of LUPA, the conclusion of the hearing examiner, in subjecting LRI's conditional use permit application to the later enacted wetland regulations, constituted an erroneous interpretation of law.

The "Vested Rights Doctrine"

Under the "vested rights doctrine" recognized in Washington,[9] developers filing a timely and complete land use application obtain a vested right to develop land in accordance with the land use laws and regulations in effect at the time of application.[10] *Erickson & Assocs., Inc. v. McLerran*, 123 Wash.2d 864, 867-68, 872 P.2d 1090 (1994); *West Main Assocs. v. City of Bellevue*, 106 Wash.2d 47, 50-51, 720 P.2d 782 (1986); *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wash.App. 171, 182, 931 P.2d 208, *review denied,* 132 Wash.2d 1010, 940 P.2d 655 (1997); *Adams v. Thurston County*, 70 Wash.App. 471, 475, 855 P.2d 284 (1993). Vesting "fixes" the rules that will govern the land development regardless of later changes in zoning or other land use regulations. *Erickson & Assocs., Inc.*, 123 Wash.2d at 868, 872 P.2d 1090; *West Main Assocs.*, 106 Wash.2d at 51, 720 P.2d 782; *Vashon Island Comm. for Self-Gov't v. Boundary Review Bd.*, 127 Wash.2d 759, 767-68, 903 P.2d 953 (1995); *see Hull v. Hunt*, 53 Wash.2d 125, 130, 331 P.2d 856 (1958) (vesting rule provides a "date certain" on which the right to develop land vests).

The vesting doctrine provides a measure of certainty to developers and protects their expectations against fluctuating land use policy. *Friends of the Law v. King County*, 123 Wash.2d 518, 867-68, 522, 869 P.2d 1056 (1994); *West Main Assocs.*, 106 Wash.2d at 51, 720 P.2d 782. The doctrine is based upon constitutional principles of fairness and due process, acknowledging that development rights are valuable and protected property interests. *Vashon Island*, 127 Wash.2d at 768, 903 P.2d 953; *Erickson & Assocs., Inc.*, 123 Wash.2d at

870, 872 P.2d 1090; *see also* Frederick D. Huebner, *Washington's Zoning Vested Rights Doctrine,* 57 WASH. L.REV. 139 n.11 (1981) (characterizing certain rights as "vested" signifies a conclusory description of a right or interest that is sufficiently secure or fixed such that divestment of that right is unfair or violates due process) (citations omitted).

But there are also important competing policy concerns involved in vesting rights for land use. *Noble Manor Co. v. Pierce County*, 133 Wash.2d 269, 280, 943 P.2d 1378 (1997). As the Supreme Court explained, development interests protected by the vested rights doctrine come at a cost to the public interest because the practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use.

Noble Manor Co., 133 Wash.2d at 280, 943 P.2d 1378, citing *Erickson & Assocs., Inc.*, 123 Wash.2d at 873-74, 872 P.2d 1090. The *Erickson* court recognized the "tension between public and private interests" inherent in adoption of the vested rights doctrine, in that a proposed development that does not conform to later adopted laws is necessarily inimical to the public interests embodied in those laws. *Erickson*, 123 Wash.2d at 873-74, 872 P.2d 1090. Thus, recognizing a vested right subverts and compromises the public interest. *Erickson & Assocs., Inc.*, 123 Wash.2d at 874, 872 P.2d 1090. On the other hand, strictly enforcing the later enacted laws, in disregard for the developer's expectations against fluctuating land use requirements, impinges upon the developer's due process interests in certainty and fairness. *See Noble Manor Co.*, 133 Wash.2d at 280-83, 943 P.2d 1378; *see also Erickson & Assocs., Inc.*, 123 Wash.2d at 870, 872 P.2d 1090 ("promoting a date certain vesting point" protects property owners' due process rights under new land use ordinances).

