KITTITAS COUNTY
LAND USE HEARING EXAMINER

IN THE MATTER OF	)	
	)	File No. SE-21-00006
Nunnally Holdings, LLC –	)	
Appeal of Administrative Interpretation	)	NUNNALLY HOLDINGS
Requiring Plat Alteration Application	)	REPLY MEMORANDUM
	)	
	)	

Nunnally Holdings, LLC ("Nunnally Holdings" or "Appellant") submits this Reply Memorandum in response to *County's Hearing Brief* and Statement of Dan Carlson, dated September 20, 2021.[1]

I. INTRODUCTION

Kittitas County filed *County's Hearing Brief* (*"County Brief"*) and *Statement of Dan Carlson (*"*Carlson Decl.*"*)* on September 20, 2021. The supplemental submissions raise new issues and introduce new facts that are outside the scope of the *Code Interpretation.* Nunnally Holdings will limit its response to rebuttal of arguments presented in the supplemental materials.

Kittitas County asks the Hearing Examiner to ignore three decades of interpretation and application of state and local subdivision law.

> In other words, whether or not the county misinterpreted or mis-enforced the need for a plat amendment in this sort of instance previously *is irrelevant*. What is relevant is that the county now sees the correct interpretation/enforcement of the law (statutory interpretation), is not following the prior course (ultra vires acts), and is dispatching its responsibility and duty to rightly enforce the law (governmental function).

County Brief 4:6-9. The history is not irrelevant. The uncontroverted facts are that the Nunnally Holdings parcels were created through lawful processes in accordance with applicable law. All processes were exempt from subdivision law. There were no plats or short plats. And each of

[1] Hearing Examiner has allowed Nunnally Holdings an opportunity to submit a reply brief with respect to issues and arguments raised in Kittitas County's supplemental filings. Nunnally Holdings limits its response to rebuttal of issues and arguments raised in *County's Hearing Brief* and *Statement of Dan Carlson.*

those land use actions are protected by the doctrine of finality. See e.g. *Snohomish County v. Pollution Control Hearings Board,* 187 Wn.2d 346, 373, 386 P.3d 1064 (2016) (distinguishing between vesting statutes and the doctrine of finality of land use decisions). Kittitas County may not collaterally attack those valid land use actions nineteen (19) years later through the artifice of a "plat alteration." There is no plat and there is no alteration.[2]

It is important to put both this current appeal and interpretation of the subdivision ordinance in proper context. The Nunnally Holdings parcels were legally created through unambiguous statutory and ordinance procedures recognizing administrative segregations and boundary line adjustments as exempt from subdivision laws. The parcels were legally created and the land use decisions were final. For three decades, Kittitas County recognized rural parcels created under these procedures as legally established properties subject to the full panoply of regulatory requirements including private road construction, public road access requirements, water right and system development, septic and waste disposal regulations and applicable zoning use and setback requirements. At the time of creation, the parcels were exempt from all provisions of the subdivision statute as unambiguously set forth in RCW 58.17.040(2) and (6).[3] Development and use of the parcels, however, were subject to zoning and development regulations in force at time of actual use or construction.

Kittitas County spends an inordinate amount of time addressing red herring issues such as vesting, equitable estoppel and statutory use protections under RCW 58.17.170(2)(a). Nunnally

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[2] Kittitas County acknowledged in the course of the public hearing that it did not review or approve access locations (including easements shown on a subsequent record of survey) in the context of review of administrative segregations and boundary line adjustments. It was further acknowledged that a record of survey cannot and does not establish a legal easement. Since the *Code Interpretation* was built on the assumption that there had been a change in prior approval (i.e. a relocation of the easement), the current provisions of RCW 58.17.215 require a "long plat alteration application" in order to provide current review of the proposed private roadway serving the properties. Since the easement shown on the record of survey was not the subject of prior county review and approval, there cannot be an alteration of the prior administrative action. The fundamental premise is well established with respect to alterations of short plats and long plats. *Hanna v. Margitan,* 193 Wn. App. 596, 373 P.3d 300 (2016) (holding that the addition of a new private roadway easement did not require processing under the "plat alteration" provisions of RCW 58.17.215 unless the change was in direct conflict with a specific note or condition on the plat or short plat).

