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Message from the Editors



By Diane Meyers, Miller Nash Graham & Dunn, LLP, and Valerie Fairwell, Cascadia Law Group PLLC

The Summer 2016 edition of the of the Environment and Land Use Law Section newsletter features articles inspired by presentations given at the Section's Midyear meeting, which took place May 5-7, 2016 at the Suncadia Resort in Cle Elum, Washington. From the Midyear meeting, we welcome the newsletter's annual legislative update, authored by Jason Callahan, Former Senior Counsel at the House of Representatives' Office of Program Research. Also from the Midyear meeting, G. Richard Hill discusses the Constitutional foundation of Washington's vested rights doctrine. Next, from this year's ethics presentation, Ken Lederman, Alexandra Gilliland, and Jacqueline Quarré provide ethical considerations for multi-party representation at cleanup sites. This issue concludes with a land use case law update, compliments of Richard Settle.

We greatly appreciate all of you who continue to volunteer your time and talent to write articles that interest and engage our readers. If you are interested in contributing to a future edition of the newsletter, please contact Diane Meyers or Valerie Fairwell.

A Balance of Powers:

The Story of the 2016 Legislature



By Jason Callahan, Former Senior Counsel, House of Representatives' Office of Program Research†

Overview

It is often observed that each legislative session is unique and defined by its own storyline. The 2016 session was no exception. Part of its uniqueness came from within. The two chambers could not have been closer in terms of partisan divides. The Democrats in the House, after losing a special election in November, ruled with a single vote majority. Over in the Senate, the Republicans entered their fourth year in the majority with a similarly thin margin. There was one more Republican than Democrat; however, one Democrat voted organizationally with the Republicans, giving the Majority Coalition Caucus a two-vote cushion.

Adding to this tension was the elections scheduled for just about eight months, to the day, following session's originally scheduled adjournment. The 2016 Legislature came into session already looking ahead to not only a spirited gubernatorial campaign, but to all 98 House seats being on the ballot, and half of the Senate seats to be decided. Everyone was aware that the change in just few legislative seats could flip the leadership of either chamber and redefine the story of the 2017 Legislature.

However, the factors giving 2016 its most unique qualities did not come from within. There were unprecedented external forces in play affecting the Legislature, especially for the committees charged with overseeing state environmental policy.

The most obvious external pressure was being applied by the state Supreme Court. Session began with the Legislature already in contempt of court for not fully funding education.¹ This contempt order came with a \$100,000/day fine that had been tolling since late summer and was being added to each day of session.

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Legislative eyes were also cast to the Temple of Justice for a determination as to the constitutionality of Initiative 1366. That initiative, passed in 2015, scheduled a one-percent reduction in the state sales tax if the Legislature did not forward a proposed constitutional amendment to the voters enshrining a two-thirds majority legislative vote for any future tax increases. An attempt in the Senate to forward such a proposal to the House fell a few votes short, leaving the actualization of a sales tax reduction in the hands of the Supreme Court.²

In addition to the judicial branch, the executive branch was making decisions that affected legislative deliberations. The Governor's office had proposed two significant pieces of legislation in 2015 that failed to pass into law. One was a plan to reduce the amount of toxic chemicals being introduced into Washington's environment³ and the other was designed to limit carbon releases into the atmosphere.⁴ The former was billed as a complement to the then newly released water quality standards rule and thought to be necessary to allow the Department of Ecology to justify the standards proposed in the rule.

In response to the Legislature's inaction on those bills in 2015, the executive branch embarked on a rulemaking process for both topics without legislative involvement. A new direction for the proposed water quality standards rule was announced in October and released for public review during the fourth week of session.⁵ At the same time, the Department of Ecology began rulemaking under the Clean Air Act to reduce greenhouse gas emissions with a progressively lowering emissions cap.⁶

Finally, outside of all branches of government, the citizen's initiative process was activated in regards to carbon. Early in session, Initiative 732 was certified by the Secretary of State. Initiative 732 is an initiative that proposes to put a price on carbon emissions. I-732 is an initiative to the Legislature; therefore, the Legislature had the option of passing it as introduced or recommending an alternative. In either case, unless passed outright, some version of a carbon pricing initiative is set to appear on the November ballot.

The 2016 Legislature existed within an unusual balancing of powers, both within the institution and within the various branches of government. The question going in was whether the Legislature would stay on the sidelines and allow the other processes to move forward, or if it would interject itself and use its authority to end or prescribe the outcomes for other processes.

The following is a summary of bills of interest to the Environmental and Land Use Section that made it all the way through to the Governor's desk during the 2016 session. Additional resources, such as the texts of the bills and the official supporting documents, can be found at www.leg.wa.gov. More detailed analyses of the bills below are included in these materials.

I. Natural Disasters

The 2016 Legislature came into session on the heels of the largest wildfire season in the state's history. The first fire started in the spring in Olympic National Park and it was well into the autumn before the last embers faded across the state. When all was done, over a million acres were burned, nearly 3,000 firefighters were deployed, and numerous homes were destroyed. The Legislature faced questions about the response, how the fires could have been prevented, and a bill for suppression efforts reaching nearly \$200 million.

Over a dozen different bills were filed in response to the 2015 fire season. In the end, two policy bills were passed and the state's operating budget paid particular attention to the issue through a series of budget provisions.⁷ How the costs of the fire season would be paid was a question that persisted until the final budget was released. In the end, the bulk of the money came from the Budget Stabilization Account⁸, which is commonly referred to as the state's rainy day fund.

Of course, wildfires weren't the only natural disasters on the Legislature's radar. Legislation was introduced, but not acted on, that was inspired by the 2014 Oso landslide.⁹ Also, the 2015 drought was front and center and the members watched the weather and snowpack through the winter months. One drought-inspired bill made it through two House committees before running out of time on the House floor,¹⁰ and the Capital Budget included funding for a low-interest loan program to allow agricultural or public entities to drill or retrofit wells to mitigate the effects of drought.¹¹ Finally, the 2007 floods that occurred in Lewis and Thurston County were still inspiring legislation. A bill creating a new Office of the Chehalis Basin was passed, and will be discussed below.

Resiliency Fires (ESHB 2928)

Relevant RCW Chapter(s): 76.04; 70.94

Like much legislation, this bill started out as a proposal for statutory change and ended up as a pilot project. It focuses on the prevention angle of wildland fires. Specifically, it asks the state to take a look at how resiliency fires, or prescribed fires designed to improve forest health, should be permitted.

The bill commissions a forest resiliency burning pilot project administered by the Department of Natural Resources and directs forest resiliency burning to be differentiated from other types of outdoor burning. The goal of the pilot project is to monitor and evaluate the benefits of forest resiliency burning and the impacts on ambient air quality.

All forest resiliency burns undertaken as part of the pilot must be approved by the Department of Natural Resources at least 24 hours before the proposed burning and the burning must be carried out by professionals to maintain ecosystems, mitigate wildfire potential, decrease forest insect or disease

susceptibility, or otherwise enhance resiliency to fire. Forest resiliency burning proposals that include non-fire treatments to reduce fuel loads prior to burning may also be considered as part of a resiliency burning treatment.

The Department of Natural Resources must approve single-day or multiple-day forest resiliency burning if the burning is unlikely to significantly contribute to an exceedance of air quality standards established by the state Clean Air Act. Unlike other forms of outdoor burning, forest resiliency burns may be approved when there is an air pollution episode called or forecasted.

Once approved, forest resiliency burns spanning multiple days may only be revoked or postponed midway through the duration of the approved burn if necessary for the safety of adjacent property or upon a determination that the burn has significantly contributed to an exceedance of air quality standards. Forest resiliency burning, and the implementation of the pilot project, must not be conducted at a scale that would require a revision to the state implementation plan under the federal Clean Air Act.

The Department of Natural Resources is the administrative lead for the pilot, but it must coordinate with a variety of organizations. These coordinating organizations include the North Central Washington Forest Health Collaborative, the Tapash Sustainable Forest Collaborative, and the Northeast Washington Forestry Coalition. A final report about the pilot project is due on December 1, 2018 and must include information about the amount of forest resiliency burns conducted, the quantity and severity of air quality exceedances by pollutant type, a comparative analysis between the predicted smoke conditions and the actual smoke conditions observed on location, and recommendations relating to continuing or expanding forest resiliency burning.

Livestock and Wildland Fire Suppression (ESHB 2925)

Relevant RCW Chapter(s): 76.04; 79.13

This legislation doesn't address how fires will be prevented, fought, or paid. Instead, it attempts to preemptively provide some clarity and ground rules that can be followed when wildland fires are raging. Specifically, it relates to what the owners of livestock grazing on public land can expect during a fire response.

Under the bill, the Department of Natural Resources must make every reasonable effort to accommodate a livestock owner's request to retrieve or care for animals in his or her charge that are at risk due to a wildfire. A livestock owner, or an owner's employee or agent, may only be prohibited from accessing public lands for the purpose of retrieving or caring for livestock during a fire suppression response if the access denial is reasonably necessary to prevent interference with a direct, active

fire response. If a person does access public lands to retrieve or care for livestock during a fire, he or she assumes full liability and no civil liability may be imposed on the Department of Natural Resources or any other subdivision of the state for any direct or indirect impacts resulting from the retrieval of livestock.

These rights and responsibilities must be included in the text of all state grazing leases and livestock retrieval must be included in any training or coordination conducted in communities that have active grazing areas.

Budget Provisos: Wildfires (ESHB 2376 (308))

Relevant RCW Chapter(s): n/a

In addition to paying for the 2015 fires, the Legislature invested funds into a series of budget provisions designed to improve the state's fire response or decrease the likelihood of future fires of the magnitude witnessed in 2014 and 2015. In an effort to improve response, money was provided to the Department of Natural Resources to conduct joint fire training with the National Guard, local fire agencies, and tribal firefighters. Investments were also made along these lines to enhance the state's capacity to respond with in-state resources, to enhance aerial attack capabilities through the creation of a list of pre-certified aerial contractors, to provide local fire agencies with firefighting equipment, and to provide portable radios to state responders.

On the prevention side, \$800,000 was provided for the implementation of ESHB 2928 (above) and the conducting of resiliency burning. In addition, investments were made for the development of a 20-year forest health treatment plan, an update to the existing state smoke management plan, fuel reduction activities on state land, wildfire prevention education, community outreach, and technical assistance to landowners.

The Department of Natural Resources was not the only agency involved with the post-fire appropriations. In addition to reimbursing the Department of Fish and Wildlife and the State Patrol for their fire costs, the Conservation Commission received \$1 million to allocate to conservation districts for the implementation of firewise land management programs and \$6.8 million for protecting water quality, preventing crop damage, replacing fences, and generally helping landowners recover from the fires.

Chehalis Basin (HB 2856)

Relevant RCW Chapter(s): 43.21A

This legislation creates the Office of Chehalis Basin within the Department of Ecology. The purpose of the Office is to pursue implementation of an integrated strategy and to administer funding for long-term flood damage reduction and aquatic species restoration in the Chehalis River Basin. The Office is overseen by a board, called the Chehalis Board. The Board is responsible for oversight of the

strategy implementation and development of budget recommendations. The strategy must include a detailed set of actions, an implementation schedule, and quantified measures to evaluate success.

The Board includes seven voting members. These include four members appointed by the Governor, which must include one member representing the Quinault Indian Nation and one member representing the Chehalis Indian Tribe. The other three members are to be selected by the Chehalis Basin Flood Authority. The Board also includes five nonvoting ex officio members from state agencies.

In addition to the creation of a specific office focused on the Chehalis Basin, the legislation also creates a specific Chehalis Basin Account in the State Treasury. The Account is to be funded through legislative appropriations and may be used only to support the activities of the Office and for expenses related to bond issuance and sales.

This legislation has its genesis in 2007 when a series of storms caused flood damage in southwest Washington. In 2008 the Legislature authorized \$50 million in state general obligation bonds for flood hazard mitigation and related projects throughout the Chehalis River Basin. Since the year 2007, a total of \$92.7 million has been appropriated in capital budgets from state general obligation bonds for catastrophic flood relief and Chehalis River Basin flood relief projects.

The 2011-13 Capital Budget¹² directed the Office of Financial Management to collaborate with state and federal agencies, tribal governments, and local governments to identify recommended priority flood hazard mitigation projects in the Chehalis River Basin for continued feasibility and design work. To help carry out this directive, former Governor Christine Gregoire convened a Chehalis Basin Work Group to recommend investments and actions that would reduce flood damages and enhance natural floodplain function and fisheries. That work group ultimately recommended an integrated program of long-term flood damage reduction and aquatic species restoration in the Chehalis Basin. The 2014 report estimates the costs of its recommendations to be approximately \$500 to \$600 million and the benefits over 100 years to be \$720 million.

