Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It

*Roger D. Wynne**

ABSTRACT

Washington's land use vested rights doctrine needs repair. The doctrine attempts to balance the interests of developers and municipalities by freezing the law applicable to the review of a land use permit application on the date that the developer submits that application. But the details of a doctrine originally designed to provide certainty and fairness now frequently offer neither in sufficient measure. The doctrine's inconsistent rationales account for much of the confusion that has become a fixture of the doctrine, and courts and the legislature have failed to resolve a host of issues clearly, accessibly, or fairly. This is especially true in the context of development projects that require multiple permits. The legislature should adopt a statutory rule that replaces the muddled details of the common-law doctrine with a principle that reestablishes certainty and at least strives for fairness.

* Roger Wynne is an attorney with Preston Gates & Ellis LLP, Seattle. As of September 2001, he will be a Senior Assistant City Attorney for the City of Seattle. B.A., Yale University; J.D., University of Michigan Law School; M.S., University of Michigan School of Natural Resources. This Article benefited from helpful reviews by Esther Bartfeld, Jill Guernsey, Jim Ryan, Dale Kamerrer, David Britton, Mae Rosok, Leslie Rochat, Jeff Eustis, and Charles Wright. Special thanks go to Esther Bartfeld for her understanding and support. The views expressed in this Article are those of the author, not necessarily those of the Article's reviewers, Preston Gates & Ellis LLP, its clients, or the Seattle City Attorney's office.

TABLE OF CONTENTS

INTRODUCTION

Every real estate developer wants to manage the risks inherent in a project. One of those risks is that after purchasing property with a particular project in mind, the local government could change the development regulations applicable to the property in a way that either precludes the project or diminishes its value. To reduce this risk, developers[1] in Washington often invoke the state's vested rights doctrine. Seattle newspapers report the doctrine being invoked, for example, by a real estate development company to blunt amended county laws that could preclude its "mini-city," slated for development in an otherwise rural area;[2] by a pipeline company to challenge new zoning laws that could dictate the pipeline's route through a city;[3] and by a casino to avoid a city moratorium on off-track betting.[4]

Use of the vested rights doctrine has its price, however. It leaves local governments less able to update and enforce their land use laws to keep pace with changing conditions and evolving views of appropriate land uses. This is especially critical in jurisdictions that revamped their development laws in the 1990s to respond to Washington's

1. This Article uses "developer" as a shorthand for those persons—often the owners of property—who must secure approval from a local jurisdiction as a condition of physically altering property or putting it to a particular use.

2. Brian Kelly, *Developer, Foes Await Redmond Growth Ruling on "Mini-City,"* SEATTLE TIMES, Aug. 18, 1999, at B1.

3. Brian Kelly, *Olympic Pipe Line Sues North Bend*, SEATTLE TIMES, June 15, 1999, at B1.

4. James Bush, *Illegal After the Fact*, SEATTLE WEEKLY, May 4, 2000, at 2.

Growth Management Act (GMA).[5] Among other things, the GMA forced local governments to encourage more dense urban land use patterns in cities and to prohibit low-density "sprawl" in unincorporated rural areas.[6] A Tacoma newspaper recently called on the Pierce County Council to hamper the use of the vested rights doctrine by those wanting to avoid GMA-era regulations and develop intensely in rural parts of the county.[7] Casting land use applications under this doctrine as "ticking time bombs," the newspaper complained that the doctrine allows developers "to speculate, their parcels rising in value because they can be developed without conforming to costly new regulations."[8] The King County Executive issued an emergency order to preclude certain applications of the vested rights doctrine to development projects "that skirt modern environmental and zoning rules."[9]

The vested rights doctrine attempts to balance these competing interests. It is designed to protect a developer's interest in having some certainty that the applicable rules will not continue to change while he or she attempts to develop or use property, and to accommodate local governments' and the public's interest in shaping land use codes to meet their communities' evolving needs. The doctrine does this by fixing a point in time at which a developer can no longer be subject to changes in local land use laws. This bright-line approach enhances both certainty and fairness, at least in theory.

The unfortunate reality is that the details of this theory have been muddled irrevocably in practice. As far back as 1939, the Washington Supreme Court observed that the "term 'vested right' is not easily defined and has been used by the courts to express various shades of meaning."[10] The ensuing six decades have done little to

---

5. WASH. REV. CODE § 36.70A (2000).

6. *See* WASH. REV. CODE § 36.70A.020(1) (2000) (goal of encouraging development in urban areas); WASH. REV. CODE § 36.70A.020(2) (2000) (goal of reducing "the inappropriate conversion of undeveloped land into sprawling, low-density development"). *See also* City of Redmond v. Central Puget Sound Growth Hearings Bd., 136 Wash. 2d 38, 57-58, 959 P.2d 1091, 1100 (1998) (describing how "the GMA changed the normal course" of land use planning in a way that thwarted the expectations of those who bought rural land hoping to develop it more intensely in the future); Eric S. Laschever, *An Overview of Washington's Growth Management Act*, 7 PAC. RIM L. & POL'Y J. 657, 664-65 (1998).

7. *Time to Put Down County's "Old Dogs,"* THE NEWS TRIBUNE (Tacoma, Washington), Sept. 27, 1999, at A8.

8. *Id.* A Seattle columnist echoed this sentiment, concluding that using the vested rights doctrine to allow dense development in rural areas of King County "leads to the land mine effect: vested properties slumbering and waiting for the right market conditions. . . . Even if it is within the law, it corrodes belief [that] the county can maintain a boundary limiting sprawl." James Vesely, *The Land Mine Beside the Snoqualmie River*, SEATTLE TIMES, Apr. 24, 2000, at B1.

9. Brier Dudley, *Sims Clamps Down on Loophole That Allows Rural Subdivisions*, SEATTLE TIMES, Mar. 19, 1999, at B1.

10. Adams v. Ernst, 1 Wash. 2d 254, 264, 95 P.2d 799, 803 (1939).

erode this observation, at least in the context of land use law. The judiciary and, to a lesser extent, the legislature have confused the doctrine's critical details. Today, any attempt to state the current vested rights doctrine with certainty falters when that statement is applied to a set of facts, especially where resolution of the issue can make the difference in a controversial land use project. In some key respects, the doctrine fails to provide fairness as it slides unjustifiably toward the developers' side of the spectrum in the context of multiple-permit projects.

This Article explores many of the problems with the details of the vested rights doctrine and outlines a statutory solution to them.[11] Part I examines the inconsistent rationales that underlie the various manifestations of the doctrine. The differences between the "mandamus" and "fairness/certainty" rationales help explain some of the confusion that has become a fixture of the doctrine. Part II discusses a host of issues that the doctrine fails to resolve adequately. It groups these issues into four fundamental questions, the divergent answers to which often form the key dispute in any vested rights case: (1) to which types of land use permit applications is the doctrine applicable; (2) what types of laws does the doctrine freeze in time; (3) when does the doctrine begin to freeze those laws in time; and (4) for how long, and for what purpose, does the doctrine apply in the context of development projects that require more than one permit? Part III makes the case for adopting a statutory rule that replaces the muddled common-law doctrine in a way that reestablishes certainty and at least strives for fairness in the law's details.

I. WHY THE DOCTRINE? THE HAZARDS OF DIVERGENT RATIONALES

Why do we have a vested rights doctrine? Washington courts' answers to this question generally conform to one of two rationales, although courts rarely acknowledge these rationales explicitly. This Article will refer to these two rationales as "mandamus" and "fairness/certainty." The fairness/certainty rationale has emerged as the more dominant, but both rationales continue to influence the doctrine. As this Article explains later,[12] the persistent interplay between these

11. This Article also serves as a moderating counterpoint to an article recently published in this Journal by the general counsel and a former staff attorney for the Building Industry Association of Washington, Gregory Overstreet & Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U. L. REV. 1043 (2000). This author drafted, submitted, and secured publication of this Article before reviewing the Overstreet and Kirchheim piece.

12. *See infra* Part II.

rationales creates much of the confusion that has undermined the vested rights doctrine.

A. The Mandamus Rationale: A Bad Fit, but Still Invoked

When initially articulated in the context of land use law,[13] the vested rights doctrine arose out of actions for mandamus in which a developer sought judicial assistance to force a municipality to issue a building permit for which the developer had applied. Given the nature of this action,[14] courts understandably tried to determine whether the municipality enjoyed discretion to deny the permit or if it was instead obligated to perform a nondiscretionary, ministerial duty and grant the permit. This led, in 1954, to one of the earliest summaries of the vested rights doctrine in the context of land use law:

> A property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto. A building or use permit must issue as a matter of right upon compliance with the ordinance. The discretion permissible in zoning matters is that which is exercised in *adopting* the zone classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom.[15]

The rule that implements this rationale applies only to building permit applications and features two relevant inquiries: (1) is the building permit application complete; and (2) does the application comply with the law in effect on the date of application? If the answer

---

13. The vested rights doctrine is not limited to land use law. In its most generalized terms, the doctrine refers to a right to do something or acquire something in the future, and prohibits government from enacting a new law that impedes realization of that right. *See In re* F.D. Processing, Inc., 119 Wash. 2d 452, 463, 832 P.2d 1303, 1309 (1992) (bank obtained a vested right in a perfected security interest); Godfrey v. State, 84 Wash. 2d 959, 963, 530 P.2d 630, 632 (1975) (no vested right against statutory change to the common law of contributory negligence); Gillis v. King County, 42 Wash. 2d 373, 377, 255 P.2d 546, 548 (1953) (no vested right to the continuation of the law regarding abandonment of property); *Adams*, 1 Wash. 2d at 264-66, 95 P.2d at 803-04 (no vested right to old age benefits against a change in the law); Wells v. Miller, 42 Wash. App. 94, 97-98, 708 P.2d 1223, 1225 (1985) (holding that if a street vacation is not perfected, adjacent property owners obtain a vested right in the unvacated street).

14. *See* WASH. REV. CODE § 7.16.160 (2000); Department of Ecology v. State Finance Comm., 116 Wash. 2d 246, 252, 804 P.2d 1241, 1243-44 (1991).

15. State *ex rel.* Ogden v. City of Bellevue, 45 Wash. 2d 492, 495, 275 P.2d 899, 901-02 (1954) (citations omitted).

to both questions is "yes," then the local government must meet its ministerial duty to issue that permit. Figure 1 illustrates this rule.

The mandamus rationale announced by the Washington Supreme Court in 1954, as well as the rule that implements it, fit poorly with the reality of land use permitting today. Posing three questions illustrates this point. First, how does this rule affect applications for land use authorizations other than building permits and laws other than zoning codes? Land use development today usually requires a host of different permits in addition to building permits[16] and brings into play a number of different bodies of development regulations other than zoning laws.[17]

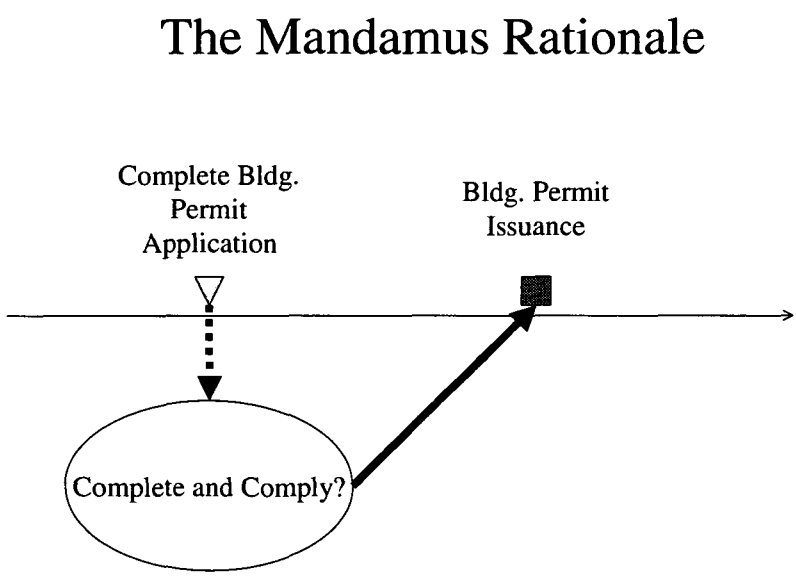

Figure 1. The rule implementing the vested rights doctrine under the mandamus rationale.

16. *See, e.g.*, WASH. REV. CODE § 36.70B.020(4) (2000) (enumerating a nonexclusive list of examples of "project permits"). *See also* Overstreet & Kirchheim, *supra* note 11, at 1053-54 (noting that since the Washington vested rights doctrine was first adopted, other permits have become vehicles through which to assess a project's consistency with local development regulations).

17. *See, e.g.*, WASH. REV. CODE § 36.70A.060 (2000) (requiring local regulation of natural resource lands and critical areas); WASH. REV. CODE § 43.21C.030 (2000) (requiring local review pursuant to the State Environmental Policy Act); WASH. REV. CODE § 90.58.050 (2000) (requiring local implementation of the Shoreline Management Act of 1971).

> Under the mandamus rationale, if a building permit application is complete and complies with the law in effect on the date of application, the local government must issue the building permit. (Bldg. = building)

Second, how many truly "ministerial," nondiscretionary land use authorizations exist? Conversely, how many truly "discretionary" authorizations exist in which the decisions are purely legislative, unhampered by any criteria set out in an ordinance? Decisions on most development authorizations today are neither purely ministerial nor purely discretionary. With the advent in 1971 of supplemental, substantive authority to condition or deny permits on the basis of environmental effects,[18] even the most "ministerial" of permits—the building permit—became imbued with a significant amount of discretion.[19] Decisions on land use permits are generally bounded by legal criteria against which the local government must assess the facts presented by each application.[20] These decisions are subject to judicial review for, among other things, errors of law or failure to make decisions based on substantial evidence.[21] A writ of mandamus is generally not available to force a particular land use decision precisely because land use decisions usually involve some exercise of discretion.[22] In this regime, the line between ministerial and discretionary acts tends to evaporate.

Finally, if the proposed land use project contains a few elements that do not "comply," must the municipality reject the application and force the applicant to reapply (potentially subject to newly-enacted law), or may the municipality condition or issue the permit if the developer changes certain elements of the proposal? The mandamus rationale suggests an all-or-nothing proposition for local governments—the government must either find that the proposal complies in its entirety and issue the permit, or reject it if even the slightest element does not comply. This approach fails to comport with the reality of contemporary land use permitting, where local governments often condition projects to address environmental impacts[23] or to meet criteria specified in local development regulations.[24]

---

18. WASH. REV. CODE § 43.21C.060 (2000).

19. *See* Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 63-65, 578 P.2d 1309, 1312-13 (1978).

20. *See, e.g.*, WASH. REV. CODE § 36.70B.040 (2000) (requiring local governments to assess the consistency of proposed land use projects with local development regulations).

21. WASH. REV. CODE § 36.70C.130(b)-(c) (2000).

22. *See* RICHARD L. SETTLE, WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE § 8.4(a) (1983).

23. *See* WASH. REV. CODE § 43.21C.060 (2000).

24. *See, e.g.*, WASH. REV. CODE § 35.63.080 (2000) (allowing cities to appoint a "board of

B. The Fairness/Certainty Rationale: The More Appropriate and Dominant Approach

At some point during the evolution of Washington's vested rights doctrine in the context of land use decisions, courts evidently realized the limits of mandamus as an intellectual foundation. Increasingly, courts articulated a rationale that furthers two primary goals. First, the doctrine is intended to strike a fair balance between the interests of (a) developers in planning, financing, and implementing land use projects with some certainty that the rules of the game will not change mid-course; and (b) municipalities in revising their land use laws to meet the demands of growth, comply with new state laws, and avoid nonconforming uses.[25] Second, the doctrine is intended to provide certainty to all involved by fixing in time a particular, definable right.

The Washington Supreme Court eventually described the balancing act that forms the "fairness" prong of this rationale:

> Development interests . . . protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.
>
> This court recognized the tension between public and private interests when it adopted Washington's vested rights doctrine. The court balanced the private property . . . rights against the public interest by selecting a vesting point which prevents "permit speculation," and which demonstrates substantial commitment by the developer, such that the good faith of the applicant is generally assured. The application for a building permit demonstrates the requisite level of commitment.[26]

---

adjustment, to make, in appropriate cases and subject to appropriate conditions and safeguards established by ordinance, special exceptions"); WASH. REV. CODE § 36.70A.090 (2000) (encouraging local governments to "provide for innovative land use management techniques"); J. Richard Aramburu & Jeffrey M. Eustis, *Zoning*, *in* WASHINGTON STATE BAR ASS'N, REAL PROPERTY DESKBOOK §§ 97.7(1)-(2) (3d ed. 1996) (discussing authority to issue conditional and special use permits).

25. A nonconforming use or structure is one that was legal when established, but that no longer conforms to later-enacted land use laws. *See* Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wash. 2d 1, 6-12, 959 P.2d 1024, 1027-30 (1998).

26. Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 873-74, 872 P.2d 1090, 1095-96 (1994). Overstreet and Kirchheim misread this identical passage as evidence that "the Washington courts and legislature clearly recognize the two competing interests and have con-

Acknowledging the "certainty" prong of the fairness/certainty rationale, the court also noted that the Washington vested rights doctrine "places great emphasis on certainty and predictability in land use regulations."[27] The "certainty" prong actually dates back to early, mandamus-based vested rights decisions. In those early decisions, the Washington Supreme Court rejected the majority vesting rule,[28] which invokes notions of estoppel and holds that a municipality may change the laws applicable to a particular development as long as the developer has not changed his or her position in reliance on the existing law.[29] The court justified rejecting this majority rule in favor of a practical rule that provides certainty:

> Notwithstanding the weight of authority, we prefer to have a date certain upon which the right vests to construct in accordance with the building permit. We prefer not to adopt a rule which forces the court to search through . . . "the moves and countermoves of . . . parties . . . by way of passing ordinances and bringing actions for injunctions"—to which may be added the stalling or acceleration of administrative action in the issuance of permits—to find that date upon which the substantial change of position is made which finally vests the right. The more practical rule to administer, we feel, is that the right vests when the party . . . applies for his building permit . . . .[30]

The fairness/certainty rationale manifests itself in a rule that freezes in time the law applicable to the review of a given land use permit application. Figure 2 illustrates this rule. Once a developer files a complete permit application, this rule ensures that subsequent changes to local land use or zoning laws will not affect the review of that application. In other words, this rule extends to developers a right to freeze the applicable law in place for purposes of bounding a local government's decision on a developer's application.[31]

---

sciously chosen one side: that of the property owner." Overstreet & Kirchheim, *supra* note 11, at 1072. Overstreet and Kirchheim further describe *Erickson* as evidence of "Washington's deliberate choice in favor of the property owner." *See id.* at 1072-73. They rely on this discussion to assert that "the Washington legislature and our courts have intentionally and consistently balanced the vested rights doctrine in favor of the individual and against the government; accordingly interpretations of the vesting statute should tilt toward the property owner." *Id.* at 1087. The language of Erickson does not support these interpretations.

27. *Erickson & Assoc.*, 123 Wash. 2d at 868, 872 P.2d at 1093.

28. *See, e.g.*, Hull v. Hunt, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958); State *ex rel.* Ogden v. City of Bellevue, 45 Wash. 2d 492, 495-96, 275 P.2d 899, 901-02 (1954).

29. *See Hull*, 53 Wash. 2d at 128-30, 331 P.2d at 858-59.

30. *Id.* at 130, 331 P.2d at 859 (citations omitted).

31. *See* West Main Assocs. v. City of Bellevue, 106 Wash. 2d 47, 53, 720 P.2d 782, 786 (1986) ("[A] vested right does not guarantee a developer the ability to build. A vested right merely establishes the ordinances to which a building permit and subsequent development must

The fairness/certainty rationale, and the law-freezing rule that implements it, provide a more appropriate fit with the realities of contemporary land use permitting than does the mandamus rationale. Unlike the mandamus rationale, the fairness/certainty rationale does not depend on a local permit being ministerial and nondiscretionary. The fairness/certainty rationale also provides more flexibility than the mandamus rationale because it creates a rule that, in theory, could apply to an application for any type of land use authorization (not just a building permit application) and to all development regulations that affect the ultimate decision on the application.

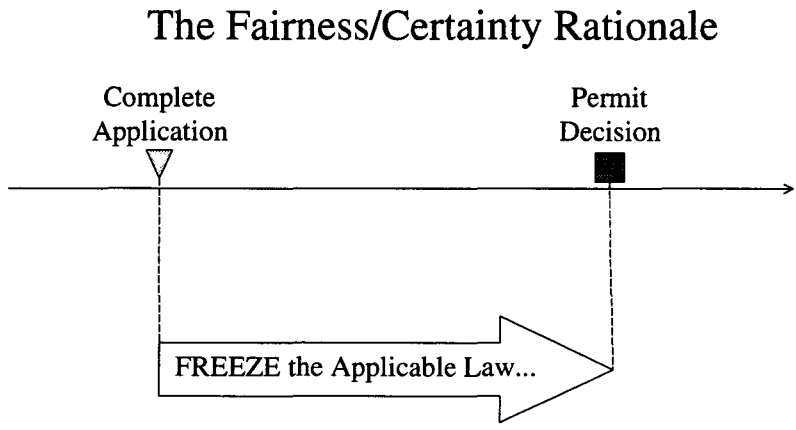

Figure 2. The rule implementing the vested rights doctrine under the fairness/certainty rationale.

Under the fairness/certainty rationale, a complete permit application freezes in time the law applicable to the local government's consideration of that application. The local government may still deny the application, but it may not do so on the basis of laws that take effect after the date of a complete application.

Fairness/certainty has generally emerged as the dominant rationale for the vested rights doctrine in Washington. The Washington Supreme Court acknowledged the primacy of this rationale and the law-freezing rule in 1997: "In Washington, 'vesting' refers generally

comply.").

to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission."[32] The legislature has attempted to codify the law-freezing rule in the context of certain land use applications.[33]

C. Is the Mandamus Rationale Dead?

The fairness/certainty rationale did not emerge through a watershed opinion, and no Washington court has explicitly rejected the mandamus rationale. In 1982, however, the Washington State Supreme Court attempted to lay to rest the ministerial-discretionary dichotomy at the heart of the mandamus rationale:

> The distinction between ministerial and discretionary acts is not relevant to the validity of procedural limits placed on the decisionmaking entity. The need for a "date certain" upon which a right vests is to avoid tactical maneuvering between parties and that need would appear equally strong whether the act is discretionary or ministerial.[34]

This 1982 observation, however, did not kill either the mandamus rationale or even the ministerial-discretionary dichotomy on which it rests. Subsequent decisions invoked the mandamus rationale unquestioningly.[35] Other decisions confused the two rationales, or at least the authority for them. For example, the Washington Supreme Court has repeatedly cited 1950s mandamus-rationale case law as authority for the rule that can only be supported by the fairness/certainty rationale.[36] Gregory Overstreet and Diana Kirchheim hold out the ministerial-discretionary distinction at the heart of the mandamus rationale as the touchstone of the current vested rights doctrine:

---

32. Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 275, 943 P.2d 1378, 1381 (1997). Part II.D.3 of this Article criticizes the remainder of this decision.

33. WASH. REV. CODE § 19.27.095(1) (2000) (building permit applications); WASH. REV. CODE § 58.17.033(1) (2000) (subdivision applications). Part II.D.2 of this Article explains how these and other statutory vested rights rules paint an inconsistent picture.

34. Norco Constr., Inc. v. King County, 97 Wash. 2d 680, 684, 649 P.2d 103, 106 (1982) (citing *Hull*, 53 Wash. 2d at 130, 331 P.2d at 859).

35. *See, e.g.*, Lincoln Shiloh Assocs., Ltd. v. Mukilteo Water Dist., 45 Wash. App. 123, 127-28, 724 P.2d 1083, 1086 (1986), *review denied*, 107 Wash. 2d 1014 (1986); Burley Lagoon Improvement Ass'n v. Pierce County, 38 Wash. App. 534, 540, 686 P.2d 503, 507 (1984), *review denied*, 103 Wash. 2d 1011 (1985); Teed v. King County, 36 Wash. App. 635, 645, 677 P.2d 179, 185 (1984).

36. *See, e.g.*, Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 867-68, 872 P.2d 1090, 1092-93 (1994) (citing *Ogden*, 45 Wash. 2d at 492, 275 P.2d at 899, and *Hull*, 53 Wash. 2d at 125, 331 P.2d at 856); Allenbach v. City of Tukwila, 101 Wash. 2d 193, 197, 676 P.2d 473, 475 (1984) ("Under *Ogden*, a building permit applicant has a vested right to processing of his application under the zoning in effect at the time his application is filed.").

"The basic rule was (and still is) that ministerial permits vest, while discretionary ones do not."[37]

In sum, even though the trend appears to be toward a vested rights doctrine founded on notions of fairness and certainty, the mandamus rationale continues to haunt the doctrine. This confusion helps explain why critical details of Washington's vested rights doctrine remain elusive, as explored in the next section of this Article.

II. WHAT IS THE RULE? THE UNRESOLVED ISSUES THAT PLAGUE THE DOCTRINE

The rule that implements the vested rights doctrine under the fairness/certainty rationale requires answers to at least four persistent questions: (1) to which types of applications does the doctrine apply; (2) what laws does the right freeze in time; (3) at what point in time does this "freeze" begin; and (4) for how long and for what purposes do the laws remain frozen?

The following sections demonstrate how the answers to these questions remain unclear even though the essential framework of the vested rights doctrine remains reasonably sound. A rule that should provide measures of certainty and fairness all too frequently provides neither. Certainty is lost in the hands of attorneys who can invoke authority to justify most positions, and fairness erodes through piecemeal, often unwitting judicial opinions. This problem is most acute in the context of development projects that require multiple permits.