[3] Kittitas County focuses its argument on the administrative exemption provided by RCW 58.17.040(2). (Exemption of land for division into lots or tracts five acres or larger "...unless the governing authority of the city, town or county in which the land is situated shall have adopted a subdivision ordinance requiring plat approval of such divisions: ...."). While the initial step in parcel creation involved administrative segregations under applicable law, the final parcels currently owned by Nunnally Holdings were created through legal boundary line adjustment processes under RCW 58.17.040(6). Boundary line adjustments remain exempt from all provisions of RCW Ch. 58.17. At best, the arguments presented by Kittitas County relate to an alteration of a boundary line adjustment which is an exempt process.

Holdings has not asserted either vesting or equitable estoppel as a basis for its appeal. Kittitas County attempts to conflate administrative segregations and boundary line adjustments. The Hearing Examiner should be mindful that the Nunnally Holdings parcels were created through a "boundary line adjustment" and the exemption for "boundary line adjustments" remains in full force and effect under both state and local subdivision law. Any alteration of a "boundary line adjustment" is similarly exempt from all provisions of both state and local subdivision laws.

II. FACTUAL SUBMISSIONS

Kittitas County supplemented its argument with the *Statement of Dan Carlson ("Carlson Decl.").*[4] The statement includes several inaccurate, incorrect and incendiary factual assertions that call for a response. We have provided the *Second Declaration of Chris Cruse* for consideration.

2.1 Administrative Segregation and Boundary Line Adjustment Procedures Were Compliant with Applicable Law.

Mr. Carlson leads with an argument that Kittitas County procedures were designed to "…evade state and local laws related to lot size, zoning requirements, and frequency of lot division." The specific argument was as follows:

> 4. I have reviewed the declaration of Mr. Cruse. *The two administrative segregation applications attached to the declaration of Mr. Cruse are examples of "shuffles" which evaded state and local laws related to lot size, zoning requirements, and frequency of lot division. .... These were done without regard to minimum lot sizes allowable by then current zoning, and by being technically one application, avoided the prohibition of re-segregating previously segregated land on the theory that it had not been previously segregated because this was the first application seeking to do so – regardless of the fact that this application did in multiple times.*

Carlson Decl. ¶4. No court has found the processes to be illegal. The land use processes did not "evade state or local law" but rather were implemented through authorized exemption processes compliant with both state and local subdivision laws. All lots created or adjusted complied with

[4] Dan Carlson is the current Director of Community Development Services for Kittitas County and is the party that issued the *Code Interpretation* that is the subject of this appeal proceeding. The declarant failed to provide any foundation for factual statements regarding administrative segregation processes and procedures applicable during times prior to his employment with Kittitas County. Nunnally Holdings has provided substantiated testimony from David Taylor, the Department and Planning Director at times relevant to the creation of the Nunnally Holdings parcels.

applicable zoning and minimum lot size established through the zoning ordinance. *Second Cruse Decl. ¶3.* No evidence has been provided to establish a violation of applicable law. The doctrine of finality bars a collateral attack on the prior land use decisions. *Chelan County v. Nykreim,* 146 Wn.2d 904, 933, 52 P.3d 1 (2002). The court's conclusion in *Nykreim* is particularly applicable to this case:

> As *amici curiae* point out, if this court allows local government to rescind a previous land use approval without concern of finality, innocent property owners relying on a county's land use decision will be subject to change in policy *whenever a new County Planning Director disagrees with the decision of the predecessor director.* They also assert that land use decisions from this court emphasis the need for property owners to rely on an agency's determinations with reasonable certainty.

Id. 146 Wn.2d at 933. It appears that Mr. Carlson's view is inconsistent with his predecessors. One thing is clear, however, and that is that the county followed the same processes for nearly three decades. And those policies are in direct conflict with the "new interpretation" that gave rise to this appeal.

Mr. Carlson also provides incorrect information with the subject parcels. He stated as follows:

> 5. The twelve parcels depicted on the original record of survey were created from a single parcel (Parcel #1718-04040-0001). The twelve parcels shown in the record of survey were created via a "shuffle", a true and correct copy of the application materials are attached hereto as Exhibit "A".