II. Water Resources

Water resources is a policy area that has been driven recently much more by the judiciary than by the Legislature or even the executive branch. This is especially true when it comes to planning for future growth in a community. Two recent Supreme Court decisions have redirected how the Department of Ecology is to use its available tools to help manage future residential growth in closed basins,¹³ while some counties have turned to the idea of water banking to accommodate their growth.¹⁴ Recent changes in on-the-ground resource management

have occurred, for the most part, absent legislative direction.

Earlier legislatures have been active in proposing water resource management changes, and many bills advanced through various stages of the legislative process. However, in recent years, no substantive bills have gotten through to the Governor's desk. That changed in 2016. This past session saw two policy bills make it through the process and one bill commissioning a study.

Reservations of Water (ESSB 6513)

Relevant RCW Chapter(s): 90.54

This legislation requires the Department of Ecology to act on all water rights applications that rely on reservations of water established in rule for Water Resource Inventory Area (WRIA) 18 and WRIA 45. Clallam County is the primary home to WRIA 18, which is the Elwha-Dungeness watershed. This WRIA is centered on the town of Port Angeles and features the Elwha River and the Dungeness River as its major drainages. Chelan County houses WRIA 45, which is known as the Wenatchee watershed. The Wenatchee River is the major drainage for WRIA 45.

This bill was one of two pieces of legislation passed in response to the potential uncertainty created by the Supreme Court's recent activities in water law. It does not seek to undo the effects of those rulings in Skagit County and Thurston County, but does attempt to clarify that the effects of those rulings should not be imported into two specific watersheds that have also relied on reservations of water established by the Department of Ecology for future growth. Much like the fact pattern in the *Swinomish* case that led to similar rules being invalidated, the rules adopted by the Department of Ecology for those watersheds rely on a finding that the reservation of water for future uses is necessary to satisfy overriding considerations of public interest.

The legislation goes on to make a declaration that the rule-based water reservations for those two WRIs are consistent with legislative intent and are authorized to be maintained and implemented by the Department. Under the legislation, the Department specifically retains the authority to adopt, amend, or repeal any rules relating to water reservations. This authority extends to the rules affecting both WRIA 18 and WRIA 45. The legislation also states that the issuance of water rights that rely on reservations of water in WRIA 18 and 45 does not prejudice any other reservations of water in the state.

Water Storage in the Skagit Basin (ESB 6589)

Relevant RCW Chapter(s): N/A

This legislation requires the Department of Ecology to examine the feasibility of using effectively sized water storage to recharge the Skagit River basin as needed to satisfy minimum instream flow requirements and to provide non-interruptible

water resources to the users of permit exempt wells. The study must be conducted in cooperation with the Department of Health, Skagit County, tribes, and any non-municipally owned private water systems located in the Skagit River basin. \$72,000 was provided to the Department to conduct the study¹⁵ and a report outlining the Department's findings must be delivered to the Legislature by December 1, 2016.

The bill was presented as a tool for dealing with future growth in the Skagit River Basin following the Supreme Court's invalidation of rules that set aside a limited amount of surface water for future out-of-stream uses in the basin.¹⁶ The goal of the bill, as presented in committee, is to investigate the possibility of mitigating for new water uses by collecting water during high water times and storing it to release into streams during the low water season. This is the second bill passed in response to the recent Supreme Court activity. Like ESSB 6513 above, this bill does not attempt to overturn or clarify the court's decisions. Instead it is an attempt to find solutions within the contents of the court's holding.

Water Banking (SSB 6179)

Relevant RCW Chapter(s): 90.42

This legislation was not a direct result of court activity, but is a response to proliferation of water banks that have arisen in an attempt to satisfy judicial standards. Water banking is an institutional mechanism used to facilitate the legal transfer and market exchange of various types of surface water, groundwater, and water storage. The phrase "water banking" is widely used to refer to a variety of water management practices and is typically facilitated by an institution that operates in the role of broker or clearinghouse. In 2003 legislation was passed to allow water banking in the Yakima Basin using the State Trust Water Rights Program. During the 2009 legislative session, the law was amended to clarify that this tool is available to use for banking statewide.

The Department of Ecology was already required to maintain information on its agency website regarding water banking. This information includes information on water banks and related programs in various areas of the state. This legislation expands the information that must be provided to the Department by water bank operators and be published on the agency website.

The new information must be presented in a table or schedule that shows the amount charged by each bank for mitigation, including any fees, and the priority date of the water offered for mitigation. The Department must also display information relating to the amount of water being made available for mitigation from a water bank, the nature of the ownership interest in the water, any applicable geographic areas in the state where the water can be used for mitigation, and the processes utilized by the water bank sponsor to obtain approval to

use the associated water rights for mitigation. The information must also include whether or not the associated water right must be recorded on a property's title.

Any person operating a water bank in the state is required to provide information, upon request, to the Department of Ecology as necessary to fulfill the Department's reporting requirements. The Department must update the information on its agency website on a quarterly basis based on the information provided by water bank operators.

III. Water Quality

As noted in the introduction, water quality has been at the center of legislative and executive branch deliberations for the entire biennium. The Governor's pre-session announcement to pursue new water quality rules absent legislative assistance quieted the discussions in the legislative hearing rooms on that topic a bit. Most prominently taking its place in both chambers were informational sessions and legislation relating to an ongoing water quality permitting updating process at the Department of Ecology relating to confined animal feeding operations (CAFO).¹⁷ In the end, those bills, and an attempted amendment to the budget on the topic,¹⁸ failed to pass. This left only one bill and a relevant budget proviso related to dairies being delivered to the Governor and another piece of legislation relating to the water quality certification of hydroelectric dams.

Dairy Farm Nutrient Uses (HB 2634)

Relevant RCW Chapter(s): 15.44

There has been much discussion for years relating to how dairy farms are to manage the organic waste produced by cows. The current Dairy Nutrient Management Program is administered by the Department of Agriculture to help protect water quality from dairy nutrient discharges. The program requires all licensed dairies to develop and implement dairy nutrient management plans, register with the state, and participate in regular inspections.

This bill does nothing to affect that regulatory regime or affect the ongoing CAFO permitting update at the Department of Ecology. It does, however, seek to find uses for dairy nutrients that can redirect the waste for beneficial uses. Specifically, the legislation authorizes the Washington Dairy Products Commission to conduct research and education related to economic uses of nutrients produced on dairy farms.

The Dairy Commission is one of several commodity commissions in the state, and promotes and provides public education regarding the state's dairy industry. The Dairy Commission also conducts research to develop efficient and equitable methods of marketing dairy products. Testimony on the bill suggested that research into using dairy nutrients for energy production and crop fertiliza-

tion would be a suitable expansion of the commission's duties.

Budget Proviso: Dairy Effluents (ESHB 2376 (309)(7))

Relevant RCW Chapter(s): n/a

Although the Legislature chose against dictating water quality permitting processes for dairies, it did provide \$100,000 from the state's General Fund for further work on the topic. The funding was provided to the Department of Agriculture to assist dairy farmers with deep soil samples, assessing dairy lagoon storage on farms in the Yakima Basin and northern Puget Sound, improving effluent analysis, developing effluent storage assessment tools, and providing technical assistance to dairy farmers for storage lagoon engineering that meets standards set by the U.S. Natural Resources Conservation Service. The technical assistance is limited to dairies located in northern Puget Sound and the Yakima Basin.

Within that same appropriation, the Departments of Agriculture and Ecology are required to develop recommendations regarding dairy water quality. These recommendations are due by July 1, 2017, and must be based on dairy lagoon and field assessments. The product delivered by the agencies must include estimated public and private costs and benefits for reducing dairy farm groundwater risk and the costs and benefits associated with the development of a state-only groundwater permit.

Water Power License Fees (SHB 1130)

Relevant RCW Chapter(s): 90.16

The Department of Ecology is responsible for issuing federal Clean Water Act water quality certifications to hydroelectric dam operators licensed by the Federal Energy Regulatory Commission (FERC). This process is typically conducted in conjunction with the FERC licensing or relicensing process for a hydropower project. After the FERC license and water quality certificate have been issued for a project, compliance with water quality protection criteria is monitored by the Departments of Ecology and Fish and Wildlife.

Most producers of hydropower are required to pay an annual fee. The revenue from the fee is used by the state to assist power generation facilities in meeting environmental regulatory requirements and other requirements associated with the FERC licensing process. The fee is based on the theoretical amount of water claimed by the entity developing power and is based on a two-step model. The first step is the base fee paid by all water power claimants. The base fee varies depending on the generating size of the facility and ranges from 18 cents per horsepower to 1.8 cents per horsepower. In addition to the base fee, an additional fee was authorized until June 30, 2017. That additional fee also varies depending on the power-generating capac-

ity of the facility and ranges from an additional 32 cents per horsepower to 3.2 cents per horsepower.

This legislation primarily extends the expiration date for the additional fee. Instead of expiring in the year 2017, the additional fee will remain until 2023. The fee is also specified to only apply to FERC projects that are subject to review for federal Clean Water Act certification. After June 30, 2023, the additional fee will expire and hydropower generators will only pay the base fee.

In the meantime, the Department of Ecology must make biennial reports to the Legislature that detail how much of the collected fees and other program funds were spent for each hydropower project. These reports must have information relating to project-specific costs, sufficient information to determine that hydropower license fees charged are not used for activities performed by other layers of government and that duplication is avoided, and an estimate of expected workload, program costs, and staff time for Clean Water Act certifications or FERC license implementation in the upcoming two-year reporting period.

The extension of the fee was also coupled with a degree of administrative reform in how the two agencies implement the program. Both the Departments of Ecology and Fish and Wildlife must assign individual staff members as project leads for each hydropower project, develop an annual work plan for their hydropower licensing programs, and circulate an annual survey to licensees regarding their interactions with the program staff of the departments. This summary must be analyzed and summarized prior to an annual meeting hosted for hydropower project licensees and other interested parties.

IV. Air Quality

As mentioned above, air regulations have been front and center in the state's environmental discussions in recent years. However, with the carbon emissions policy action switching to the executive branch and the ballot box, the Legislature was faced with the choice of taking a positive action to affect one of the other processes or stay put and allow those processes to advance unimpeded. The last weeks of session saw traded concepts about an alternative to I-732¹⁹ and an attempt in the Senate to condition the passing of a bill designed to promote renewable energy on a cessation of the greenhouse gas rulemaking process;²⁰ however, in the end, the Legislature decided though inaction to allow the rulemaking and initiative process to move forward. The lone passed air quality bill did not affect either process.

Solid Fuel Burning Devices (ESHB 2785)

Relevant RCW Chapter(s): 70.94

Washington's Clean Air Act regulates uses of wood stoves and fireplaces, both of which are captured under the term "solid fuel burning device." Since 1995 state law has restricted the sale of certain

types of solid fuel burning devices that are not certified by the state or the Environmental Protection Agency as meeting fine particulate matter emissions criteria. The use of these uncertified wood stoves is prohibited during a Stage Two burn ban and restricted during a Stage One burn ban.

The Department of Ecology or a local air pollution control authority may impose a burn ban when it forecasts that fine particulate pollution levels in an area will exceed the federal 24-hour standard of 35 micrograms per cubic meter, or a standard of 30 micrograms per cubic meter in areas at risk for federal nonattainment designations. Burn bans are tiered, so the Department of Ecology or the local air pollution control authority will typically first call a Stage One burn ban. If the first stage of impaired air quality has been in force and has not achieved sufficient reductions, and a forecast is made that fine particulate pollution levels will exceed the federal 24-hour standard of 25 micrograms per cubic meter, a Stage Two burn ban may be called.

Under this legislation, the burning of wood in a solid fuel burning device is allowed even during a State Two burn ban if there is an emergency power outage. The bill defines an emergency power outage to include two instances. The first is a natural or human-caused event outside of a person's control that leaves a home or business temporarily without an adequate alternative source of heat. The second instance is an emergency declared by the Governor for an area on the basis of disaster, public disorder, or an energy emergency. The bill also allows a person to temporarily install, repair, or replace any type of solid fuel burning device for the duration of an emergency power outage.

Budget Proviso: Wood Stove Replacement (SHB 2380 (310))

Relevant RCW Chapter(s): n/a

Unrelated to the wood stove bill, the Legislature also provided additional funding in the state's Capital Budget for wood stove replacements. Specially, \$1,350,000 was provided to the Department of Ecology for an existing program that works on replacing outdated wood stoves in Pierce County. Those replacements, targeted to a part of the state with high fine particulate levels, must be consistent with a federally-approved maintenance plan under the federal Clean Air Act.

V. Solid Waste

The 2016 session was a relatively quiet one for bills and policies relating to the collection, handling, and disposal of solid waste. Expectations for a renewed push to pass a 2015 bill relating to paint stewardship²¹ failed to come to fruition, and the headline solid waste issue of the session was a newly emerging tension between King County's yard waste recycling program and the apple growers in central Washington. In the end, two bills and one budget proviso were passed relating to solid waste.