---

37. Overstreet & Kirchheim, *supra* note 11, at 1077. Neither of the two authorities that Overstreet and Kirchheim cite contains a useful or relevant "general description of 'discretionary' versus 'ministerial' permits." *Id.* at 1077 n.193 (citing Grayson P. Hanes & J. Randall Minchew, *On Vested Rights to Land Use and Development*, 46 WASH. & LEE L. REV. 373 (1989), and Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625 (1978)). In fact, both authorities underscore the difficulty of making a ministerial-discretionary distinction clearly or consistently. First, Hanes and Minchew, using an example from Virginia law, equate discretionary approvals with legislative ones and, unlike Overstreet and Kirchheim, suggest that conditional and special use permits are discretionary, not ministerial. Hanes & Minchew, *supra*, at 381. *Cf.* Overstreet & Kirchheim, *supra* note 11, at 1077-78. Second, far from endorsing the ministerial-discretionary distinction, Cunningham and Kremer complain that "the choice of nomenclature[, 'ministerial' or 'discretionary,'] applied to the permit has the talismanic effect of dictating the outcome of the vested rights controversy." Cunningham & Kremer, *supra*, at 638. Following circular logic, Cunningham and Kremer ultimately suggest that choosing to label a decision ministerial or discretionary "is directly dependent on the degree of subjective discretion which is delegated by the legislature to the permit-issuing decisionmakers." *Id.* This approach is different from Hanes and Minchew's legislative-ministerial distinction and, unlike Overstreet and Kirchheim, leads to labeling special, conditional use, and planned unit development permits discretionary. *See id.* at 636 n.48. *Cf.* Overstreet & Kirchheim, *supra* note 11, at 1077-78.

A. To Which Types of Land Use Permit Applications Does the Doctrine Apply? Extending the Doctrine in Fits and Starts

Courts have not consistently identified the universe of land use permit applications to which the doctrine applies.[38] From its inception in the 1950s, the vested rights doctrine has always applied to building permit applications.[39] Washington courts have moved beyond this base haphazardly. From 1968 to 1977, Washington courts extended the doctrine to four other types of land use development applications without much explanation. In the 1980s, courts expressed a newfound reluctance to extend the doctrine further. The legislature overcame this judicial reluctance in the case of subdivision applications, but it left in place the judiciary's curious refusal to extend the doctrine to site-specific rezone applications. The result is a rule that is difficult to apply without first checking piecemeal case law and legislation.

1. The Judiciary's Initial, Almost Matter-of-Fact Extension of the Doctrine Beyond Building Permit Applications

The vested rights doctrine first ventured beyond the confines of building permit applications in 1968.[40] In dicta, and without explicitly acknowledging the new ground it was breaking, the Washington State Supreme Court extended the vested rights doctrine to conditional use permit applications.[41]

This initial, off-handed extension of the doctrine opened the door to the court of appeals, which, in the following decade, extended the doctrine almost matter-of-factly to three other types of permit applications. In 1973, the court of appeals found "no rational distinction between building or conditional use permits and a grading

38. Limiting the universe of applications to ones for "land use" permits necessarily excludes applications that, although they might relate indirectly to property, are not truly for "land use" permits. *See, e.g.*, Vashon Island Comm. for Self-Government v. King County Boundary Review Bd., 127 Wash. 2d 759, 767-68, 903 P.2d 953, 957-58 (1995) (doctrine does not apply to annexation proceedings). *Cf.* WASH. REV. CODE § 36.70B.020(4) (2000) (defining "project permit application").

39. *See, e.g., Ogden*, 45 Wash. 2d at 496, 275 P.2d at 902; *Hull*, 53 Wash. 2d at 130, 331 P.2d at 859.

40. *See* Beach v. Board of Adjustment of Snohomish County, 73 Wash. 2d 343, 438 P.2d 617 (1968).

41. *Id.* at 347, 438 P.2d at 620. The issue in *Beach* was whether a local government had to prepare a transcript of a local hearing at which the local government denied a conditional use permit. *Id.* at 345, 438 P.2d at 619. The court held that a transcript was required and remanded the matter for a rehearing. *Id.* at 347, 438 P.2d at 620. The court noted that in oral argument, the local government stated that the local conditional use permit law had changed during the judicial appeal. *Id.* The court therefore added that on remand, "the zoning code which was in force at the time of the filing of the application shall apply." *Id.*

permit,"[42] and so held that the vested rights doctrine also applies to grading permit applications.[43] The court of appeals quickly applied the doctrine to shoreline substantial development permit applications without even acknowledging that it was extending the doctrine beyond the three types of applications to which the doctrine had been applied to date.[44] More cautiously, in 1977, the court of appeals held that to the extent the vested rights doctrine might apply to septic tank permit applications, it only freezes the applicable law as of the date a complete septic tank permit application is filed.[45] Twenty years later, an unquestioning court of appeals cited this as authority for the proposition that "[t]he doctrine applies to septic tank installations."[46] By the end of the 1970s, therefore, the judiciary had essentially taken the doctrine from the realm of building permit applications and extended it to conditional use, grading, shoreline substantial development, and septic permit applications.

2. The Judiciary's Subsequent Reluctance to Extend the Doctrine and the Legislature's One-Time Intervention

In the 1980s, the judiciary began retreating from its liberal extensions of the vested rights doctrine to other types of development permit applications. The Washington Supreme Court first developed its apparent reluctance to extend the doctrine in the context of preliminary subdivision applications. In *Norco Construction, Inc. v. King County*,[47] the court refused to extend the vested rights doctrine, at least in so many words, to preliminary subdivision applications. In that case, the county council failed to act on a preliminary subdivision application[48] within ninety days of the date of completed application, as required by statute.[49] The council based its refusal on a perceived conflict between the application and a draft comprehensive plan that the county had not yet adopted.[50] The court of appeals held that the vested rights doctrine applied to this situation, but the particular con-

42. Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wash. App. 59, 84, 510 P.2d 1140, 1155 (1973), *review denied*, 83 Wash. 2d 1002, 1003 (1973).

43. *Id.* at 85, 510 P.2d at 1156.

44. *See* Talbot v. Gray, 11 Wash. App. 807, 811, 525 P.2d 801, 803-04 (1974), *review denied*, 85 Wash. 2d 1001 (1975).

45. *See* Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wash. App. 709, 715, 558 P.2d 821, 826 (1977).

46. Thurston County Rental Owners v. Thurston County, 85 Wash. App. 171, 182, 931 P.2d 208, 214 (1997).

47. 97 Wash. 2d 680, 649 P.2d 103 (1982).

48. *See Norco*, 97 Wash. 2d at 682, 649 P.2d at 105.

49. *See id.* at 686-87, 649 P.2d at 107 (discussing WASH. REV. CODE § 58.17.140).

50. *See id.* at 683, 649 P.2d at 105-06.

text of preliminary subdivision applications required a rule that froze the applicable law in effect at the *end* of the 90-day statutory period, rather than at the *start* of the period on the date of complete application.[51]

The supreme court agreed that the law in effect at the *end* of the statutory 90-day period should apply, but based its decision on an interpretation of the statute, *not* the vested rights doctrine: "[T]he use of the term 'vested right' in the opinion of the Court of Appeals overstates the nature of [the developer's] right."[52] Although *Norco*'s direct treatment of the vested rights doctrine was ambiguous, subsequent decisions removed any ambiguity by describing *Norco* as holding that the vested rights doctrine does not apply to preliminary subdivision applications.[53]

The retreat continued in 1984, when the court of appeals ruled that submitting a preliminary site plan does not trigger the vested rights doctrine.[54] Three years later, the supreme court held that the vested rights doctrine does not apply to binding site plan applications.[55] The legislature responded to the judiciary in 1987, extending

---

51. *See* Norco Constr., Inc. v. King County, 29 Wash. App. 179, 190, 627 P.2d 988, 995 (1981), *aff'd as modified*, 97 Wash. 2d 680, 649 P.2d 103 (1982).

52. *Norco*, 97 Wash. 2d at 687, 649 P.2d at 108. *See generally id.* at 687-89, 649 P.2d at 108. Overstreet and Kirchheim incorrectly suggest that *Norco* was based on a distinction between "discretionary" and "ministerial" permits. Overstreet & Kirchheim, *supra* note 11, at 1077 n.193, 1078 n.195. The *Norco* court expressly ruled that any such distinction is irrelevant to the vested rights doctrine. *See Norco*, 97 Wash. 2d at 684, 649 P.2d at 106; *supra* Part I.C (discussing *Norco*'s treatment of this issue).

53. *See, e.g.*, *Erickson*, 123 Wash. 2d at 872, 872 P.2d at 1095; Friends of the Law v. King County, 123 Wash. 2d 518, 522, 869 P.2d 1056, 1059 (1994); Lincoln Shiloh Assocs. v. Mukilteo Water Dist., 45 Wash. App. 123, 128, 724 P.2d 1083, 1086 (1986), *review denied*, 107 Wash. 2d 1014 (1986). These descriptions of *Norco* are ironic because both appellate courts in *Norco* left in place the trial court's order applying the vested rights rule directly to the subdivision application. *See Norco*, 29 Wash. App. at 192, 627 P.2d at 996; *Norco*, 97 Wash. 2d at 690-91, 649 P.2d at 109. The trial court ordered the council to consider the preliminary subdivision application under the law in effect at the *start* of the statutory 90-day period (in other words, on the date of application), consistent with the fairness/certainty rationale for the vested rights doctrine. *See Norco*, 29 Wash. App. at 192, 627 P.2d at 996. The appellate courts presumably upheld the trial court's order because the law in effect at the end of the period remained unchanged from the law that was in effect at the start of the period. *See id.* at 188 n.4, 627 P.2d at 993 n.4. Therefore, even though the supreme court asserted that it was applying its own rule that was not related to the vested rights doctrine, the factual outcome of *Norco* was to uphold an application of the vested rights doctrine to a preliminary subdivision application. *See Norco*, 97 Wash. 2d at 684, 649 P.2d at 106.

54. *See Burley Lagoon*, 38 Wash. App. at 540, 686 P.2d at 507. The court applied the mandamus rationale to reach this result, reasoning that "processing a building permit [that is subject to the vested rights doctrine] is a ministerial act, whereas processing a preliminary site plan for approval is a discretionary act." *Id.*

55. *See* Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 639, 733 P.2d 182, 193 (1987). The court dispensed with the issue in one sentence and with no citation to authority: "As a general principle, we reject any attempt to extend the vested rights doctrine to

the vested rights doctrine to preliminary subdivision applications,[56] but not to preliminary or binding site plan applications.

Even after the legislature intervened, the supreme court continued to resist extending the doctrine to other types of development permit applications. In 1994, for example, the court considered an application for a master use permit (MUP) from the city of Seattle.[57] "MUPs are 'umbrella' or 'master' permits, which actually represent a number of independent regulatory components, including environmental impact review, comprehensive plan review, and other *use* inquiries."[58] The court refused to extend the vested rights doctrine to the developer's MUP application because filing a MUP application could occur in the infancy of a project, well before the developer had committed substantial resources to a project.[59] Furthermore, the court noted that the city had put in place a local vesting ordinance that allowed a MUP applicant to file a building permit application and thereby lock in the law applicable to both the building permit and the MUP application.[60] This gave the court comfort that the developer had the control to freeze the applicable law when he or she actually decided to commit to develop.[61] The legislature has not responded to this decision with any MUP vesting law of its own.

3. The Unique Case of Site-Specific Rezones: The Mandamus Rationale Rears Its Head in the Wrong Place

The issue of whether the doctrine applies to site-specific rezone applications merits particular attention. The legislature's decision to extend the doctrine to preliminary subdivision applications[62] and the

---

site plan review." *Id. Cf.* Overstreet & Kirchheim, *supra* note 11, at 1083 n.233 (asserting that RCW 58.17.033 arguably covers binding site plans in addition to plat applications without acknowledging *Valley View*).

56. Act of Apr. 20, 1987, ch. 104, § 2, 1987 Wash. Laws 317 (enacting WASH. REV. CODE § 58.17.033). *See infra* Part II.D.2 (discussing application of this statute).

57. *See* Erickson & Assocs. v. McLerran, 123 Wash. 2d 864, 872, 872 P.2d 1090, 1095 (1994).

58. *Id.* at 866, 872 P.2d 1092.

59. *Id.* at 874-75, 872 P.2d 1096.

60. *Id.* at 875, 872 P.2d 1096.

61. *See id.* The *Erickson* court did not reverse an earlier court of appeals ruling that, while not acknowledging it was extending the doctrine to MUPs, held that filing a complete MUP application freezes applicable SEPA policies in time. *See* Victoria Tower Partnership v. City of Seattle, 49 Wash. App. 755, 756, 760-61, 745 P.2d 1328, 1331 (1987). Instead, the *Erickson* court distinguished the facts of *Victoria Tower* on the grounds that in *Erickson*, the city adopted its vesting ordinance after the relevant facts of *Victoria Tower* occurred. *See Erickson*, 123 Wash. 2d at 872, 872 P.2d at 1095.

62. *See* WASH. REV. CODE § 58.17.033 (2000). For a fuller discussion of this provision in the context of multiple-permit projects, see *infra* Part II.D.2.

judiciary's decisions not to extend the doctrine to a binding site plan[63] or to MUP applications[64] arguably find some basis in a dispute over the policies on which the doctrine is constructed. By contrast, the judicial refusal to extend the doctrine to rezone applications appears to be based more on a misapplication of the doctrine in the guise of the mandamus rationale than on any fundamental policy.

The determination that the vested rights doctrine does not apply to site-specific rezone applications occurred in *Teed v. King County*.[65] In that case, developers applied for a rezone, which the county granted on the condition that the developers dedicate a right-of-way to the county.[66] After the developers dedicated the right-of-way, the county amended the zoning code applicable to the entire area and then used the new code to deny the requested rezone.[67] The court ordered the county to convey the land back to the developers, but refused to order the county to issue the requested rezone.[68]

Two problems hamper the court's rationale. First, it relied on the mandamus rationale for the vested rights doctrine: "The situation raised in the instant appeal is clearly not the type of ministerial action which warrants the granting of mandamus contemplated under the 'vested rights' doctrine."[69] The court apparently overlooked the *Norco* court's announcement roughly eighteen months earlier that the ministerial/discretionary distinction was not relevant to the vested rights doctrine.[70] Second, the *Teed* court invoked authority regarding area-wide rezones to reason that site-specific rezones may not be compelled by the judiciary through a writ of mandamus.[71] Although area-wide zoning and rezoning is a legislative function,[72] site-specific rezones are quasi-judicial decisions bounded by local regulations and criteria.[73]

---

63. *See* Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 639, 733 P.2d 182, 193 (1987). *See supra* Part II.A.2.

64. *See Erickson*, 123 Wash. 2d at 874-75; *supra* Part II.A.2.

65. 36 Wash. App. 635, 643-44, 677 P.2d 179, 184 (1984).

66. *See id.* at 637, 677 P.2d at 181.

67. *Id.* at 637-39, 677 P.2d at 181-82.

68. *Id.* at 645, 677 P.2d at 185.

69. *Id.*

70. *See* Norco Constr., Inc. v. King County, 97 Wash. 2d 680, 684, 649 P.2d 103, 106 (1982).

71. *See Teed*, 36 Wash. App. at 644-45, 677 P.2d at 184-85.

72. Areawide rezones are legislative acts subject to initial review for consistency with the Growth Management Act only by the Growth Management Hearings Board. *See* WASH. REV. CODE § 36.70A.280(a) (2000) (Growth Management Hearings Board shall hear petitions alleging that development regulations violate the GMA); WASH. REV. CODE § 42.36.010 (adoption of an area-wide rezoning ordinance is a legislative act, not a quasi-judicial one, and as such is not subject to the appearance of fairness doctrine); Buckles v. King County, Cent. Puget Sound Growth Management Hearings Bd. No. 96-3-0022c, Final Decision and Order, at 23 (Nov. 12, 1996) (the Board will review areawide rezones, which are legislative acts). *Cf.* Citizens for

Despite its shortcomings, the *Teed* decision has become accepted as authority for the proposition that the vested rights doctrine does not apply to site-specific rezone applications. This has forced courts to engage in needless contortions to reach reasonable results, only to have those contortions further confuse the doctrine. For example, the court of appeals faced the issue of the vested rights doctrine in the context of a site-specific rezone application in *Hale v. Island County*.[74] In that case, the county had in place a two-step rezone procedure similar to that for subdivisions: the developer must first seek preliminary approval and then apply for final approval.[75] The developer filed its preliminary rezone application, obtained preliminary approval, and then filed its application for final approval shortly before the state Growth Management Hearings Board invalidated the county zoning provisions that favored the rezone application.[76] The court found itself in a bind. The Growth Management Act (GMA) maintains that a Board order of invalidity does not affect those "rights that vested under state or local law" prior to the order.[77] However, as the court

---

Mount Vernon v. City of Mount Vernon, 133 Wash. 2d 861, 867-68, 947 P.2d 1208, 1211-12 (1997) (Growth Management Hearings Board has no jurisdiction over quasi-judicial, site-specific rezone decisions).

73. Site-specific rezones are now subject to review only pursuant to the Land Use Petition Act, WASH. REV. CODE § 36.70C. *See, e.g.*, WASH. REV. CODE § 36.70B.020(4) (2000) (including site-specific rezone applications among the "project permits" subject to the procedural requirements of WASH. REV. CODE § 36.70B (2000)); WASH. REV. CODE § 36.70C.030(1) (2000) (providing exclusive means of review of land use permit decisions); WASH. REV. CODE § 36.70C.130(1) (2000) (applicable standard of review). *See also* Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wash. 2d 169, 172-73, 178-79, 4 P.3d 123, 124, 127 (2000) (site-specific rezone must be appealed only pursuant to the Land Use Petition Act, not the GMA); *Citizens for Mount Vernon*, 133 Wash. 2d at 874-75, 947 P.2d at 1215 (treating planned unit development applications like site-specific rezones, which are quasi-judicial); City of Bellevue v. East Bellevue Community Council, 138 Wash. 2d 937, 947-48, 983 P.2d 602, 607-08 (1998) (site-specific rezone decisions are subject to writ actions under an arbitrary and capricious standard of review); Pleas v. City of Seattle, 112 Wash. 2d 794, 805 n.1, 774 P.2d 1158, 1164 n.1 (1989) ("A rezone action is quasi judicial in nature. . . ."); Barrie v. Kitsap County, 84 Wash. 2d 579, 587, 527 P.2d 1377, 1381 (1974) (finding that "rezone proceedings conducted by county planning commissions and boards of county commissioners are quasi-judicial in character."); Bassani v. Board of County Commissioners, 70 Wash. App. 389, 393, 853 P.2d 945, 948 (1993); Concerned Organized Women and People Opposed to Offensive Proposals, Inc. v. City of Arlington, 69 Wash. App. 209, 216 n.9, 847 P.2d 963, 967-68 n.9 (1993).

74. 88 Wash. App. 764, 946 P.2d 1192 (1997).

75. *See id.* at 766-67, 946 P.2d at 1193. *Cf.* WASH. REV. CODE §§ 58.17.070-.110 (2000) (describing subdivision approval process).

76. *See Hale*, 88 Wash. App. at 766-67, 946 P.2d at 1193. The Board is the administrative tribunal with exclusive, initial jurisdiction over challenges alleging that a local comprehensive plan or development regulation is inconsistent with the GMA. WASH. REV. CODE § 36.70A.280 (2000).

77. WASH. REV. CODE § 36.70A.302(2) (2000). *See Hale*, 88 Wash. App. at 772, 946 P.2d at 1195.

noted, *Teed* precludes the vested rights doctrine from applying to site-specific rezone applications.[78]

To reach the result it wanted, the *Hale* court executed an end-run around *Teed*. Although it acknowledged that the vested rights doctrine does not apply to rezones, the court essentially picked, out of thin air, a point of vesting that allowed it to fit the case into the GMA's protection of vested rights. The court made a few observations about the county's apparent intent behind its two-step rezone application procedure, and from those observations concluded that, at least in that county, the "applicant's development rights on specific rezones vested upon preliminary use approval."[79] Applying this non-vested-rights-doctrine-vested-rights rule to the case at hand, the court held that the developer's rights had "vested" upon preliminary rezone approval and therefore could not be affected by the Board's invalidation order.[80]

Hale would have been a relatively easy case were it not for *Teed*. If site-specific rezone applications were subject to the general vested rights doctrine, the applicant in *Hale* would have been able to freeze the law applicable to its final rezone application at least as of the date it submitted that application, which was before the Board's ruling. This would have fit the developer within the GMA's protection of vested rights.

Teed remains unquestioned authority for the proposition that the vested rights doctrine has no place in the realm of site-specific rezones.[81] More importantly, it remains yet another example of how we have muddied the vested rights doctrine. The doctrine deserves more certainty and simplicity than decisions like *Teed* allow.

4. So, What Is the Rule?

As of now, the rule in Washington seems to be that the vested rights doctrine applies to applications for building permits, preliminary subdivisions,[82] conditional use permits, shoreline substantial

78. *See Hale*, 88 Wash. App. at 771, 946 P.2d at 1195.

79. *Id.* at 771-72, 946 P.2d at 1195.

80. *Id.* at 772, 946 P.2d at 1195.

81. Making no mention of *Teed*, the court of appeals in a subsequent decision used different grounds to reject an effort to apply the doctrine to a site-specific rezone request. In *Donwood, Inc. v. Spokane County*, 90 Wash. App. 389, 397-98, 957 P.2d 775, 779-80 (1998), the court simply held that because the developer never completed its rezone application by submitting the requisite final site plan, the developer was not able to invoke the vested rights doctrine.

82. The Washington State Supreme Court has held that a developer may invoke the vested rights doctrine by filing an application for a planned unit development (PUD) that is "linked" to a preliminary subdivision application; the court did not address whether filing a PUD application alone is sufficient. *See infra* Part II.D.4 (discussing Association of Rural Residents v. Kitsap

development permits, grading permits, and septic permits, but *not* to applications for site-specific rezones, preliminary or binding site plans, or master use permits.

What about applications for other types of development permits or applications for types of permits that do not currently exist, but that, given the evolving nature of land use law, will arise in the future? Unfortunately, the doctrine does not provide a discernible pattern for determining which types of applications are covered by the doctrine. Should we assume that the doctrine does *not* apply to any type of development authorization to which neither the judiciary nor the legislature has explicitly extended the doctrine? Instead, should we assume that the doctrine *applies* to all types of development authorizations except those that the judiciary has determined do not trigger the doctrine?

The doctrine should provide more certainty than this. Its applicability should be apparent without resorting to piecemeal case law and legislation.

B. *What Bodies of Law Does the Doctrine Freeze in Time? Bounding the Substantive Reach of the Doctrine*

Beyond the issue of what types of land use permit applications trigger the vested rights doctrine lies this question: once triggered, what bodies of law does the doctrine freeze in time? Courts have generally noted that "zoning ordinances" are within this universe of laws, along with most ordinances requiring a host of other land use authorizations.[83] Courts have struggled, however, with laws that might not fit neatly within this category of zoning or land use controls. This section discusses three such laws: (1) "health and safety" regulations; (2) procedural land use requirements; and (3) GMA impact fees.

1. "Health and Safety" Regulations

Most zoning or land use regulations advance public health and welfare, and many directly promote safety. Nevertheless, two judicial decisions suggest, as do Overstreet and Kirchheim, that some body of "health and safety" regulation exists apart from zoning or land use restrictions that is not frozen in time by application of the vested

---

County, 141 Wash. 2d 185, 192-95, 4 P.3d 115, 118-20 (2000)).

83. *See, e.g.*, Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 271, 943 P.2d 1378, 1380 (doctrine freezes in time "zoning and land use laws"); State *ex rel.* Ogden v. City of Bellevue, 45 Wash. 2d 492, 495, 275 P.2d 899, 901-02 (1954) (early vested rights decision referring to "zoning ordinance"); New Castle Investments v. City of LaCenter, 98 Wash. App. 224, 232, 989 P.2d 569, 573 (1999) (noting that the doctrine is generally limited to what can loosely be called "zoning" ordinances), *review denied*, 140 Wash. 2d 1019, 5 P.3d 9 (2000).

rights doctrine. Divining this distinction remains one of the more difficult, and unnecessary, aspects of the vested rights doctrine.

a. Hass v. City of Kirkland[84]

In *Hass*, the Washington Supreme Court considered an appeal from a developer who submitted a building permit application *after* the effective date of an amendment to the city's fire code.[85] The amendment created a requirement that buildings of the developer's type had to be within a certain distance from an improved public street to secure adequate fire service access.[86] The court held that because the building permit application was filed *after* the effective date of the amendment, the developer was subject to the amendment.[87] This was a simple case, requiring a direct, uncomplicated application of the vested rights doctrine—the court applied the law in effect on the date of building permit application.

Unfortunately, the court indulged in dicta that has taken on a life of its own. "Even if, arguendo, the [developer] had a vested right to a building permit, this right would have been extinguished through the exercise of the [city's] police power in enacting the ordinance."[88] The court relied on the 1905 case of *Seattle v. Hinckley,*[89] which includes the following statement: "There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community."[90] The *Hass* court also pointed to the body of law exploring the constitutionality of municipal exercise of police powers to further the public health and welfare.[91]

The authorities cited by the *Hass* court, however, do not support its dicta. The 1905 *Hinckley* decision had nothing to do with the vested rights doctrine, at least as that doctrine came to affect land use decisions half a century later. In *Hinckley*, the owner of an existing office building challenged a city's attempt to force him to upgrade his fire escapes to meet a newly-enacted fire code provision.[92] This was not a case in which the law changed while a municipality was considering a permit application. Instead, the new fire escape law applied universally to future *and existing* buildings, thereby overcoming the

84. 78 Wash. 2d 929, 481 P.2d 9 (1971).
85. *Id.* at 930-31, 481 P.2d at 10.
86. *Id.*
87. *See id.* at 931, 481 P.2d at 10.
88. *Id.*
89. 40 Wash. 468, 82 P. 747 (1905).
90. *Id.* at 471, 82 P. at 748, *quoted in Hass*, 78 Wash. 2d at 931-32, 481 P.2d at 11.
91. *See Hass*, 78 Wash. 2d at 932-34, 481 P.2d at 11-12.
92. *See Hinckley*, 40 Wash. at 469-70, 82 P. at 748.

presumption that new laws act only prospectively.[93] Likewise, the other decisions cited in the *Hass* decision deal with the authority of municipalities to enforce health and safety rules generally, not necessarily with their retroactive application to existing land uses or to uses for which an application has been submitted.[94]

Although at least one appellate court evidently recognized the *Hass* treatment of "health and safety" laws as mere dicta,[95] *Hass* continues to muddy the water. For example, the supreme court relied on *Hass* when concluding that "[m]unicipalities can regulate or even extinguish vested rights by exercising the police power reasonably and in furtherance of a legitimate public goal,"[96] and the court of appeals has nodded toward *Hass*, at least on a theoretical basis.[97]

b. Rhod-A-Zalea & 35th, Inc. v. Snohomish County[98]

In *Rhod-A-Zalea*, a peat mine began operations decades before the county enacted both a zoning code that required a conditional use permit and a grading ordinance that required a grading permit. The parties agreed that the peat mining operation constituted a valid, nonconforming use and, as such, it was not subject to the conditional use permit requirement.[99]

Nevertheless, the court agreed with the county that the developer still had to apply for a grading permit. The court's rationale appears to hinge upon labeling the grading ordinance as "police power regulations subsequently enacted for the health, safety and welfare of the community."[100] The court asserted that the vested rights doctrine did not apply because "the doctrine only applies to permit applications" and no application was at issue in the case.[101] In the alternative, the court reasoned that the doctrine cannot prevent application of "later

93. *Id.* at 470, 82 P. at 748.