Carlson Decl. ¶5. The parcels identified are not the "Nunnally Holdings parcels" but unrelated segregations located in an entirely different portion of Kittitas County. *Second Decl. ¶4.* The correct application and approval documents for the Nunnally Holdings properties are set forth in the *Declaration of Chris Cruse Exhibit C.* There were multiple parent or original parcels for the segregation and boundary line adjustments. A simple review of the record submitted by Mr. Carlson shows that the referenced applications were submitted by Arlene Anderson were approved (February 12, 2004) nearly two years after the filing of the record of survey for the Nunnally Holdings properties (December 31, 2002). They also involve properties located in a different area in the County. *Second Cruse Decl. ¶4.*

Mr. Carlson also acknowledges that Kittitas County did not require a long plat alteration application for the Flying M Ranch Boundary Line Adjustment (BL-20-00006). *Carlson Decl. ¶6.* The Flying M Ranch boundary line adjustment was approved on December 16, 2020. The boundary line adjustment for Flying M Ranch included reconfiguration of all parcels, elimination of easements identified on the original record of survey, and establishment of new easement locations. This decision on Flying M Ranch was issued three weeks after Nunnally Holdings submitted a complete grading permit application. *Story Decl. ¶4.* Mr. Carlson characterized that decision as a "...misunderstanding that they were still regulated by the long repealed administrative segregation provisions of Kittitas County code, rather than the current and applicable section of Ch. 58.17 RCW." *Carlson Decl. ¶6.* In three decades of administrative subdivision ordinance, Nunnally Holdings is the first (and only) property owner that has been subjected to a requirement for submission of a "Long Plat Alteration Application". A local entity "...bears the burden to show its interpretation was a matter of pre-existing policy." *Ellensburg Cement Products, Inc. v. Kittitas County,* 179 Wn.2d 737, 753, 317 P.3d 1037 (2014). Kittitas County's pre-existing policy was contrary to its position in the *Code Interpretation.*

III. ARGUMENT AND AUTHORITIES

Kittitas County makes two primary arguments in its supplemental briefing: (1) that the "vested rights" doctrine is not applicable in this proceeding; and (2) that past interpretation and pattern of enforcement is irrelevant in this proceeding. Nunnally Holdings will address each argument.

2.1 Kittitas County confuses "vested rights" with the doctrine of finality in land use decisions.

Kittitas County incorrectly characterized Nunnally Holdings's position as being based on the assertion of "vested rights". Nunnally Holdings has not made that argument because this is not a "vested rights" case. It is a case involving the doctrine of finality coupled with application of the rules of statutory interpretation.

"Vested rights" and the doctrine of finality are separate and distinct legal doctrines. While the vested rights doctrine and the doctrine of finality of land use decisions are closely related, the court in *Snohomish County v. Pollution Control Hearings Board,* 187 Wn.2d 346, 373, 386 P.3d 1064 (2016) clarified the distinction between the two doctrines. Vesting is a statutory construct applicable to "pending permit applications". *Id.* The doctrine of finality, on the other

hand, applies to "projects that already have permits issued". The Nunnally Holdings parcels were legally created through applicable statutory and ordinance processes and became final with Kittitas County's administrative approval on February 3, 2003. *Cruse Decl.* ¶6(a) – Exh. B p. 10. The doctrine of finality applies in this case.

The doctrine of finality is well established in this state. See *Chelan County v. Nykreim,* 146 Wn.2d 904, 931-32, 52 P.3d 1 (2002) (establishing the doctrine of finality in the context of a boundary line adjustment); *Durland v. San Juan County,* 182 Wn.2d 55, 60, 340 P.3d 191 (2014); *Snohomish County v. Pollution Control Hearings Board,* 187 Wn.2d at 373-74; and *RMG Worldwide LLC v. Pierce County,* 2 Wn. App. 2d 257, 275-76, 409 P.3d 1126 (2017). "This court has faced numerous challenges to statutory time limits for appealing land use decisions and has repeatedly concluded that the rules must provide certainty, predictability, and finality for land owners and the government." *Durland,* 182 Wn.2d at 60. In *Nykreim,* the court held that a county improperly sought and collaterally attack a prior boundary line adjustment through a subsequent conditional use application. The court barred this challenge to the original land use decision and the doctrine of finality. See also, *Habitat Watch v. Skagit County,* 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005) (holding prior decision cannot be collaterally attacked through subsequent grading permit application). And most significantly, the court in *Nykreim* held that an erroneous boundary line adjustment became final and legally binding where the county failed to challenge the land use decision within the statutory 21-day appeal period under Land Use Petition Act (LUPA). The court stated:

> To allow Respondents to challenge a land use decision beyond the statutory period of 21 days is inconsistent with the Legislature's declared purpose in enacting LUPA. *Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner.*

Chelan County v. Nykreim, 146 Wn.2d at 932-33. These principles apply in the present case.