Also included in this section, although not directly related to the traditional solid waste infrastructure, is a proviso regarding the disposal of dredged materials.

Solid Waste and Plant Pathogens (ESSB 6605)

Relevant RCW Chapter(s): 70.95

The Department of Agriculture has the authority to adopt rules that establish plant pest quarantine areas and prohibit the movement of regulated articles that are likely to contain plant pests, noxious weeds, genetically engineered plants, or bee pest organisms from designated quarantine areas to non-quarantine areas. The quarantines may be implemented in specific states, counties, areas, places, or agricultural establishments. The quarantines may be absolute prohibitions on the movement of regulated articles, or the rules may prescribe certain allowable conditions for the movement of regulated articles. One of the most significant, and most publicized, quarantine areas was established to protect the state's apple industry from the apple maggot.²²

The Department of Agriculture establishes plant pest quarantine areas; however, it is the Department of Ecology that is responsible for classifying areas of the state as being appropriate for solid waste handling facilities. These decisions are made according to factors that bear on solid waste disposal standards, including population density, geology, and climate. The location of pest quarantine areas is not one of these factors. The nexus of these two regulatory programs came into focus with this legislation.

The legislation arose from the Department of Ecology's allowance of the siting of a municipal compost facility in an area of the state that was not under an apple maggot quarantine. However, the facility received yard waste that originated from the quarantined area of the state. The risk of moving plant material out of the quarantine zone and into the state's apple production area generated enough concern that the Department of Agriculture suspended the operations of the composting facility.

This legislation looks to learn from that experience. It requires the Department of Ecology to provide copies of all draft preliminary county solid waste management plans to its sister agency. The Department of Agriculture must review those plans for compliance with insect pest and plant disease rules, including quarantine restrictions, and must advise the applicable local government of the results of their compliance review.

Jurisdictional health departments must also forward certain applications to establish solid waste handling facilities to the Department of Agriculture for review. The facilities covered by this review requirement are those applications to establish or modify a facility in an area that is not under a pest, pathogen, or disease quarantine, but that will receive material for composting from an area that is under a quarantine. The Department of Agriculture must review these applications to determine if the

proposed facility presents a risk of spreading disease, plant pathogens, or pests. Solid waste disposal site permits are subject to suspension by a jurisdictional health department if it is determined that the facility's operations violate Department of Agriculture rules.

Similarly, the Department of Ecology must forward any applications for beneficial use determination or a waste-derived soil amendment to the Department of Agriculture for review. The Department of Agriculture must comment within 45 days on whether the approval of the application risks the spread of disease, plant pathogens, or pests to areas not under quarantine.

Finally, any local solid waste policy advisory committees formed by counties must include membership from agricultural interests and the Department of Ecology is given the authority to consider an area's quarantine status among the other relevant factors that bear on solid waste disposal standards.

Steel Slag from Electric Arc Furnace (EHB 2400)

Relevant RCW Chapter(s): 70.95

Steel is typically manufactured from raw materials including iron ore and coke, which is a product formed from the carbonization of coal at high temperatures in an oxygen-deficient environment. By contrast, steel produced from scrap metals typically uses an electric arc process, where batches of scrap steel, iron, and other metal materials are rendered molten through the application of electric current between electrodes in a furnace, often supplemented by inputs of natural gas and oxygen. The resultant molten steel is then further refined through the addition of alloys, casted, and then finished. During the electric arc steelmaking processes, slag is produced by the oxidation of molten metallic compounds, such as calcium, iron, silicon, and manganese that are not incorporated into the steel product, as well as sulfur and phosphorus. Slag from steel production is sometimes used in various commercial applications, including in the manufacture of cement, concrete, glass, and other construction materials.

There have been developments in the solid waste laws of other states that have caused the slag created during steel production to be treated as a waste product and not a secondary commodity purposefully produced to set standards. Although that regulatory shift has not occurred in Washington, this legislation ensures that steel slag is not required to be managed under state solid waste management requirements. This exemption from the state solid waste rules applies as long as the steel slag is produced to specification, managed as having commercial value, and is placed in commerce for public consumption. Steel slag that is placed in the solid waste stream, abandoned, or discarded is not exempt from solid waste management requirements.

Budget Proviso: E-Waste Collections (ESHB 2376 (302)(16))

Relevant RCW Chapter(s): n/a

The Legislature created an electronics products recycling requirement 10 years ago.²³ This law, generally referred to as the E-Waste law, basically requires the manufacturers of computers and computer components to fund a system for the collection and disposal of the products at the end of their useful lives. Although overseen by the Department of Ecology, the E-Waste program is operated by the Washington Materials Management and Financing Authority. That group is a quasi-public entity established in statute and with membership comprised of participating electronic manufacturers.²⁴

A fundamental underpinning of the E-Waste program is how the discarded electronics are collected. The Legislature offered some direction in 2006. Collection services must be provided in a manner that is reasonably convenient and available to all citizens of the state, including specific collection service in every county. Collection services in forms different than collection sites, such as curbside services, are allowed if they provide equal or better convenience to citizens and equal or increased recovery of unwanted covered electronic products.²⁵

This budget proviso relates to the collection services aspect of the E-Waste law. Concerns were raised publically that the E-Waste program has not adequately utilized existing solid waste collection services as the program continues to evolve.²⁶ Under the proviso, the Department of Ecology and the Washington Materials Management and Financing Authority must prepare a report that evaluates how the E-Waste program has utilized the existing solid waste collection infrastructure for collections. The report must include information relating to new collection systems created since 2006, how many existing collection sites have been utilized, and how many curbside collection companies have contracts for collecting E-Waste.

The report is due back to the Legislature on September 1, 2016.

Budget Proviso: Dredged Materials Disposal (ESHB 2376 (302)(12))

Relevant RCW Chapter(s): n/a

The Dredged Materials Management Program is a joint program between the state and federal governments that oversees the open water disposal of dredged materials. The Program is run on the state level by the Departments of Ecology and Natural Resources and on the federal level by the Army Corps of Engineers and the Environmental Protection Agency. There are eight open water disposal sites in Washington where dredged materials that are deemed suitable for open water disposal may be placed.

This proviso directs the director of the Department of Ecology and the Commissioner of

Public Lands to conduct a management review of the Dredged Materials Management Program. After the review, the two agencies must recommend and, when applicable, implement actions designed to ensure the facilitation of open-water disposal of dredged materials in a fashion that is protective of human health and in compliance with all regulations. The review must include a focus on the extent to which the current program is providing for the needs to dredging operations required to maintain navigational access, any existing regulatory flexibility that would allow additional open water disposal opportunities, and the decision making process and policies of the Dredged Materials Management Program that ensure the existing regulatory flexibility is used appropriately.

A report is due back to the Legislature on November 1, 2016.

VI. Land Use

In the House, jurisdiction over the Shorelines Management Act (SMA) was transferred from the Local Government Committee to the Environment Committee. This marked the first time in decades that the House committee responsible for considering shorelines issues was different from the committee assigned with jurisdiction over land use planning and growth management.²⁷ In the end, no bills relating to the Growth Management Act (GMA) made it into law, and only one bill on the SMA was passed. The summary of one additional bill related to the costs of local government nuisance abatement has been added.

Disability Retrofits and the Shorelines Management Act (ESHB 2847)

Relevant RCW Chapter(s): 90.58

This was the lone piece of legislation passed that directly affects either the SMA or the GMA. The bill creates a new exemption to the definition of “substantial development” in the SMA. This exemption applies to any retrofitting projects on either the outside or the inside of an existing structure if they are undertaken with the exclusive purpose of complying with the Americans with Disabilities Act or to otherwise provide physical access to a structure by individuals with disabilities. As a result of this exemption, these projects are specifically not considered “substantial developments” by statute and are exempt from the requirement of obtaining a special development permit under the SMA regardless of the cost or value of the project.

The testimony for the bill involved a church located in the community of Coal Creek, WA that saw the price of installing a wheelchair lift rise dramatically due to SMA permitting costs. After some bicameral debate over whether the bill should affect “structures” or “buildings,” the Legislature decided that SMA permitting for these retrofit projects added cost without commensurate regulatory value.

Nuisance Abatement Costs (SHB 2519)

Relevant RCW Chapter(s): 35.21, 35A.21

Under this legislation, any city or town that has exercised authority under various existing statutes or other laws to declare a nuisance that threatens human health or safety is authorized to levy a special assessment on the property where the nuisance is situated. The special assessment is for the purpose of reimbursing the city or town for the expense of abatement. This authority is supplemental to any existing authority to levy an assessment or obtain a lien for the costs of abatement.

The special assessment levied by a city or town constitutes a lien that is binding on successors of title. Up to \$2,000 of the recorded lien is of equal rank with state, county, and municipal taxes.

Before issuing an assessment, cities and towns must provide prior notice of the action to the property owner. Cities and towns levying a special assessment for nuisance abatement may contract with the county treasurer to collect the special assessment in accordance with applicable statute.

VII. Energy

The committees that deal with energy policy are an occasionally overlooked Legislative corner when it comes to environmental policy. In the Senate, the committee with jurisdiction over energy is the same committee where more traditional environmental policy bills are heard. In the House, however, energy bills are heard in their own committee. The bifurcation of energy and environmental issues in the House often results in bills relating, on some level, to carbon emissions being assigned to different committees. This session, the Legislature’s energy portfolio included two bills with a nexus to climate policy; however, due to a gubernatorial veto, only one of the bills became law.²⁸

Transition of Coal Units (ESSB 6248)

Relevant RCW Chapter(s): 70.95

The issue behind this bill is often referred to by different names. Transition of coal units is the short title assigned by the Office of the Code Reviser. It is also known as “coal-by-wire” and the “Colstrip bill.” Regardless of the name, it refers to power generated through coal combustion outside of Washington that is delivered onto the Washington grid. Although the electrical companies serving Washington currently own or partially own 12 coal-fired electric generation facilities throughout several western states, most of the legislative conversation has been around a four-unit coal-generating plant located in the town of Colstrip, Montana. Of the four units in Colstrip, two are jointly owned by six entities, including each of Washington’s three electrical companies.

There have been discussions in Olympia regarding whether Washington should continue to use coal-fired electricity, the length of time on the Colstrip plant’s useful life, and when the Colstrip

plant should be decommissioned. Upon decommissioning, there are environmental laws likely to require remediation at the site. These include water quality laws and requirements of the Resource Conservation and Recovery Act (RCRA). The latter regulates coal combustion residuals as a nonhazardous waste.

Under this legislation, the Utilities and Transportation Commission may authorize an electrical company to place regulatory liabilities into a retirement account to cover decommissioning and remediation costs of eligible coal units. To be included as an “eligible coal unit,” the unit must be a generating unit of a coal-fired electric generation facility that had two or less generating units as of January 1, 1980, and four generating units as of January 1, 2016. An eligible unit must also have multiple owners and serve retail customers in Washington with a portion of its load. This limiting language essentially reduces the scope of the bill to the coal plant in Colstrip, MT.

As used in the bill, the concept of regulatory liabilities are liabilities recorded on a utility’s financial statements resulting from a requirement by a regulator that certain amounts are to be paid by the utility in the future. An example is revenue collected by the utility that has been ordered to be refunded to customers. Regulatory liabilities are the reverse of regulatory assets and, under the bill, may only be put into a retirement account after adjudicative proceedings in accordance with the Administrative Procedures Act have been conducted.

The regulatory liabilities funding a retirement account may not be used for any purpose other than prudently incurred decommissioning and remediation costs. The regulatory liabilities in the account may not be reduced, altered, impaired, or limited from the date of the Utilities and Transportation Commission’s approval of their inclusion in an account until all decommissioning and remediation costs are recovered or paid in full. Any remaining funds in the retirement account, after the electrical company recovers all prudently incurred decommissioning and remediation costs, must be returned to customers.

The funds in a retirement account for decommissioning and remediation costs may not be used for those purposes if the proposed closure date is prior to December 31, 2022 unless certain conditions are satisfied. To close the plant prior to that date, the electrical company must demonstrate that the decision to close is attributable to the actions of a co-owner or operator of the eligible coal unit, or is prudent. In this case, prudence must be determined by evidence showing that the continued operation of an eligible coal unit is economically or technologically unfeasible, requires a capital investment that is outside the scope of a prudent improvement or investment, or the eligible coal unit has reached the end of its useful life.

VIII. Toxic Chemicals

The realm of toxic chemicals received a great deal of attention over the course of the last legislative biennium. As noted above, the Governor made a push in 2015 to reduce the amount of toxic chemicals entering the Washington market and, ultimately, its waters. Although the Governor’s toxics package received most of the attention in 2015, separate legislation on toxic chemicals used as flame retardants in children’s products charted its own course. Although unsuccessful in 2015, legislation on that topic found a path forward in 2016.