94. *See Hass*, 78 Wash. 2d at 932-34, 481 P.2d at 11-12.

95. "Appellant suggests that the *Hass* case may signal an end to the 'vested rights' doctrine. We do not so interpret *Hass*, nor do we regard it as an erosional retreat from the 'vested right' doctrine. . . ." Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wash. App. 59, 84, 510 P.2d 1140, 1155 (1973), *review denied*, 83 Wash. 2d 1002-03 (1973).

96. West Main Assocs. v. City of Bellevue, 106 Wash. 2d 47, 53, 720 P.2d 782, 786 (1986).

97. "Having based our holding on the 'vested rights doctrine,' we do not reach the more basic issue of whether in the first instance anyone can ever have a vested right to imperil the health or otherwise impair the safety of the community." Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wash. App. 709, 715, 558 P.2d 821, 826 (1977).

98. 136 Wash. 2d 1, 959 P.2d 1024 (1998).

99. *Id.* at 4, 959 P.2d at 1026. A nonconforming use is one that was legal when established but that no longer conforms to later-enacted land use laws. *See id.* at 6-12, 959 P.2d at 1027-30.

100. *Id.* at 6, 959 P.2d at 1027. *See also id.* at 9, 15, 20, 959 P.2d at 1028, 1031, 1034.

101. *Id.* at 16, 959 P.2d at 1032.

enacted police power regulations."[102] Curiously, the court never even mentioned case law that applies the vested rights doctrine to grading permit applications.[103] If grading regulations are truly "health and safety" regulations that a local jurisdiction may upgrade and apply through exercise of its "police powers," then the *Rhod-A-Zalea* court should have overruled grading permit vested rights case law.

Like *Hass*, *Rhod-A-Zalea* forced a cumbersome distinction between zoning or other land use regulations (which the vested rights doctrine presumably freezes in place) and some more specific set of "health and safety" regulations (which are apparently immune from the vested rights doctrine).[104] Application of the vested rights doctrine should not hinge on such fuzzy distinctions.

c. Overstreet and Kirchheim

Hass and *Rhod-A-Zalea* each characterized the imposition of "health and safety" regulations as an exercise of "police power" that can apply to a project notwithstanding the vested rights doctrine.[105] Overstreet and Kirchheim, by contrast, perceive a distinction between "police power" and "health, safety, and welfare" laws and reason that only the latter may trump vested rights.[106] According to Overstreet and Kirchheim, "local governments can still impose valid (that is, reasonable) health, safety, and welfare regulations (e.g., fire protection standards) on a vested project. However, activities that can be regulated under the 'police power' are much broader than activities subject to 'health, safety, and welfare' regulations."[107]

---

102. *Id.* at 16 n.1, 959 P.2d at 1032 n.1.

103. *See* Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wash. App. 59, 84-85, 510 P.2d 1140, 1155-56 (1973), *review denied*, 83 Wash. 2d 1002-03 (1973).

104. Ironically, the *Rhod-A-Zalea* court does not heed this distinction between zoning and police powers. The court describes police powers as protecting "health, safety and welfare," and describes zoning ordinances as also protecting "health, safety, morals, or welfare." *Rhod-A-Zalea*, 136 Wash. 2d at 7, 959 P.2d at 1027.

105. In *Hass v. City of Kirkland*, the court stated, "[e]ven if, arguendo, the [developer] had a vested right to a building permit, this right would have been extinguished through the exercise of the [city's] police power in enacting [the] ordinance. . . ." 78 Wash. 2d at 931, 481 P.2d at 11. The court also pointed to the body of law exploring the constitutionality of municipal exercise of police powers to further the public health and welfare. *Id.* at 932-34, 481 P.2d at 11-12. In *Rhod-A-Zalea*, the court characterized police power regulations as ones "enacted for the health, safety and welfare of the community." 136 Wash. 2d at 6, 959 P.2d at 1027. The vested rights doctrine cannot prevent application of "later enacted police power regulations." *Id.* at 16 n.1, 959 P.2d at 1032 n.1. *See also* West Main Assocs. v. City of Bellevue, 106 Wash. 2d 47, 53, 720 P.2d 782, 786 (1986) ("Municipalities can regulate or even extinguish vested rights by exercising the police power reasonably and in furtherance of a legitimate public goal.").

106. *See* Overstreet & Kirchheim, *supra* note 11, at 1047 n.20, 1058-59.

107. *Id.* at 1047 n.20.

Overstreet and Kirchheim's distinction between "police power" and "health, safety, and welfare" regulations cannot stand in light of the history of police power jurisprudence. Courts, including *Hass* and *Rhod-A-Zalea,* have consistently defined the "police power" to be concurrent with—indeed, defined by—the authority to promote "health, safety, and welfare."[108] The terms are synonymous.

Overstreet and Kirchheim's distinction is unsupported by the four decisions they cite.[109] As explained above,[110] two cases, *Hinckley*[111] and *Hass,*[112] were either unrelated to the vested rights doctrine or amounted to unjustifiable dicta. Even the *Hass* dicta stated that a municipality could extinguish vested rights through the exercise of its "police power,"[113] not just through the exercise of some more limited authority to regulate health, safety, or welfare. In the third case cited by Overstreet and Kirchheim, *DeTamore v. Hindley,*[114] the court analyzed a railroad overpass safety ordinance purely as a "police power regulation" and not as a "health, safety, and welfare" regulation.[115] Furthermore, *DeTamore,* decided in 1915, did not have anything to do with the vested rights doctrine, which was announced some forty years later. The vested rights holding in the final case cited by Overstreet

---

108. *See, e.g.*, City of Tacoma v. Boutelle, 61 Wash. 434, 444, 112 P. 661, 664 (1911) ("In its broadest acceptation [police power] means the general power of the state to preserve and promote the public welfare."); State v. Buchanan, 29 Wash. 602, 604, 70 P. 52, 52 (1902) (defining police power as "that power which enables the state to promote and protect the health, welfare, and safety of society."). *See generally* Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights,* 75 WASH. L. REV. 857, 880-88 (2000) (historical treatment of police power case law in Washington).

The statute that provides damages for certain unlawful land use permitting "acts" exempts from the definition of "acts" those "lawful decisions of an agency which are designed to prevent a condition which would constitute a threat to the *health, safety, welfare, or morals* of residents in the area." WASH. REV. CODE § 64.40.010(6) (2000) (emphasis added). Inclusion in this statute of "health, safety, welfare, or morals" is more likely the result of political compromise rather than some back-door attempt to rewrite case law to carve out certain types of regulations from "police power" authority or the vested rights doctrine. Although the Washington House of Representatives version of the bill for this statute was completely supplanted by the Senate version, the House sponsors were evidently motivated, in part, by a desire to shield local governments from adult businesses that might otherwise use this law to seek damages as a result of the then-pending federal case involving a Washington city. *See* House Journal, 47th Leg., 2d Spec. Sess., Point of Inquiry, at 514 (1982) (discussing the case that was eventually resolved as *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)). Even though the legislature shielded certain decisions motivated by "health, safety, welfare, or morals" from financial liability, "police power" regulations otherwise remain synonymous with "health, safety, and welfare" regulations.

109. *See* Overstreet & Kirchheim, *supra* note 11, at 1059 n.15.

110. *See supra* at Part II.B.1.a.

111. City of Seattle v. Hinckley, 40 Wash. 468, 82 P. 747 (1905).

112. Hass v. City of Kirkland, 78 Wash. 2d 929, 481 P.2d 9 (1971).

113. *Id.* at 931, 481 P.2d at 11.

114. 83 Wash. 322, 145 P. 462 (1915).

115. *See id.* at 326-27, 145 P. at 463-64.

and Kirchheim, *Ford v. Bellingham-Whatcom County District Board of Health*,[116] was not premised on the septic regulation at issue somehow being a "health, safety, and welfare" regulation instead of a mere "police power" regulation. *Ford* was a direct application of the vested rights doctrine in which the court determined that the developer did not trigger the doctrine. The court did not decide whether a septic regulation was subject to the doctrine.[117] It merely held that "to the extent" the doctrine could apply to such regulations, the applicant did not trigger the doctrine in that case.[118] Overstreet and Kirchheim's assertion that septic regulations may trump the vested rights doctrine is undermined by a post-*Ford* decision that found that "the doctrine applies to septic tank installations."[119]

Even Overstreet and Kirchheim trip over their own distinction. Describing an example elsewhere in their article, they state that "if an elected body thinks the public health, safety, and welfare requires less housing density, it exercises its regulatory powers and passes a new antisprawl ordinance increasing minimum lot sizes."[120] It seems unlikely that Overstreet and Kirchheim would therefore conclude that minimum lot sizes are among the "health, safety, and welfare" laws that may trump the vested rights doctrine. That conclusion would conflict with established case law.[121] Overstreet and Kirchheim's own confusion of this distinction undermines their use of the distinction "to avoid confusion about which kind of regulations can trump vested rights."[122]

---

116. 16 Wash. App. 709, 714-15, 558 P.2d 821, 826 (1977).

117. *Id.* at 715, 558 P.2d at 826.

118. *Id.*

119. *See* Thurston County Rental Owners v. Thurston County, 85 Wash. App. 171, 182, 931 P.2d 208, 214 (1997).

120. Overstreet & Kirchheim, *supra* note 11, at 1057.

121. *See* Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 943 P.2d 1378 (1997) (holding that the vested rights doctrine precludes application of new minimum lot size requirement).

122. Overstreet & Kirchheim, *supra* note 11, at 1047 n.20. Even if lacking a foundation in law, this distinction at least provides Overstreet and Kirchheim a platform from which to argue that the scales of the vested rights doctrine should tip further toward the side of developer interests. Citing to their own distinction between "police power" and "health, safety, and welfare" regulations, Overstreet and Kirchheim offer the following rationale for swinging the scales in favor of developers:

> Given that local governments retain a wide assortment of regulatory powers immune from the vested rights doctrine [namely, their ability to regulate "health, safety, and welfare"], it is perfectly reasonable to provide property owners all the certainty and fairness of strong vesting protection. To do otherwise would dramatically tip the balance of interests one-sidedly in favor of the government.

Id. at 1074. *See also id.* at 1057-60 (casting health, safety, and welfare as the only policy interest of local government, and suggesting that a fair vested rights doctrine need only protect that interest). Having asserted that local governments lack a justifiable interest in preserving their

d. A "Health and Safety" Distinction Is Relevant to the Law of Nonconforming Uses, Not the Vested Rights Doctrine

Hass, *Rhod-A-Zalea*, and Overstreet and Kirchheim illustrate the danger of confusing the vested rights doctrine with the law of nonconforming uses. A new land use law (no matter how tailored to "health and safety" concerns) can apply to both existing and new land uses. A local government may force land owners to cease their *existing*, nonconforming uses—in effect, enforce the law retroactively—but only if the governmental interest is strong enough and, sometimes, only if the government allows a reasonable period to phase out the existing use and perhaps pays compensation.[123] Because *new* or future uses are not sheltered as valid nonconforming uses, the government has much wider discretion to apply a new law—in effect, to enforce it only prospectively.

The vested rights doctrine, by contrast, resolves only the issue of when a particular land use ceases to be "new" and must be considered "existing" such that it is protected as a nonconforming use. The vested rights doctrine does not dictate what types of regulations may apply retroactively to existing uses. That determination remains within the purview of the law of nonconforming uses. Although distinctions between "zoning," "police power," or "health and safety" might have relevance for the law of nonconforming uses, such distinctions remain an unnecessary distraction within the vested rights doctrine.

2. Land Use Procedures That Do Not Affect Substantive Requirements

Local land use codes will invariably affect developers' substantive rights by regulating the type, degree, or physical attributes of

---

police power through the vested rights doctrine, Overstreet and Kirchheim further tip the scales toward developers by pointing out that the doctrine preserves only a limited range of "health, safety, and welfare" laws. *See, e.g.*, *id.* at 1058-59 nn.73-74 (only "reasonable" health, safety, and welfare laws may trump vested rights); *id.* at 1059 n.74 ("There are strict limits on what qualifies as a valid health, safety, and welfare regulation," and courts will "carefully scrutinize" any attempt to impose such regulations in derogation of vested rights.). The necessary debate about the vested rights doctrine deserves a more balanced approach that recognizes the valid interests of both developers and local government. *See infra* Part III.C.

123. *See generally* Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wash. 2d 1, 7-13, 959 P.2d at 1024, 1027-31 (1998); SETTLE, *supra* note 22, § 2.7(d). "Local governments, of course, can terminate nonconforming uses but they are constitutionally required to provide a reasonable amortization period." *Rhod-A-Zalea*, 136 Wash. 2d at 10, 959 P.2d at 1029. For a useful discussion of the distinction between the vested rights doctrine and the law of nonconforming uses, see *Skamania County v. Woodall*, 104 Wash. App. 525, 536-38, 16 P.3d 650 (2001).

development or use. Most local land use codes also dictate the procedures that developers must follow to obtain the permits that they seek. These procedures generally include elements such as a determination of an application's completeness, public notice of applications, and administrative hearings and appeals.[124]

Beyond land use law, the general rule in Washington is that any new law that affects only procedural rights applies retroactively.[125] An exception to this general rule is that new laws that affect vested rights do not apply retroactively.[126] With most procedural laws, this exception is not available because a party does not have a "vested right"—at least as that term is used in its broadest sense—to any particular form of procedure.[127]

Despite this general rule, is something special about "vested rights" in the context of *land use* law that allows a developer to have his or her application processed according to the procedural rules in effect on the date he or she files a complete land use permit application? Washington courts have twice suggested that this is the case. First, in a decision that is generally cited for the proposition that the vested rights doctrine extends to shoreline substantial development permit applications, a procedural, rather than a substantive rule, was at issue. In *Talbot v. Gray*,[128] property owners tried to enjoin a city from issuing a shoreline permit to one of their neighbors for the construction of a dock. The property owners argued that while the neighbors gave notice pursuant to the Washington State Department of Ecology's shorelines regulations, they did not give the notice required by the city shorelines ordinance.[129] The court noted that the neighbor applied for the permit before the effective date of the city ordinance, at which time the state regulations were the only applicable notice provi-

---

124. *See* WASH. REV. CODE § 36.70B.060 (2000) (requiring local jurisdictions planning under RCW 36.70A.040 to adopt certain land use permitting procedures).

125. *See* Godfrey v. State, 84 Wash. 2d 959, 961-65, 530 P.2d 630, 631-33 (1975) (involving a statutory change to the common law of contributory negligence). The presumption that procedural rules apply retroactively is especially strong when the legislative body has manifested some intent that new procedures apply retroactively, even if that expression is as simple as noting that the procedural rule applies to "all appeals" without distinguishing between existing and subsequent appeals. *See* Nelson v. Dept. of Labor & Industries, 9 Wash. 2d 621, 627, 115 P.2d 1014, 1017 (1941).

126. *See Godfrey*, 84 Wash. 2d at 961, 530 P.2d at 631; Pape v. Dep't of Labor & Industries, 43 Wash. 2d 736, 741, 264 P.2d 241, 244 (1953) (disability benefits law).

127. *See* Tellier v. Edwards, 56 Wash. 2d 652, 654, 354 P.2d 925, 926 (1960) (procedure related to tort action); *In re* Marriage of Hawthorne, 91 Wash. App. 965, 968, 957 P.2d 1296, 1297 (1998) (divorce action). For a discussion of vested rights beyond the context of land use law, see *supra* note 13.

128. 11 Wash. App. 807, 525 P.2d 801 (1974), *review denied*, 85 Wash. 2d 1001 (1975).

129. *Id.* at 811, 525 P.2d at 803.

sions.[130] Without noting any distinction between substantive and procedural requirements, the court cited a 1950s mandamus-rationale decision[131] as the applicable rule (without noting that the decision did not address procedural issues) and held that the neighbors' "obligations and rights to develop vested . . . when they applied for a substantial development permit."[132]

Later, in *Norco Construction, Inc. v. King County*,[133] a case involving substantive law, not procedures, the court of appeals stated that the vested rights doctrine freezes in time both "the zoning ordinances *and procedures*."[134] The supreme court referred to "procedural limits" when noting that the distinction between ministerial and discretionary acts should not be relevant to application of the vested rights doctrine.[135]

As a matter of policy, should the vested rights doctrine confer a right to freeze procedures in time, contrary to the general rule of retroactive application of procedures? The advantage to such an approach is that it would clearly protect both developers and local governments from having to repeat procedural steps that they have already taken just in order to comply with newly enacted procedures. The disadvantage of this approach is that it could force a local jurisdiction to maintain dual procedures—one set of procedures for handling existing applications, and a new set of procedures for handling new applications. This period of dual procedures could be significant because, as a consequence of environmental review or judicial appeals, a local jurisdiction may consider an application many years after the original application date.[136]

---

130. *Id.*

131. Hull v. Hunt, 53 Wash. 2d 125, 331 P.2d 856 (1958).

132. *Talbot*, 11 Wash. App. at 811, 525 P.2d at 803.

133. 29 Wash. App. 179, 627 P.2d 988 (1981), *aff'd as modified*, 97 Wash. 2d 680, 649 P.2d 103 (1982).

134. *Id.* at 191, 627 P.2d at 995 (emphasis added).

135. *See* Norco Constr., Inc. v. King County, 97 Wash. 2d 680, 684, 649 P.2d 103, 106 (1982).

136. *See* WASH. REV. CODE § 36.70B.090(1)(b)-(c) (2000) (exempting environmental review and administrative appeals from the time limits otherwise bounding local review of land use permit applications). *See, e.g.*, Weyerhaeuser v. Pierce County, 95 Wash. App. 883, 885-88, 976 P.2d 1279, 1281-82 (1999), *review granted sub. nom.* Weyerhaeuser v. Land Recovery, Inc., 139 Wash. 2d 1001, 989 P.2d 1139 (1999). In *Weyerhaeuser*, the application issued over six years after the date of application, and the judicial appeal process was not complete for nearly ten years after the date of application. The appeal to the Washington Supreme Court was dismissed as moot on February 10, 2000. *See* Overstreet & Kirchheim, *supra* note 11, at 1044 n.2. RCW 36.70B.090, which generally requires local governments to adopt local procedures to render a permit decision within 120 days of permit application, expired on June 30, 2000. *See* Implementing Land Use Study Commission Recommendations, ch. 286, § 8, 1998 Wash. Laws 1421, 1429. Municipalities originally agreed to adopt such procedures "[i]n exchange for suspending

One way to resolve this issue would be to focus *not* on the date of permit application, but rather on the date that the developer completes the type of procedure at issue. For example, if a local government adopted a new ordinance after the date of a developer's application and that ordinance shifted review of that type of application from a planning commission to a hearing examiner proceeding, the hearing examiner would review the developer's application, unless the planning commission had already commenced its hearings. This approach would prevent the inefficiency of having to repeat procedural steps that have already been taken and having to maintain dual procedures until the local government finally decides all existing applications. For now, *Talbot* and *Norco* remain authority for the proposition that a local government must consider an application using the procedures in effect on the date of permit application, even though this could force local jurisdictions to use long-expired procedures.

3. GMA Impact Fees Pursuant to RCW 82.02

Litigation has followed the debate over whether impact fees assessed by local governments pursuant to RCW 82.02 (GMA impact fees) must be frozen by the vested rights doctrine. As part of the GMA, the legislature authorized local governments to assess impact fees to fund certain types of capital facilities (such as schools, roads, and parks) that the local jurisdiction identifies in its capital improvement plan.[137] The fees take the form of an excise tax on the activity of growth that a local jurisdiction assesses either as part of the subdivision or building permit process. As the local jurisdiction's capital needs expand, it may amend the relevant impact fee schedules.

The court of appeals recently held that GMA impact fee ordinances are not frozen in time by the vested rights doctrine. In *New Castle Investments v. City of LaCenter,*[138] a developer filed a prelim-

---

certain claims of municipal liability" that were under consideration when the legislature reformed land use permitting procedures in 1995. Kenneth S. Weiner, *Relearning the Ropes: The Changing Landscape of Environmental Law*, WASH. STATE BAR NEWS, Mar. 1997, at 17. *See* Integration of Growth Management Planning and Environmental Review, ch. 347, § 433, 1995 Wash. Laws 1556, 1617 (original sunset provision that would have caused expiration of the section on June 30, 1998). Even though RCW 36.70B.090 has expired, the land use codes of many Washington jurisdictions feature 120-day timelines that are consistent with that section. *See, e.g.*, EVERETT MUNICIPAL CODE §§ 15.12.090-.100 (1998); KING COUNTY CODE § 20.20.100 (2000); PIERCE COUNTY CODE § 18.100.010 (1998); SKAGIT COUNTY CODE § 14.01.059 (1996); SNOHOMISH COUNTY CODE § 2.02.150 (1997) and § 32.50.110 (1998); WHATCOM COUNTY CODE § 2.33.090 (1996).

137. Growth Management Act, 1st Spec. Sess., ch. 17, §§ 42, 43-44, 46-48, 1990 Wash. Laws 1972, 1994–1996, 1996–1998, 1999–2001 (§ 42 codified as amended at WASH. REV. CODE § 82.02.020, §§ 43-44, 46-48 codified at WASH. REV. CODE §§ 82.02.050-.090 (2000)).

138. 98 Wash. App. 224, 989 P.2d 569 (1999), *review denied*, 140 Wash. 2d 1019, 5 P.3d 9

inary subdivision application two days before the local city council adopted an impact fee ordinance that required impact fee payment as a condition of building permit issuance.[139] The court ruled that the city could apply the new impact fee ordinance to the developer's project.[140] Although much of the court's reasoning was focused on the particular language, history, and policy of the impact fee statute,[141] the court found that the common-law vested rights doctrine offered no support to the developer's argument. The court conceded that the doctrine affords a measure of certainty and predictability to developers and that impact fees can add to the cost of development.[142] "But," the court noted, "it does not necessarily follow that the cost of development is the type of expectation that the vested rights doctrine was intended to protect."[143] The court reasoned that impact fees do not limit or control the actual use of land and, like taxes, they only affect the ultimate cost of land use.[144] Controlling cost "is not the type of right that vests under the vested rights doctrine."[145]

Although the *New Castle* court answered the question of whether impact fees are subject to the vested rights doctrine, the fact that the nearly half-century-old doctrine failed to provide a clear, non-litigious

---

(2000).

139. *Id.* at 226-27, 989 P.2d at 571.

140. *See id.* at 236, 237-38, 989 P.2d at 575, 576.

141. *Id.* at 229-31, 236, 989 P.2d at 572-73, 575. In light of balancing the interests at the heart of the *Washington* vested rights doctrine, the court was intent on limiting its review to the *Washington* law at issue: "With these concerns [of the Washington legislature about balancing the interests of municipalities and developers] in mind, it is important that the vested rights doctrine not be applied more broadly than its intended scope." *Id.* at 232, 989 P.2d at 573. Given the court's deliberate focus on Washington law, it is no wonder that the court did not bother to discuss California case law based on a California vested rights statute. *See* Kaufman & Broad Central Valley, Inc. v. City of Modesto, 30 Cal. Rptr. 2d 904 (1994). *Cf.* Overstreet & Kirchheim, *supra* note 11, at 1068 & nn.142-43 (arguing that the *New Castle* court erred by ignoring *Kaufman*).

142. *See New Castle*, 98 Wash. App. at 232, 989 P.2d at 573.

143. *Id.* at 232, 989 P.2d at 573.

144. *See id.* at 232-36, 989 P.2d at 573-75.

145. *Id.* at 232, 989 P.2d at 573. The court found support by making an analogy to the holding in *Lincoln Shiloh Assocs. v. Mukilteo Water Dist.*, 45 Wash. App. 123, 128-29, 724 P.2d 1083, 1086-87 (1986), concluding that utility connection fees were not subject to the vested rights doctrine. Criticizing *New Castle*'s reliance on *Lincoln Shiloh*, Overstreet and Kirchheim complain that "[i]n fact, the entire purpose of the vesting protection is to protect property owners from changes affecting the *cost* of developing, thus making the rationale for *Lincoln Shiloh* very questionable." Overstreet & Kirchheim, *supra* note 11, at 1081 n.221. Overstreet and Kirchheim cite no authority for their assertion that the "entire purpose" of the doctrine is to protect developers. No such authority exists because Washington's doctrine is intended to balance the interests of developers and municipalities alike. *See supra* Part I.B. Allowing the doctrine to freeze development regulations that affect the physical aspects of development, while not affecting local government's taxing authority, is a reasonable part of that balance.

answer only underscores the need to reform the doctrine by legislation that adds much-needed clarity.