Based upon the vested rights doctrine, LRI asserts that its right to develop the landfill project vested in 1989 when it submitted its application for a conditional use permit. The court in *Beach v. Board of Adjustment*, 73 Wash.2d 343, 438 P.2d 617 (1968),[11] addressed the vested rights doctrine as applied to a conditional use permit. The issue in *Beach* was whether a verbatim record of proceedings was required to establish an adequate record for review. Holding that a verbatim record of administrative proceedings was necessary to enable judicial review, the court remanded the case for a new hearing. *Beach*, 73 Wash.2d at 347, 438 P.2d 617. But, in remanding, the court stated that the conditional use permit application was to be measured by the land use regulations in effect at the time the application was filed. *Beach*, 73 Wash.2d at 347, 438 P.2d 617. The court explained that the "subsequent change in the zoning ordinance does not operate retroactively so as to affect vested rights." *Beach*, 73 Wash.2d at 347, 438 P.2d 617.

The vesting rule has been also applied in a number of other contexts.[12] For instance, the court in *Noble Manor Co.*, 133 Wash.2d 269, 943 P.2d 1378, recognized vesting with respect to an application for land division under RCW 58.17.033. At issue in *Noble Manor Co.* was the question of whether the filing of a complete application for a short subdivision vested the builder's rights only to divide the property, that is, as to the subdivision laws, or if the short plat application also

vested the right to develop property under other land use and zoning laws in effect at the time of application. *Noble Manor Co.*, 133 Wash.2d at 274, 943 P.2d 1378. Pierce County argued that the only right vested was to divide the property into smaller lots, that is, as to the laws governing short platting, and thus no other land use or development rights vested. But the developer argued that the right to divide the land without the right to develop it was meaningless unless its rights also vested for the other proposed uses disclosed in its initial application. *Noble Manor Co.*, 133 Wash.2d at 277, 943 P.2d 1378.

Applying the vesting rule, the Supreme Court held that the developer obtained a vested right not only to subdivide the property under the laws at the time of application, but also to develop its land in accord with the zoning and land use laws existing at the time the developer submitted the short plat application. *Noble Manor Co.*, 133 Wash.2d at 285, 943 P.2d 1378. As the court explained,

if the County requires an applicant to apply for a use for the property in the subdivision application, and the applicant discloses the requested use, then the applicant has the right to have the application considered for that use under the laws existing on the date of the application.

Noble Manor Co., 133 Wash.2d at 278, 943 P.2d 1378. If vesting were limited to the right to divide land with no assurance that the land could be developed, no protection would be afforded to the developer. *Noble Manor Co.*, 133 Wash.2d at 278, 943 P.2d 1378. In the court's view, a vested right to subdivide the property without extension of the right to develop the land was "an empty right." *Noble Manor Co.*, 133 Wash.2d at 280, 943 P.2d 1378. The court, however, qualified its holding, noting that not all conceivable uses allowed by the laws in effect at the time of application vested, but only those "specific use[s]" disclosed in the application. *Noble Manor Co.*, 133 Wash.2d at 285, 943 P.2d 1378.

Here, based upon *Noble Manor Co.* and Washington's steadfast adherence to the vested rights doctrine, we are constrained to hold that the hearing examiner erred in concluding that LRI's conditional use permit application was subject to the wetland regulations enacted by the County after LRI's application.

LRI submitted a complete conditional use permit application disclosing its intentions and proposed uses as to the wetlands. Thus, LRI's rights vested as to the laws governing applications for conditional use permits and as to the regulations governing wetland activities applicable at the time of LRI's application. LRI's landfill project proposed extensive activity involving wetlands, ranging from the cutting and clearing of significant wetland acreage to the creation and enhancement of the same. Wetland development, therefore, was not only foreseeable at the time of application, but also necessary and essential to the project's successful development because a substantial part of the proposed landfill site is situated upon 70 acres of wetlands.

LRI disclosed all of the proposed uses of the wetlands in its application for the conditional use permit. As the hearing examiner stated in his January 2, 1999

decision approving the permit, LRI "developed a wetlands mitigation and monitoring plan" and the plan's "basic features" included the proposed activities on the wetlands.

Here, a vested right for the conditional use permit, but not for land use and development, would be "an empty right" as wetland development was an integral component of the project. Declining to recognize vesting as to the wetland regulations would not only increase the procedural and financial burdens borne by LRI in resubmitting its application to comply with the subsequently enacted laws, but also it would fundamentally and necessarily defeat the project.