Meanwhile, in a very different corner of the toxics world, the generally popular Pollution Liability Insurance Agency was up for one of its regular reauthorizations. The agency, a complement to the Model Toxics Control Act, is part of the state’s efforts to address toxic releases. This year the agency was not only reauthorized, but its scope of work was expanded in significant ways.

Flame Retardants (ESHB 2545)

Relevant RCW Chapter(s): 70.240

The path towards banning certain flame retardant chemicals that are used in children’s products has been a long one for the Legislature. In 2008 a prohibition was enacted on the sale or distribution of a children’s product that contains amounts of lead, cadmium, or phthalates above a certain weight percentage.²⁹ For the purposes of the prohibition, “Children’s product” includes toys, car seats, children’s cosmetics, children’s jewelry, and any product designed to help a child with teething, to facilitate sleep, relaxation, or the feeding of a child, or to be worn as clothing by children.³⁰

In that same 2008 legislation, the Department of Ecology was directed to develop of a list of high-priority chemicals of high concern for children (the “CHCC list”).³¹ The rule eventually adopted by the Department of Ecology that created the CHCC list included over 60 different chemicals.³² These included the chemicals TDCPP (tris (1, 3-dichloro-2-propyl) phosphate), TCEP (tris (2-chloroethyl) phosphate), decabromodiphenyl ether, HBCD (hexabromocyclododecane), and additive TBBPA (tetrabromobisphenol A). Products with chemicals on the CHCC list are still eligible for use on children’s products; however, the manufacturer is required to provide notice to the Department of Ecology that the manufacturer’s product contains a chemical on the CHCC list.

Recent legislative biennia have seen various versions of bills proposed relating to the use of chemicals on the CHCC list that have passed the House but failed in the Senate.³³ Although the bills failed, the 2014 Supplemental Operating Budget did direct the Department of Ecology to test for the presence of flame retardants in children’s products and furniture and to analyze TBBPA and antimony compounds used as flame retardants.³⁴ In January 2015 the Department submitted a report to the

Legislature that recommended the restriction of 10 flame retardants in children's products and furniture.³⁵

These various bills on the topic had originated in the House Environment Committee and were eventually considered by the corresponding Senate committee. The 2016 session saw a different path. A new bill was introduced and referred to the House Health Care and Wellness Committee. After leaving the House, the bill travelled to the Senate Health Care Committee. This legislative path ultimately proved successful, and although it was changed many times in the process, a toxic flame retardants bill was sent to the Governor's desk.

This bill creates a prohibition on a new set of flame retardant chemicals. Beginning July 1, 2017, no manufacturer, wholesaler, or retailer may manufacture, knowingly sell, offer for sale, distribute for sale, or distribute for use in the state any children's products or residential upholstered furniture containing any of five flame retardants in amounts greater than one thousand parts per million in any product component.

The list of prohibited chemicals is taken from the CHCC list. They are the chemicals known as TDCPP, TCEP, decabromodiphenyl ether, HBCD, and additive TBBPA. In addition to the prohibited chemicals, the Department of Ecology is directed to consider whether six additional chemicals meet the criteria of a chemical of high concern for children.

If the Department of Ecology adds any of the six highlighted chemicals to the CHCC list, then within one year the Department of Health must organize a stakeholder advisory committee for that chemical. The advisory committee would serve as a forum for providing early stakeholder input, expertise, and additional information as the state develops policy options and recommendations for reducing exposure to the chemical and designating and developing safer substitutes. If through this process the Department of Health determines that a flame-retardant chemical should be restricted or prohibited from use in children's products, residential upholstered furniture, or other commercial products or processes, then it must make a legislative recommendation to do so. The recommendation must come with a list of citations to the peer-reviewed science and other sources of information reviewed and relied upon in support of the recommendation to restrict or prohibit the flame retardant chemical.

Pollution Liability Insurance Agency (SHB 2357) Relevant RCW Chapter(s): 70.148

The Pollution Liability Insurance Agency (PLIA) was established in 1989 to provide reinsurance to insurance companies that provide coverage to the owners and operators of underground storage tanks (UST) used to store petroleum.³⁶ The program allows the owners and operators of USTs that store petroleum to demonstrate financial responsibility regarding their ability to pay for any accidental

releases. The PLIA programs are funded through a tax of 0.3 percent of the wholesale value of refined petroleum products. Proceeds from the tax are deposited in the Pollution Liability Insurance Trust Account and spent on the PLIA's insurance program and associated administrative costs. The tax temporarily ceases to be imposed when the trust account balance exceeds \$15 million in the previous calendar quarter, and is imposed again when the balance falls below \$7.5 million in the most recent calendar quarter. A specific heating oil insurance program is funded through a fee of 1.2 cents per gallon of heating oil that is imposed on fuel dealers.

The program managed by the PLIA is set up to be reauthorized by the Legislature at regular intervals. The program and agency went into session set to be expired in the year 2020. This legislation extends that expiration date until the year 2030. It also makes some of the largest structural changes in the agency's history.

In addition to its reinsurance work, the legislation directs the PLIA to establish a program to issue grants and revolving loans to UST owners or operators. Grants or loans offered by the PLIA may not exceed \$2 million per UST facility and must be used for projects that develop and acquire assets with a useful life of at least 13 years. The grants and loans may be used for remedial actions at UST facilities consistent with the requirements in the Model Toxics Control Law and for upgrading, replacing, or closing a UST used to store petroleum. The grants may also be used for installing new infrastructure or retrofitting existing infrastructure to disperse alternative fuels, including electric vehicle charging, or to temporarily situate above-ground petroleum storage tanks as long as the project involves either a remedial action at a UST facility associated with petroleum release or a petroleum UST upgrade, replacement, or closure.

The legislation also authorizes the PLIA to conduct remedial actions to investigate and clean up a release at a UST facility if the owner or operator received a grant or loan from the PLIA. In doing so, the PLIA may not spend more than the difference between the amounts granted or loaned to the owner or operator and a \$2 million spending limit for each UST facility. In order for the PLIA to conduct a remedial action, the owner of the real property must consent to the PLIA's remedial actions and to the PLIA filing a lien on the UST facility in order to recover the PLIA's costs.

The funding underpinnings of the PLIA are also changed. The possession tax on refined petroleum products is reduced from 0.30 percent of the petroleum product's wholesale value to 0.15 percent, beginning July 1, 2021. However, along with the reduction in the tax rate, the mechanism that allows the tax to be turned off if the agency has a high balance is removed. Instead of the tax turning off, if the balance exceeds \$7.5 million at the beginning of any fiscal biennium, then the excess is

transferred to a new account designated to fund the new grant and loan program.

IX. Miscellaneous Agency Research and Pilot Projects

Like most states, Washington has a part-time, citizen legislature. As a result, legislative members often have to commission other instruments of the state to gather information and report back with a goal of, ideally, informing future substantive policies. This process appears under subject matter headers above; however, the following efforts do not fit into any of those headers.

Pollen-Rich Noxious Weeds (EHB 2478)

Relevant RCW Chapter(s): 17.10

Honeybee population levels, and Colony Collapse Disorder, have been in the news and on the mind of legislators and the apiary industry for a number of years. There have been legislative proposals related to Colony Collapse Disorder in recent sessions; however, the Legislature in general has taken a wait-and-see approach as the scientific community evaluates what, if any, public policy changes can reverse the downward trend of pollinator populations.

In the meantime, some legislators have looked for ways to support pollinators, apiarists, and the agricultural production they help support. This session they sought to address an unintended consequence of noxious weed control. State policy encourages, and in some cases requires, land owners to eradicate noxious weeds. However, many of the species of weeds in Washington are also productive pollinator forage plants. When weeds are removed, the land is often left bare, creating a pollen deficit in the area. To begin addressing this side effect of weed control, the Legislature commissioned the State Noxious Weed Control Board to conduct a pilot project that evaluates the advantages of replacing pollen-rich noxious weeds with native forage plants, or non-native and non-invasive forage plants, that can produce similar levels of seasonally balanced pollen and nectar to support honey bee populations.

The goal of the pilot project is to develop optional guidance and best practices for landowners and land managers. In developing the pilot project, the Weed Board must seek to maximize the dual public benefits of reducing noxious weeds and supporting agricultural production through access to pollen-rich and nectar-rich forage for honey bees and other pollinators. The Weed Board must coordinate with willing landowners to provide plant starts, seed packs, and other goods or services necessary to replace noxious weeds with native plants or non-native plants that are not invasive. Priority participation in the pilot project must be given to interested private landowners located in areas of the state where the dual public benefits of the pilot project can be maximized with an expectation that

pilot project partners will be located in both eastern and western Washington.

The Weed Board must report the findings from the pilot project to the Legislature by October 31, 2020. The report must include a list of suitable pollen-rich forage plants that are alternatives to noxious weeds, a list of plant suppliers, guidelines for replacing noxious weeds, an assessment scale that rates the usefulness of various approaches, and any other recommendations for extending the pilot project or implementing the lessons learned through the pilot project.

In addition to the pilot project, this bill also adds to an existing mandate for state agencies to control noxious weeds on the land they manage. Under this legislation, state agencies must give preference to replacing pollen-rich and nectar-rich noxious weeds with native pollinator-friendly forage plants when deemed appropriate by the agency and its targeted resource-management goals. This directive also applies to projects undertaken by the Washington Conservation Corps.

Budget Proviso: Biofertilizers (ESHB 2380 (6004))

Relevant RCW Chapter(s): n/a

This proviso of the Capital Budget directs the Department of Natural Resources, the Department of Fish and Wildlife, and the State Parks and Recreation Commission to evaluate the use of locally-produced renewable biofertilizers and fiber from dairy digester systems when such products are cost-competitive and provide a suitable substitute for imported conventional fertilizers and fiber. A report is due back by the agencies by November 1, 2016.

Budget Proviso: Cross Laminated Timber (ESHB 2380 (1021))

Relevant RCW Chapter(s): n/a

A bill to give a tax preference to wood construction products over concrete and aggregate products failed to advance in the Legislature.³⁷ However, the Capital Budget kept the idea of promoting wood products alive through a \$75,000 appropriation to Washington State University for the preparation of a review and summary of available engineering test results and other evidence demonstrating the performance of cross laminated timber (CLT) and other regionally sourced sustainable or renewable materials in building construction. The review must emphasize results and evidence that are relevant to the consideration of building code amendments that allow for greater use of CLT in construction. This appropriation was coupled with \$50,000 to the Department of Commerce to assist prospective CLT manufacturers in evaluating the potential CLT market and determine necessary investments to manufacture CLT.

A report of these activities is due December 1, 2016.

X. Work Groups, Task Forces, and Councils.

One often-overlooked part of the Legislature's work each year is bills that commission work groups. These groups may be established to focus on a one-time issue, or they may be provided with a broader scope. Some work groups are created indefinitely, while others are given a set expiration date and an opportunity to convince the Legislature why their existence should continue. The work groups usually are comprised of agency representatives, representatives of other governments (federal, tribal, and local), and interested stakeholders. Legislation relating to work groups is usually not the go-to source material for the Olympia press corps; however, the work groups, and the issues addressed by them, are usually important to a specific set of constituents and the work done by the groups often serves as the foundation for policy changes eventually addressed by future legislatures.

The 2016 session saw a number of existing work groups request legislation that extended their impending expiration date. Many of these work groups were not set to expire until after the 2017 legislative session; however, it is an accepted practice to ask for an extension at least one year before it is actually needed. In addition to extending expiration dates, the Legislature also commissioned new groups to make recommendations on specific policy questions.

Invasive Species Council (SB 6195)

Relevant RCW Chapter(s): 79A.25

The Washington Invasive Species Council was set to expire on June 30, 2017. This legislation extends the Council, and the account that supports the Council's work, until June 30, 2022. The Washington State Invasive Species Council was first established in 2006 with direction to facilitate collaboration, coordination, and development of a statewide plan of action to combat harmful invasive species. The first iteration of the Council was set to expire in 2011 and it had already been renewed once before.

The Council is tasked with developing and periodically updating a Statewide Strategic Plan to address invasive species. The strategic plan was first published in 2008 and most recently updated in 2015. Each year the Council must submit a report to the Governor and relevant policy committees of the Legislature outlining an evaluation of progress made in the preceding year to implement the strategic plan.

Council membership includes representatives from the state departments of Agriculture, Fish and Wildlife, Ecology, Natural Resources, and Transportation along with a representative from the Washington State Noxious Weed Control Board. The state family is joined by two representatives of county government and invited participation from the U.S. Department of Agriculture, U.S. Fish and

Wildlife Service, the U.S. Environmental Protection Agency, and the U.S. Coast Guard.