C. *When Does the Doctrine Begin to Freeze Law in Time? Fixing a Date Certain on the Date of a Complete Application Submittal*

Practicality underlies the choice of the date of a complete application as the bright line from which a developer may invoke the vested rights doctrine. It obviates the litigation necessary under the majority rule to probe for a developer's good-faith change in position to lock in the applicable development regulations.[146] From this consistent, practical foundation stems a number of issues that the vested rights doctrine has not resolved clearly. The following subsections explore some of those issues.

1. When Is the Application "Complete"?

Courts have consistently held that an application must be complete before a developer can invoke the vested rights doctrine. But how complete is "complete"? In the case of building permit and subdivision applications, the legislature has dictated that the application must be "fully" complete.[147] The Washington Supreme Court, however, has pointed out that this statutory standard is different from the common-law requirement for a "sufficiently" complete application.[148] This may be mere semantics, but the difference injects unnecessary uncertainty into the doctrine.

Even if we assume that an application must be "fully" complete, how do we know exactly when that application is fully complete? In 1987, the legislature stated only that "[t]he requirements for a fully completed application shall be defined by local ordinance."[149] The legislature may have inadvertently confused this statement in 1995 by requiring local governments to provide a written determination of an application's completeness or incompleteness within twenty-eight days of application submittal.[150] The 1995 law dictates that an application is "complete for purposes of this section" if the application

146. *See, e.g.*, Hull v. Hunt, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958) (rejecting the majority, estoppel-based rule). When the legislature attempted to codify some version of the vested rights doctrine for subdivisions and building permit applications in 1987, it selected this same point in time. *See* WASH. REV. CODE § 19.27.095(1) (2000) (building permits); WASH. REV. CODE § 58.17.033(1) (2000) (divisions of land).

147. WASH. REV. CODE § 19.27.095(1) (2000); WASH. REV. CODE § 58.17.033(1) (2000).

148. *See* Friends of the Law v. King County, 123 Wash. 2d 518, 524 n.3, 869 P.2d 1056, 1060 n.3 (1994).

149. WASH. REV. CODE § 19.27.095(1) (2000); WASH. REV. CODE § 58.17.033(1) (2000).

150. *See* WASH. REV. CODE § 36.70B.070(1) (2000).

"meets the procedural submission requirements of the local government and is sufficient for continued processing, even though additional information may be required or project modifications may be undertaken subsequently."[151] But is an application that is good enough to continue processing complete enough for purposes of the vested rights doctrine, even though the local government may ultimately need more information to render its decision? If the application is deemed incomplete for purposes of RCW 36.70B, may it still be deemed complete for purposes of the vested rights doctrine?[152] Is the application complete for the purposes of the vested rights doctrine as of the date of application or only as of the date of the notice of completeness? These types of questions cloud the doctrine.

2. Is the Good Faith of the Developer or the Local Jurisdiction Relevant to the Point at Which the Doctrine Applies?

The issue of good faith on the part of the relevant actors further complicates the question of "completeness." This may arise when a local jurisdiction tries to delay a developer from completing an application and then changes the underlying law while keeping the developer at bay. In these situations, courts have applied equitable or due process principles to suspend the usual rules of "completeness" and deem applications complete for the purpose of applying the vested rights doctrine.[153]

Courts have reminded developers that the issue of good faith is relevant to their conduct as well. The supreme court has noted that a developer must pursue an application diligently, not just submit a complete application, in order to reap the law-freezing benefits of the vested rights doctrine.[154] In another case, where a local code was "highly ambiguous" with respect to the requirements for a complete

151. WASH. REV. CODE § 36.70B.070(2) (2000).

152. Snohomish County apparently employs a two-step process: land use permitting staff first determine whether a short subdivision application is "complete for regulatory purposes"—which means complete enough to trigger the vested rights doctrine—and then consider whether it is "complete for processing." *See* Schultz v. Snohomish County, 101 Wash. App. 693, 698, 5 P.3d 767, 769-70 (2000).

153. *See, e.g.*, Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 639, 733 P.2d 182, 193 (1987); West Main Assocs. v. City of Bellevue, 106 Wash. 2d 47, 52-53, 720 P.2d 782, 786 (1986); Adams v. Thurston County, 70 Wash. App. 471, 479, 855 P.2d 284, 289-90 (1993). *Cf.* Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 871, 989 P.2d 1090, 1094 (1994) (noting that this was *not* a case of bad faith by the government). Part III.C.4 of this Article discusses the relevance of constitutional limitations to the vested rights doctrine.

154. *See* Parkridge v. City of Seattle, 89 Wash. 2d 454, 464-66, 573 P.2d 359, 365-66 (1978).

application, the court considered the good faith of the developer in resolving that ambiguity in the developer's favor.[155]

Even though an overlay of good faith to the vested rights doctrine offers some appeal, it makes little sense as part of a doctrine that should foster certainty. The Washington Supreme Court specifically rejected the majority vesting rule, in part, to avoid having to probe good faith reliance on a case-by-case basis.[156] It should not be difficult to enforce a rule regarding completeness that eliminates the possibility of chicanery from the local government, and a rule regarding time limits that handles the prospect of the laggard developer. Unfortunately, because the current vested rights doctrine offers no such rules, the relative good faith of both developers and local governments continues to influence application of the vested rights doctrine.

3. Must the Application Be Filed During the Period That the Laws Under Which the Developer Seeks to Develop Are in Effect?

Many courts have maintained that for a developer to take advantage of the vested rights doctrine, the developer's application must be "filed during the effective period of the zoning ordinances under which the developer seeks to develop."[157] This observation is perhaps relevant in situations where a local legislative body enacts a new or amended law, but the developer submits a complete application before that law takes effect. In such cases, the law in effect on the date of the application controls, even if we might bemoan the developer's strategic decision to out-race the effective date of the new law by rushing the submittal of a complete application.[158]

Including "during the effective period" as a separate requirement to invoke the vested rights doctrine is unnecessary. It adds nothing to the part of the vested rights rule that freezes in time the law "in effect" on the date of the application. Laws are either in effect on a particular

155. *See* Friends of the Law, 123 Wash. 2d 518, 524-25, 869 P.2d 1056, 1060 (1994).

156. *See* Hull v. Hunt, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958).

157. *West Main*, 106 Wash. 2d at 51, 720 P.2d at 785. *See Erickson*, 123 Wash. 2d at 867-68, 872 P.2d at 1992-93; *Valley View*, 107 Wash. 2d at 638, 733 P.2d at 192; Noble Manor Co. v. Pierce County, 81 Wash. App. 141, 144, 913 P.2d 417, 419 (1996), *aff'd*, 133 Wash. 2d 269, 943 P.2d 1378 (1997); Victoria Tower Partnership v. City of Seattle, 49 Wash. App. 755, 760-61, 745 P.2d 1328, 1331 (1987).

158. *See, e.g.*, Allenbach v. City of Tukwila, 101 Wash. 2d 193, 196, 676 P.2d 473, 474-75 (1984) (relying on *State ex rel. Hardy v. Superior Court*, 155 Wash. 244, 248-49, 284 P. 93, 95 (1930), in which the court held that a permit applicant was entitled to process his application under the ordinance in effect at the time of application); *Victoria Tower*, 49 Wash. App. at 761-62, 745 P.2d at 1331-32. *See also* State *ex rel.* Kuphal v. Bremerton, 59 Wash. 2d 825, 371 P.2d 37 (1962) (finding that an application filed after the effective date of new zoning code text but before the city adopted a new zoning map was subject to the zoning classification applicable to the property on the date of application).

day or they are not. Submitting an application "during the effective period" of a law should, therefore, not be a threshold requirement for freezing in time the law applicable to that application.

The requirement actually came into existence not from the judiciary, but from a 1981 University of Washington Law Review Comment, in which the author, Fredrick Huebner, explained this requirement as a product of his own synthesis of case law through 1981.[159] As a practical matter for any developer wanting to use the vested rights doctrine strategically, Huebner accurately stated that "[t]he ordinance under which the applicant seeks to develop must be in effect when the applicant applies for a building permit."[160] This observation, however, does not lead to an additional threshold requirement for the application of the vested rights doctrine. The doctrine applies regardless of the developer's wishes—the doctrine imposes the law in effect on the date of application.

4. May a Moratorium Thwart a Developer from Freezing the Applicable Law for a Given Application?

The questions of good faith and the effective dates of local land use laws come into sharpest focus when considering the interplay of the vested rights doctrine and local authority to implement a temporary moratorium on establishing certain types of land uses.[161] Just like a developer may act strategically by submitting an application on the day before a new law takes effect,[162] a local legislative body may learn of a forthcoming application for a particular project and enact a temporary moratorium—even without first holding a public hearing—against the type of use at issue while it studies a permanent ban.

The court of appeals has expressly endorsed such behavior by municipalities by ruling that a moratorium is valid even though it can be enacted quickly to prevent property owners from obtaining vested rights.[163] Indeed, the court pointed to the potential for the vested

159. Fredrick D. Huebner, Comment, *Washington's Zoning Vested Rights Doctrine*, 57 WASH. L. REV. 139, 143 n.21, 144 (1981).

160. *Id.* at 144 n.29.

161. Statutory authority for moratoriums is found in a number of sections, depending on the type of municipality or planning enabling act at issue. *See, e.g.*, WASH. REV. CODE § 35.63.200 (2000) (under planning commission statutes, moratorium adopted by council or board); WASH. REV. CODE § 35A.63.220 (2000) (under the Planning Enabling Act, moratorium adopted by a legislative body); WASH. REV. CODE § 36.70.795 (2000); WASH. REV. CODE § 36.70A.390 (under GMA, moratorium adopted by a board) (2000).

162. *See Allenbach*, 101 Wash. 2d at 200, 476 P.2d at 476 ("Throughout the history of the vested rights doctrine, . . . this court has rejected any 'pending zoning change' exception to the vested rights doctrine.").

163. *See* Matson v. Clark County Bd. of Comm'rs, 79 Wash. App. 641, 647-48, 904 P.2d 317, 320-21 (1995).

rights doctrine to frustrate deliberative land use planning efforts as the very reason for allowing moratoriums to trump the doctrine.[164]

Left unanswered by case law is whether a developer may freeze the applicable law by submitting a complete application before the effective date of a moratorium, only to have the municipality refuse to process the application during the moratorium period. Given that the municipality would be unable to impose new substantive law on the application,[165] that the municipality likely has a code provision requiring it to render a final decision on the application within a certain period of time,[166] and that an overlay of due process bounds the municipality's actions,[167] a municipality would have difficulty arguing that a moratorium justifies an attempt to delay the inevitable decision on the pre-moratorium application.

The prospect of moratoriums demonstrates the essential trade-off at the heart of Washington's bright-line minority vested rights doctrine. We should be able to determine with a high degree of certainty when a developer obtains a right to freeze the applicable law, but we must be willing to accept that a municipality may outmaneuver the developer before he or she reaches that point.

5. Must the Application "Comply" with Applicable Laws at the Time of Submittal?

The Washington Supreme Court noted that the early, mandamus-based vested rights rule, "of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of application for the permit."[168] This statement has evolved into a freestanding, additional requirement for invoking the vested rights doctrine—that an application must "comply" with applicable laws at the time of submittal.[169]

---

164. *See id.* at 647, 904 P.2d at 320 ("This potential to frustrate long-term planning is of particular concern in a state such as Washington where vesting occurs upon application for a building permit."). *See also* Jablinske v. Snohomish County, 28 Wash. App. 848, 851, 626 P.2d 543, 545 (1981).

165. While ignoring this procedural issue, the *Matson* court acknowledged that substantively, a municipality "may not change the rules applicable to an already submitted application." *Matson*, 79 Wash. App. at 649, 904 P.2d at 321.

166. *See supra* note 136 discussing the effect of the now-expired WASH. REV. CODE § 36.70B.090.

167. *See* Parkridge v. City of Seattle, 89 Wash. 2d 454, 464-66, 573 P.2d 359, 365-66 (1978) (ruling that under the vested rights doctrine, the municipality must process the application "promptly, diligently and in good faith").

168. Hull v. Hunt, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958).

169. *See, e.g.*, Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 638, 733 P.2d 182, 192 (1987); West Main Assoc. v. City of Bellevue, 106 Wash. 2d 47, 51, 53, 720 P.2d 782, 785, 786 (1986); *Allenbach*, 101 Wash. 2d at 200, 676 P.2d at 476. Overstreet and Kirch-

As an anachronistic vestige of the mandamus rationale, this requirement continues to muddy the vested rights doctrine. Under the now common certainty/fairness rationale, the local government cannot determine whether an application "complies" without first determining what law to apply. The local government applies the law in effect on the date of application. Whether that law results in a finding of compliance (resulting in the granting of a permit) or noncompliance (resulting in permit denial) goes to the merits of the application. Demonstrating "compliance" cannot be a threshold for invoking a process designed to assess compliance itself.

The genesis of the "complies with" requirement is likely Huebner's analysis in his 1981 Comment regarding *Mercer Enterprises v. City of Bremerton*.[170] Huebner was perhaps influenced by one sentence in the dissenting *Mercer Enterprises* opinion.[171] However, both Huebner and the dissent in *Mercer Enterprises* relied on cases involving incorrectly issued *permits*, where the issue was whether the developer had a right to enjoy a permit that did not comply with the applicable rules.[172] This authority is not necessarily relevant to cases involving *applications*, where the issue is the core question of the vested rights doctrine—what law applies to determine whether and how to grant a permit in the first instance?

The Washington State Supreme Court actually tried unsuccessfully to kill the "complies with" requirement. In 1994, the court noted that the "complies with" rule is best dealt with as part of the review of the merits of the application.[173] But just two months later, the court

---

heim also recite "compliance with existing laws" as an element of the doctrine. Overstreet & Kirchheim, *supra* note 11, at 1079-80.

170. Huebner, *supra* note 159, at 150-58 (1981) (discussing Mercer Enterprises v. City of Bremerton, 93 Wash. 2d 624, 611 P.2d 1237 (1980)).

171. *See Mercer Enterprises*, 93 Wash. 2d at 634, 611 P.2d at 1243 (Utter, C.J., dissenting) ("In order to gain vested rights, the developer's application for a building permit must comply with the applicable building code as well as the applicable zoning ordinance.").

172. *See* Huebner, *supra* note 159, at 143-44 nn. 22-27 (1981); *Mercer Enterprises*, 93 Wash. 2d at 634 (Utter, C.J., dissenting) (citing Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash. 2d 475, 479, 481-84, 513 P.2d 36 (1973)). Because the *Mercer Enterprises* majority invoked the mandamus rationale, it was a difficult decision from which to examine the vested rights doctrine at a time when the fairness/certainty rationale was attaining dominance. In *Mercer Enterprises*, no one disputed that the law in effect on the date of permit application controlled the city's review of the application. *See Mercer Enterprises*, 93 Wash. 2d at 625-26, 611 P.2d at 1238-39. In this respect, the case did not involve any vested rights issue, at least under the fairness/certainty rationale. The real issue was whether the city properly denied the permit under the law in effect on the date of application. *See id.* Because the court applied the mandamus rationale—and because one of the key questions under that rationale is whether an application complies with the law in effect on the date of application—the court characterized its review of the merits of the city's decision as a vested rights issue. *See id.* at 628, 631, 611 P.2d at 1240, 1241.

173. *See* Friends of the Law v. King County, 123 Wash. 2d 518, 525 n.4, 869 P.2d 1056,

unquestioningly recited the "complies with" rule as part of the vested rights doctrine.[174] Such flip-flops on critical details help mire the doctrine in unnecessary ambiguity.

6. Does Freezing the Law for Purposes of the Underlying Application Also Freeze the Law for Purposes of Exercising SEPA Substantive Authority?

Pursuant to the State Environmental Policy Act (SEPA), a local government may exercise substantive authority to condition or deny a land use proposal on SEPA policies adopted by the local government.[175] At what point in time does the vested rights doctrine freeze applicable local SEPA policies in place—at the time of permit application or at some later stage of the permitting process? Two possible answers exist.

First, the usual vested rights rules may apply. Some courts of appeals have apparently determined that SEPA policies should be among the laws frozen in place at the time of permit application. In *Victoria Tower Partnership v. City of Seattle*, the Division One court reasoned that SEPA policies are among the zoning and other building codes subject to the vested rights doctrine.[176] Although this reasoning suggests that applicable SEPA policies should be frozen on the same date that all other applicable zoning and building codes are frozen (namely, the date of application), the court did not resolve this issue explicitly.[177] Evidently believing that Division One resolved the issue, Division Two cited *Victoria Tower* for the proposition that a local government "must base any condition or denial on SEPA policies adopted prior to the application or submittal date, because vesting applies to those policies as well."[178]

The second possible answer is that SEPA policies might not be frozen in place until later in the development process. In 1984, the Washington State Department of Ecology (Ecology) adopted a vested

---

1060 n.4 (1994).

174. *See* Erickson & Assoc., Inc. v. McLerran, 123 Wash. 2d 864, 868, 872 P.2d 1090, 1093 (1994).

175. *See* WASH. REV. CODE § 43.21C.060 (2000).

176. *See* Victoria Tower Partnership v. City of Seattle, 49 Wash. App. 755, 761, 745 P.2d 1328, 1331 (1987).

177. The court did not have to resolve this issue because the effective date of the SEPA policy at issue occurred after both the date of application and the date of the draft environmental impact statement, which, as discussed below, is the other possible date on which to freeze SEPA policies. *See id.* at 757, 745 P.2d at 1329.

178. Adams v. Thurston County, 70 Wash. App. 471, 481 n.11, 855 P.2d 284, 291 n.11 (1993).

rights rule for the exercise of this SEPA substantive authority.[179] Ecology maintains that any exercise of SEPA substantive authority must be based on policies adopted and in effect as of the date that either a determination of nonsignificance (DNS) or a draft environmental impact statement (DEIS) is issued for the proposal.[180] Even though Ecology selects a point in time well after the filing of any application for a proposal, and even though this rule predates the case law applying the usual vested rights doctrine rules to SEPA substantive authority, those judicial opinions did not mention or resolve this conflict of authority.

In defense of Ecology's rule, some might note that SEPA is expressly intended to be an overlay that is supplemental to all other land use authority.[181] Conceding that SEPA is a distinct body of law, however, does not help explain why the goals of fairness and certainty that underlie the vested rights doctrine necessarily favor choosing a point in time for SEPA that is later in the process than for other types of applicable law. For now, the issue of when SEPA policies are frozen in time by the vested rights doctrine remains unresolved.[182]

7. May an Applicant Modify or Supplement an Application Without Affecting the Date on Which the Applicable Law Is Frozen?

In considering this question, courts have generally held that a developer who submits a complete application freezes in time the law applicable to that application and does not lose that benefit if he or she

---

179. *See* Wash. St. Reg. 84-05-020 (1984) (adopting WASH. ADMIN. CODE § 197-11 (1999)).

180. WASH. ADMIN. CODE § 197-11-660(1)(a) (1999). A DNS is issued for projects that are not likely to impose significant adverse environmental impacts and so do not require the preparation of a full environmental impact statement (EIS). WASH. ADMIN. CODE § 197-11-340 (1999). For projects deemed likely to impose significant adverse environmental impacts, the DEIS is the formal draft of the EIS that is circulated for public comment. WASH. ADMIN. CODE § 197-11-455 (1999).

181. *See* WASH. REV. CODE § 43.21C.060 (2000); Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 63-65, 578 P.2d 1300, 1312-13 (1978). *See also* WASH. REV. CODE § 19.27.095(6) (2000) (exempting the exercise of SEPA substantive authority from the statutory vested rights rule); WASH. REV. CODE § 58.17.033(3) (2000) (same). For a discussion of the statutory vested rights rules, see *infra* Part II.D.2.

182. That the vested rights doctrine is relevant to SEPA (without resolving timing issues) at least undermines mandamus as a rationale for the vested rights doctrine. Washington courts agree that SEPA authorizes local governments to make discretionary, nonministerial decisions about land use proposals. *See, e.g.*, *Polygon*, 90 Wash. 2d at 63-65, 578 P.2d at 1312-13; Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wash. App. 59, 73, 510 P.2d 1140, 1149 (1973). If this is true, then a mandamus-based vested rights doctrine (under which a local government carries a non-discretionary, ministerial duty to issue a land use authorization) could not apply to the exercise of SEPA substantive authority. The fact that the vested rights doctrine is relevant to SEPA, therefore, strikes at mandamus as a foundation for the doctrine.

later modifies or supplements the application. The most direct statement to this effect arose in the context of grading permit applications: "[T]he 'vested rights' doctrine is applicable such that, even if the original application were defective in some manner, a grading permit properly may issue provided the application is subsequently modified or completed to bring it into conformance with the applicable ordinances."[183] How far can a developer push this? What is to prevent a developer from rushing in a complete application for a relatively simple, "bare bones" proposal to lock in the applicable law days before the effective date of a new, more restrictive law, only to "modify" that proposal later by intensifying the proposal and adding more mitigation in a manner that complies with the former law but not the new one? The vested rights doctrine does not currently offer a way to limit creeping expansions of a "complete," albeit thin, proposal.

8. May an Applicant "Opt" to Be Considered Under a Later Version of a Particular Law?

The vested rights doctrine typically arises when a developer prefers to avail him or herself of a less restrictive development regulation rather than comply with a newer, more restrictive regulation. Situations may arise, however, in which a developer prefers a newer, less restrictive law to an older, more restrictive one.

If the vested rights doctrine actually conveys a "right" to the applicant to insist that the application be considered under the law in effect on the date of application, then the doctrine should allow the applicant to forego that right and select some later, more favorable version of the law to guide that determination. This comports with the doctrine's origin as a right that an applicant could vindicate through a mandamus action. Presumably, the applicant could elect not to vindicate that right by declining to seek mandamus relief.

If the vested rights doctrine finds its only manifestation in a rule, should the rule be applied consistently, regardless of the developer's preferences? The vested rights doctrine is often phrased as a mandate that an application *shall* be considered under the law in effect on the date of application, suggesting a rule of universal application, not a

183. *Juanita Bay*, 9 Wash. App. at 83-84, 510 P.2d at 1155. *See Mercer Enterprises*, 93 Wash. 2d 624, 630, 611 P.2d 1237, 1241 (1980) (The application was valid "even if it did require some further information to complete the processing before a permit could be issued."). *But see id.* at 635, 611 P.2d at 1243 (Utter, C.J., dissenting) (noting that the permit application lacked required storm, sewer, foundation, and water plans). *See also Parkridge*, 89 Wash. 2d at 458, 573 P.2d at 362 (noting that the developer modified its proposal from 60 to 50 units and changed access, but not mentioning any effect such changes had on application of the vested rights doctrine).

right to be invoked at the will of the applicant.[184] Do only the interests of the developer matter, or do local governments and third parties have an interest in determining, with certainty and without exception, which laws will govern review of a particular application? As with so many aspects of the vested rights doctrine, questions like these remain unanswered.

D. For How Long and for What Purpose Does the Doctrine Apply? Contorting the Doctrine to Fit the Reality of Multiple-Permit Projects

Typically, a building permit alone is not sufficient to authorize development. For example, one project may require a rezone, subdivision approval, a conditional use permit, a shoreline substantial development permit, critical area review, stormwater approval, and a building permit. The developer might apply for these authorizations over the course of time. If a developer can invoke the vested rights doctrine as of the date of submittal of a complete application, does the doctrine freeze in time the law applicable only to that particular application and not subsequent ones? May the local government change the relevant development regulations such that one set of regulations applies to one application, but an amended set applies to a later application for the same development? If the submittal of one complete application freezes the law applicable to subsequent applications, should we be concerned if the developer submits the original application years or decades in advance of any physical development?

The vested rights doctrine has become addled most dramatically in response to questions like these that arise in the context of multiple-permit projects. In particular, the legislature and the courts have struggled to decide how applications to subdivide land—which developers may submit at the very beginning of the development process—should affect the law applicable to subsequent applications to physically develop that land. As described below, the vested rights doctrine's divergent rationales lend themselves to two different approaches to this issue. The legislature attempted to chart a course along one of these approaches, but failed to do so clearly. The Washington Supreme Court, unfortunately, further confused the matter and tipped the scales too far to one side in the process.[185]

---

184. *See, e.g.*, WASH. REV. CODE § 19.27.095(1) (2000); WASH. REV. CODE § 58.17.033(1) (2000).

185. Overstreet and Kirchheim, by contrast, believe that this body of law is clear. *See* Overstreet & Kirchheim, *supra* note 11, at 1082 ("While Washington's common-law vesting doctrine is fairly coherent, the 1987 passage of a vesting statute further clarified the law.") Far from allowing parties to avoid lengthy and costly court battles, (*see* Overstreet & Kirchheim, *supra* note 11, at 1047), the scores of reported vested rights decisions are testament to the

1. Two Possible Approaches: Follow Either the Mandamus or Fairness/Certainty Rationale

In broadest terms, two possible ways exist to apply the vested rights doctrine in the context of multipermit developments. These approaches mirror the different rationales that underlie the vested rights doctrine: (1) pick *one* permit application that freezes all law applicable to all permit applications for that development, following one derivation of the mandamus rationale; or (2) follow the fairness/certainty rationale, applying it on an application-by-application basis in which each permit application freezes the law that controls *that* application, but not necessarily any subsequent application.

a. The Mandamus Rationale Justifies a Right "To Use" or "To Develop," but Only as of the Date of Building Permit Application Submittal

Under the facts of the early mandamus rationale cases, courts held that a complete application for a building permit (assuming that the application complies with the law then in effect) vests the applicant with a right to issuance of that permit.[186] Even though these cases focused on the permits at issue, they often used language suggesting that the law with which a building permit complies is the law applicable to later uses of the property. For example, when first enunciating the mandamus rationale for the vested rights doctrine in 1954, the Washington Supreme Court pointed to something more like a right "to use" or "to develop": "An owner of property has a vested right *to put it to a permissible use* as provided for by prevailing zoning ordinances."[187]

In the context of the mandamus rationale, this right "to use" appears broader than a right "to a permit." As depicted in Figure 3, a right "to use" seems to have ramifications beyond the granting of a building permit. It might grant a developer the right to put property to some later, undefined uses that are consistent with the law in effect on the date the developer submits a complete and compliant building permit application.