Moreover, disregarding LRI's rights to develop the wetlands under the laws applicable in 1989, would inject a level of uncertainty into the project that would frustrate the developer's ability to streamline and plan the project. LRI had a due process right to expect that its project would be subject to fixed rules, as opposed to fluctuating legislative policy, so it could plan its project with reasonable certainty. *See* *Valley View Indus. Park v. City of Redmond*, 107 Wash.2d 621, 733 P.2d 182 (1987) (because property development rights constitute a valuable property right, due process requires that developers be able to plan projects under fixed rules governing development of land). Without vesting as to the wetland regulations, there would be no "date certain" by which LRI could have fixed its rights to develop the land in an efficient manner. *See* *Erickson*, 123 Wash.2d at 870, 872 P.2d 1090 (application of "date certain vesting point" ensures that development rights are not duly oppressed by enactment of new land use ordinances).

We realize that protecting LRI's rights unfortunately will come at the public's expense[13] because part of the project may not be in compliance with the later enacted wetland regulations. But neither can we disregard the vested rights doctrine, which is well-rooted in Washington case law, and cast aside LRI's due process rights in fairness and certainty.

The decision of the superior court is reversed and the case is remanded for issuance of a conditional use permit subject to regulations in effect at the time LRI submitted its application for a conditional use permit.

MORGAN, P.J., and HUNT, J., concur.

[1] A "conditional use permit" is a permitted exception to zoning ordinances; it allows a property owner to use his or her property in a manner that the zoning regulations expressly permit under conditions specified in the regulations. BLACK'S LAW DICTIONARY 1399 (6th ed. 1990) (see definition of "special use").

[2] Category II wetlands are "those regulated wetlands of significant resource value based on significant functional value and diversity, wetland communities of infrequent occurrence, and other attributes which may not be adequately replicated through creation or restoration." Pierce County Code § 18E.30.020(B) (former PCC § 17.12.030(B)) (recodified December 1998 as Pierce County Code 18E.30.020); *see infra* n.7.

[3] The actual "footprint" of the proposed landfill rests on 168 of the 320 acres, and a portion of the site outside the landfill will consist primarily of buffers and wetland mitigation areas. The site is also underlaid by a thick, continuous layer of low permeability material, "glacial till," that overlays and protects the aquifer (stratum of ground water) below the site. Based upon these features, the hearing examiner concluded that the aquifer "is not vulnerable to potential groundwater contamination" from the landfill.

[4] The Supreme Court held that (1) landowners were entitled to cross-examine County staff involved with producing the report and EIS; (2) the hearing examiner's findings and conclusions did not adequately support his decision; (3) the EIS was inadequate as a matter of law; and (4) the proposed project was required to comply with the county solid waste management plan. *Weyerhaeuser*, 124 Wash.2d 26, 873 P.2d 498.

[5] In October 1994, the County informed LRI that it would take no further action in processing its 1989 conditional use permit application, and that LRI would need to file a new application if it wanted to process the conditional use permit application for the landfill. Instead, LRI sought a writ of mandamus in superior court, which the court granted on January 13, 1995, ordering the County to initiate and complete the processing of LRI's 1989 application. The County continued processing and reviewing the application accordingly.

[6] LRI was the cross-appellant below as the Weyerhaeusers also appealed to the superior court. More specifically, the Weyerhaeusers challenged the hearing examiner's approval of the conditional use permit and the Tacoma-Pierce County Health Department's issuance of a permit to operate the landfill. Finding no errors in those decisions, however, the superior court rejected the Weyerhaeusers' contentions and upheld the issuance of both permits. The Weyerhaeusers have not appealed the superior court ruling.

[7] When this case was filed, the Pierce County "Wetland Management Regulations" were codified in Chapter 17.12 of the Pierce County Code. In December 1998, this chapter was recodified under Chapter 18E.30, "Wetlands," within Title 18E, "Development Regulations-Critical Areas."

[8] *See supra* n. 6.