Habitat and Recreational Lands Coordinating Group (SB 6296)

Relevant RCW Chapter(s): 79A.25

The Habitat and Recreation Lands Coordinating Group was set to expire on July 31, 2017. This legislation extends its existence until July 31, 2027. The Habitat and Recreation Lands Coordinating Group, often called the "Lands Group" within state government, is a statutorily created work group assigned the task of annually reporting to the Office of Financial Management on issues relating to state habitat and recreation land purchases and disposals.

The Lands Group has been assigned specific statutory duties. These duties include reviewing agency land acquisition and disposal plans to help ensure statewide coordination, producing a forecast of land acquisition and disposal plans, and monitoring the success of acquisitions.

The Lands Group is required to include the participation of staff from the various state agencies involved on some level with public land acquisition and management. In addition, representatives of appropriate stakeholder groups may be invited to participate. Currently the Lands Group has 16 members representing various state agencies, local governments, nonprofit organizations, industry trade groups, and legislative districts.

Like the Invasive Species Council, the 2016 legislation was the second renewal of the Lands Group. It was first created in 2007 and was initially set to expire in 2012.

Marine Resources Advisory Council (SB 6633)

Relevant RCW Chapter(s): 43.06

The Marine Resources Advisory Council was set to expire on June 30, 2017. This legislation extends the Council until the year 2022. The Marine Resources Advisory Council was first established as an entity within the Office of the Governor in 2013 to focus on the issue of ocean acidification. Specifically, the Council has been asked to maintain a sustainable coordinated focus on state efforts to address the impacts of ocean acidification, advise the University of Washington and others on technical aspects of ocean acidification, develop policy recommendations, seek public and private funding for technical analyses, and conduct public education activities around the ocean acidification issue.

The membership of the council is specified to include 23 voting members, including representatives of the Legislature, state agencies, federally recognized Indian tribes, fishing groups, marine tourism and conservation groups, and agricultural and business organizations. In addition, the Governor is directed to invite the participation of the federal National Oceanic and Atmospheric Administration

and academic institutions as nonvoting members of the Council.

XI. Conclusion

The 2016 session ended quietly in the late evening on March 29th. This was 20 days later than the scheduled end of session and after the Governor vetoed 27 bills as a reminder to the Legislature to complete an operating budget. It was a quieter than usual Sine Die ceremony after a relatively bruising biennium. The last substantive action of the House was to vote to override the 27 vetoes, while the Senate concurred with the Capital Budget.

The 2016 interim brings with it further judicial action on the *McCleary* case to decide if the Legislature's promise to develop a school funding plan is adequate³⁸. This interim also brings another general election. With all 98 House members, and half of the Senators, up for reelection, along with the carbon pricing initiative, the story of the 2017 Legislature will start taking shape on the morning of November 9th.

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† The nonpartisan Office of Program Research provides legal drafting, research, and objective information to assist House members and legislative committees in making informed judgments about policy and funding issues facing the state.

- 1 *McCleary v. State of Washington*, 173 Wn.2d 477 (2012).
- 2 This initiative was ultimately deemed unconstitutional by the Washington Supreme Court.
- 3 HB 1472.
- 4 HB 1314.
- 5 Washington State Register 16-04-092.
- 6 Washington State Register 16-02-101.
- 7 The policy content of many policy bills was given life in the form of provisos in the operating budget.
- 8 ESHB 2988.
- 9 HB 2828 and SB 6280 would have streamlined the Forest Practices Board's authority for adopting rules designed to protect public safety on unstable slopes.
- 10 HB 2863 would have provided direction to the Department of Ecology as to how emergency drinking water projects should be prioritized.
- 11 ESHB 2380, Section 3018.
- 12 Section 1033, Chapter 49, Laws of 2011.

- 13 *Swinomish Indian Tribal Community v. Department of Ecology* (178 Wn.2d 571); *Sara Foster v. Department of Ecology* (184 Wn.2d 4).
- 14 Most notably, Kittitas County (Chapter 13.40, Kittitas County Code).
- 15 The funding was provided in the 2016 supplemental operating budget, ESHB 2376 (302)(17).
- 16 *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571.
- 17 HB 2840 and SB 6568.
- 18 Amendment to SHB 2376 (2376-S AMH BUYS JOND 085).
- 19 HB 2777 and SB 6381 were both introduced as vehicles to potentially house alternative language to the initiative, but neither was amended with official alternative language.
- 20 E2SHB 2346, as amended by the Senate Energy, Environment, and Telecommunications Committee.
- 21 ESHB 1571.
- 22 The apple maggot quarantine area is established in WAC 16-470-10.
- 23 Chapter 70.95N RCW.
- 24 RCW 70.95N.280.
- 25 RCW 70.95N.090.
- 26 House Environment Committee work session on February 18, 2016.
- 27 Growth management issues, including the GMA, remained with the House Local Government Committee. The SMA and GMA were both considered in the same Senate Committee.
- 28 ESB 6166, dealing with incremental electricity generation from qualified biomass energy facilities was vetoed in its entirety.
- 29 RCW 70.240.020.
- 30 RCW 70.240.010.
- 31 RCW 70.240.030.
- 32 WAC 173-334-130.
- 33 HB 1295 (in the 2013/14 biennium) and HB 1174 (in 2015).
- 34 Chapter 221, Laws of 2014, Section 302(13).
- 35 Department of Ecology publication number 14-04-047.
- 36 Chapter 383, Laws of 1989.
- 37 HB 2857
- 38 E2SSB 6195.

Vested Rights: Washington's Constitutional Land Use Doctrine



By Rich Hill

Originally Presented at the WSBA ELUL Section Midyear Meeting 2016

Fundamental Fairness

Washington's vested rights doctrine arises from, and continues to be grounded in and enforceable by, the state and federal constitutional requirements that the actions of government, in regulating property rights, must be fundamentally fair.

Washington courts recognize that it is fundamentally unfair to property owners for government to change the land use rules in the middle of the game. This would be unacceptable in Major League Baseball's World Series. It is equally unacceptable for Washington municipalities.

Washington courts acknowledge that government will always want to keep its options open, to change the rules of the game to reflect the fluctuating policy preferences of its legislative bodies. It is the gravamen of Washington's vested rights doctrine that courts must intervene to protect property owners from such fundamentally unfair practices. Washington courts have made it clear that these practices harm not only property owners, but society in general. They have no place in a just society.

The Vested Rights Doctrine Has, From the Beginning, Been Mandated by the Constitution.¹

*State ex rel Ogden v. Bellevue*² is commonly cited by the Washington courts as the key progenitor of the Washington vested rights doctrine. In that case, the City of Bellevue engaged in administrative and legislative shenanigans (including a rezone) in an effort to prevent a property owner from developing a fruit and produce market, a use consistent with the zoning ordinance in effect as of the date of his application. The court held that the Washington Constitution, Article I, Section 12 (privileges and immunities) mandates the protection of property owners' vested rights: "To subject individuals to questions of policy in administrative matters would be unconstitutional." *Id.* at 495. Because the City of Bellevue had done so, its action was unconstitutional and was reversed. The court held, "An owner of property has a vested right to put it to a permissible use as provided for by prevailing zoning ordinances. The right accrues at the time an application for a building permit is made... A zoning ordinance is not retroactive so as to affect rights that have already vested...."³

As is made clear by a reading of the case, *State ex rel Ogden v. Bellevue* is not a common law case. It

is a constitutional law case. But for the Washington constitution, a different result would have ensued.

Hull v. Hunt,⁴ issued four years later, held that a newly adopted Seattle ordinance could not be applied retroactively to a property owner who had filed a building permit application prior to the effective date of the new ordinance, which would have precluded the property owner's proposed project. The court's ruling relies explicitly on *State ex rel Ogden v. Bellevue*, which, as demonstrated above, is constitutionally based, and repeats its holding: "[T]he right vests when the party... applies for his building permit, and the permit is thereafter vested."⁵

Interestingly, the Seattle corporation counsel raised to the court the same bugaboo that continues to be argued by municipal attorneys today, 60 years later: "The corporation counsel... expresses the fear that such a rule... will result in speculation of building permits." The court's response, made 60 years ago, is equally pertinent today: "[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 building, particularly in view of [applicable permit] time limitations..."⁶

To the best of my knowledge, there was not in 1958, nor is there today, any empirical support for the "permit speculation" parade of horrors that municipal attorneys often present to the courts in an effort to take away property owners' vested rights. The fact that should be obvious to everyone is that property owners are always highly unlikely to invest considerable financial resources for merely "speculative" ventures.

Ten years later, in *Beach v. Board of Adjustment*,⁷ the Washington Supreme Court considered a contention by the Snohomish County Board of Adjustment that a property owner's conditional use permit application was subject to newly adopted zoning ordinance changes. The court relied on the constitutional vested rights case of *State ex rel Ogden v. Bellevue* to state unequivocally and unanimously, "This contention is erroneous. The applicant's right to a hearing vested at the time the application was properly filed with the Board and, furthermore, the subsequent change in the zoning ordinance does not operate retroactively so as to affect vested rights."⁸

It has become a commonplace to suggest that what the Washington courts have done in *Beach* and subsequent cases is to have "expanded" the vested right doctrine to different types of permit applications. This commonplace is, however, incorrect. There is no suggestion in *Beach*, or in any of the subsequent cases, that the court was engaging in any sort of "expansion" exercise. Rather, these judicial decisions are instead simply applying the constitutional requirements of *State ex rel Ogden* in a consistent manner to other development applications.

*Juanita Bay Valley Community Association v. City of Kirkland*⁹ is best known as a landmark SEPA case that defined the broad scope and intent of SEPA and its applicability to local governmental decision-making. However, the court in that case also had occasion to consider the applicability of the constitutional vested rights doctrine to grading permits. The court held, relying again upon the constitutional vested rights case of *State ex rel Ogden v. Bellevue*:

This doctrine has been held applicable to an application for a conditional use permit, *Beach v. Board of Adjustment, supra*. Appellant argues that the “vested right” doctrine has never been held to apply to a grading permit but, in the context of that doctrine, we see no rational distinction between building or conditional use permits and a grading permit... [W]e conclude the trial court correctly determined that ordinance No. 2183 was not applicable to KSG’s March 31, 1972 application for the grading permit here in question.¹⁰

Again, there is no suggestion here by the court that it was “expanding” the doctrine. Rather, the court was merely applying it to the context of grading permits.

*Talbot v. Gray*¹¹ was a dispute between neighbors and the City of Seattle about a substantial development permit for a dock. One of the key issues in the case was which version of Seattle’s shoreline ordinance applied to the proposal, that in effect on the date of application for the shoreline substantial development permit, or that in effect on the date of the decision. The court found no need to debate the question. Relying on *Hull v. Hunt*, which, as has been stated above relies on the constitutional analysis set forth in *State ex rel Ogden v. Bellevue*, the *Talbot* court held: “Grays’ obligations and rights to develop vested on November 18, 1971, when they applied for a substantial development permit.”¹²

As will be explained below, the attempt of the *Potala* court to distinguish *Talbot* on the grounds that *Talbot* involved a building permit has no merit. *Talbot* holds unequivocally that it was the date of the shoreline substantial development permit that vested the applicant’s rights “to develop.”

*Ford v. Bellingham-Whatcom County District Board of Health*¹³ reiterated the constitutional basis of the vested rights doctrine by citing its origin in *State ex rel Ogden v. Bellevue*, and reiterating that the same rule has been applied in connection with the right of property owners to obtain other types of permits such as clearing and grading permits, and cited *Juanita Bay*. The *Ford* court was “persuaded by analogy” that a property owner “has a right to obtain a septic tank permit under existing septic tank regulations” once that owner “actually makes a valid application for a septic tank permit.”¹⁴

Again, this is not an expansion of the doctrine, but an application of it to an “analogous” development permit application.

Five years later, the Washington Supreme Court rendered its decision in *Norco Construction v. King County*.¹⁵ The meme on this case has become that in *Norco*, the court “refused” to extend the vested rights doctrine to subdivision applications. This meme is misleading.

In *Norco*, the court considered a preliminary plat application that conformed to all then-applicable King County regulations, but was not in conformity with proposed comprehensive plan changes. The County deferred indefinitely from acting on the application. The Court of Appeals held that because of the 90-day time limit for action on plats set forth in RCW 58.17.140, *Norco* had a “vested right” to have the application considered as of the regulations in effect on that date.

The Washington Supreme Court unanimously upheld the ruling of the Court of Appeals, and modified it only to state that the use of the term “vested right” to explain the basis of the ruling was inappropriate, but that nonetheless, due to the applicable statute, *Norco* was entitled to have its application considered as of the rules in effect 90 days after the date of application.