---

doctrine's inability to forestall litigation.

186. *See generally* Hull v. Hunt, 53 Wash. 2d 125, 331 P.2d 856 (1958); State *ex rel.* v. City of Bellevue, Ogden, 45 Wash. 2d 492, 275 P.2d 899 (1954).

187. *Ogden*, 45 Wash. 2d at 496, 275 P.2d at 902 (emphasis added).

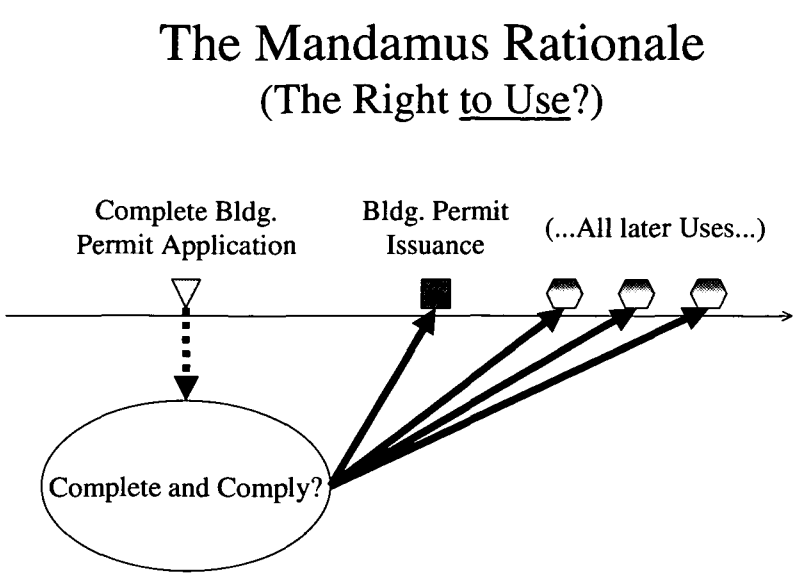

Figure 3. The rule implementing the mandamus rationale if that rationale were to vest the right to "use" or "develop" property.

Under this expression of the doctrine, filing a complete and compliant building permit application earns the applicant some rights to some later, undefined uses that are consistent with the law in effect on the date of the building permit application. Compare this to Figure 1, *supra*, in which the right is to "a permit." (Bldg. = building)

In reality, the right "to use" under the mandamus rationale is not broad at all. As the court explained in 1954, "[t]he right accrues at the time an application for a *building permit* is made."[188] A developer necessarily submits a building permit application at the very end of the development permitting process, when he or she is ready to construct. Generally, no other permits are required after that point. In 1958, the court explained that it chose the date of building permit application precisely because it occurs at the end of the process, after the developer has invested time and money in a development and when the developer is ready to break ground:

> [T]he cost of preparing plans and meeting the requirements of most building departments is such that there will generally be a good faith expectation of acquiring title or possession for the

188. *Id.* (emphasis added).

> purposes of building, particularly in view of the time limitations which require that the permit becomes null and void if the building or work authorized by such permit is not commenced within a specified period . . . .[189]

Given this rationale, it is not surprising that courts later pointed to these 1950s-era decisions for the proposition that the vested rights doctrine conveys a broad right "to use," or "develop," or "construct," noting that any such right arises only at the time of a building permit application.[190] Any right "to use" or "to develop" under the mandamus rationale should therefore be read as an unfortunate rhetorical flourish. This characterization of such a "right" is necessarily tied to an application that arises only at the very end of the development permitting process. None of the mandamus-rationale courts needed—and so probably never intended—to suggest that filing an application for any one permit early in the permitting process vests in a developer the right "to use" or "to develop" the property later pursuant to the laws in effect at that early stage.

---

189. *Hull*, 53 Wash. 2d at 130, 331 P.2d at 859.

190. *See, e.g.*, Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 637-38, 733 P.2d 182, 192 (1987); Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash. 2d 475, 480-81, 513 P.2d 36, 40-41 (1973); Bishop v. Town of Houghton, 69 Wash. 2d 786, 795, 420 P.2d 368, 374 (1966); Hale v. Island County, 88 Wash. App. 764, 771, 946 P.2d 1192, 1195 (1997); Jablinske v. Snohomish County, 28 Wash. App. 848, 851, 626 P.2d 543, 545 (1981); Mayer Built Homes, Inc. v. Town of Steilacoom, 17 Wash. App. 558, 565, 564 P.2d 1170, 1174 (1977). *See also* West Main Assocs. v. City of Bellevue, 106 Wash. 2d 47, 53, 720 P.2d 782, 786 (1986) ("A vested right merely establishes the ordinances to which a building permit and subsequent development must comply.").

Even the decisions that extend the doctrine beyond the realm of building permit applications are consistent with the view that, to the extent the mandamus rationale conveys a right "to develop," the right arises only at the point an application for the last permit necessary to develop is filed. *See generally supra* Part II.A.1. The decision that extended the doctrine to conditional use permit applications did not identify the right at issue. *See* Beach v. Board of Adjustment of Snohomish County, 73 Wash. 2d 343, 347, 438 P.2d 617, 620 (1968). The decisions that extended the doctrine to grading permit applications, Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wash. App. 709, 715, 558 P.2d 821, 826 (1977), and septic permit applications, Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wash. App. 59, 83-84, 510 P.2d 1140, 1155 (1973), *review denied*, 83 Wash. 2d 1002-03 (1973), actually limited the right at issue to only "the permit." Although the court that extended the doctrine to applications for shoreline substantial development permit applications spoke of a right "to develop," the case involved a permit that, like a building permit, must be obtained by the property owner just prior to actual construction. Talbot v. Gray, 11 Wash. App. 807, 811, 525 P.2d 801, 803-04 (1975).

b. *The Fairness/Certainty Rationale Justifies Freezing in Time the Law That Controls Each Permit Application, but Only on an Application-by-Application Basis*

As discussed at the beginning of this Article, in Washington, fairness/certainty has become the dominant rationale for the vested rights doctrine.[191] The freeze-the-law-in-time rule that implements the fairness/certainty rationale makes more sense, in part, because it can be applied to a variety of permit applications other than building permit applications.

The fairness/certainty rationale developed in case law justifies an application-by-application approach in the multipermit context. Figure 4 illustrates this approach. Each application freezes the law applicable to *that* application, but not to any subsequent application.

Case law regarding septic permit applications illustrates this application-by-application approach. In *Ford v. Bellingham-Whatcom County District Board of Health*,[192] a county approved a subdivision for certain property in 1969. Owners of eleven lots within that subdivision received approval for septic systems pursuant to applications filed with the local public health agency between 1969 and 1972.[193] In 1972, the agency adopted new septic regulations.[194] The agency then began applying the new regulations, rejecting septic permit applications for other lots in the subdivision when filed in or after 1973.[195] The court held that the new regulations applied to all applications filed after the effective date of those regulations.[196] The court rejected an argument that the applications should be considered under the law in effect in 1969, the year the subdivision was approved.[197] In other words, the fact that the developer had applied for and been granted an earlier permit (the subdivision approval) had no effect on the law applicable to a subsequent application for a different permit (the septic permit application).

191. *See generally supra* Part I.B.
192. 16 Wash. App. 709, 558 P.2d 821 (1977).
193. *Id.* at 711, 558 P.2d 823-24.
194. *Id.*
195. *Id.* at 710, 558 P.2d at 826.
196. *Id.* at 715, 558 P.2d at 826.
197. *Id.* at 714-15, 558 P.2d at 825-26.

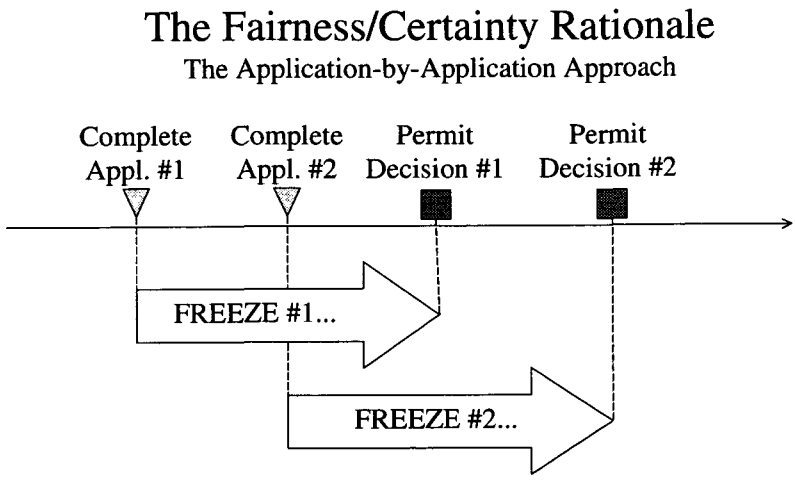

Figure 4. The application-by-application approach required by the rule that implements the fairness/certainty rationale.

Under the fairness/certainty rationale, an application for a permit freezes in time the law applicable to consideration of that permit. *See supra* Figure 2. In the context of a development that requires multiple permits, this means that the local government should assess each application under the law in effect on the date of *that* particular application only. (Appl. = application)

The court of appeals reaffirmed this approach twenty years later. In *Thurston County Rental Owners Ass'n v. Thurston County*,[198] a county required two distinct permits: a septic *construction* permit and a septic *use* permit.[199] The developer in that case obtained a septic construction permit, but the court rejected the developer's argument that this earlier permitting had any effect on the developer's subsequent obligation to apply for a septic use permit.[200] As in *Ford*, the *Rental Owners* court adhered to the application-by-application approach necessitated by the fairness/certainty rationale.

198. 85 Wash. App. 171, 931 P.2d 208 (1997).
199. *Id.* at 176, 931 P.2d at 211.
200. *Id.* at 182-83, 931 P.2d at 214-15.

c. *The Hazards of Blending the Two Approaches*

It is possible to invoke the mandamus rationale in the multi-permit context, but only if the rationale grants a right at the time of building permit application and not earlier. This means that a developer should not expect to freeze the law applicable to his or her development until very late in the permitting process.

In the alternative, it is possible to invoke the fairness/certainty rationale on an application-by-application basis. As with the mandamus rationale, this would also mean that a developer does not have the most favorable rule at his or her disposal. Under this approach to a multiple-permit project, the developer could expect to freeze the law for each permit application, but could not stop a local government from applying a new law that takes effect before the developer submits a later application.

The real danger comes from blending parts of the mandamus and the fairness/certainty rationales to justify freezing all the law applicable to all phases of a development as of the date of one of the earliest application submittals. It makes little sense to use the language from mandamus-rationale case law that speaks of a right "to use" or "to develop" with the law frozen in time (ignoring the part of that case law that picks the building permit application as the freezing point) *and* to use the part of the fairness/certainty rule that moves the point in time back to the filing of earlier applications (ignoring the part of the rule that grants only the right to have each application considered under the laws in effect on the date of that particular application).

Unfortunately, the Washington legislature and judiciary have failed to maintain an intellectually consistent or sensible approach to applying the vested rights doctrine in the multipermit context. As explained in the following subsections of this Article, the legislature complicated the issue in 1987, and the supreme court distorted it in 1997. The resultant confusion continues to cloud the vested rights doctrine and erode the fairness that justifies Washington's unique approach.

2. The Legislature Adopted Four Contradictory Vested Rights Rules That Affect Residential Subdivisions

The legislature attempted to codify a vested rights rule for subdivisions and building permits in 1987. The core language is nearly identical for both types of permits:

> A proposed *division of land* . . . shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a

> fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted . . . .[201]

> 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.[202]

This clear language is consistent with the application-by-application approach mandated by the fairness/certainty rationale.[203] In the context of subdivisions, the language applies only to the "proposed division" and says nothing about applications filed for later phases of development, such as conditional use, grading, or building permit applications. The only twist is that the subdivision provision freezes the law in time, not only for the initial authorization for which the developer submits an application (*preliminary* subdivision approval), but also for a subsequent authorization (*final* subdivision approval). The subdivision provision goes no further. In the context of building permit applications, the language is a verbose recitation of the fairness/certainty rationale: a decision on a building permit application must be guided by the law in effect on the date of the building permit application. Figure 5 illustrates these two provisions.

---

201. WASH. REV. CODE § 58.17.033(1) (2000) (emphasis added). A "plat" is the map that depicts a "subdivision" of land into distinct lots. WASH. REV. CODE § 58.17.020(2) (2000). Although this Article attempts to use "plat" only when referring to the actual map, common practice is to use the terms almost interchangeably.

202. WASH. REV. CODE § 19.27.095(1) (2000) (emphasis added).

203. Even though the legislature mistakenly pointed to *Ogden* (a mandamus-rationale case; *see supra* Part I.A) as the source for these provisions, the legislature intended to manifest the fairness/certainty rationale: "The [common law] doctrine provides that a party filing a timely and sufficiently complete building permit application obtains a vested right to have that application processed according to zoning, land use and building ordinances in effect at the time of the application." FINAL LEGISLATIVE REPORT, 50th Legis., 1st Reg. Sess. 255 (1987) (quoted in Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 277, 943 P.2d 1378, 1383 (1997)).

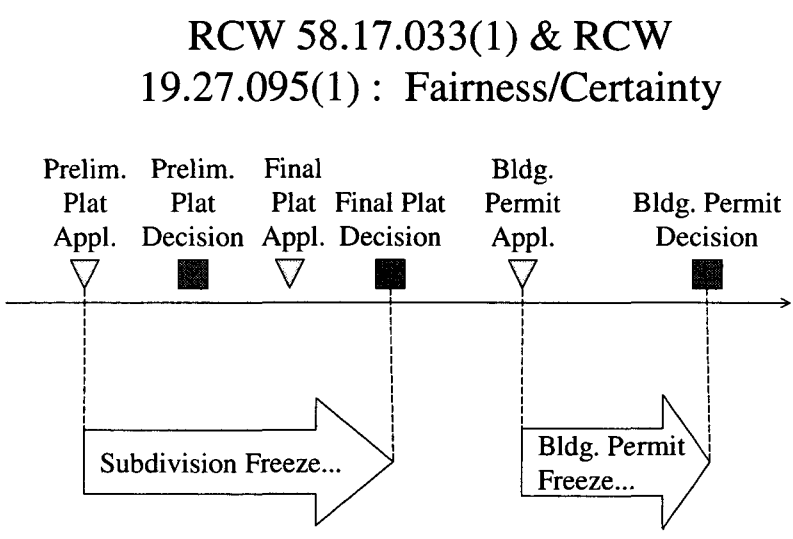

Figure 5. The rule created by RCW 58.17.033(1) and RCW 19.27.095(1).

This is essentially an application of the fairness/certainty rationale. *Cf. supra* Figure 2. The only variation comes in the context of subdivision applications, where the legislature extended the temporal reach of the "freeze" to include not only the decision on the preliminary subdivision approval but also on the final subdivision approval. By its very terms, the language of these provisions has no effect on other permit applications, and so is consistent with the application-by-application approach that the fairness/certainty rationale requires. *See supra* Figure 4. (Prelim. = preliminary; appl. = application; bldg. = building)

A preexisting section of the subdivision statute, RCW 58.17.170,[204] contains two additional rules that reduce the clarity of RCW 58.17.033(1) and RCW 19.27.095(1) in the context of formal subdivisions.[205] First, it suggests that, notwithstanding RCW 58.17.033(1), a decision to grant final subdivision approval will be

204. *See* Subdivision Approval Act, ch. 293, sec. 10, § 17, 1981 Wash. Laws 1242, 1251 (codified as amended at WASH. REV. CODE § 58.17.170).

205. Formal subdivisions are large; land is divided into five or more lots, depending on the local jurisdiction's land use laws. *See* WASH. REV. CODE § 58.17.020(1). These are distinct from smaller, "short" subdivisions that, depending on the local jurisdiction, create four or fewer lots. *See* WASH. REV. CODE § 58.17.020(6) (2000). *See also* WASH. REV. CODE §§ 58.17.060-.065 (2000) (less formal review procedures for short subdivisions).

subject to the laws in effect at the time of preliminary subdivision *approval*, not at the time of application:

> When the legislative body of [a municipality] finds that the subdivision proposed for final plat approval conforms to all terms of the preliminary plat approval, and that said subdivision meets the requirements of this chapter, other applicable state laws, and any local ordinances adopted under this chapter *which were in effect at the time of preliminary plat approval*, it shall [approve] the plat.[206]

As depicted in Figure 6, this first rule of RCW 58.17.170 is a variation of the mandamus rationale. Consistent with that rationale, this approach depends on a complete application complying with the body of law in effect on a certain date, and then forces approval of the application. Unlike the standard mandamus rationale, however, this approach starts with the application for final subdivision approval (not for a building permit) and applies the law in effect on the date of *approval* of an *earlier* application (not the law in effect on the date of *submittal* of the application *at issue*).

The second relevant part of RCW 58.17.170 suggests that granting final approval for a formal subdivision may freeze in place some laws applicable to later phases of development within that subdivision if those applications are filed within five years of final subdivision approval.

> A subdivision shall be governed by the terms of approval of the final plat [by the local government], and the statutes, ordinances, and regulations *in effect at the time of approval [by the local health department and the local municipal engineer] under RCW 58.17.150(1) and (3)*[207] for a period of five years after final plat approval unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision.[208]

206. WASH. REV. CODE § 58.17.170 (2000) (emphasis added).

207. RCW 58.17.150 (2000) reads in relevant part,

> Each preliminary plat submitted for final approval of the legislative body shall be accompanied by the following agencies' recommendations for approval or disapproval:
>
> (1) Local health department or other agency furnishing sewage disposal and supplying water as to the adequacy of the proposed means of sewage disposal and water supply; [and]
>
> (3) City, town or county engineer.

208. WASH. REV. CODE § 58.17.170 (2000) (emphasis added).

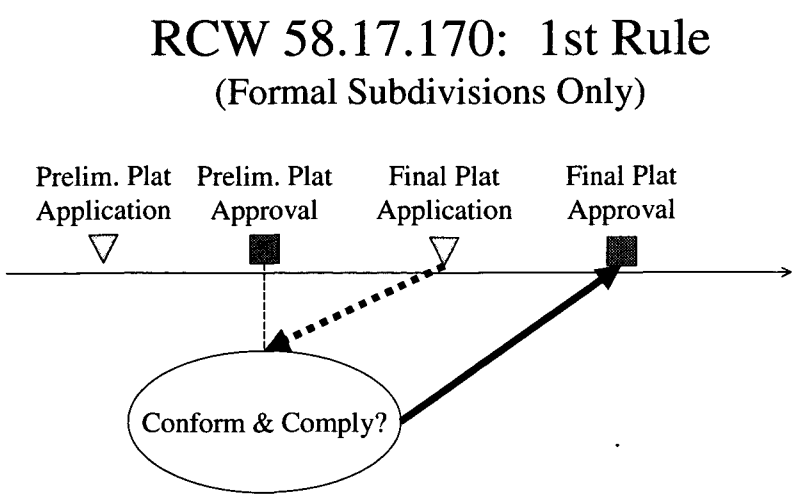

Figure 6. The first rule created by RCW 58.17.170.

This is a variation of the standard mandamus rationale. *Cf. supra* Figure 1. Like that rationale, this rule forces approval of an application (the final, formal subdivision) if that application is complete and complies with the law in effect on a certain date. Unlike the standard mandamus rationale, this approach focuses on an application that arises much earlier in the development process than does a building permit application, applying the law in effect on the date of the *approval* of an *earlier* application, not the law in effect on the date of *submittal* of the application *at issue*. (Prelim. = preliminary)

As illustrated in Figure 7, this approach is not directly premised on either of the standard rationales for the vested rights doctrine. Like the fairness/certainty rationale, this provision freezes some law in time, but it does so *not* as of the date of any application, but rather as of the date that certain officials consent to grant the permit. Furthermore, the law remains frozen not for the purpose of deciding the application at issue, but for a fixed number of years after the permit is eventually granted, seemingly for the purpose of assessing subsequent permit applications for that property.

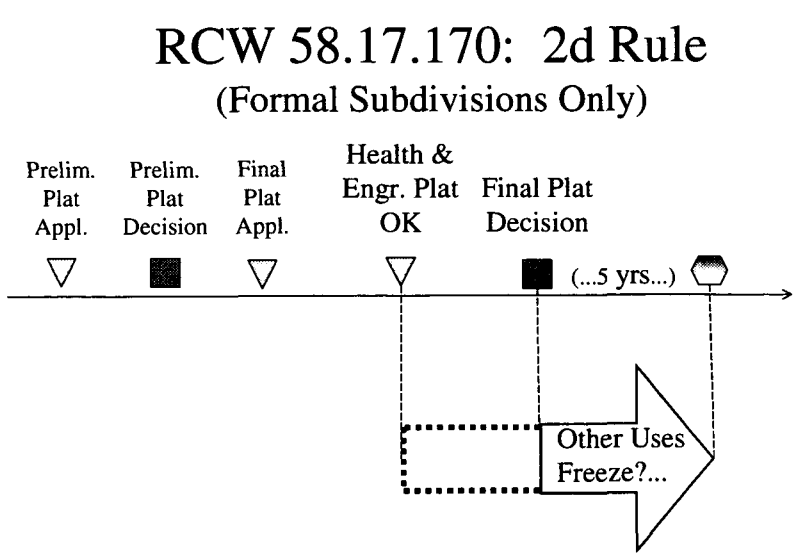

Figure 7. The second rule created by RCW 58.17.170.

Other than freezing law in place as of a certain date, this approach does not resemble either of the standard rationales for the vested rights doctrine. *Cf. supra* Figures 1 and 2. Under this approach, the law in effect on the date that certain officials approve a formal (not a "short") subdivision apparently controls the laws that will shape land uses within the platted subdivision for a period of five years. (Prelim. = preliminary; appl. = application; engr. = engineering)

This conflicts with RCW 19.27.095(1), the vested rights statute for building permits. If a developer files a complete building permit application after receiving final subdivision approval, which law guides consideration of that application: (1) the law in effect on the date that the local health department and the local municipal engineer approved the final subdivision application, as dictated by RCW 58.17.170; or (2) the law in effect on the date of the building permit application, pursuant to RCW 19.27.095(1)?

Taken together, the four vested rights rules established by the legislature that affect subdivisions[209] paint the confusing picture illus-

209. At least one other provision is relevant to this issue: "No plat or short plat may be approved unless the city, town, or county makes a formal written finding of fact that the proposed subdivision or proposed short subdivision is in conformity with any applicable zoning ordinance or other land use controls which may exist." WASH. REV. CODE § 58.17.195 (2000)

trated in Figure 8. Ways may exist to reconcile these seemingly inconsistent rules, but only with a certain amount of creativity or selectivity.[210] The vested rights doctrine should foster more certainty and require less creativity.

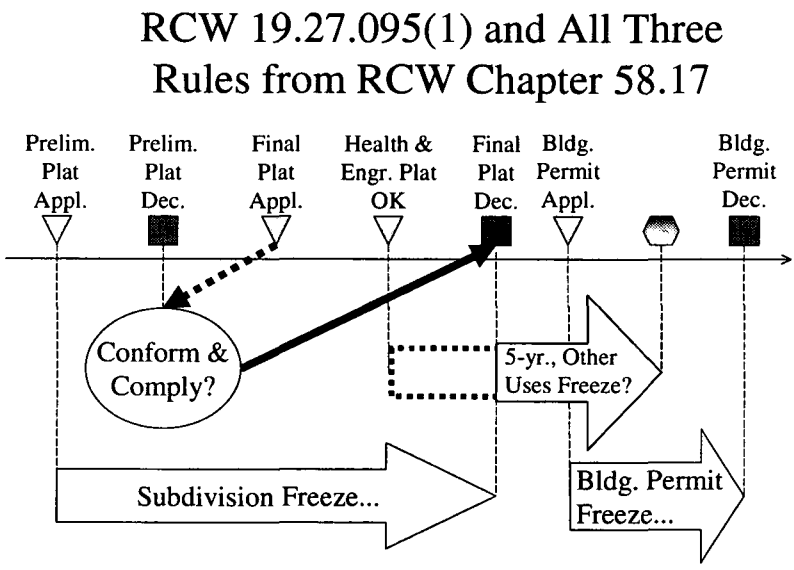

Figure 8. The conflicting vested rights rules established by RCW 58.17 and RCW 19.27.095(1).

This combines Figures 5-7 to illustrate the apparent conflict inherent in the legislature's approach to the vested rights doctrine in the context of multiple-permit subdivision projects. (Prelim. = preliminary; appl. = application; dec. = decision; engr. = engineering; bldg. = building)

(adopted by Subdivision Approval Act, ch. 293, § 14, 1981 Wash. Laws 1244, 1252). Because this provision does not dictate the point in time at which the relevant local laws exist, it does not directly address the issue of the vested rights doctrine.

210. One practitioner reports that because of the conflict between these provisions, most local jurisdictions simply chose to follow RCW 58.17.033, such that RCW 58.17.170 is "routinely ignored." Richard U. Chapin, *Subdivision of Land*, *in* WASHINGTON STATE BAR ASS'N, REAL PROPERTY DESKBOOK § 89.5(2) (3d ed. 1996). As to any relevancy of RCW 58.17.170 after the local government approves a subdivision, he suggests: "In this writer's opinion, 'a valid land use' means that the lot must be permitted some use which is reasonable given all of the attendant circumstances, including the type of development in the general area." *Id.* § 89.5(3), at 89-11.

3. *Noble Manor*'s Distortion of the Doctrine

In the case of *Noble Manor Co. v. Pierce County*,[211] the Washington Supreme Court broke new ground unnecessarily while ostensibly interpreting the legislature's codification of the vested rights doctrine. The legal basis for the decision is wrong and the holding of the decision is elusive. It will continue to thwart attempts to easily or fairly define how the vested rights doctrine applies in the context of multi-permit developments.

a. Bad Facts Can *Make Bad Law*

The facts presented in the *Noble Manor* appeal were unfortunate.[212] They made the developer's situation very sympathetic despite the dearth of law supporting its legal position. This may have caused the court to focus more on the result than on the rationale for the result. The story began when the developer submitted an application to divide an existing lot into three lots for the express purpose of building duplexes. Two weeks later, the developer submitted a building permit application for three duplexes. The county accepted the short subdivision application, but accepted only one building permit application, noting that only one legal lot existed at that time because the county had not yet processed the developer's subdivision application.