The original administrative segregation and boundary line adjustment become final 21-days after county approval on November 1, 2001. *Cruse Decl. Exh. C.* There was no plat, short plat or other restriction on development of the property other than regulations applicable to subsequent development such as private road standards, water availability and system design,

septic and waste disposal system and zoning ordinance provisions regarding use and development standards.

Nunnally Holdings specifically recognizes the development of the parcels is subject to current zoning and development regulations. Nunnally Holdings does *not* argue or assert that parcel development is vested to 2001 zoning regulations. The proposed private road is consistent with Title 12 standards and any use of the parcels subject to current zoning regulations. This is not a case involving "vested rights" but rather involving the doctrine of finality in land use decisions.

2.2 Kittitas County's arguments regarding "vested rights" are inapposite to this code interpretation appeal.

Kittitas County has provided extended argument regarding the "vested rights" doctrine. Nunnally Holdings has never asserted that "vested rights" are applicable to this case. As the Hearing Examiner is well aware, the vested rights doctrine protects building permit and subdivision applications from subsequently adopted zoning or other land use control ordinances. RCW 19.27.095(1) and RCW 58.17.033. Washington's vested rights doctrine originated at common law but is now statutory. *Town of Woodway v. Snohomish County,* 180 Wn.2d 165, 173, 322 P.3d 1219 (2014). The vested rights doctrine simply does not apply to the current case.

(a) Scope of Vesting statutes is limited to municipal discretion with respect to local zoning and land use ordinances. Kittitas County offers as its initial argument that there are "...no vested rights against state law, only local ordinances." *County Brief 1:11-15.* The argument is as follows:

> One does not vest against application of state law, only against certain changes in local ordinances. Vesting cannot protect one from state laws, such as Ch. 58.17 RCW, only against local ordinances. *Snohomish County v. PCHB,* 187 Wn.2d 346, 365, 386 P.3d 1064 (2016).[5]

[5] *Snohomish County v. PCHB* is a case in which municipal storm water permitees appealed Pollution Control Hearings Board's order holding that the vested rights doctrine did not apply to storm water regulations that the Department of Ecology required permitees, as owners or operators of large or medium municipal separate storm water systems, to adopt and apply to completed development applications as part of the National Pollutant Discharge Elimination System (NPDES) permitting program. *Id.* The Supreme Court held that storm water regulations that permitees were required to implement and apply to completed development applications as part of the NPDES permitting program were not "land use control ordinances" subject to vesting statutes requiring building permits and subdivision applications to be considered under land use control ordinances in effect at time of complete application. The court interpreted the language set forth in RCW 19.27.095 and RCW 58.17.033. Nunnally Holdings has not argued that the statutory "vesting" doctrines are applicable to this case. Rather, this case involves legally created parcels of property that are subsequently developed with a private roadway easement.

To begin, this case does not involve application of the "vesting" doctrines. The statutory vesting provisions entitle "...developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations." *Abbey Road Group, LLC v. City of Bonney Lake,* 167 Wn.2d 242, 250, 218 P.3d 180 (2009). Nunnally Holdings recognizes that its property is subject to current zoning and other land use regulations.

For some reason, Kittitas County seeks to distinguish between state and local law in the context of the "vesting doctrine". *County Brief 1:11-15.* Reliance is placed on the case of *Snohomish. Snohomish County v. Pollution Control Hearings Board*, 87 Wn.2d 346, 386, P.3d 1064 (2016). The issues presented to the court in *Snohomish County* was "...[w]hat constitutes a 'land use control ordinance' under RCW 19.27.095 and RCW 58.17.033 ...." *Snohomish County v. PCHB,* 187 Wn.2d at 359. The court held that "...[t]he legislative history and our precedent demonstrate that the vesting statutes were intended to restrict municipal discretion with respect to local zoning and land use ordinances" *Id.* 187 Wn.2d at 374. Subsequently adopted storm water regulations are not "...land use controls." Nunnally Holdings has not argued that it is vested to state law. It has argued that the parcels were legally created under state and local subdivision law and that decision is *final.*

While Nunnally Holdings agrees that the state stormwater regulations are not "land use control ordinances" subject to state vesting laws, it is relevant that the operative legislative change underlying the *Code Interpretation* was amendment of the local subdivision ordinance removing the exemption for administrative segregations. *Ordinance 2014-015.* And to put the ordinance change in context, the state subdivision statute and local subdivision ordinance continue to recognize that *boundary line adjustments* are exempt from all provisions related to such subdivision laws. That exemption specifically applies to changes to boundary line adjustments. An amendment to a boundary line adjustment is specifically exempt from the plat alteration requirements of RCW 58.17.215.