In the course of its unanimous decision, the Washington Supreme Court reaffirmed its commitment to the vested rights doctrine, continued to rely upon *State ex rel Ogden v. Bellevue* as its authority for the doctrine, and explicitly reaffirmed its application to building permits, conditional use permits, grading permits, and substantial development permits.¹⁶

The court also reaffirmed the constitutionally protected property rights of owners, and the due process limitations on government’s authority to regulate property:

The basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit. U.S. Const. amends. 5, 14. Although zoning is, in general, a proper exercise of police power which can permissibly limit an individual’s property rights, it goes without saying that the use of police power cannot be unreasonable... Not only are local governments limited by due process protections in how they zone communities, they are similarly limited in the decisions they make under the adopted zoning plan.¹⁷

Thus, *Norco* is yet another reaffirmation of the constitutional basis of the Washington vested rights doctrine.

*Burley Lagoon v. Pierce County*¹⁸ is often cited as a case that refuses to “extend” the vested rights doctrine to site plan approval applications. However, a review of that case demonstrates that its focus is not

on that issue, but rather whether Burley Lagoon's application qualified for the County's local municipal transition vesting rule. The court held that it did not. While there is a brief discussion whether site plans should be treated like building permits for vesting purposes, the court's dismissal of that claim does not address applicable case law, does not address the constitutional principles at stake, and relies on the already at that time discredited discretionary/ministerial distinction. This case must be viewed as an outlier.

West Main Definitively Defines Vested Rights as Constitutionally Guaranteed.

Which brings us to *West Main Associates v. City of Bellevue*,¹⁹ the Washington Supreme Court's comprehensive discussion and analysis of Washington's vested rights doctrine, a discussion and analysis that continues to be cited and followed to the present day.²⁰ *West Main* was a challenge to a Bellevue ordinance that required a property owner to obtain administrative design review approval for a project as a precondition to being allowed to file a building permit application. This in effect transferred to the City the right to determine at what point the property owner could vest his rights.

The court commenced its analysis by a return to the constitutional basics of property rights law:

We have recognized that "although less than a fee interest, development rights are beyond question a valuable right in property." *Louthan v. King County*, 94 Wn.2d 422, 428, 617 P.2d 977 (1980), relying on *Pen Cent. Transp. Co. v. New York*, 438 U.S. 104... (1978)...

Despite the expanding power over land use exerted by all levels of government, "[t]he basic rule in land use law is still that absent more, an individual should be able to utilize his own land as he sees fit. U.S. Const. amends. 5, 14." *Norco Constr. Inc. v. King Cy.*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982).²¹

The court then moves on to one aspect of the court's protection of these constitutional property rights:

One aspect of this court's protection of these rights is our vested rights doctrine. Under this doctrine, developers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application. The Washington doctrine protects developers who file a building permit application that (1) is sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which

the developer seeks to develop.... Once a developer complies with these requirements a city cannot frustrate the development by enacting new zoning regulations.²²

After having defined the doctrine, the court identifies its purpose and constitutional basis:

The purpose of the vesting doctrine is to allow developers to determine, or "fix," the rules that will govern their land development... The doctrine is supported by notions of fundamental fairness. As James Madison stressed, citizens should be protected from the "fluctuating policy" of the legislature. *The Federalist*, NO. 44, at 301 (J. Madison)... Persons should be able to plan their conduct with reasonable certainty of the legal consequences. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960). Society suffers if property owners cannot plan their developments with reasonable certainty, and cannot carry out the developments they begin.

Of course, all institutions, including government, like to keep options open. But while keeping options open normally involves a price, government can keep its options open at no cost to itself in the vesting game because virtually all the risk of loss is initially imposed on the developer. Unfortunately, that loss is still a social cost, ultimately borne by all, whether or not the government recognizes it.

(Footnote omitted) Hagman, *The Vesting Issue: The Rights of Fetal Development vis a vis the Abortions of Public Whimsy*, 7 Env'tl. L. 519, 533-34 (1977).²³

In *West Main*, the court cited the Due Process Clause of the United States Constitution, Amendments V and XIV. In *State ex rel Ogden*, the court cited the Privileges and Immunities Clause of the Washington Constitution, Article I, Section 12. Both provisions underpin the Washington vested rights doctrine. Both guarantee the rights of property owners to plan their developments with reasonable certainty, and to carry out the developments they begin. Both recognize that society suffers if property owners are subjected to the fluctuating policy of legislative bodies.

The court in *West Main* found that Bellevue's ordinance violated the constitutional rights of property owners: "The vesting rule of the Bellevue ordinance does not meet the due process standards of the Fourteenth Amendment.... The ordinance completely upsets our vesting doctrine's protection of a citizen's constitutional right to develop property free of the 'fluctuating policy' of legislative bodies."²⁴

The court does not leave the cities empty-handed, however. The court emphasizes that cities “can regulate or even extinguish vested rights by exercising the police power reasonably and in furtherance of a legitimate public goal.” At 53. But, it is equally clear, any such regulation or extinguishment must address the due process property rights of landowners that are protected by the court’s vested rights doctrine.

The lesson of *West Main* is that the vested rights doctrine, in the event there was a doubt in the mind of anyone, is not a common law doctrine, but a constitutional law doctrine intended to protect the most fundamental of property rights. It is not a doctrine that can be watered down or eliminated by the “fluctuating policy” of legislative bodies, whether at the city level or the state level.

West Main was followed just a few months later by *Valley View Industrial Park v. Redmond*.²⁵ In *Valley View*, the property owner had submitted building permit applications for five light industrial buildings, and sought to pursue seven additional buildings, but was frustrated by city officials from doing so. In the meantime, the property was downzoned.

The Washington Supreme Court ruled that the property owner was entitled to develop all twelve buildings, due to the actions taken by the city to frustrate building permit application. The court relied upon the vested rights doctrine, citing the constitutional decisions in *West Main* and *State ex rel Ogden v. Bellevue*: “These due process considerations require that developers be able to take recognized actions under fixed rules governing the development of their land... Due process requires governments to treat citizens in a fundamentally fair manner.... Property development rights constitute a ‘valuable property right’....”²⁶

The purpose of the doctrine was stated as follows: “Washington’s ‘date certain vesting rights doctrine’ aims at insuring that new land-use ordinances do not unduly oppress development rights, thereby denying a property owner’s right to due process under the law.”²⁷

As of 1987, then, there was no doubt whatsoever in the case law as to the basis of or the purpose for the vested rights doctrine. The basis is Article 1, Section 12 of the Washington Constitution, and Amendments V and XIV of the United States Constitution. The purpose is to insure that new land-use ordinances do not unduly oppress development rights. This law has not changed in the intervening years. It has, if anything, been strengthened.

Statutes Guaranteeing Vested Rights are Consistent With, but not Intended to Limit (and Could not, in any Event), the Constitutional Vested Rights Doctrine.

Since *West Main*, the Legislature has adopted four laws to provide additional statutory protection for property owners’ vested rights. The first two

were adopted in 1987, shortly after the court’s decision in *West Main*, and were obviously informed by the constitutional discussion of vested property rights set forth in that decision, and were intended to protect society from unduly oppressive efforts by municipalities to change the land use regime in the middle of the process.

RCW 19.27.095 addresses building permit vesting: “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.”

RCW 58.17.033 addresses subdivision vesting. It is a response to *Norco Construction, supra*, which had held that subdivision applicants are guaranteed by statute to have their applications considered under the rules in effect 90 days after the date of application, but declined to term those rights as “vested rights.” RCW 58.17.033 modifies the holding in *Norco* to grant applicants for subdivisions greater rights than recognized in *Norco*, indeed the same rights as those who apply for building permits. “The vested rights doctrine established by case law is made statutory... The vesting of rights doctrine is extended to applications for preliminary or short plat approval...”²⁸

RCW 58.17.033 contains language that parallels that of RCW 19.27.095: “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... or short plat approval... has been submitted....”

There is no suggestion either in the language of the statute or in the legislative history that a property owner’s subdivision application would provide any weaker vested rights than would his building permit application.

There is also no suggestion in the language of either of these statutes, or in the legislative history, that the Legislature intended to abrogate the constitutional rights of property owners protected by the vested rights doctrine and recognized in *State ex rel Ogden, Hull v. Hunt, Beach v. Board of Adjustment, Juanita Bay, Talbot v Gray, West Main, or Valley View*. Of course, even if that had been the Legislature’s intent, the Legislature is without power to reduce constitutional rights by statutory fiat.

RCW 36.70B.180, adopted in 1995 as part of the Legislature’s regulatory reform package of land use process changes, specifically authorized local jurisdictions to enter into development agreements with property owners that include the ability to vest rights in existing land use regulations for time periods as authorized by the agreement. These development agreements are valid only after a public

hearing, and approval by the legislative authority of the jurisdiction. These provisions are fully consistent with and indeed implement successfully the constitutional requirements of vested rights set forth in *West Main*.

RCW 36.70A.302 was adopted in 1997 as part of GMA. It provides that a property owner who has vested his rights under local legislation, even if that legislation is later deemed invalid by the Growth Management Hearings Board, may proceed with his development. This provision, too, is fully consistent with our state's constitutional vested rights doctrine.

Any efforts, then, that may be taken to amend existing statutory vested rights law must be consistent with the constitutional protections guaranteed by *State ex rel Ogden* and *West Main*. Those efforts must be at a minimum consistent with the rights guaranteed by our court's vesting doctrine.

Since 1987, Washington Courts Have Continued to Protect Vested Rights Against Government Incursion.²⁹

In 1994, the Washington Supreme Court was asked to determine whether the vested rights doctrine applied to the City of Seattle's master use permit application process. The court issued its verdict in *Erickson & Associates v McLerran*,³⁰ the first significant vested rights case since *West Main*. In *McLerran*, the City had changed the land use rules applicable to the property owner's proposal before he had applied for a building permit, but after he had applied for a master use permit.

In its decision, the court acknowledges *West Main*'s holding that "our vesting doctrine is rooted in constitutional principles of fundamental fairness," and that "[t]he doctrine reflects a recognition that development rights represent a valuable and protectable property right."³¹ Writing seven years after the adoption of the 1987 building permit and subdivision statutes, the court emphasized that "[o]ur vested rights cases thus establish the constitutional minimum: a 'date certain' standard that satisfies due process requirements," citing as authority the 1958 *Hull v. Hunt* constitutional vesting case.³²

Significantly, the court agreed with the property owner "that our prior cases apply the vested right doctrine in other contexts besides building permits," referring with approval to *Talbot*, *Juanita Bay*, *Ford*, *Victoria Tower Partnership*, and *Beach*.³³ There was no hint in the court's analysis that the 1987 vesting statutes, adopted seven years earlier, had somehow abrogated the constitutional protections afforded by these rulings.

At the end of the day, however, the court held that the property owner's due process rights were sufficiently protected by allowing the submission of a building permit at any time, before, during, or after the master use permit application. Given the ability of the property owner to obtain certainty by filing a building permit, application of the vested

rights doctrine, according to the court, to master use permits was not necessary.

The lesson of the *McLerran* case, then, is that the vested rights doctrine is alive and well, and will be vigorously defended by the courts as necessary to protect property owner's valuable and protected property rights. The reasoning and holding of *West Main*, and all of the courts' prior vesting cases, were reaffirmed. To affirm the retroactive application of an ordinance such as Seattle's, the court will and must apply the due process analysis of *West Main*.

As a footnote to this discussion of *McLerran*, mention should be made of the puzzling assertion by the court about the vested rights doctrine's purported cost to the public interest:

Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws, is by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.³⁴

This assertion is puzzling for several reasons. First, it runs directly counter to *West Main*'s holding only eight years earlier that "[s]ociety suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin," 106 Wn.2d at 51, a holding that was supported by authority contained in the *Harvard Law Review*, the *Environmental Law Journal*, and legal precedent. This novel contention in *McLerran*, on the other hand, is supported by no authority whatsoever. It is a mere assertion, with no tether to any factual or doctrinal support. It is, of course, not difficult to disprove this contention. Most Washington jurisdictions include nonconforming use and structure provisions that encourage preservation and even expansion of nonconformities. Indeed, virtually every historic landmark in the City of Seattle is a nonconforming structure, along with virtually every Seattle commercial and multifamily residential structure constructed since 1990. To argue that all of these structures are "inimical to the public interest" is, frankly, absurd, and unlikely to have been intended by the Supreme Court in *McLerran*.

The *McLerran* court recognized that the court's prior recognition of vested rights in cases other than building permit cases—*Beach*, *Juanita Bay*, *Talbot*, *Ford*—remains as good law even after the legislative affirmance of building permit and subdivision vested rights. This recognition was reaffirmed by the Court of Appeals in *Thurston County Rental Owners Association v. Thurston County*.³⁵ The Owners Association challenged Thurston County's permit system for on-site septic tank systems on a number

of grounds, including the doctrine of vested rights. The court concluded that the Owners Association had failed to timely apply for their septic system operation permits and therefore had not perfected their vested rights. Nonetheless, the court did affirm that “[t]he [vested rights] doctrine applies to septic installations,” citing *Ford*.³⁶

In the same year, the Washington Supreme Court decided *Noble Manor v. Pierce County*.³⁷ A developer had submitted a short plat application for three duplex multifamily structures on three legal lots. The application complied with zoning and land use control ordinances in effect on the date of application. The County subsequently changed the zoning regulations, and refused to authorize construction of the duplexes.