While the county was considering the subdivision application, it enacted an ordinance that increased the minimum lot size for duplexes. If applied to the developer's property, this new law would have allowed only two lots. Nevertheless, applying the *old* lot size requirement, the county approved the subdivision into three lots, and the resulting plat showed three duplex building sites.

The developer then tried to submit two more building permit applications. Applying the *new* minimum lot size requirement, the county denied the building permits. Two weeks later, the developer tried again to submit the two additional building permit applications. This time, an unwary counter technician issued the permits and the developer immediately started construction. After the developer made substantial progress on the construction, the county issued stop-work orders for two of the buildings. The developer appealed to the county hearing examiner, who reversed the county's orders and allowed construction to proceed. The developer sued the county for damages for

211. 133 Wash. 2d 269, 943 P.2d 1378 (1997).

212. *See id.*, 133 Wash. 2d at 271-73, 943 P.2d at 1380-81.

the four months of delay that occurred while the stop-work orders were in effect.

b. *Division Two's Reliance on Dicta*

The Washington Court of Appeals, Division Two, ruled in favor of the developer.[213] The court relied on its earlier decision in *Adams v. Thurston County*,[214] in which the court indulged in an inaccurately sweeping description of the vested rights doctrine:

> Under Washington law, property development rights vest at the time a developer files a complete and legally sufficient. . . preliminary plat application. The date on which development rights vest determines which land use laws, rules, and policies will apply to that land development.[215]

The description of the vested rights doctrine in *Adams* lacked foundation. Until *Adams*, no fairness/certainty-rationale decision had suggested that a preliminary subdivision or other application locks in the law for all subsequent "land development" in perpetuity. Furthermore, the *Adams* description of the doctrine was unnecessary. At issue in *Adams* was whether a county impermissibly delayed developers from completing their preliminary plat application.[216] The *Adams* dispute did not involve the question of whether a complete preliminary plat application freezes in place laws applicable to subsequent permit applications for the same development.

Nevertheless, in its treatment of *Noble Manor*, Division Two transformed the *Adams* dicta into a holding. Citing *Adams*, the court claimed that that case "held that development rights vest upon compliance with either RCW 58.17.033 or RCW 19.27.095."[217] No court, even the *Adams* court, had ever reached such a conclusion. Nevertheless, Division Two sent the ball rolling with sufficient, if misguided, momentum to the supreme court.

c. *Where the Washington Supreme Court Went Wrong*

The supreme court affirmed Division Two, finding that the vested rights doctrine, as codified in RCW 58.17.033(1),[218] means that

---

213. Noble Manor Co. v. Pierce County, 81 Wash. App. 141, 142, 913 P.2d 417, 418 (1996), *aff'd*, 133 Wash. 2d 269, 943 P.2d 1378 (1997).

214. 70 Wash. App. 471, 855 P.2d 284 (1993).

215. *Id.* at 475, 855 P.2d at 287 (citations omitted).

216. *See id.* at 472-73, 855 P.2d at 286.

217. *Noble Manor*, 81 Wash. App. at 146, 913 P.2d at 420.

218. As discussed above, this provision reads: "A proposed division of land . . . shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use

the filing of a preliminary subdivision application freezes some laws applicable to some later applications for permits for that land. The court committed a number of errors in reaching its decision.

First, the court jumbled the mandamus and the fairness/certainty rationales for the vested rights doctrine. On the one hand, the court noted that the doctrine could be invoked by filing applications for authorizations other than building permits, consistent with the application-by-application approach supported by fairness/certainty rationale case law.[219] The court, however, failed to acknowledge that the application-by-application approach does not allow the application for one permit to affect the law applicable to a different application.[220] On the other hand, the court also suggested that the filing of one application could have an effect on the law applicable to subsequent applications, consistent with the statement of the mandamus rationale that speaks of a right "to develop" or "to use."[221] But the court ignored that part of mandamus-rationale case law that consistently applied the vested rights doctrine only to building permit applications, expressly because those applications arise only at the *end* of the development process.[222]

Second, the court imported its own vision of fairness, putting words in the mouth of the legislature: "If all that the Legislature was vesting under the statute was the right to divide land into smaller parcels with no assurance that the land could be developed, no protection would be afforded the landowner."[223] This is incorrect. While the legislature did not protect the developer from changes that might apply to later applications, that does not amount to "no protection." If the legislature considered the challenges presented in the context of multiple-permit projects, it apparently decided to stick to an application-by-application approach.[224] If the legislature did not consider these challenges, the court should not have concocted an intent that the legislature never articulated.[225]

---

control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted . . . ." WASH. REV. CODE § 58.17.033(1) (2000). *See supra* Part II.D.2; Figure 5.

219. *See Noble Manor*, 133 Wash. 2d at 275, 943 P.2d at 1381. *Cf. supra* Figures 4-5.

220. *Cf. supra* Part II.D.1.b; *supra* Figures 4-5.

221. *See Noble Manor*, 133 Wash. 2d at 271, 280, 281, 283, 943 P.2d at 1380, 1384, 1385, 1385. *Cf. supra* Figure 3.

222. *See supra* Part II.D.1.a.

223. *Noble Manor*, 133 Wash. 2d at 278, 943 P.2d at 1383.

224. *See supra* Part II.D.1.b; *supra* Figure 5.

225. Overstreet and Kirchheim should likewise refrain embracing this version of legislative intent. *See, e.g.*, Overstreet & Kirchheim, *supra* note 11, at 1085 ("By specifying a preliminary plat—an application encompassing so many regulatory topics—as the trigger for statutory vesting, the legislature intentionally extended vesting protection to *all* the many kinds of devel-

Third, the court rendered meaningless the relevant language of RCW 58.17.170, which maintains that final subdivisions are to be approved only if in accord with laws "in effect at the time of preliminary plat approval" and that a subdivision "shall be governed" for five years by "the statutes, ordinances, and regulations in effect at the time of approval" of the subdivision application by the local health department and the local municipal engineer.[226] Even though this language calls into question the significance of filing the preliminary subdivision application, not only for the overall subdivision approval process but also for later permit applications, the court refused to be distracted by this language. The court noted that RCW 58.17.170 pre-dates RCW 58.17.033, a provision that expressly attempted to codify the vested rights doctrine,[227] but the court cited no authority for why that fact limits the importance of RCW 58.17.170. Focusing on the five-year limit in RCW 58.17.170, but overlooking the section's more relevant language,[228] the court characterized the section as merely a "divesting statute."[229] Relying on *Friends of the Law v. King County*,[230] a case involving a short subdivision (which the *Noble Manor* Court had earlier noted was not subject to RCW 58.17.170 because that statute applies only to formal subdivisions), the court somehow reasoned that RCW 58.17.170 was irrelevant to its view of the vested rights doctrine.[231]

Finally, the court ignored the relevance of RCW 19.27.095(1), which uses language nearly identical to RCW 58.17.033(1), to force local governments to consider building permit applications under the law in effect on the date of application for *that* permit—not on the date of application for some earlier permit.[232] The court did not

---

opment standards contained therein.").

226. *See* WASH. REV. CODE § 58.17.170. *See generally supra* Part II.D.2; *supra* Figures 6-7.

227. *See Noble Manor*, 133 Wash. 2d at 281-82, 943 P.2d at 1384-85.

228. The provision states that the law in effect on the date of approval of a formal, final subdivision by the local health department and the local municipal engineer—not the law in effect on the date of preliminary subdivision application—apparently controls land uses for five years after the approval of the final subdivision. *See* WASH. REV. CODE § 58.17.170; *supra* Part II.D.2; *supra* Figure 7.

229. *See Noble Manor*, 133 Wash. 2d at 282, 943 P.2d at 1385. "The Legislature did not consider RCW 58.17.170 to be an application of the vested rights doctrine because it did not vest any rights *at the time of application*, but only acted to divest rights which do not accrue under that statute until the time of *approval* of the subdivision." *Id.* at 282 n.8, 943 P.2d at 1385 n.8.

230. 123 Wash. 2d 518, 869 P.2d 1056 (1994).

231. *See Noble Manor*, 133 Wash. 2d at 281-82, 943 P.2d at 1384-85.

232. *See supra* Part II.D.2; *supra* Figure 5. Overstreet and Kirchheim also ignore the import of this statute. Although they include RCW 19.27.095 among Washington's vested rights statutes, *see, e.g.*, Overstreet & Kirchheim, *supra* note 11, at 1046 n.16, 1066 n.127, 1067 n.133, they examine only the subdivision vesting statute "[b]ecause the building permit statute is

explain how this building permit language can remain relevant if, as the court held, some laws applicable to a building permit application are frozen as of the date of the preliminary subdivision application, not the date of the building permit application. The court improperly rendered RCW 19.27.095(1) meaningless.[233]

d. The Elusive Holding of Noble Manor

Not only did the *Noble Manor* court employ questionable legal reasoning, it also failed to state its holding with sufficient clarity. What is clear is that *Noble Manor* held that a preliminary subdivision application freezes at least some law as of that date, and that this law remains frozen beyond the date of final subdivision approval so as to control subsequent applications for the same development.[234] Figure 9 illustrates this "*Noble Manor* Freeze" in comparison to the statutory rules that the court purported to interpret.

The question mark at the far end of Figure 9 indicates the uncertainty regarding the duration of this freeze. In the case of formal, "long" subdivisions, which were not at issue in *Noble Manor*, the court suggested that this law remains frozen only for five years after final subdivision approval.[235] This suggestion was based on the court's reading of RCW 58.17.170 as merely constituting a "divesting" statute.[236] The court acknowledged that RCW 58.17.170 does not apply any such "divesting" to "short" subdivisions,[237] and so the "freeze" for those subdivisions stays in effect in perpetuity, even though they are subject to less scrutiny and public process than formal subdivisions. The court merely suggested that the legislature address the disparate "divesting" of short and long subdivisions.[238]

---

rarely invoked and is almost identical to the plat vesting statute." *Id.* at 1046 n.16. *See also id.* at 1082 n.229 ("The building permit vesting statute will not be analyzed separately in this Article.").

233. Statutes related to the same subject matter must be read together in a way that harmonizes them and renders no provision of either one meaningless. *See* Waste Management, Inc. v. Washington Utilities and Transp. Comm'n, 123 Wash. 2d 621, 630, 869 P.2d 1034, 1039 (1994).

234. *See Noble Manor*, 133 Wash. 2d at 283-84, 943 P.2d at 1385-86.

235. *See id.* at 281-82, 943 P.2d at 1384-85. The court did not mention that it might take as long as seven years or more from preliminary subdivision application submittal to final subdivision approval. This timeframe is based on the local jurisdiction taking two years to process and issue a preliminary subdivision approval with associated environmental review, and the developer returning within five years to file an application for final subdivision approval. *See* WASH. REV. CODE § 58.17.140 (2000) (setting relevant timelines).

236. *See Noble Manor*, 133 Wash. 2d at 281-82, 943 P.2d at 1384-85.

237. *See id.* at 281-82, 943 P.2d at 1385.

238. *See id.* at 282, 943 P.2d at 1385.

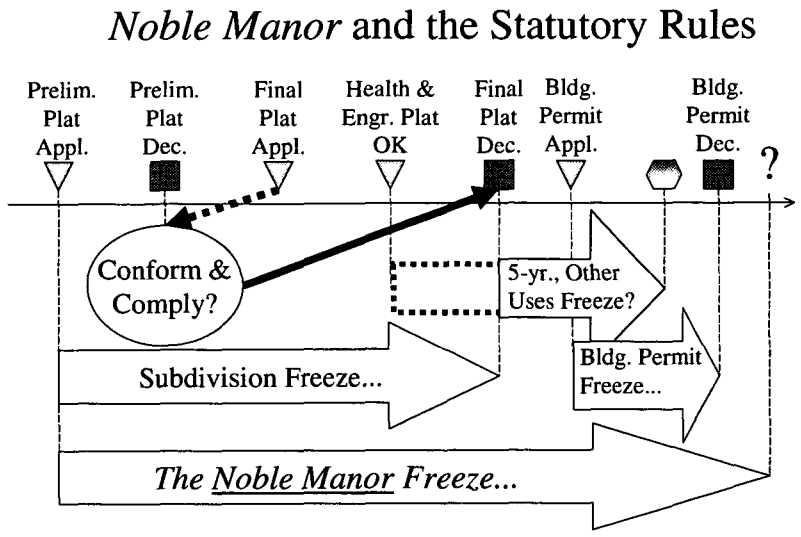

Figure 9. The *Noble Manor* vested rights rule in comparison to the statutory vested rights rules.

Although attempting to apply the vested rights rule of RCW 58.17.033(1), *see supra* Figure 5, the *Noble Manor* court adopted a rule that extends the time during which the law remains frozen in place far beyond what the legislature intended. The question mark at the far right indicates that the *Noble Manor* "freeze" apparently lasts forever in the case of "short" subdivisions. (Prelim. = preliminary; appl. = application; dec. = decision; engr. = engineering; bldg. = building)

More crucial than the duration of the "freeze" is the function of the "freeze." For what purposes or for what other permit applications does the law remain frozen in time as of the date of preliminary subdivision application? Language in *Noble Manor* arguably supports two alternate answers to this question—one more favorable to municipalities and the other more favorable to developers.

The first way to interpret the nature of the right extended by *Noble Manor* is to limit the scope of the right earned by the developer to the use disclosed by the developer in the subdivision application. Under this interpretation, a subdivision application gives the developer only a right to develop the property to realize the use identified in the application. In other words, the local government would be able to impose all new land use laws that would not prevent the developer

from realizing the overall type or intensity of use that he or she described in the subdivision application. This interpretation comports most narrowly with the facts of *Noble Manor*, where the court ruled only that the county could not apply a new minimum lot size requirement that would prevent the developer from building the three duplexes it disclosed. This interpretation also comports with the court's conclusion that "what is vested is what is sought in the application."[239]

The other, more developer-friendly way to interpret *Noble Manor* is to view the use disclosure requirement as a procedural step that, once taken, allows the developer to freeze all laws that might apply to any aspect of development within the subdivision. Under this interpretation, a local government would be unable to apply any new land use law within the boundaries of the subdivision as long as the developer used or developed that land in a manner consistent with the type of land use disclosed in the subdivision application. Although not necessary under the facts of *Noble Manor*, this interpretation finds support in many of the court's more sweeping statements of the law.[240]

4. The Fruits of *Noble Manor*

The improper reasoning and elusive holding of *Noble Manor* will continue to hinder attempts to define the vested rights doctrine fairly in the context of multiple-permit developments. The decision's short lineage suggests that it might soon stand for a proposition more favorable to developers than what is supported by the narrow facts and language of that case. Four families of *Noble Manor* offspring merit note.

First, the Washington State Supreme Court has applied the language and reasoning of *Noble Manor* to a permit application that is "linked to" or "coupled with" a subdivision application. In *Associa-*

---

239. *Id.* at 284, 943 P.2d at 1386. The developer contended "that it should be vested for the uses disclosed to the County in its application and considered by the County when approving the plat." *Id.* at 274-75, 943 P.2d at 1381. The court concluded, "If a landowner requests only a division of land without any specified use revealed, then the county, city or town may consider the application to see if any legal use can be made of the land so divided, and no particular development rights would vest at that time." *Id.* at 285, 943 P.2d at 1387.

240. The court framed the issue as whether "the filing of a complete application for a short subdivision vest[s] the right to develop the property under the land use and zoning laws in effect on the date of the application." *Id.* at 274, 943 P.2d at 1381. The court later stated, "the Legislature has made the policy decision that developers should be able to develop their property according to the laws in effect at the time they make completed application for . . . subdivision of their property." *Id.* at 280, 943 P.2d at 1384. A developer obtains "a vested right to develop its land in accord with the [subdivision] application." *Id.* at 285, 943 P.2d at 1386.

tion of Rural Residents v. Kitsap County,[241] the court determined whether an application for a planned unit development (PUD)[242] should be considered under the law in effect on the date of that application. The court reached the right result by holding that the PUD application had to be considered under the county law in effect on the date of that application.[243] But the court could have simply extended the application-by-application approach and found that the PUD application, on its own, froze in time the law applicable to that application. Instead, the court relied on *Noble Manor*.[244] Even though *Noble Manor* interpreted a statute that had nothing to do with PUDs, the court found it relevant. The court reasoned that *Noble Manor* "addressed the issue of development of land, as opposed to merely dividing land, in the context of the vested rights doctrine," and from this premise it leaped to the conclusion that "[s]ince a PUD is a land use technique that can be used to divide land as well as develop it, the *Noble Manor* reasoning is helpful here."[245] The supreme court then followed a court of appeals decision[246] to hold that when a PUD application is "inextricably linked to" or "coupled with" a subdivision application, it triggers the vested rights doctrine.[247] Decisions like these signal the court's willingness to apply the rationale of *Noble Manor* outside of the statute and facts at issue in that case.

Second, the court of appeals has eliminated the need for a "link" to a subdivision application by applying the reasoning and language of *Noble Manor* directly to a conditional use permit (CUP) application in a case that did not involve a subdivision application. In *Weyerhaeuser v. Pierce County*,[248] the developer applied for a CUP to establish a

241. 141 Wash. 2d 185, 4 P.3d 115 (2000).

242. "'Planned Unit Development' is a generic term for a regulatory technique which allows a developer to be excused from otherwise applicable zoning regulations in exchange for submitting to detailed, tailored regulations." Schneider Homes, Inc. v. City of Kent, 87 Wash. App. 774, 775-76, 942 P.2d 1096, 1097 (1997), *review denied*, 134 Wash. 2d 1021, 958 P.2d 316 (1998).

243. *See* Association of Rural Residents v. Kitsap County, 141 Wash. 2d 185, 193-95, 4 P.3d 115, 119-20 (2000). The court turned away an argument that a PUD is like a rezone and, as such, is not subject to the vested rights doctrine. *Id.* at 193, 4 P.3d at 119. This was likely the right result. *See supra* Part II.A.3 (critiquing case law holding that rezones are not subject to the vested rights doctrine).

244. *See Rural Residents*, 141 Wash. 2d at 193-94, 4 P.3d at 119.

245. *Id.* at 194, 4 P.3d at 119.

246. *Schneider Homes*, 87 Wash. App. at 774, 942 P.2d at 1096.

247. *See Rural Residents*, 141 Wash. 2d at 195, 4 P.3d at 120. The court did not explain why, if a PUD is indeed so much like a subdivision application, it needed to be linked to a subdivision application to trigger the vested rights doctrine. Whether a PUD application alone is sufficient remains unanswered by case law.

248. 95 Wash. App. 883, 976 P.2d 1279 (1999), *review granted sub nom.*, Weyerhaeuser v. Land Recovery, Inc., 139 Wash. 2d 1001, 989 P.2d 1139 (1999).

landfill. The county ultimately approved the CUP, but imposed a condition that the developer apply for a wetlands permit under an ordinance that became effective after the developer submitted its complete CUP application.[249] The court held that the county could not impose the new wetlands ordinance,[250] but it did not merely rely on authority extending the vested rights doctrine to CUP applications.[251] Instead, the court based its decision on *Noble Manor* and found that the developer disclosed its intended "uses" of the wetlands.[252] The court paraphrased *Noble Manor*, ruling that "a vested right for the [CUP], but not for land use and development, would be 'an empty right' as wetland development was an integral component of the project."[253] Developers will likely invoke this language in the future to assert that *any* application has the same lasting effect on other permit applications as did the subdivision application in *Noble Manor*.[254]

Third, the appellate courts have moved to relegate *Noble Manor*'s use disclosure requirement[255] to a mere procedural trigger that, once pulled, becomes irrelevant. Some courts omit the use disclosure requirement altogether when summarizing the holding of *Noble Manor*.[256] Taking a different path around the use disclosure requirement, the *Weyerhaeuser* court deflected any argument that the application of later-enacted wetlands regulations would not prevent the developer from realizing its disclosed landfill use.[257] The court ruled

---

249. *See id.* at 887-88, 976 P.2d at 1282.

250. *See id.* at 894, 976 P.2d at 1285.

251. *See id.* at 892-93, 976 P.2d at 1284-85 (noting Beach v. Board of Adjustment of Snohomish County, 73 Wash. 2d 343, 347, 438 P.2d 617, 620 (1968)).

252. *See id.* at 894, 976 P.2d at 1285.

253. *Id.* at 895, 976 P.2d at 1286 (quoting, but not citing, *Noble Manor*, 133 Wash. 2d at 280, 943 P.2d at 1384). *See Noble Manor*, 133 Wash. 2d at 283-84, 943 P.2d at 1385-86 (defining the vested "development rights"—and so likely limiting their scope—in terms of the "uses disclosed" in the application).

254. Bucking the trend toward a headlong expansion of *Noble Manor* beyond the facts of that case, the court of appeals has since held that lots created by devise, which does not require submission of a subdivision application (*see* WASH. REV. CODE § 58.17.040(3) (2000)), are still subject to land use regulations in effect on the date the developer applies for an application to develop the land. *See* Dykstra v. Skagit County, 97 Wash. App. 670, 678-79, 985 P.2d 424, 428-29 (1999), *review denied*, 140 Wash. 2d 1016, 5 P.3d 3 (2000). The court, appropriately, did not even cite *Noble Manor*.

255. *See Noble Manor*, 133 Wash. 2d at 283-84, 943 P.2d at 1385-86. *See generally supra* Part II.D.3.d.

256. *See, e.g.*, Association of Rural Residents v. Kitsap County, 95 Wash. App. 383, 391-92, 974 P.2d 863, 868 (1999) (pursuant to *Noble Manor*, developers obtain "a vested right to have their project considered only under the land use statutes and ordinances in effect" on the date of their preliminary subdivision applications), *rev'd on other grounds*, 141 Wash. 2d 185, 192-95, 4 P.3d 115, 118-20 (2000) (also omitting the use disclosure requirement).

257. Weyerhaeuser v. Pierce County, 95 Wash. App. 883, 894, 976 P.2d 1279, 1285

that the developer disclosed the "use" of the wetlands for its landfill (as though "wetlands filling" were the primary use of the land, rather than an accessory detail of the primary landfill use) and that the new ordinance would prevent *that* use.[258] In *Westside Business Park, LLC v. Pierce County*,[259] the court evaded an argument by the county that application of a later-enacted county drainage ordinance through a subsequent permit would not interfere with the use disclosed by the developer during its subdivision process. The court treated the use disclosure requirement as some kind of affirmative defense rather than as an essential part of the developer's burden to invoke the reasoning of *Noble Manor*, and refused to entertain the county's argument because the county had failed to raise it below.[260]

Finally, while reducing the use disclosure requirement to a procedural trigger, the court of appeals ruled that a local jurisdiction may not prevent a developer from pulling that trigger by rendering the intended use irrelevant to the consideration of a particular application. In *Westside*, the county's short subdivision application requirements did not require a developer to disclose the intended use of the property,[261] presumably because the intended use was not relevant to the county's decision on a short subdivision application. The developer therefore filed a two-lot short subdivision application that "showed only two vacant lots with no structural improvements, storm drainage facilities, roads or utilities."[262] However, during a preapplication conference with county permitting staff, the developer reported "that it planned a two-lot commercial short plat with an office building and parking on one lot and four mini storage buildings and a small office on the other lot."[263] A new drainage ordinance took effect shortly after the developer filed its application, and the county issued an administrative determination that the developer would have to comply with the new ordinance when the developer applied for a site development permit (which the developer could do at any time in the development process).[264] The court held that *Noble Manor* prevented application of the drainage ordinance to the eventual development slated for the two

---

(1999).

258. *See id.*

259. 100 Wash. App. 599, 5 P.3d 713 (2000).

260. *Id.* at 608, 5 P.3d 718. Overstreet and Kirchheim cite *Westside* as "an example of how Washington's date certain vesting rule can be easily applied even to seemingly complicated questions concerning which uses an application contemplated." Overstreet & Kirchheim, *supra* note 11, at 1070 n.156. This ease of application may come at the cost of fairness.

261. *See Westside*, 100 Wash. App. at 605, 5 P.3d 717.

262. *Id.* at 601, 5 P.3d 715.

263. *Id.*

264. *See id.* at 601-02, 606 n.4, 5 P.3d 715, 717 n.4.

lots because the county had actual knowledge of the developer's proposed use from the preapplication conferences: "where the County invites vague information in the application and declares it to be complete, the only resort may be to other communications."[265] The *Westside* court has essentially invited developers to blurt out a proposed "use" to a local planner (even if declaring a use is unnecessary for the permit for which they are applying) in the hope of using that disclosure to stave off any new land use laws (even ones that do not prevent realization of the proposed use). The court has also invited a slew of evidentiary disputes about what developers actually said in conversations with municipal permitting staff.

The trajectory of *Noble Manor*'s progeny is toward a rule that finds little support in the roots of the vested rights doctrine—that any land use application "vests" the right to freeze in time the law that will control all aspects of later development or use of that land, as long as that development or use is consistent with the type of use disclosed, even verbally, by the developer. This rule threatens the essential balance at the heart of Washington's unique vested rights doctrine. To justify incursions into the public's ability to apply new development regulations that meet changing conditions and avoid nonconforming uses, Washington chose a bright-line date—the date of permit application—on which we could presume that the developer possessed the good faith intent to diligently complete a development project.[266] The headlong slide triggered by *Noble Manor*, if left unchecked, portends a doctrine in which a developer need no longer manifest such good faith. He or she need only file some preliminary application that manifests an intent to pursue some use at some point in the future, after obtaining other permits. This is not a fair price for the right to hold the public interest at bay.

III. HOW CAN WE REPAIR THE DOCTRINE? TOWARD A STATUTORY "APPLICABLE LAW RULE"

In its current form, the details of the vested rights doctrine provide neither certainty nor fairness in sufficient measure. The final part of this Article calls on the legislature to repair these details and reclaim the doctrine in three ways. First, the legislature can reestablish certainty relatively easily. It should replace the vested rights

265. *Id.* at 605, 5 P.3d 717.