> When any person is interested in the alteration of any subdivision or the altering of any portion thereof, *except as provided in RCW 58.17.040(6),* that person shall submit an application to request the alteration to the legislative authority of the city, town or county where the subdivision is located.

(Italics added). The plain and unambiguous language of the subdivision alteration statute *excepts* modifications under RCW 57.18.040(6) which is the exemption for boundary line adjustments. There is no factual dispute that the Nunnally Holdings parcels were created through a legal boundary line adjustment process and approval.

(b) Development of the Nunnally Holdings parcels are subject to current development regulations. Kittitas County has repeatedly asked the question – "how should the Nunnally Holdings property be regulated with respect to current development?" This question was posited by Kittitas County as follows:

> This case asks this question: "Now that this thing exists, after having been created under a process that no longer exists, and alterations to it are sought, how should it be regulated to review, approve or deny the proposed alteration?"

County's Brief 4:19-21. Kittitas County also makes the following misplaced argument:

> Yet Appellant argues that its property should be regulated (unregulated), forever, by the regulations in place when it was subdivided, despite the fact that those regulations no longer exist (because they were not lawful).

County Brief - 2:11-13. Nunnally Holdings has never made this argument. The parcels created are subject to current regulations with respect to both zoning and development standards.

Hearing Examiner should be mindful of the status of this application and the permit that is subject of the land use application. Nunnally Holdings submitted a grading permit for construction of a private roadway serving thirteen (13) rural parcels under common ownership. The project was described as follows:

> Approximately 1 mile of proposed roadway to serve existing parcels. Roadway construction will be off of Strande Rd. The proposed roadway will be a 20' wide private roadway with BST surface treatment and CSTC gravel base.

The application included a site plan together with roadway design plans and details. *Story Decl.* ¶*4*. Private road standards and development requirements are set forth in KCC 12.04.070 and KCC 12.04.080.[6] The private road design standards set forth minimum design requirements based

[6] Private road design criteria established minimum design standards for private roads (driveway, joint-use driveway and various private roads). KCC 12.04.080 Table 4-4A sets forth those standards and specifies minimum easement

upon the number of parcels and/or units to be served by the private roadway. KCC 12.04.080 Table 4-4A sets forth the following design standards:

Design Elements	Road Type					
	Driveway	Joint-Use Driveway	Private Road[2]	Private Road[2]	Private Road[2]	Private Road
			Average Lot Size <= 10.0 acres			Average Lot Size > 10.0 acres
Number of Parcels and/or Units	1	4	3-14	15-40	41+	2+
Minimum Easement Width	0	30'[3]	60'[3]	60'	60'	60'
Paved Apron[1]	N/A	N/A	Req'd	Req'd	Req'd	Req'd
Roadway Width	12' or 16'[6]	12' or 16'[6]	20'	22'	22'	20'
Shoulder Width	N/A	N/A	1'	1'	2'	1'
Minimum Centerline Radius (ft)	N/A	N/A	60	60		60
Surfacing Requirements[4]	Gravel	Gravel	Gravel	BST/ACP		Gravel
Minimum Crushed Surfacing[5]	N/A	N/A	6"	6"		6"
Maximum Grade %[7]	15	15	10	10		10
Cul-de-Sac Required	N/A	N/A	Req'd	Req'd		Req'd
County Road Approach Permit	Req'd	Req'd	Req'd	Req'd		Req'd
Stopping Site Distance	N/A	N/A	AASHTO	AASHTO		AASHTO
Ditch Slope (inside slope)	2:1	2:1	2:1	2:1		2:1

width, roadway width, shoulder width, minimum center line radius, minimum grade, cul-de-sac requirements and other applicable design considerations. Nunnally Holdings proposed private road meets or exceeds all applicable private design standards.