[9] Washington adopted and maintains a minority position in recognizing vested property rights and the protection of those rights against subsequently adopted land development regulations. *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wash.2d 1, 6, 959 P.2d 1024 (1998); *see Noble Manor Co. v. Pierce County*, 133 Wash.2d 269, 280, 943 P.2d 1378 (1997) (vested rights doctrine is minority rule among jurisdictions); *see also Mercer Enterprises, Inc. v. City of Bremerton*, 93 Wash.2d 624, 627, 611 P.2d 1237 (1980) (retroactive effect of later zoning regulations not recognized in Washington).

[10] The vested rights doctrine is codified in statute for only two types of land use permit applications, building permits, RCW 19.27.095, and subdivision permits, RCW 58.17.033.

[11] *Cf. Rhod-A-Zalea*, 136 Wash.2d 1, 959 P.2d 1024. In *Rhod-A-Zalea,* the court addressed the question of whether a nonconforming land use was subject to later enacted health and safety regulations. Here, in contrast, we are concerned with LRI's *application* for a conditional use permit in determining which set of rules govern its approval; that is, whether the rules in effect at the time of its application apply or whether LRI's project should also have to comply with regulations enacted after it submitted its conditional use permit application. We are not asked to determine whether LRI's proposed project, subsequent to an issuance of a conditional use permit, should be exempted from compliance with later enacted police power land use regulations. As the Supreme Court in *Rhod-A-Zalea* explained, the vested rights doctrine "only applies to permit *applications* "—a situation that was not before that court. *Rhod-A-Zalea*, 136 Wash.2d at 16, 959 P.2d 1024 (emphasis added).

[12] *See e.g., Friends of the Law*, 123 Wash.2d at 522, 869 P.2d 1056 (subdivision permit); *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wash.App. 709, 715, 558 P.2d 821 (1977) (septic tank permit); *Talbot v. Gray*, 11 Wash. App. 807, 811, 525 P.2d 801 (1974) (shoreline permit), *review denied,* 85 Wash.2d 1001 (1975); *Juanita Bay Valley Comm'ty Ass'n v. City of Kirkland*, 9 Wash.App. 59, 83-84, 510 P.2d 1140 (grading permit), *review denied,* 83 Wash.2d 1002 (1973).

[13] We also note that the Tacoma-Pierce County Health Department issued a permit to LRI to operate the proposed landfill, which the trial court affirmed. That ruling has not been appealed. *See supra* n.8.

Bowker, Kristina J.

From: Bowker, Kristina J.
Sent: Wednesday, January 24, 2024 12:43 PM
To: DCLongwell
Cc: Webb, Taylor K.; Nelson, Ryan J.; Pederson, Holly D.
Subject: RE: Questions for tonight's Public Hearing

Mr. Longwell,

I have forwarded your email to our ADA Coordinator. I will provide any information she shares with me to you.

I am aware that there is a hearing assistance loop installed in Council Chambers. For those with hearing aids, you may turn your device to the "T" setting (stands for telecoil). For those without aids, we have an amplifier and headphones that can be made available.

Thank you,
Kristi Bowker, Assistant to the Hearing Examiner
Office of the Hearing Examiner, City of Bellingham
360-778-8399
kbowker@cob.org
Office Hours: Monday Wednesday Friday 9:00am - 2:30pm . Tuesday 9:00am - 12:30pm. Closed Thursdays.

Mission: To provide fair and impartial quasi-judicial hearings on land use applications and administrative appeals.

From: DCLongwell <DCLongwell@comcast.net>
Sent: Wednesday, January 24, 2024 10:34 AM
To: Bowker, Kristina J. <kbowker@cob.org>
Subject: Questions for tonight's Public Hearing

Ms Bowker,
Bellingham Hearing Examiner's Clerk.

Please let the Examiner know about my hearing loss issues and that I had a very hard time hearing City Planner Taylor Webb's testimony at the 11/29/23 Public Hearing.

Also please ask the Examiner to address why I was not able to point out a falsehood expressed by Ms Taylor Webb after the Public Comment period ended.
As you may recalled you stopped me from sending an additional written note to the Hearing Examiner on Thursday after the Hearing before the Examiner had closed the Public Hearing input period on Friday.

Also, do I need to have any headphones or specialized equipment designed for Hearing loss to participate in tonight's Public Hearing?

Do you have any headphones or specialized equipment available for this Public Hearing that I can use?

Please let me know.

Thanks

Dean Longwell