266. *See* Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 873-74, 872 P.2d 1090, 1095-96 (1994); Hull v. Hunt, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958). *See generally supra* Part I.B (discussing the fairness/certainty rationale for Washington's vested rights doctrine).

doctrine with an "applicable law rule" that is codified with the other state land use permitting procedures and that expressly resolves the questions left unanswered by case law. Second, the legislature should strive for fair answers, even at the risk of failing. The easier part of this step will be articulating a set of principles that can help shape the rule's details. Applying those principles will prove more contentious. Finally, the legislature should not be deterred by naysayers. Reform should not be left to the judiciary, which must focus on one narrow fact pattern at time. Only the legislature is positioned to provide a comprehensive solution to the addled vested rights doctrine. Because the legislature need not change the essential framework of the doctrine to reform it, the effort should not be doomed to end in political gridlock. Because the doctrine is not dictated by constitutional provisions, the legislature is not constrained by those provisions.

A. The Legislature Can *Reestablish Certainty*

If nothing else, the legislature should reintroduce clarity and certainty to the vested rights doctrine. Lawyers and clients spend needless time and money trying to interpret and manipulate the doctrine's vagaries. Courts, which are limited to exploring these uncertainties on a case-by-case basis, have deepened the confusion.

The legislature can restore clarity to this body of law in three ways. First, abandon the term "vested rights doctrine," override the common law on which it is based, and replace it with a statutory "applicable law rule." Second, centralize the rule in RCW 36.70B, which has controlled local land use permitting procedures since 1995. Finally, clearly resolve the questions left unanswered by the common law, even at the risk of providing the wrong answers.

1. Replace the Common Law "Vested Rights Doctrine" with a Statutory "Applicable Law Rule"

The legislature would clarify the law by striking "vested rights" from the legal lexicon of this state and replacing it with something more descriptive, like an "applicable law rule." "Vested" is an unnecessary appendage to "rights." If a person truly has a "right," rather than some privilege or expectation, the government cannot deprive the person of that right. Dressing the right up in a "vest" adds nothing to the right, except perhaps to underscore that we *really, really* mean that the right is, in fact, a right.

"Vested" is also a confusing appendage to "rights." To say that a right has "vested" implies that "vesting" sheds light on the nature of the right at issue. It sends people searching for meaning in the "vest"

rather than in the "right" itself. Unfortunately, "vesting" does not answer crucial questions such as what right accrues at what point, for what purposes, or for how long.

To fix the vested rights doctrine, the legislature should adopt a statute that supplants the doctrine and the case law on which it rests. Any attempt to codify the existing doctrine will only lead to debates about the case law that the legislature had in mind. Instead of codifying the doctrine, the legislature should enact a "rule" that cleanly replaces the details of any common law "doctrine." Selecting a more descriptive name for that rule—like the "applicable law rule"—will further help the legislature distance itself from a confused body of law that, unfortunately, does not merit codification.

2. Centralize the Applicable Law Rule in RCW 36.70B

It is currently impossible to put a finger on "the law" of vested rights. Vested rights case law is diffuse, spread over decisions stretching back to the 1950s. To the extent that the legislature has already attempted to codify some discrete aspects of the vested rights doctrine, it has sprinkled that law over a number of statutes.[267]

To foster certainty and clarity, we should be able to find the law in one place. The most logical place to consolidate an applicable law rule is in RCW 36.70B. The legislature adopted this chapter in 1995 to simplify the number of required land use permits, hearings, and appeals, and to enhance predictability and reduce unnecessary duplication.[268] This chapter now sets uniform standards for reviewing land use permit applications to which local governments must conform.[269] This is where one would expect to find a rule that establishes what version of local development regulations controls the review of each application.

Consolidating an applicable law rule in RCW 36.70B would mean removing attempts to codify the vested rights doctrine from other parts of the code, such as the building permit, subdivision, and growth management chapters.[270] One rule should apply to all land use

---

267. *See, e.g.*, WASH. REV. CODE § 19.27.095(1) (2000); WASH. REV. CODE § 36.70A.302(2) (2000); WASH. REV. CODE § 58.17.033(1) (2000); WASH. REV. CODE § 58.17.170 (2000).

268. *See* Weiner, *supra* note 136, at 16-17.

269. For example, the statute requires local governments to provide each applicant with a determination that an application is complete, to give certain types of public notice of applications, to consolidate review of multiple permit applications and environmental issues for the same project, and to subject applicants to no more than one open-record hearing and one closed-record administrative appeal. *See* WASH. REV. CODE § 36.70B.060 (2000).

270. *See* WASH. REV. CODE § 19.27.095(1) (2000) (building permit); WASH. REV. CODE § 58.17.033(1) (2000) (plat subdivision); WASH. REV. CODE § 36.70A.302(2) (2000) (GMA).

applications, and that one rule should be found in one place. Other parts of the code that either authorize local governments to require certain types of permits or require local governments to plan for growth may alert the reader through cross-references to the location of the applicable law rule. Scattering a rule around the code—even if merely repeating it—only leads to confusion.

3. Resolve the Unanswered Questions Clearly, Even at the Risk of Being Wrong

The common law vested rights doctrine does not adequately resolve a host of questions.[271] A statutory rule that replaces this doctrine must answer those questions expressly. We may never know if the legislature has provided the *right* answers, but we will know if the legislature has provided *clear* answers. We should hope for the former and ensure the latter.

B. The Legislature Should Strive for Fairness

Adding clarity will be the relatively easy part. Achieving fairness will be much more difficult. The legislature should nevertheless strive for fairness, no matter how elusive. One way to enhance fairness is to articulate a set of principles to help resolve choices among alternatives, using those principles to resolve the questions left unanswered by the common law vested rights doctrine.[272] This section of the Article outlines the author's personal attempt to achieve fairness. Others will disagree. The legislature will ultimately have to find its own way.

1. Establish Guiding Principles

Two principles should guide any attempt to reform the vested rights doctrine through a statutory applicable law rule. First, when in doubt, keep it simple. Second, do not reward real estate speculation, but allow those who are actually ready to develop to lock in the applicable law.

a. When in Doubt, Keep It Simple

With any attempt to codify a rule comes the temptation to tailor exceptions to the rule to protect certain interests. In many cases, tailoring enhances fairness. In every case, however, tailoring adds

271. *See supra* Part II.

272. This section relies heavily on the critique of the doctrine in Part II. Rather than repeat those critiques, this section generally relies on references to them.

complexity, rendering seemingly simple statements subject to a host of provisos.

In the case of a statutory applicable law rule, the legislature should err on the side of clarity and simplicity. When trying to choose between two courses of action, the legislature should keep in mind that it is attempting to add clarity to a body of law that has become needlessly confusing.

Where possible, the legislature should harmonize a statutory applicable law rule with the GMA[273] and the land use permitting statute.[274] These statutes have already resolved most fundamental principles of Washington land use law. The legislature should continue to build on these principles as clearly and simply as possible.

b. Protect Diligent Development and Discourage Speculation

Washington abandoned the majority, estoppel-based vested rights doctrine in the 1950s for good reason. The Washington rule obviates the litigation inherent in the majority rule, which forces parties to debate whether and when a developer substantially changed his or her position in good faith reliance on a given set of land use laws.[275]

Nevertheless, the Washington rule remains grounded in a notion that, at some point in time, we may presume that a developer has proceeded so far in good faith that it would be unfair to change the rules of the game. At first, courts found this point in time to be the date on which a developer submits a complete building permit application.[276] Washington courts later looked to indicia of a developer's good faith commitments to decide whether to extend the doctrine to other types of permit applications.[277]

Washington should continue to insist on a rule that does not allow a developer to freeze relevant development regulations unless the developer files a complete permit application that necessarily manifests a good faith willingness and ability to complete a development. If a developer is ready and willing to complete a development with

273. WASH. REV. CODE Chap. 36.70A (2000).

274. WASH. REV. CODE Chap. 36.70B (2000).

275. *See* Hull v. Hunt, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958).

276. *See id. See also* Allenbach v. City of Tukwila, 101 Wash. 2d 193, 199, 676 P.2d 473, 476 (1984) (applying the same rationale in a building permit case).

277. *See, e.g.*, Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 874-75, 872 P.2d 1090, 1096 (1994) (refusing to extend the doctrine to master use permit applications because "the necessary indicia of good faith and substantial commitment are lacking at the outset of the master use permitting process.").

reasonable diligence, we should allow the developer to lock in the law and proceed accordingly.

We should not indulge speculation, however. Real estate is a risky investment. One way to hedge that risk is to prevent the local government from changing the land use laws applicable to the investment.[278] But that hedge necessarily comes at the expense of the public's interest in revising and applying land use laws to keep pace with the demands of growth and new ecological challenges. We should therefore allow the developer to hedge his or her risk only when the developer is actually ready and willing to develop.

Insisting on a rule that rewards diligent development and discourages speculation comports with another principle of Washington land use law—discouraging piecemeal review of projects. Most local governments must "establish a permit review process that provides for the integrated and consolidated review and decisions on two or more project permits relating to a proposed project action."[279] Local governments must also integrate environmental review under the State Environmental Policy Act[280] with a review of the underlying permit,[281] and should avoid piecemeal review of any given project.[282] Given this policy of encouraging consolidated review of any development, we should not adopt an applicable law rule that allows a developer to race to a local planning department and submit one preliminary permit application just to lock in the law that will apply to all subsequent permit applications for the same project.

---

278. Overstreet and Kirchheim assert that "Washington courts realize that permit speculation is not a problem in the real world." Overstreet & Kirchheim, *supra* note 11, at 1078-79 n.201 (citing *Hull*, 53 Wash. 2d at 130, 331 P.2d at 859; Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash. 2d 475, 484, 513 P.2d 36, 43 (1973); *Allenbach*, 101 Wash. 2d at 199, 676 P.2d at 476). This is not accurate. All three of the decisions Overstreet and Kirchheim cite in support of this assertion stand only for the proposition that *building permit* speculation is not a problem in the real world, because courts have focused on that permit as the lynchpin for the mandamus rationale—a developer usually seeks a building permit *after* investing considerable time in a project and at the point that the developer is ready to break ground. *See supra* Part II.D.1 (discussion of how the mandamus rationale provides one approach for dealing with multiple permits). When developers rely on *earlier* permits to freeze applicable development regulations, permit speculation is a very real possibility. *See, e.g.*, *supra* notes 2-4, 7-9 (newspaper articles discussing use of the vested rights doctrine); Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 281-82, 943 P.2d 1378, 1384-85 (1997) (finding that "short" subdivision applications allow developers to freeze applicable land use laws in perpetuity); New Castle Investments v. City of LaCenter, 98 Wash. App. 224, 237, 989 P.2d 569, 576 (1999) ("[T]he time lag between the application for preliminary plat approval and the issuance of the permit application may be many years."), *review denied*, 140 Wash. 2d 1019, 5 P.3d 9 (2000).

279. WASH. REV. CODE § 36.70B.120(1) (2000).

280. WASH. REV. CODE § 43.21C (2000).

281. *See* WASH. REV. CODE § 36.70B.060(6) (2000).

282. *See* WASH. ADMIN. CODE § 197-11-060(3)(b) (1999).

2. Use the Principles to Define the Contours of an Applicable Law Rule That Resolves the Questions Left Unanswered by the Vested Rights Doctrine

In light of these principles—simplicity and protecting only diligent development—four essential elements of an applicable law rule could replace the vested rights doctrine and resolve its unanswered questions clearly and fairly. First, apply the rule to all "project permit applications" as defined by existing law. Second, freeze in time those "development regulations" (within the meaning existing law) that affect the type, degree, or physical attributes of new developments or uses. Third, for any one application, freeze the relevant law—including SEPA policies—in effect on the date an application is deemed complete pursuant to existing law. Finally, for multiple-permit projects, protect only consolidated applications or prompt, sequential applications.

a. The Applicable Law Rule Should Apply to All "Project Permit Applications" as Defined in RCW 36.70B.020(4)

A crucial shortcoming of the vested rights doctrine is the haphazard way that it has been extended to some, but not all, types of land use applications.[283] An applicable law rule, by contrast, should apply to all local land use authorizations that are not legislative in nature. In other words, the rule should apply to all "project permit applications," as defined by the statute, that already govern land use permitting procedures:

> "[P]roject permit application" means any land use or environmental permit or license required from a local government for a project action, including, but not limited to, building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection.[284]

This definition divides the potential universe of land use decisions made by local government into two categories: quasi-judicial and legislative. Quasi-judicial decisions remain subject to RCW 36.70B, and therefore would be subject to an applicable law rule. Legislative

283. *See supra* Part II.A.

284. WASH. REV. CODE § 36.70B.020(4) (2000).

decisions, by contrast, should not be encumbered by existing laws, and so an applicable law rule should not apply to them.

This distinction explains the sleight of hand executed by applying this statutory definition not to *all* site-specific rezone requests, but only to those "authorized by a comprehensive plan or subarea plan."[285] If a rezone request is not consistent with the comprehensive plan, the local government presumably cannot grant the request until the local government makes the legislative decision to amend the plan.[286] If a developer believes that she presents a rezone request that is consistent with the applicable plan, the developer should be allowed to present that request as a "project permit application" and attempt to avail herself of the applicable law rule. If the local government decides that the request is *in*consistent with the plan, the developer will either have to challenge that decision or wait for the local legislative body to change that plan before having a chance to freeze the law applicable to her rezone request.

Selecting this definition of "project permit application" should also exclude from the applicable law rule formal interpretations by local government officials regarding the applicability of a given set of local land use laws to a particular property.[287] Interpretations do not constitute permits or authorizations. Although they are rendered under the law as it exists on a particular day, they cannot constitute a promise that the law will remain unchanged. An interpretation allows a developer to resolve an issue in advance of submitting an application, and that resolution may allow the developer to properly tailor a project application or to avoid submitting a futile one. Because an interpretation occurs before we can presume a developer's good faith commitment to proceed with a project to its completion,[288] an application for an interpretation should not freeze the law that will apply to some later application for a project permit application.

---

285. *Id.*

286. *See* WASH. REV. CODE § 36.70A.130 (2000) (procedures for amending plans).

287. *Compare* WASH. REV. CODE § 36.70C.020(1)(a) *with* WASH. REV. CODE § 36.70A.130 (b) (2000).

288. *See* Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 874-75, 872 P.2d 1090, 1096 (1994).

b. The Applicable Law Rule Should Freeze in Time Those "Development Regulations" Within the Meaning of the GMA That Affect the Type, Degree, or Physical Attributes of New Developments or Uses

Courts have generally agreed that the vested rights doctrine freezes in time "zoning ordinances" and most ordinances requiring a host of other land use authorizations. Courts have struggled, however, with laws that might not fit neatly within this body of law.[289]

The GMA provides a useful starting point for defining this body of law more precisely. That statute defines "development regulations" as

> the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto.[290]

This definition is useful because it focuses on those ordinances that "control" development or uses. Unfortunately, the phrase "including, but not limited to" might inappropriately expand the universe of laws embraced by the definition.

An applicable law rule should therefore freeze in time only those GMA "development regulations" that meet two criteria. First, the rule should freeze only those development regulations that affect the type, degree, or physical attributes of a development or use. This would exclude local ordinances such as those that impose GMA impact fees and that might be triggered by a development application but do not necessarily "control" that development or use other than to potentially increase its cost.[291] It would also exclude ordinances that establish the procedures through which local governments process and consider permit applications.[292] Second, the rule should freeze only prospective regulations, which apply to *new* developments or uses—not retroactive regulations, which apply to both existing and new developments or uses. This would obviate any "health and safety"

289. *See supra* Part II.B.

290. WASH. REV. CODE § 36.70A.030(7) (2000).

291. *See supra* Part II.B.3.

292. *See supra* Part II.B.2. At the risk of complicating the rule, the legislature may want to ensure that developers and local governments are not required to comply with new procedural rules if they have already completed the procedure at issue. *See id.*

exclusion, which has relevance only for the retroactive application of land use laws to existing, nonconforming uses.[293]

c. For Any One Application, the Applicable Law Rule Should Freeze the Relevant Law—Including SEPA Policies—in Effect on the Date an Application Is Deemed Complete Pursuant to RCW 36.70B.070

Although the common law vested rights doctrine focuses on the date a developer files a complete application for a permit, statutory authority provides a ready way to determine that date with greater certainty.[294] Pursuant to the statute governing local land use permitting procedures, a local government has twenty-eight days from the date a developer submits a facially complete application to render a determination as to whether that application was actually complete when submitted at the beginning of the twenty-eight-day period.[295] The local government must find that an application was complete within the meaning of that statute if the application "meets the procedural submission requirements of the local government and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently."[296] Silence from the local government at the end of the twenty-eight-day period constitutes a determination that the application was complete when submitted.[297] However, if, within the 28-day period, the government asks for more information to complete the application, the application cannot be deemed complete until the developer provides that information.[298]

Using this process to fix the date for an applicable law rule retains the essential framework of the vested rights doctrine and keeps the applicable law rule simple by relying on existing statutes. This approach leaves the local government in the relatively strong position of determining when an applicant has actually triggered an applicable law rule. It may also allow a local government to claim, inappropriately, that an application is incomplete simply to buy more time to change the underlying laws to prevent the proposal. These concerns should be moderated not only by the requirement that the local gov-

293. *See supra* Part II.B.1.

294. *See supra* Part II.C (describing how the common law vested rights doctrine addresses this issue).

295. WASH. REV. CODE § 36.70B.070(1) (2000).

296. WASH. REV. CODE § 36.70B.070(2) (2000).

297. *See* WASH. REV. CODE § 36.70B.070(4)(a) (2000).

298. *See* WASH. REV. CODE § 36.70B.070(1)(b); WASH. REV. CODE § 36.70B.070(4)(b) (2000).

ernment define procedural requirements,[299] but also by the developer's ability to challenge the local government for engaging in an unlawful procedure or for failing to follow its own procedures.[300]

The applicable law rule should also ensure that the date of complete application remains the relevant date for freezing SEPA policies in place.[301] Although SEPA provides a necessary overlay to local land use law[302] and derives its authority from its own statute,[303] that does not necessarily mean that the only way to properly further SEPA's goals in the context of land use decisions is by freezing the applicable SEPA policies at some point after the date of a complete application. By using the point of complete permit application to freeze SEPA authority, we not only keep the rule simple, we also remove any temptation from the local government to adopt and apply SEPA policies to condition or deny a permit when the local government would not be able to reach the same result by amending its development regulations.

In a similar vein, the applicable law rule should remain consistent with the GMA by ensuring that a complete application freezes the applicable law, notwithstanding a later administrative or judicial finding that the frozen law violates the GMA.[304] Allowing a developer to

---

299. *See* WASH. REV. CODE § 36.70B.070(2) (2000).

300. WASH. REV. CODE § 36.70C.130(1)(a) (2000). Read literally, this provision might apply only to the "body or officer" with the "highest level of authority to make the determination" on the ultimate application, and might not apply to lower-level staff responsible for rendering a determination of completeness. *See id.*; WASH. REV. CODE § 36.70C.020(1) (2000). This author takes no position on whether the legislature should explicitly allow appeals of determinations of completeness in the context of an applicable law rule.

301. *See supra* Part II.C.6 (discussing the treatment of SEPA substantive authority under the common law vested rights doctrine and the Washington State Department of Ecology's rules). To the extent that we accept the common law application of the vested rights doctrine to SEPA rather than the Department of Ecology's treatment of SEPA regulations, this approach would also retain the doctrine's existing framework. *See id.*

302. *See, e.g.*, Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 65, 578 P.2d 1309, 1313 (1988); Sisley v. San Juan County, 89 Wash. 2d 78, 83, 569 P.2d 712, 715-16 (1977).

303. *See* WASH. REV. CODE § 43.21C (2000).

304. The GMA grants Growth Management Hearings Boards the authority to enter an order invalidating local development regulations that fail to comply with the GMA. *See* WASH. REV. CODE § 36.70A.300(3)(b) (2000); WASH. REV. CODE § 36.70A.302(1) (2000). In 1997, the legislature declared that the invalidated regulations should still govern those applications submitted while the development regulations were still valid. *See* WASH. REV. CODE § 36.70A.302(2) (2000) (enacted by Growth Management Act, ch. 429, § 16, 1997 Wash. Laws 2615, 2633-34). This rule is consistent with an early vested rights case that noted that a court must defer to vested rights when voiding a zoning ordinance. *See* Bishop v. Town of Houghton, 69 Wash. 2d 786, 793, 420 P.2d 368, 373 (1966) ("If vested rights have not intervened, the court may also judicially declare when the regulations become void."). The supreme court has enforced this rule. *See* Association of Rural Residents v. Kitsap County, 141 Wash. 2d 185, 192, 4 P.3d 115, 118-19 (2000). *But see* Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash. 2d 475, 484-85, 513 P.2d 36, 43 (1973) (asserting that those who commence development

lock into a law that violates the GMA invites developers to lobby local legislative bodies to adopt such laws just long enough for the developer to submit an application.[305] Such abuses are unfortunate, but they are best addressed through the political process by electing local legislators who will not bend to such lobbying. The alternative is to adopt an applicable law rule that allows a developer to freeze law on the date of complete application, but with the proviso that if any part of that law is later deemed to violate the GMA, a new law might apply at some later date if the developer has not already relied in good faith, to his or her detriment, on the former law. This would essentially reintroduce the majority vesting law to Washington's minority scheme, complicating and undermining the existing structure.

While conceding this measure of certainty to developers, we can limit their ability to abuse that concession. First, developers should not be allowed to submit a bare-bones application just to freeze the applicable law, only later to "modify" or "supplement" that application in a way that changes the essential type or scale of the original proposal.[306] Second, we should create a rule upon which *all* parties can rely—developers, government, and the public. The applicable law rule would freeze the law in effect on a particular date, and not allow a developer later to "opt" to have some part of a subsequent law apply.

---

in the face of a legal challenge to the validity of the permit run the risk of a court ordering the work to be stopped).

Even when developers have not submitted a complete permit application, the legislature has dictated that certain applications will still be controlled by the now-invalidated law, such as applications for building permits for single-family homes, permits for remodeling or expansions on an existing lot, and certain boundary line adjustments. *See* WASH. REV. CODE § 36.70A.302(3)(b) (2000). Where the board refuses to issue an order of invalidity for a provision that fails to comply with the GMA, that provision continues to remain in effect, and the local jurisdiction may apply it to permit applications. *See* WASH. REV. CODE § 36.70A.302(1)(b) (2000); King County v. Central Puget Sound Growth Management Hearings Bd., 138 Wash. 2d 161, 180-82, 979 P.2d 374, 384-85 (1999).

305. A state commission found insufficient information to determine whether vesting during a period of time a comprehensive plan is on appeal results in the approval of projects that are inconsistent with a comprehensive plan that is found in compliance with the GMA.

> Some Commission members and environmental community representatives expressed disappointment with the data collected. They suggest a further general study of the vesting issue should be considered. The environmental community believes there is anecdotal evidence that Washington's vesting law, which grants vesting at the time a complete application is submitted, creates problems for implementation of the GMA. However, there has been no systematic study to indicate whether vesting in general is a problem.

Study of the Impact of Vesting During GMHB Appeals, Washington State Land Use Study Commission Final Report (Dec. 1998) (visited Feb. 1, 2001) <http://www.ocd.wa.gov/info/lgd/landuse/report/chapter14.html>.

306. *Cf.* WASH. ADMIN. CODE §§ 173-27-100(1) - (2) (1999) (allowing amendments to shoreline substantial development permits that are still within the "scope and intent" of the original permit).

If a developer wants to take advantage of some later law, he or she should refile the application so that *all* new laws apply, not just those portions most favorable to the developer.

d. *For Multiple-Permit Projects, Protect Only Consolidated Applications or "Prompt," Sequential Applications*

Like the common law vested rights doctrine, an applicable law rule would be easiest to craft for individual permit applications, but would be significantly more challenging in the context of projects that require multiple permits. This challenge is met most easily in local jurisdictions that provide for consolidated review of multiple permit applications pursuant to state statute,[307] and where developers take advantage of that provision to pursue one process covering a multitude of permit applications for the same project. In that situation, the local jurisdiction would consider all of the separate permit applications under the law in effect on the date that the developer completed the single, consolidated application. If Pierce County had allowed consolidated review when the facts of *Noble Manor Co. v. Pierce County*[308] arose, the supreme court would not have needed to entertain that case. The developer in *Noble Manor* attempted to file, nearly simultaneously, its short subdivision application (to create the new lots) and its building permit applications (to build the structures once the subdivision was complete), but the county refused to accept the building permit applications because they were for activities on lots that did not yet exist.[309] Moreover, the county changed the underlying law before accepting the eventual building permit applications, and applied that new law to deny the building permits.[310] If the county had allowed consolidated submission and review of both the subdivision and the building permit applications, the former law would have applied to all of the applications.[311]

Not all developers will see consolidated review as an attractive option in all cases. Many projects are much more complicated than the short subdivision and building permits required in *Noble Manor*. Developers may want to assess whether and how a local government approves a relatively preliminary application—such as a proposed sub-

307. *See* WASH. REV. CODE § 36.70B.120 (2000).

308. 133 Wash. 2d 269, 943 P.2d 1378 (1997) (discussed in detail *supra* Part II.D.3).

309. *See id.* at 271-73, 943 P.2d at 1380-81.

310. *See id.* at 272-73, 943 P.2d at 1380-81.

311. In *Noble Manor*, an amicus by the Building Industry Association of Washington urged the supreme court to rule against the county on the basis of the county's refusal to accept the tendered building permit applications with the subdivision application. *See id.* at 272 n.1, 943 P.2d at 1380 n.1. The court refused to consider issues raised only by amicus. *See id.*

division, binding site plan, or conditional use permit application—before investing in the design and other preparation necessary to submit applications for subsequent permits for the same development. This sequential permitting approach allows developers to hedge their bets, but at the risk that the underlying law will change between applications.