[1]Applies to all roads accessing existing paved roadway.

[2]All private roads shall be inspected and certified by a civil engineer licensed in the State of Washington for conformance with the current edition of the Kittitas County Road Standards

[3]Existing road easements may be a minimum of 40'. New road easements shall be a minimum of 60'. Existing driveway easements may a minimum of 20'. New driveway easements shall be a minimum of 30'.

[4]Crushed surfacing per WSDOT Standard Specifications.

[5]Additional depth may be required for roads that are to be public roads.

[6]A variance request is required for private road grades between 10-12%

Kittitas County has also raised concerns about road "access" review and standards. The answer to those questions is found in the ordinance.

> A. No person shall construct any access providing direct movement to or from any Kittitas County maintained road from or to property adjoining the road without an access permit issued by the Kittitas County Department of Public Works, hereinafter called the "Department."

KCC 12.05.030(A). Nunnally Holdings submitted an access permit application. The access in this case complies with spacing and sight distance requirements of KCC 12.05.080 Table 5-1 and Table 5-2. Nunnally Holdings is not trying to circumvent review of this issue.

As a final point, development regulations do not end with Title 12 standards. All land use and development of the Nunnally Holdings parcels is subject to the current zoning ordinance. KCC Title 17. Development requires compliance with applicable setbacks, overlay zoning and use regulations. In addition, current development standards for on-site sewage disposal systems (KCC Ch. 13.04), adequate water supply determination (KCC Ch. 13.35), are public and community water system requirements (KCC 13.35.030 -.050) and environmental review (KCC Title 15) are also applicable to site development. Nunnally Holdings has not sought variances with respect to any applicable development standard or requirement. Kittitas County's argument that there will be no review or controls applicable to development simply has no legal or factual basis.

(c) Nunnally Holdings Does Not Request that Land Use Policies Yield to Unexpressed Owner Desires. Kittitas County next makes the vague argument that "[f]uture land use policies are not required to yield to any potential, but unexpressed, use the owner desires." *County Brief 1:15-16.*[7] Kittitas County extracts the following statement out-of-context from the court's decision in *Alliance Investment Group*:

> Any other position would have the absurd result of freezing land use regulations forever upon submission of a short plat, leaving lawyers and judges centuries in the future the task of determining what the local ordinance were that applied to this short plat. Put another way, *Noble Manor* stands for the proposition that the government may not frustrate the owner's legitimate plans made known to it during the permitting process, but future land use policies are not required to yield to any potential, but unexpressed, use the owner desires.

Citing *Alliance Investment Group,* 189 Wn. App. at 771-772.[8] In this case, there has been no freezing of land use regulations and Nunnally Holdings does not argue vested rights. Nunnally Holdings did not prepare or participate in the original administrative segregation or boundary line adjustment. It simply purchased twelve (12) existing legal parcels that had no recorded restrictions, encumbrances or subdivision conditions. It is entitled to use and develop its property.

(d) Provisions of RCW 58.17.170 Apply Only to Lots "... In a Final Plat Filed for Record....." Kittitas County makes an odd and confusing argument with respect to vesting of plats under RCW 58.17.170. The argument seems to be that land use protections for

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[7] Kittitas County sites this statement from *Alliance Inv. Group Of Ellensburg, LLC v. City of Ellensburg*, 189 Wn. App. 763, 771-2, 358 P.3d 1227 (2015). The court in *Alliance Investment Group* involve a Land Use Petition Act (LUPA) action in which a property owner sought review of a decision by the city planning commission that an amended critical area ordinance (CAO) applied to the property owner's building permit application following approval of a short-plat application. The Court of Appeals, held that the property owner's development rights did not vest at time of approval of short-plat application. In *Alliance Investment Group,* the property owner had filed complete applications for short-plat and building permits. The court held that the development was subject to changes in the critical area ordinance.

[8] The issue in *Alliance Investment Group* and *Noble Manor* was the scope and extent of "uses" that vested with a plat application. The courts recognized the well-established principle that vesting extends only to a specific use identified by a property owner or developer at time of complete short plat application.