The issue before the court was to construe RCW 58.17.033 and to determine whether the rights that vest upon subdivision application are merely the right to divide (the County’s position) or also the right to develop (the property owner’s position). The court had little difficulty answering the question:

We conclude that when the Legislature extended the vested rights doctrine to plat applications, it intended to give the party filing an application a vested right to have that application processed under the land use laws in effect at the time of the application. Therefore if the County requires an applicant to apply for a use for the property in the subdivision application, and the applicant discloses the requested use, then the applicant has the right to have the application considered under the laws existing on the date of the application. 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 to the landowner....

[W]e...recognize developers’ needs for certainty and fairness in planning their developments. In extending the common-law vested rights doctrine to include short and long plat applications, 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 or short subdivision of their property. We do not accept the County’s argument that the only right that vests upon a subdivision application is to draw lines on a map... This would be an empty right and would conflict with the Legislature’s intent to extend the protections of the vested rights doctrine to subdivision applications.³⁸

The court specifically addressed the concerns of the County that the absence of a divesting provision in the short plat statute, as opposed to the five-year limit in the subdivision statute, allowed the short plat’s vested status to remain indefinitely. The court acknowledged the concern, but insisted that the Legislature was fully able to respond if necessary.³⁹

The court then addressed what development rights vest. Two alternatives are possible: 1) all uses allowed by zoning on the date of application, or (2) an applicant should have the right to have the uses disclosed in their application considered under the laws in effect on the date of application. The court concluded that the second alternative comports with prior vesting law, citing *West Main*, and that this rule makes “permit speculation” less probable. Therefore, “what is vested is what is sought in the application for a short plat.”⁴⁰

Because the County had violated the applicant’s vested rights, the court awarded damages.

Some municipal attorneys still, after all these years, advocate for a “narrow construction” of *Noble Manor*. It should be clear, however, that the position taken by these attorneys is the one that was proffered by the County in *Noble Manor*, and roundly rejected by the court. These attorneys seek to transform the vested rights guaranteed by RCW 58.17.033 into “empty rights” that have no basis in our jurisprudence. These municipal attorneys are inviting damages awards against their clients, just as the Pierce County attorneys confronted in *Noble Manor*.

Finally, although the court in this case was construing a statute and therefore its ruling was not dependent on the Constitution, it is important to point out that the court, in determine what development rights vest, relied on the constitutional vesting jurisprudence of *West Main*, which was described by concurring Justice Talmadge as “our principal case on the vesting doctrine.”

Shortly after the *Noble Manor* decision, the court issued its decision in *Rhod-A-Zalea v. Snohomish County*.⁴¹ The County, although acknowledging that Rhod-A-Zalea was a valid nonconforming use, insisted that it acquire a grading permit under newly adopted regulations.

The court, citing *West Main*, confirmed that the vested rights doctrine protects a permit applicant from regulations enacted after a permit application has been completed and serves to fix the rules that will allow the development to be established.⁴² Once the development has been established, however, subject to constitutional limits and statutory and ordinance protections, the nonconforming use that the vested rights have established may be subjected to later enacted police power regulations. In this case, because the imposition of the grading permit requirement did not appear on the record to substantially interfere with Rhod-A-Zalea’s business operations, and because Rhod-A-Zalea had not yet

applied for a permit enabling the court to review its constitutional objections, the court ruled that the County was entitled to impose the grading permit requirement, without prejudice to Rhod-A-Zalea's right to make constitutional claims after applying for the permit.

For purposes of this article, *Rhod-A-Zalea* stands for the proposition, once again, that the vesting doctrine, and its fraternal doctrine of nonconforming uses, are constitutionally based, but that the nonconforming use doctrine does provide a municipal safety valve of sorts for regulations that are truly necessary to protect the public safety. In the appropriate circumstances, and subject to constitutional limitations, they may be applied retroactively.

Also in 1998, the Washington Supreme Court applied *Noble Manor* in the subdivision context to confirm that a subdivision application vests a development to the storm drainage regulations in effect on the date of subdivision application. Subsequently adopted storm drainage rules are not applicable. *Phillips v. King County*.⁴³

One year later, Division II reaffirmed Washington's vested rights doctrine as in effect since *Hull v. Hunt*: "Under the 'vested rights doctrine' recognized in Washington, developers filing a timely and complete land use application [note the use of the term "land use application—this doctrine is not limited to building permit applications] obtain a vested right to develop land in accordance with the land use laws and regulations in effect at the time of application." *Weyerhauser v. Pierce County*.⁴⁴

Weyerhauser cites *West Main* for the proposition that "[t]he doctrine is based upon constitutional principles of fairness and due process, acknowledging that development rights are valuable and protected property interests."⁴⁵

The property owner claimed that its rights to develop the landfill project at issue vested in 1989 when it submitted its application for a conditional use permit, relying on the conditional use permit case of *Beach v. Board of Adjustment*. The court acknowledged the number of other contexts in which the vesting rule has also been applied, including *Ford*, *Talbot*, and *Juanita Bay*, and concluded that in order to protect the property owner's vested rights, "a vested right for the conditional use permit, but not for land use and development, would be an 'empty right' as wetland development was an integral component of the project."⁴⁶ The court continued:

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

aside LRI's due process rights in fairness and certainty.⁴⁷

Weyerhauser, then, stands for the proposition that the constitutional validity of the "well-rooted" Washington vested rights doctrine remains vital, well over a decade after the adoption of the statutory building permit and subdivision provisions. Conditional use permit vesting remains enforceable, and other forms of vesting are affirmed.

Two years later, Division II considered whether a short plat application was vested as to a County's storm water drainage ordinances. *Westside Business Park v. Pierce County*.⁴⁸ The court concluded, relying on *Noble Manor*, that "[s]torm drainage ordinances are land use control ordinances," within the meaning of RCW 58.17.033, and therefore the property owner, in submitting his short plat application and advising the County of his plans to develop a business park. Accordingly, the project was subject to the ordinance in effect on the date of application, not the ordinance adopted subsequently.

This brings us to *Abbey Road v. Bonney Lake*,⁴⁹ a 5-4 Washington Supreme Court decision. The five members in the majority followed *McLerran* for the proposition that the Constitution does not require that a site plan application vest an applicant's rights to the laws in effect on the date of application, when an applicant is free at any time to submit a building permit application. In so doing, the court appropriately recognized that the vesting doctrine adopted by the court is intended to ensure that "new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law."⁵⁰ The court went on to emphasize that "[o]ur vested rights cases thus recognize a 'date certain' standard that satisfies due process requirements."⁵¹

The property owner asked the court to reconsider *McLerran*, and to "expand" the vesting doctrine to include site plan applications. However, the court did not accept the invitation, and instead reaffirmed *McLerran*, and held that, based on RCW 19.25.095, a building permit application was required, on these facts, to vest.⁵²

At footnote 8, the court did cite its case law that recognized vesting in other development application contexts—*Juanita Bay*, *Talbot*, *Ford*, *Beach*, and *Weyerhauser*. The court did not indicate any disapproval of these cases, or of their holdings, but merely determined not to "expand" its vesting doctrine, in light of the legislature's action in adopting RCW 19.25.095.

The disagreement between the 5-member court majority and the 4-member court minority was not as to the unsurprising conclusion that *McLerran* should not be overruled. Instead, the disagreement was whether in fact the City of Bonney Lake unduly frustrated the property owner from submitting a building permit application, in violation of the holding of *West Main*. The entire court was, how-

ever, in agreement that *West Main*, and its constitutional analysis that the underlying purpose of the vesting doctrine “is to protect a citizen’s right to develop property free of the ‘fluctuating policy’ of legislative bodies,” remains good law.⁵³ The 5-member majority concluded that the property owner in this case was free to submit a building permit application at any time. The 4-member minority disagreed.

One year later, Division III issued its decision in *Deer Creek Developers v. Spokane County*.⁵⁴ The *Deer Creek* court followed *Abbey Road* for the proposition that a site plan application does not vest, and declined the property owner’s request to extend the vesting doctrine to include such applications. This result is not surprising, although the facts of the case are rather harrowing.

Significantly, though, while acknowledging the codification of “Washington’s common law vested rights doctrine for building permit applications” in RCW 19.27.095, the court emphasized the continuing validity of the vested rights doctrine for other construction permits:

The vested rights doctrine guarantees the applicant the right to have the project reviewed under the laws and regulations in effect at the time of the application. *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986). The vested rights doctrine also applies to applications for other construction permits. See, e.g., *Beach v. Board of Adjustment*, 73 Wn.2d 343, 438 P.2d 616 (1968).⁵⁵

Woodway, Potala, Alliance, and Snohomish County

In the last two years, the courts have issued four opinions, one from the Supreme Court, and one from each of the three divisions of the Court of Appeals. Review has been denied of the Division I case, and petitions for review are pending in the two others.

Town of Woodway v. Snohomish County is a statutory vesting case, construing the GMA vesting provision set forth in RCW 36.70A.302.⁵⁶ The court held:

Local land use plans and development regulations enacted under the Growth Management Act (GMA), chapter 36.70A RCW, are presumed valid upon adoption. Should a valid plan or regulation later be found to violate SEPA, the exclusive remedies provided by the GMA affect only future applications for development—not development rights that have already vested.⁵⁷

In this case, the property owner filed two permit applications to develop Point Wells and thereby vested its rights in the GMA plan adopted by Snohomish County. Although the plan was later invalidated by the Board, the court held that RCW 36.70A.302 applied, and the Board’s invalidation of

the Snohomish County Plan was not applicable to Point Wells.

In response to policy arguments raised by opponents of this rule, the court reviewed the legislative history:

As the Court of Appeals noted, the legislature was well informed when it made the amendments. The legislature relied on several government reports that examined the continuing validity of noncompliant plans and regulations and vested rights issues....

This history shows that the legislature thoughtfully considered the review process for comprehensive plans and regulations under the GMA. It purposefully integrated SEPA review with GMA review and outlined the remedies for faulty plans and regulations. It considered the impact that GMA review would have on vested rights and chose not to disturb this state’s strong vested rights doctrine. Our decision reflects the clear intent of the legislature, and we apply the statute as written.⁵⁸

In the course of its analysis, the court once again emphasized the constitutional property interests guaranteed by its vested rights doctrine: “Our vested rights doctrine protects due process and property interests by setting a clear date for vesting development rights...”⁵⁹

And, although he dissented on the merits of the Decision, Justice C. Johnson well stated the purpose and scope of the doctrine:

The [vested rights] doctrine operates to protect citizens and developers from the government changing the conditions and requirements that existed and were relied on when a completed building permit or development proposal was submitted. In other words, under the doctrine, the government could not change the game after it had already been played.⁶⁰

The vesting doctrine has stabilized over the years, has become better defined, and developed statutory definition. But the basic purpose remains the same: To provide due process protection for property owners against the fluctuating policy of legislative bodies.

*Potala Village v. Kirkland*⁶¹ is an outlier. In that case, Division I imagined that the Legislature implicitly intended in 1987 to reverse half a century of Supreme Court constitutional law precedent, despite the fact that the explicit intention of the Legislature, stated in the legislative history, was to protect property owner’s constitutional vested rights.

In *Potala Village*, the City of Kirkland had adopted a land use plan that encouraged dense multifamily development in the center of the city. The property owner purchased the property in reliance on that plan, and submitted a shoreline substantial development permit application to vest its rights. Neighbors then lobbied the City Council in opposition to the plan, and the city, responding to those neighbor concerns, “fluctuated” its legislative policy, and adopted a moratorium and ultimately downzoned the property. The city refused to honor the property owner’s vested rights.

There are four key fallacies in the court’s decision.

First, as mentioned above, the court suggests that the legislature, in adopting RCW 19.27.095, intended to abrogate the “common law” vested rights doctrine, except as set forth in the statute. However, there is nothing in the legislative history to support this conclusion. The *Potala* court is just making this up. *Potala* cites to *McLerran* and *Abbey Road* for the proposition that the vested rights doctrine is “now statutory.” But this is merely a truism. *McLerran* and *Abbey Road* declined to extend the vested rights doctrine to master use permits or site plan permits, but in so doing it continued to cite with approval the court’s extension of vested rights protections set forth in its half century of judicial precedents. Neither of these cases suggested in the slightest what the *Potala* court implied, which is that the vested rights doctrine is now “exclusively” statutory. The *Potala* court also makes the argument that had the legislature wanted to include shoreline substantial development permits, conditional use permits, grading permits, and other development permit applications, it would have included those types of permits in the statute, as it did with subdivisions. However, that is nonsensical. All of these other permit applications were already protected under the vested rights doctrine. Subdivisions were not protected. That is why the protection was extended to subdivisions alone, statutorily. The intention of the legislature in 1987 was to expand vested rights, not to limit them.

