KITTITAS COUNTY HEARING EXAMINER

Nunnally Holdings, LLC Administrative Interpretation Appeal	NO. SE-21-00006 COUNTY'S HEARING BRIEF

NO VESTED RIGHTS AGAINST STATE LAW, ONLY LOCAL ORDINANCES

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). The purpose of the vesting doctrine was to protect developers from the fiat of local government, and so it applies to local government regulations only, not state or federal law. *Id.* (see the carve-out for state law in RCW 58.17.033(3) regarding SEPA).

"[F]uture land use policies are not required to yield to any potential, but unexpressed, use the owner desires." *Alliance Inv. Grp. Of Ellensburg, LLC v. City of Ellensburg,* 189 Wn.App. 763, 771-2, 358 P.3d 1227 (2015). Here, the desire to completely reroute the internal road system, to access off of a different county road, and to include an additional lot had never previously been expressed to the county as evident from the record of survey.

Vesting for *platted* lots is limited in duration by statute, and the lots involved here are neither the product of *platting* nor within the statutory time frame. In *Tekoa Constr. V. Seattle,* 56 Wn.App. 28, 3, 781 P.2d 1324 (1989), the Court stated "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 5-

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year immunity period has run, the owner of contiguous lots could be required to comply with new zoning regulations." Because the lots had been platted more than 5 years previous, the appellant was subject to current zoning. *Id.* In this matter, it is clear that the subject property (at least 12 of the 13 lots) were not created by *platting* and had no *final plat recorded* and so this provision does not apply or give them any vesting. These lots were created by a different subdivision process that no longer exists and, for which, the Legislature has made no vesting provisions. Hence, since vesting is purely statutory (*RMG Worldwide LLC v. Pierce County,* 2 Wn.App. 257, 279-280, 409 P.3d 1126 (2017)), no vesting is present, and the applicant is subject to current regulation which requires a plat amendment for the sort of change Appellant is contemplating. Additionally, even if vesting did occur (which it did not) the time period has long run, leaving the Appellant subject, again, to current regulation.

The vested rights doctrine only allows for the processing of "that application" to be processed under the land use control ordinances in effect at the time of submission of the application. *Snohomish County v. PCHB* at 363. So, a plat application's vesting is only for the processing of that plat application. 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).

This position has already been rejected by the Washington courts. In *Alliance* (at 771-772), the court stated "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 ordinances 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." 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.

PAST PATTERN OF ENFORCEMENT IS IRRELEVANT

Appellant argues that the County's insistence on the need for a plat amendment is contrary to past practice. As has been pointed out before in the County's Brief, that stands to reason given

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that the administrative segregation regulations were repealed several years ago. The government has a duty to correctly apply the law regardless of prior errors. In *Campbell & Gwinn v. Dept. of Ecology,* 146 Wn.2d 1, 19, 43 P.3d 4 (2002), correctly interpreting and enforcing a statute is a government function and requiring that prior errors continue to be followed would impair that function. Said another way, government has a right and a duty to correctly enforce the law, and so prior misinterpretations cannot impede the exercise of that duty, it cannot impede government function by binding the government to continue an error. *State v. Adams,* 107 Wn2d 611, 614-5, 732 P.2d 149 (1987).

The County (government) has a duty to correctly enforce the law, and a past pattern of enforcement is only relevant if it is enforcing a *local* law with a contrary history of enforcement. In *Campbell & Gwinn v. Ecology,* the Department of Ecology was able to correctly enforce the state law (RCW) regarding exempt wells despite having made previous statements to the contrary of its enforcement position. 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. Hence, like in *Campbell & Gwinn v. Ecology* the county can enforce the corrected understanding of state law despite its enforcement history because correct legal enforcement is a government duty and an essential government function. 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. But, since this is a matter of enforcing state law, and because the county has a duty to correctly enforce the law, and the county has no ability to amend or clarify state law, the county is obliged to enforce in accord with the corrected understanding of the legal requirements. Past errors cannot bind the county to forsake its essential government function of correctly enforcing the law.

This contrast between whether what is being enforced is local regulation or state law makes sense from a policy perspective. 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

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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. In contrast, local governments that are enforcing state laws (RCWs) have no ability to change them or to clarify them. But, because the local government has a duty, indeed, it is an essential government function, to correctly enforce laws, it must have the ability to pivot as to correct enforcement, regardless of enforcement history. Since local government cannot change or clarify state laws, it is left with the duty to do its best which cannot be impinged by past mistakes.

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 prior course (ultra vires acts), and is dispatching its responsibility and duty to rightly enforce the law (governmental function). Appellants arguments to the contrary would undermine governmental function and bind the county to continuing an error. The Department of Ecology was able to enforce against the developer in *Campbell & Gwinn* despite its prior statements and actions and Kittitas County can require a plat amendment in this instance because that is what the law requires, despite any possible prior contrary conduct.

CONCLUSION

The subject property is a "subdivision" under county code and state law and it must be treated as such. RCW 58.17.215 requires that "any subdivision" that is seeking alteration to "any portion thereof" first get a plat amendment. Vested rights law gives limited vesting (for periods of 5 or 7 years) to only those "subdivisions" that received a "final plat approval", which this property did not. We are also long beyond the time when such vesting would have existed had it attached in the first place, which it did not. Whether or not an easement was created is irrelevant because what is being proposed is markedly different than what appeared in the 2002 record of survey. The validity of the lots here is not at issue. The county's history of actions related to administrative segregations and plat amendment is irrelevant and not barred by the doctrine of equitable estoppel because the doctrine does not run against the government if doing so would impede government function, and forcing the county to erroneously enforce land use regulations would certainly impede government function. Therefore, Kittitas County's code interpretation must be upheld, and the appellant must be required to seek a plat amendment.

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