> Not all conceivable uses by the laws in effect at the time of a short plat application are vested development rights of the applicant. *However, when a developer makes an application for a specific use, then the application has a right to have that application considered under the zoning and land use laws existing at the time the completed plat application is submitted.*

Noble Manor Co. v. Pierce County, 133 Wn.2d 269, 285, 943 P.2d 1378 (1997). This case does not involve a short plat or issue related to "use" of the property. Any use of the established parcels is subject to current regulations.

lots within "...a final plat filed for record" should also be applicable to parcels created through exempt administrative segregations and boundary line adjustments. This argument is in direct conflict with the clear and unambiguous language of the statute:

> (2)(a) Except as provided by (b) of this subsection, *any lots in a final plat filed for record* shall be a valid land use notwithstanding any *change in zoning laws* for a period of seven years from the date of filing if the date of filing is on or before December 31, 2014, and for a period of five years from the date of filing if the date of filing is on or after January 1, 2015.

RCW 58.17.170(2)(a).[9] This provision protects "...any lots in a *final plat filed for record* ..." against changes in *zoning laws* for a period of either five (5) or seven (7) years. This protection was not extended to parcels created through exempt administrative segregation or boundary line adjustment processes. And more significantly, Nunnally Holdings is not asserting that it is vested to "zoning laws" at the time of lot creation.

In a similar obtuse argument, Kittitas County argues that the "freezing land use regulations forever ..." would lead to absurd results. Kittitas County construes arguments to be as follows:

> Yet here, the Appellant is arguing for that same "absurd" result – that its property must be frozen in whatever regulation it was subdivided under despite any change in the law or passage of time, regardless of the lack of authority for such freezing.

County Brief – 2:18-21. Nunnally Holdings is not asking that development regulations applicable to all parcels be frozen "forever". Again, no development regulations are frozen or suspended over time.

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[9] Kittitas County sites the case of *Teakoa Constr. v. Seattle,* 56 Wn. App. 28, 781 P.2d 1324 (1989) for the following proposition which is clearly set forth in RCW 58.17.170.

> Appellants contend that they should have a vested right to develop previously platted lots in accordance with minimum area requirements in effect at the time of platting. We disagree. In Washington, an approved plat is immune from zoning changes for a period of 5 years from the date of filing the final plat. RCW 58.17.170. However, after the five-year immunity period has run, the owner of contiguous lots could be required to comply with new zoning regulations.

Id. 56 Wn. App. at 33. Kittitas County came to the obvious conclusion that the subject property did not include any lots contained within "a final plat filed for record" and that the issue presented does not arise from "...any change in zoning laws...." Nunnally Holdings did not assert vested rights under RCW 58.17.170.

The only argument that is "absurd" is that the "long plat alteration" rules should apply to property that has never been "platted". A reference to the definition of "final plat" and "preliminary plat" is illuminating.

> (4) "Preliminary plat" is a neat and approximate drawing of a *proposed subdivision* showing the general layout of streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements of this chapter. The preliminary plat shall be the basis for the approval or disapproval of the general layout of a subdivision.
>
> (5) "Final plat" is the final drawing of the *subdivision and dedication prepared for filing for record with county auditor and containing all elements and requirements set forth in this chapter and in local regulations adopted under this chapter.*

RCW 58.17.020(4) and (5). Requirements for filing of plats (short subdivisions and "subdivisions") are clearly set forth in RCW 58.17.065 and RCW 58.17.160. A record of survey is not a "plat" under the subdivision statute.

2.3 Kittitas County Incorrectly Argues that Historic Interpretation of an Ordinance is Irrelevant to the Considerations in the Context of Statutory Interpretation.

Kittitas County argues that it has a duty to "correctly enforce the law" and that prior misinterpretations cannot impede the exercise of that duty. There is no dispute that the *Code Interpretation* is contrary to decades of interpretation, administration and enforcement of subdivision and zoning provisions by Kittitas County. Kittitas County has provided no legal authority to support any errors in the prior interpretation of these provisions. It is simply offered conclusory arguments without authority.

Kittitas County argues that historic interpretation and enforcement are "irrelevant". *County Brief 4:6-9.* That position is contrary to applicable law. There is no dispute, however, that County "...bears the burden to show its interpretation was a matter of pre-existing policy." *Ellensburg Cement Products, Inc. v. Kittitas County,* 179 Wn.2d 737, 753, 317 P.3d 1037 (2014). The courts have been clear that interpretation of a statute or ordinance considers legislative history as well as prior interpretations given a statute or ordinance by administrative officials.