We should address multiple-permit projects under an applicable law rule in one of two ways. First, we could insist that local governments allow consolidated review (as RCW 36.70B.120 already requires) and that developers take advantage of that review to submit consolidated permit applications. Under this approach, if a developer submits one application after another, he or she cannot argue that the former application has any effect on the law applicable to the latter one. This would enhance simplicity and would protect those developers that are truly ready to develop, but it would not necessarily help those who are trying to manage their risks.

The other, more-developer friendly way to approach multiple-permit projects would be to allow developers to "link" one permit application to the law applicable to an immediately preceding permit application, but only if the developer files the next permit application "promptly."[312] Promptness could be defined perhaps as submitting the next application either before a final decision is rendered on the preceding one, or within some period of time (such as twenty-eight days) after that decision. If developers stall between permit applications, they would run the risk that the law might change and result in denial of a subsequent permit. Although this approach would be more cumbersome and complicated, it would be consistent with the principle of protecting those who are actually ready to develop, but without forcing them to invest in potentially wasted permitting efforts.

Both of these approaches would involve complications. The applicable law rule would have to prevent developers from "amending" or "supplementing" their projects in ways that change the projects from what the developers originally proposed to lock in the applicable law.[313] Because both approaches might result in saddling a developer with a legally-created lot on which he cannot establish the use he originally anticipated, the applicable law rule may have to embrace some type of "reasonable use" exception.[314]

---

312. This approach would not go as far as Overstreet and Kirchheim's proposal to codify the "inextricably linked" case law. Overstreet & Kirchheim, *supra* note 11, at 1095. *See supra* Part II.D.4 (discussing the "inextricably linked" case law).

313. *See supra* Part II.C.7.

314. Many local land use codes provide that if strict application of a particular body of land use law precludes all "reasonable use" of property, the local government may issue certain types

C. Why Not? Answering the Potential Naysayers

Some will disagree with the particular solutions offered by this Article. Others likely will assail its fundamental premise. They will argue that the legislature should not, or cannot, attempt to reform the vested rights doctrine. The legislature should not be deterred by these arguments.

1. Why Change Something That Is a "Model" for the Rest of the Country?

This Article maintains that the details of Washington's vested rights doctrine fail in crucial respects to meet the mission of providing certainty and fairness.[315] This Article therefore counsels against viewing Washington's doctrine as some kind of model more worthy of emulation than reform. Overstreet and Kirchheim present no evidence in support of their claim that "[i]n essence, Washington has been a trailblazer for states like California and Texas, which have adopted vesting legislation similar to Washington's. In fact, California and Texas have used Washington's law as a starting point."[316] Indeed, given that California's statute predates Washington's by three years,[317] and that Texas enacted its original statute at nearly the same time that Washington adopted its vested rights statutes,[318] one must

---

of conditional use permits or variances to allow some reasonable use. *See, e.g.*, KING COUNTY CODE § 21A.24.070.B (2000); PIERCE COUNTY CODE § 18E.20.040 (1998); SEATTLE MUNICIPAL CODE § 22.808.010.C.3 (2000); SNOHOMISH COUNTY CODE § 32.10.610 (1998); SPOKANE MUNICIPAL CODE §§ 11.02.0175, 11.19.3093.C (1996). *See also* WASH. REV. CODE § 36.70A.090 (2000) (encouraging local governments to "provide for innovative land use management techniques").

315. *See generally supra* Part II.

316. Overstreet & Kirchheim, *supra* note 11, at 1068-69. Overstreet and Kirchheim cite no authority with respect to California. For an analysis of Texas law, Overstreet and Kirchheim point only to David Hartman, Comment, *Risky Business: Vested Real Property Development Rights—The Texas Experience and Proposals for the Texas Legislature to Improve Certainty in the Law*, 30 TEXAS TECH. L. REV. 297 (1999). *See* Overstreet & Kirchheim, *supra* note 11, at 1068 n.144. Hartman's Comment discusses Virginia's estoppel-based vesting legislation (Hartman, *supra*, at 321) and California and Hawaii's contractual vesting legislation (*id.* at 324-26), but no Washington legislation or case law.

317. *Compare* Act of Sept. 13, 1984, ch. 1113, § 8, 1984 Cal. Stat. 3744-45 (adopting the California vested rights statute codified at CAL. GOV'T CODE §§ 66498.1 *et seq.*) *with* Act of Apr. 20, 1987, ch. 104, §§ 1-2, 1987 Wash. Laws 317 (codified at WASH. REV. CODE §§ 19.27.095(1), 58.17.033(1)) (the vested rights statutes for building permits and subdivisions, respectively, discussed *supra* at Part II.D.2).

318. *Compare* Act of May 30, 1987, 70th Leg., R. Sess., ch. 374, 1987 Tex. Gen. Laws 1838-89 (adopting the original Texas vested rights statute, as cited in Hartman, *supra* note 316, at 312 n.107) *with* Act of Apr. 20, 1987, ch. 104, §§ 1-2, 1987 Wash. Laws 317 (codified at WASH. REV. CODE §§ 19.27.095(1), 58.17.033(1)) (the vested rights statutes for building permits and subdivisions, respectively, discussed *supra* at Part II.D.2).

question the historical foundation of any claim that those states have followed Washington's lead.

This Article also suggests that other states should not necessarily look to Washington as a model of fairness.[319] From state to state, vested rights are largely a function of valid expectations shaped by state law.[320] For nearly half of a century, Washington has fostered an expectation that a permit application triggers the doctrine in some fashion. It would be politically difficult, and ultimately unfair, to alter that fundamental expectation in Washington now. Expectations in most other states are shaped by notions of estoppel that allow local jurisdictions to apply new land use laws as long as the developer has not made a substantial change of position in reliance on the current law.[321] Lawmakers in other states must assess prevailing expectations, how well their states have been served by those expectations, and how their states might be better served by altering those expectations. Likewise, the Washington legislature should keep its eyes fixed on what is fair in Washington without sensing some responsibility to lead the rest of the nation.

2. Why Not Leave It to the Judiciary?

Only the legislature is positioned to wipe the slate clean and provide a comprehensive solution to the muddled vested rights doctrine. We cannot expect the judiciary to offer that solution. Judges must remain constrained by the facts and issues presented to them in each case. It would be the rare case, indeed, that would allow one decision to address all of the questions that the doctrine currently answers inadequately. Even if a case did present a court with the opportunity to add clarity, that court would likely feel constrained by past precedent, which, as described above, too often provides either confusing or questionable answers.

---

319. *Cf.* Overstreet & Kirchheim, *supra* note 11, at 1095 ("[W]e wholeheartedly urge other states to adopt, by case law or statute, the Washington rule.").

320. *See* John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27, 27-33 (1996).

321. *See generally* E.C. YOKLEY, 2 ZONING LAW AND PRACTICE §§ 14-5 to 14-7 (4th ed. 1978 & Supp. 2000); Linda S. Tucker, Annotation, *Activities in Preparation for Building as Establishing Valid Nonconforming Use or Vested Right to Engage in Construction for Intended Use*, 38 A.L.R.5th 737 (1996); Lynn Ackerman, Comment, *Searching for a Standard for Regulatory Takings Based on Investment-Backed Expectations: A Survey of State Court Decisions in the Vested Rights and Zoning Estoppel Areas*, 36 EMORY L.J. 1219 (1987).

3. Won't the Legislature Be Paralyzed by Political Gridlock?

Supplanting the vested rights doctrine with a statutory applicable law rule will be a politically contentious endeavor. Contention need not mushroom into paralysis, however. The legislature should keep in mind that it does not have to change the basic framework of the doctrine to reform it. For nearly half a century, Washington has used a bright-line minority rule that emphasizes certainty by focusing on the date of application. Although the details of that rule have become confused, and although *Noble Manor*[322] and its progeny threaten to undermine fairness in the context of multiple-permit applications, the essential framework has remained intact. The goal of reform should be to restore the details of the basic framework clearly and fairly.

The legislature should not tolerate attempts by either side of the vested rights debate—those who favor stronger land use regulation and those who favor less regulation—to alter the doctrine's essential balance in the name of reforming the doctrine. If local governments or those who support more stringent land use regulation push to alter the doctrine's essential framework (either by selecting a different point in time at which to freeze applicable law or by adopting the majority rule), legislators should press those advocates to demonstrate how the current framework has failed to serve Washington.

On the other side of the debate, the legislature should not countenance complaints from developers about the Washington framework's essential balance. To put it bluntly, developers have a sweet deal in Washington. Compared to the rest of the country, the scales are tipped heavily in their favor.[323] Washington developers have enjoyed a right to lock in land use laws simply by filing a permit application. They should concede their favored status and not try to tip the scales further in their direction.[324]

Unfortunately, legislators should expect arguments from both sides that impugn the other's motives and cast its own side as needing special protection. According to Overstreet and Kirchheim, for example, local elected officials are too busy to give the requisite attention to land use permitting decisions, and, as a result, remain under

322. 133 Wash. 2d 269, 943 P.2d 1378 (1997).

323. *See generally supra* note 321 (authority explaining the majority rule).

324. Overstreet and Kirchheim applaud this favored status. *See, e.g.*, Overstreet & Kirchheim, *supra* note 11, at 1047 n. 18 ("Washington's vested rights doctrine is, indeed, the most protective of constitutional rights in the nation."); *id.* at 1095 ("Washington should be proud. Our state's vested rights doctrine is the most protective in the nation."). They push for an even sweeter deal for developers. *See, e.g.*, *id.* at 1095 ("In general, we suggest that the guiding principles for future interpretation of the doctrine should be certainty and fairness, with all doubts resolved in favor of the property owner.").

the sway of rogue development staff who capriciously suggest permit conditions that increase the cost of a project.[325] In Overstreet and Kirchheim's view, local legislators—who would otherwise have little interest in changing land use laws or denying a development permit—cave to political pressure to block developments "[u]sing 'environmental protection' or 'growth management' as cover."[326] For Overstreet and Kirchheim, land use is a game of politics stacked against developers.[327]

For every snapshot like the one offered by Overstreet and Kirchheim, others in this state could offer the negative. Developers frequently support local legislators financially, lobby them to enact plans and regulations that protect developers' relatively focused interests, and employ consultants and attorneys who have close working relationships with development planning staff and local officials who use those connections and that skill to permit projects with a minimum of public exposure or resistance.

---

325. *See id.* at 1050 n.32.

326. *Id.* at 1052. *See also id.* at 1052 (describing a hypothetical council "caving in to political pressure from a handful of neighbors"); *id.* at 1057 n.66 ("The common reason local governments sometimes radically change their land use standards, despite their obvious interest in stable planning, is the political pressure asserted on local politicians."); *id.* at 1090 n.287 ("[S]ometimes—legal liability or not—elected officials will bow to political pressure to stop unpopular projects."). Overstreet and Kirchheim also attempt to paint developers as having to overcome incredible odds. As an example of "how multiple approvals can affect vested rights" in the context of residential development, Overstreet and Kirchheim quote a professor who describes how one project "required 65 permits from 12 separate agencies," and how the odds are against a developer successfully obtaining all of those permits. *Id.* at 1054. But Overstreet and Kirchheim relegate to a footnote the concession that the professor was describing the permitting of a petrochemical plant, not a residential development. *See id.* at 1054 n.51.

327. *See id.* at 1052 ("Perhaps in the old days, when local governments generally wanted growth, politics favored property owners. This is not the case any more. Now politics usually work against property owners."). Overstreet and Kirchheim confuse the exercise of legislative authority (which is *not* bounded by the vested rights doctrine) with the exercise of quasi-judicial authority (which *is* bounded by the doctrine). For example, they present *Donwood, Inc. v. Spokane County*, 90 Wash. App. 389, 395, 957 P.2d 775, 778 (1998) as

> describing local governments' land use regulatory power as a "broad constitutional grant of *political* authority." The fact that a Washington court has characterized the land use approval process as being part of a local government's "political authority" should dispel any myths that politics plays no role in the development approval process.

Overstreet & Kirchheim, *supra* note 11, at 1051 n.40 (emphasis in original). The clause from *Donwood* was not directed at the *quasi-judicial* function of "the land use approval process." Instead, the court was explaining why a county had the *legislative* authority to adopt a particular transitional zoning code provision. *See Donwood*, 90 Wash. App. at 392-93, 957 P.2d at 777 (describing the transitional zoning code); *id.* at 395-96, 957 P.2d at 778-79 (full context for the excerpt selectively quoted by Overstreet & Kirchheim). The *Donwood* court in no way suggested that application of that code provision through the permitting process was some kind of political exercise.

Although infused with some factual foundation, neither picture fully captures reality. All stakeholders in every land use arena will use every legal means of persuasion available to shape laws to favor their view of the world. We should expect these battles and should enact procedural laws that ensure fair fights. We should not focus on the interests of only one set of stakeholders and warp the rules of the game to serve them.

In short, both sides of the debate should exercise some restraint. The Washington land use bar should find itself standing on a wide swath of common ground when considering the need to clarify the vested doctrine, even when discussing the principles that should shape the doctrine's details. Legislators should not hesitate to discount those who run too far out of bounds.

4. Won't Constitutional Protections Limit the Legislature's Ability to Act?

The constitution does not block the legislature from reforming the vested rights doctrine. Washington's vested rights doctrine is not dictated by the constitution. If it were, one of two things would have to be true: (1) the other states that follow the majority rule violate constitutional guarantees; or (2) something unique about the Washington Constitution mandates the particular rule in this state. Neither is the case. Constitutional protections have not shaped the vested rights doctrine in the past and should not dictate an effort to reform it.

a. Takings

Constitutional protections against governmental takings of property without just compensation[328] do not dictate the contours of Washington's vested rights doctrine. Once established, a property right—including a vested one—is subject to constitutional protections against governmental taking of property without just compensation.[329] But this truism says nothing about how one establishes a vested right in the first instance, or about the ultimate scope of that right. This explains why no Washington court has invoked constitutional takings protections to explain the details of Washington's vested rights

328. *See* U.S. CONST. amend. V; Wash. CONST. art. I, § 16.

329. *See, e.g.*, Department of Ecology v. Grimes, 121 Wash. 2d 459, 478, 852 P.2d 1044, 1054-55 (1993) ("A vested water right is a type of private property that is subject to the Fifth Amendment prohibition on takings without just compensation."); Island County v. Dillingham Dev. Co., 99 Wash. 2d 215, 224, 662 P.2d 32, 37-38 (1983) (holding that without compensation, government may not impair vested rights of riparian owners in submerged lands).

doctrine. These protections should remain irrelevant to any effort to reform the doctrine.

b. *Equal Protection*

Equal protection concerns favor a rule that can be applied consistently and fairly. When announcing the vested rights doctrine in 1954, the Washington Supreme Court acknowledged this by pointing to state equal protection guarantees to justify mandamus as the foundation for the vested rights doctrine.[330] The basic idea was to preclude administrators, who presumably carried a ministerial duty to apply the law as written, from applying standards differently to different applicants.[331] Equal protection makes sense in the context of an assertion that the vested rights doctrine is available only to force performance of a ministerial duty. When a municipality has in place a truly nondiscretionary duty, it must apply that duty consistently to all persons.

But equal protection goes no further than that. It stands only for the proposition that a rule must apply consistently to everyone within a given class. It does not suggest what that rule must be. If, for example, every applicant were subject to the laws in effect on the date of permit *issuance*, equal protection would be guaranteed just as readily as it is under a rule in which every applicant is subject to the laws in effect on the date of *application*.

c. *Due Process*

Due process likewise serves as a useful overlay to the vested rights doctrine without dictating its shape. Beginning in the mid-1980s, some Washington courts inserted due process as though it were the original motivation for the vested rights doctrine more than thirty years earlier. This has tended to take the form of assertions that the doctrine either provides "a 'date certain' standard that satisfies due process requirements,"[332] or "is based on constitutional principles of fundamental fairness."[333] Statements like these only echo the fairness/certainty rationale for the vested rights doctrine. To the extent that these statements attempt to invoke procedural due process, they merely underscore the need to fix a date upon which certain rights

330. State *ex rel.* Ogden v. City of Bellevue, 45 Wash. 2d 492, 275 P.2d 899 (1954).

331. *See id.* at 495, 275 P.2d at 902.

332. Erickson & Assocs., Inc. v. McLerran, 123 Wash. 2d 864, 870, 872 P.2d 1090, 1094 (1994).

333. Vashon Island Comm. for Self-Government v. King County Boundary Review Bd., 127 Wash. 2d 759, 768, 903 P.2d 953, 957 (1995). *See also* Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 636, 733 P.2d 182, 191 (1987); West Main Assocs. v. City of Bellevue, 106 Wash. 2d at 47, 51, 53, 720 P.2d 782, 785-86 (1986).

accrue—they do not dictate when that date must be.[334] To the extent that such statements attempt to invoke substantive due process concerns, they just underscore that the vested rights doctrine should be consistent with notions of fairness—they do not dictate the shape that a fair application of the doctrine must take.

Overstreet and Kirchheim point to a "constitutional vested rights doctrine" premised on due process violations.[335] This assertion lacks historical and legal foundation. Overstreet and Kirchheim concede that no Washington court has ever recognized a distinct, constitutional vested rights doctrine,[336] and that to the extent Washington courts have mentioned due process concerns in vested rights cases, those courts have not explained whether they refer to the federal or state due process clauses.[337] In fact, no court mentioned due process in vested rights case law until the vested rights doctrine was more than a quarter-century old. For a Washington court to have shaped the doctrine through substantive due process, the court would have had to find that some alternative form of the doctrine amounted to an irrational or arbitrary interference with property rights.[338] No court has ever applied this test to the vested rights doctrine, and, even if one were to do so, there is no reason to think that the current common law doctrine is the only one that could pass muster.[339]

---

334. It is within this context that one must critique Overstreet and Kirchheim's conclusion that "Washington's constitution provides broad due process protections and [that] vested rights are the quintessential expression of due process; the government cannot change the law midstream and apply the new law retroactively." Overstreet & Kirchheim, *supra* note 11, at 1091. *See also id.* ("The 'process' of 'law' that is 'due' under the Washington or United States Constitution is to have the legal standards in effect at a specific point applied to a person. . . ."). Even if one were to accept the premise that vested rights are an expression of due process, no authority exists for asserting that due process protections dictate *where* a state must fix the "midstream" point.

335. *See id.* at 1090-91 ("Washington courts, at least indirectly, have been deciding vesting cases on constitutional grounds, both before and after the enactment of the 1987 vesting statute.").

336. *See id.* at 1090 ("[N]o Washington case directly holds that there is a separate constitutional doctrine. . . .").

337. *See id.* at 1072 n.161, 1091 n.290.

338. *See* Sintra, Inc. v. City of Seattle, 119 Wash. 2d 1, 21, 829 P.2d 765, 776 (1992). To probe whether a regulation crosses this due process threshold, Washington courts ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner. *Id. See generally* Talmadge, *supra* note 108, at 894-901 (historical treatment of due process constraints on the police power in Washington).

339. Proffering other case law, Overstreet and Kirchheim mistakenly conclude that "Washington cases. . .address the constitutional purpose of Washington's vested rights doctrine by equating vesting protections with yet another due process concept, the prohibition against retroactive legislation." Overstreet & Kirchheim, *supra* note 11, at 1072. Overstreet and Kirchheim premise this conclusion on *State* ex rel. *Hardy v. Superior Court*, 155 Wash. 244, 248, 284 P. 93, 95 (1930). Overstreet & Kirchheim, *supra* note 11, at 1072 n.165. Although *Hardy* speaks

Overstreet and Kirchheim next conclude that a "constitutional vesting doctrine" must exist because courts have allowed "constitutional remedies" when local jurisdictions misapply the doctrine.[340] They reason, "Of course, a constitutional remedy would not be necessary to cure violations of mere common-law or statutory rights, so one is forced to conclude a constitutional doctrine protects vested rights. . . ."[341] This reasoning is unsound. To find a violation of due process in land use permitting, a court need only determine that the local jurisdiction improperly interfered with land use permitting procedures.[342] Land use permitting procedures are shaped by statute and by local law,[343] however, the fact that a constitutional remedy exists for a violation of such procedures does not prove that the procedures are constitutional in nature. Even the decision that Overstreet and Kirchheim use to illustrate their point demonstrates that the existence of a constitutional remedy does not mean that the underlying law is dictated by due process guarantees.[344] In *Mission Springs, Inc. v. City of Spokane*, the court explained that a due process violation may be premised on improper deprivation of a *"state-created* property right"[345] and that "[p]roperty interests are *not created by the constitution* but are reasonable expectations of entitlement derived from independent sources such as state law."[346] The *Mission Springs* court found that a city violated due process guarantees by flouting the vested rights doctrine and a local grading code.[347] This does not establish that the local grading code, which is driven by state statute and a uniform professional code,[348] is a "constitutional" body of law. Like the grading

to the prohibition against retroactive legislation, it does not mention the due process clause, and speaks of constitutional protections only in *contrast* to vested rights: "If an ordinance relates to a subject-matter within the competency of the municipal corporation and is enacted in the manner prescribed, the general rule is that the courts will not interfere unless it appears on its face that it is arbitrary, oppressive, *or* impairs some vested right *or* contravenes some constitutional provision." *Hardy*, 155 Wash. at 250, 284 P. at 95 (quoting MCQUILLIN ON MUNICIPAL CORPORATIONS (2d ed.), § 840) (emphasis added). Furthermore, as Overstreet and Kirchheim themselves point out in a different context, *Hardy* is not a land use vested rights decision and does very little to illuminate the land use doctrine announced nearly a quarter-century later. *See* Overstreet & Kirchheim, *supra* note 11, at 1074 n.173, 1075 n.179.

340. Overstreet & Kirchheim, *supra* note 11, at 1092-93.

341. *Id.* at 1093.

342. *See* Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 965, 954 P.2d 250, 258 (1998).

343. *See generally* WASH. REV. CODE § 36.70B (2000) (establishing parameters for local land use permitting procedures).

344. *See Mission Springs*, 134 Wash. 2d at 947, 954 P.2d at 250. *See* Overstreet & Kirchheim, *supra* note 11, at 1092-92 nn.299 & 302 (invoking *Mission Springs*).

345. *Mission Springs*, 134 Wash. 2d at 962, 954 P.2d at 257 (emphasis added).

346. *Id.* at 962 n.15, 954 P.2d at 257 n.15 (emphasis added).

347. *See id.* at 962-69, 954 P.2d at 257-60.

348. *See* Int'l Conference of Building Officials, 1 UNIFORM BUILDING CODE app. §§

code, the vested rights doctrine remains a creature of state law that the legislature may use to shape expectations about property interests.

Another reason to question Overstreet and Kirchheim's description of a "constitutional vested rights doctrine" is the uncanny coincidence that this constitutional doctrine seems to mandate, "at a minimum, the current (very broad) scope of Washington's common-law and statutory vested rights."[349] Going even further, Overstreet and Kirchheim assert that this is just a minimum and that "the parameters of the constitutional doctrine—reflecting the legislature's and courts' unmistakable decision to favor property owners—must be broader that [sic] the common-law or statutory doctrines."[350] That a "constitutional vested rights doctrine" may, without citation to any authority, be so malleable as to necessarily result in Overstreet and Kirchheim's developer-sided vision should be reason enough to doubt that due process concerns have shaped the vested rights doctrine in the past or that they should shape the doctrine in the future.

Even the commentators to whom Overstreet and Kirchheim point to as authorities on the vested rights doctrine stress that the vested rights doctrine, whether in Washington or elsewhere, is not shaped by due process concerns. Richard Settle observes that "[t]he legal basis for Washington's vested rights doctrine never has been articulated."[351] Settle discounts both substantive due process and takings as possible foundations for Washington's doctrine.[352] As a matter of federal law, John Delaney and Emily Vaias conclude that property interests, like vested rights, "of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."[353]

The contours of Washington's vested rights doctrine are not dictated by due process or any other constitutional provision. The actual foundation of the vested rights doctrine has remained a balance between private and public interests. The legislature is uniquely posi-

---

3302–3318, at 1-407 to 1-412 (1997) (excavation and grading); WASH. REV. CODE § 19.27.031 (2000) (adopting Uniform Building Code as state standard); WASH. ADMIN. CODE § 51-40 (1999) (tailoring Uniform Building Code to Washington).

349. Overstreet & Kirchheim, *supra* note 11, at 1094.

350. *Id.*

351. SETTLE, *supra* note 22, § 2.7(b), at 42.

352. *Id.* at 42-43. Overstreet and Kirchheim laud Professor Settle as "undisputedly one of the most prominent commentators on Washington land use law." Overstreet & Kirchheim, *supra* note 11, at 1076.

353. Delaney & Vaias, *supra* note 320, at 29 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1992). *See* Overstreet & Kirchheim, *supra* note 11, at 1045 n.6 ("This outstanding piece of scholarship is one of the most important articles every written about vested rights.").

tioned to strike a balance that provides certainty and remains consistent with reasonable expectations.

D. The Bottom Line: We Must Reclaim Certainty and Fairness

Washington accepted an explicit trade-off when it abandoned the majority vested rights rule. In exchange for giving up the ability to probe the equities of each individual case, we gained a practical, bright-line rule to enhance certainty and predictability while ensuring a measure of fairness.

Unfortunately, in many key respects, we have eroded the certainty and fairness that justified our unique approach. A doctrine that should enhance certainty fails to answer the most crucial questions clearly, consistently, or accessibly. A doctrine that should ensure fairness is quickly tipping far to one side in the context of multiple-permit projects.

We need to reclaim certainty and fairness from amid the muddled details of the vested rights doctrine. The Washington legislature built a solid foundation for this effort by reforming local land use permitting procedures in 1995; today, most local jurisdictions concurrently follow a reasonably predictable and fair set of procedures to render permit decisions.[354] The legislature should complete that task by codifying an applicable law rule that replaces Washington's vested rights doctrine clearly and fairly.

354. *See* Integration of Growth Management Planning and Environmental Review, ch. 347, 1995 Wash. Laws 1556 (codified at WASH. REV. CODE § 36.70B).