> It is an elementary principle of statutory interpretation that legislative intention may be inferred from extrinsic evidence such as the legislative history of prior enactments, the legislative history of the enactment itself, *the interpretation given the statute by administrative officials, etc.*

Ropo, Inc. v. City of Seattle, 67 Wn.2d 574, 577, 409 P.2d 148 (1965); *Whitehead v. Department of Social and Health Services,* 92 Wn.2d 265, 268, 595 P.2d 926 (1979). A long period of acquiescence also is a significant consideration in statutory interpretation.

> We give great weight to the interpretation placed on a statute by the officials charged with its enforcement, particularly where that interpretation has been accompanied by a long period of silent acquiescence by the Legislature.

Colasusrdo v. Waltd, 49 Wn. App. 257, 261, 752 P.2d 920 (1987). See also, *Matter of Welfare of J.D.,* 112 Wn.2d 164, 169, 769 P.2d 291 (1989) ("...the court may look to the contemporaneous and continuing interpretation given the statue by the officials charged with its administration, especially when the Legislature has acquiesced in this interpretation over a long period of time."). The historical context and three decades of interpretation are relevant considerations in this matter. Despite the clear judicial authorities, Kittitas County argues that "...past pattern of enforcement is irrelevant." *County Brief* – 2:21-4:12.

It is argued that the county "...has a duty to correctly apply the law regardless of prior errors." Kittitas County has not shown a prior error in its interpretation and enforcement of either the subdivision statute or local ordinances. It has simply established that the current administration disagrees with three decades of prior interpretation and administration. In fact, it disagreed with its own interpretation and administration over the seven (7) years following the 2014 amendment.

2.4 Kittitas County Seems to Agree That the New Interpretation Should be Applied "Prospectively."

Kittitas County also agreed with *prospective* application of code interpretations. *County Brief* – 3:10-21. The circular argument is as follows:

> The past pattern did not bar the agency from correctly enforcing state law. In contrast, in *Ellensburg Cement Prods., Inc. v. Kittitas County,* 179 Wn.2d 737, 753, 317 P.3d 1037 (2014), *the court found that when a local government is enforcing a local ordinance, the complete absence of a congruous prior pattern or policy robs the local government's interpretation of authority. Id.* That case is not applicable to this matter because this involves a matter of interpretation of state law, not local ordinance. *Said another way, if the need for a plat amendment were driven by local*

> *code or ordinance, in the absence of a pattern of like enforcement, the county should amend/clarify its regulation and enforce accordingly prospectively.*

(Italics added). Kittitas County seems to affirm Nunnally Holdings' argument that any change in enforcement policy should be applied on a "prospective" basis. The change in interpretation occurred, allegedly, from the 2014 amendment of the subdivision ordinance. As noted in our prior briefing, the courts have recognized that retroactive application of an ordinance is disfavored in the law. *Lewis v. City of Medina,* 13 Wn. App. 501, 505, 535 P.2d 150 (1975). The court in *Lewis* set forth the following established principle of law:

> However, an ordinance is not considered retroactive merely because it relates to prior facts or transactions [citations omitted]. But where the ordinance
>
> > "takes away or impairs vested rights acquired under existing laws, *or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed, ...*" *It is deemed retroactive.*

Prospective application is consistent with the doctrine of finality. Kittitas County states the obvious:

> If a local government believes its regulation has been mis-applied or needs clarification, it is free to redraft it to add the needed clarification and provide for proper application *on a prospective basis*. In other words, if a local government sees that its regulation is not getting the job done, it can change it to accomplish the desired goal.

County Brief - 3:21-4:2. Kittitas County ended the exemption for administrative segregations with the adoption of adopted Ordinance 2014-015. *County Brief* – Exh. 10. It appears to have taken an additional seven (7) years to come up with a new interpretation. Based on the County's own reasoning, the interpretative change based on ordinance amendment should be, at a minimum, applied prospectively.

CONCLUSION

Nunnally Holdings requests that Hearing Examiner reverse the *Code Interpretation* and remand this matter to Kittitas County for processing of the grading permit for the private road construction without submission of a "long-plat alteration application".

Dated this 30th day of September, 2021

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James C. Carmody, WSBA 5205

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

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DATED at Yakima, Washington, this 30 day of September, 2021

Deborah Girard

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