The second major flaw in *Potala* is the court’s idea that the Legislature has the authority to deprive property owners of their due process constitutional protections as guaranteed by our judiciary over the last half century—even if the Legislature had intended such an outcome, which it obviously did not. Simply put, the Legislature cannot amend the Constitution, and it is the role of the judiciary, not the legislature, to construe the Constitution.

The third major flaw in *Potala* is in its contention that the Supreme Court’s views on vested rights have been “evolving.” As this article demonstrates, the fact is that the Supreme Court’s views on vested rights have been impressively stable. Since 1954, the Supreme Court has made it clear that its vested rights doctrine is meant to protect property owners, and society at large from the fluctuating poli-

cies of legislative bodies, to provide privileges and immunities protections, and due process protections, to property owners, from the unduly oppressive actions of local government, actions seeking to change the rules in the middle of the game.

The fourth, and final, major flaw in *Potala* is in its just plain incorrect effort to distinguish *Talbot*. As discussed above, *Talbot* held unequivocally: “Grays’ obligations and rights to develop vested on November 18, 1971, when they applied for a substantial development permit.” *Potala* makes two arguments why this precedent, cited with approval as recently as 2009 in *Abbey Road*, should not be followed. First, *Potala* contends it was really a building permit, not a substantial development permit, case. But of course, nothing in the text of the decision mentions a building permit. The holding of the case, cited above, is that vesting occurs on the date of substantial development permit application. Nothing could be more clear. Second, *Potala* pooh-poohs the holding in *Talbot* because it was decided 50 years ago. But of course, it has continued to be cited with approval ever since, as recently as 2009. The Constitution, which is the basis for the holding in *Talbot*, remains in effect, and of course is as vigorous as ever.

The Supreme Court has denied review of *Potala*. So, for now, it is the law in Division I. Importantly, the court limited its holding to shoreline substantial development permits, and expressed no opinion as to the other constitutional vested rights cases that have been decided by the courts in the last half century. This provides litigants with the opportunity in future cases to limit *Potala* to its facts, and to ensure that it remains the outlier that it deserves to be.

This is an appropriate place, perhaps, to address the meme that has surfaced to the effect that the pre-1987 vested rights cases were cases of “common law” vesting. It is unclear what the origination of that meme is. But it is, as this article argues, a dangerously incorrect meme. There is no question but that the court’s vested rights doctrine is constitutional, not “common law.” No one would refer to *Brown v. Board of Education* as a “common law” equal protection case. By the same token *West Main Associates* is not a “common law” vesting case. Both *Brown* and *West Main* are constitutional cases. Calling our vesting doctrine the product of the “common law” is an invitation to judicial and legislative watering down of property owners’ constitutional due process development rights.

These are constitutional cases, not common law cases. The “common law” meme, in the context of the vesting doctrine, should be eliminated from the lexicon.

Turning to *Alliance Investment Group v. Ellensburg*,⁶² this case could have been easily decided based on *Noble Manor*, without controversy and without error. The property owner filed a short plat application to divide the property into nine lots

to develop an industrial park. After the short plat was approved, the city adopted a new Critical Area Ordinance (CAO). The developer, however, did not appear to have met the *Noble Manor* requirement to make an application for a specific use in connection with the short plat. Rather, it appears the applicant merely advised the city of a general interest in developing an industrial park. *Noble Manor* does hold that unless there is an application for a specific use, “no development rights would vest at that time.” The *Alliance* court could have said that, concluded, and its decision would have been unexceptionable.

Unfortunately, perhaps inspired by the amicus briefs submitted by WASAMA and Futurewise, the court took the opportunity to go off on a vesting riff that was more free form jazz than bebop.

The court states that “[a]fter the legislature acted [in 1987], one question was whether the common law vesting doctrine [sic] continued to have any force.” To the best of my knowledge, the only parties that have ever expressed any interest in that question are the cities, and Futurewise. The question was never discussed by the courts until last year, a full 30 years after the adoption of the legislation, in the *Potala* case. *McLerran* and *Abbey Road* declined to expand the types of applications subject to the vested rights doctrine, but continued to cite with approval the prior cases that had applied the doctrine to different types of applications. Indeed, none of the cases cited by the *Alliance* court came close to suggesting that the vested rights doctrine was now exclusively statutory.

While this *Alliance* riff was thought-provoking, if wrong, it was wholly unnecessary to decide the case and will potentially be the subject of future vesting mischief. *Noble Manor* makes it clear that if no specific use is set forth in connection with the short plat application, the property owner does not vest. Here, it appears the use was not set forth with sufficient specificity. The court’s decision should have stopped there.

Alliance has sought review. If review is granted, it is hoped that the wheat in the decision can be separated from its chaff.

*Snohomish County v. Pollution Control Hearings Board*⁶³ had been closely watched. The PCHB had ruled that applying new DOE stormwater permit conditions to vested development projects does not violate their vested rights. Division III reversed that determination.

Division III began its analysis with a review of the vested rights doctrine. In footnote 7, it pointed out that *Potala* had reached the conclusion that the doctrine is now “purely statutory.” Division III expressed no opinion as to whether it agreed or not with the *Potala* court’s conclusion, as its adjudication of this case was limited to the vested rights statutes rather than case law.

The court identified the question as to whether the stormwater regulations were “land use control ordinances” within the meaning of the vested

rights statutes. If so, then they could not be applied to vested projects. The court found its prior case, *Westside Business Park*, determinative. In that case, Division III had found that an ordinance imposing increased stormwater drainage requirements was in fact a land use ordinance, because it “exerts a restraining or directing influence over land use.” The Ecology regulations were no different.

The PCHB is seeking review. There may be another chapter to this particular saga.

Does the Constitutional Vested Rights Doctrine Need a Legislative Fix?

As this article demonstrates, the Washington Constitutional vested rights doctrine was defined over half a century ago and remains vital and necessary.

And as the court noted in *West Main*, cities will always want to keep their options open. The doctrine of vested rights frustrates those municipal desires. Because the doctrine of vested rights hampers cities from imposing their fluctuating policies on property owners, it is not surprising that cities seek legislative change to dilute vested rights, and submit amicus briefs in court proceedings to denigrate the vested rights doctrine from its Constitutional status to a mere “common law” doctrine.

Arguments have been made that the vested rights doctrine has become “muddled,” and requires a complete legislative rewrite. But, as stated in this article, the vested rights doctrine is generally very clear, and simple to apply. An attempted legislative rewrite almost certainly guarantees increased, rather than decreased, confusion.

Most significantly, the vested rights doctrine is a Constitutional doctrine. It is the responsibility of the judiciary to protect the Constitutional rights of property owners, and to construe the Constitution. And, with the exception of the occasional outlier such as *Potala*, the courts have met that responsibility admirably. What is important is for the courts to continue to be vigilant in protecting the Constitutional vested rights of property owners. As Justice Utter stated in *West Main*, society will suffer if they do not.

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junct professor at the University of Washington School of Law. He is listed in The Best Lawyers in America.

- 1 In a law review article by Roger Wynne, "Washington's Vested Rights Doctrine," 24 *Seattle University Law Review* 851 (2001), Mr. Wynne, despite having been allowed over 90 pages in the *Review* to discuss the doctrine, does not acknowledge the Constitutional nature of the doctrine nor the judicial significance of that nature. The Constitution is not even mentioned until page 85 of the article which, without analysis or discussion of the many Constitutional vested rights cases in Washington's jurisprudence, dismisses the Constitutional basis of Washington's vested rights doctrine. This lacuna in Mr. Wynne's article is surprising, since, as this paper demonstrates, the Constitution permeates the holdings of all of the significant case law. While it is understandable that Mr. Wynne, as a municipal attorney interested in a devaluation of the doctrine, may seek to erase its Constitutional foundations from judicial discourse, the failure to discuss and analyze the doctrine and its Constitutional bases undermines Mr. Wynne's conclusions and policy prescriptions.
- 2 45 Wn.2d 492, 275 P.2d 899 (1954).
- 3 *Id.* at 496.
- 4 53 Wn.2d 125, 331 P.2d 856 (1958).
- 5 *Id.* at 130.
- 6 *Id.*
- 7 73 Wn.2d 343, 438 P.2d 617 (1968).
- 8 *Id.* at 347.
- 9 9 Wn. App. 59, 510 P.2d 1140 (1973).
- 10 *Id.* at 84-85.
- 11 11 Wn. App. 807, 525 P.2d 801 (1974).
- 12 *Id.* at 811.
- 13 16 Wn. App. 709, 558 P.2d 821 (1977).
- 14 *Id.* at 715.
- 15 97 Wn.2d 680, 649 P.2d 103 (1982).
- 16 *Id.* at 684.
- 17 *Id.* at 685.
- 18 38 Wn. App. 534, 686 P.2d 503 (1984).
- 19 106 Wn.2d 47, 720 P.2d 782 (1986).
- 20 It is nothing less than astonishing that Mr. Wynne's law review article on "Washington's Vested Rights Doctrine" barely mentions this seminal case, as though in an attempt to erase it from the annals of vested rights jurisprudence. To write a 90-page article on vested rights without giving *West Main* its due is like writing a book on Marlon Brando's acting career without mentioning *The Godfather*. Indeed, in *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997), Justice Talmadge, concurring, identified *West Main* as "our principal case on the vesting doctrine."
- 21 106 Wn.2d at 50.
- 22 *Id.* at 50-51.
- 23 *Id.* at 50-51.
- 24 *Id.* at 52-53.
- 25 107 Wn.2d 621, 733 P.2d 182 (1987).
- 26 *Id.* at 636.
- 27 *Id.* at 637.
- 28 FINAL LEGISLATIVE REPORT, 50th Legis., 1st Reg. Sess. 255 (1987).
- 29 Wynne uses the term "retreat" to describe the judicial attitude toward vested rights since 1987. As this discussion demonstrates, nothing could be further from the truth.

30 123 Wn.2d 864, 872 P.2d 1090 (1994).

31 *Id.* at 870.

32 *Id.*

33 *Id.* at 871-72.

34 *Id.* at 873-74.

35 85 Wn. App. 171, 931 P.2d 208 (1997).

36 *Id.* at 182.

37 133 Wn.2d 269, 943 P.2d 1378 (1997).

38 *Id.* at 279-80.

39 *Id.* at 282.

40 *Id.* at 283-84.

41 136 Wn.2d 1, 959 P.2d 1024 (1998).

42 *Id.* at 25.

43 136 Wn.2d 946, 968 P.2d 871 (1998).

44 95 Wn. App. 883, 890, 976 P.2d 1279 (1998).

45 *Id.* at 891.

46 *Id.* at 895.

47 *Id.*

48 100 Wn. App. 599, 5 P.3d 713 (2000).

49 167 Wn.2d 242, 218 P.3d 180 (2009).

50 *Id.* at 251 (citing *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987) (internal quotations omitted)).

51 *Id.*

52 *Id.* at 252-53.

53 *Id.* at 255.

54 157 Wn. App. 1, 236 P.3d 906 (2010).

55 *Id.* at 8.

56 180 Wn.2d 165, 322 P.3d 1219 (2014).

57 *Id.* at 169.

58 *Id.* at 179.

59 *Id.* at 180.

60 *Id.* at 181.

61 183 Wn. App. 191, 334 P.3d 1143 (2014).

62 189 Wn. App. 763, 358 P.3d 1227 (2015).

63 192 Wn. App. 316, 368 P.3d 194 (2016).

Ethical Considerations for Multi-Party Representation at Aquatic Cleanup Sites



By Ken Lederman,
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I. Introduction

The Environmental Protection Agency's Superfund Program has become increasingly focused on pursuing the remediation of contaminated sediment sites in major harbor and river systems. EPA Region 10, working in conjunction with the state environmental agencies, has been at the forefront of this effort. Cleanup activities have been intensified at multiple operable units throughout the northwest during the past 10 years, including Commencement Bay, the Lower Duwamish Waterway and Elliott Bay, Bellingham Bay, and Portland Harbor.

The site characterization and remedy development efforts at these sites require evaluation of complicated scientific and technical issues. These sites typically involve multiple potentially responsible parties or "PRPs"—often 50 or more. Many are "de minimis" parties who have made minor contributions of contamination to the site, and therefore have limited liability. While these parties may lack the resources to have a significant level of involvement in the remedial work, they will face strict and joint and several liability and will therefore be expected to contribute to the costs of the remedy.

The investigative work at multiparty sites is frequently conducted by a group of the larger responsible parties who operate under close supervision by the regulatory agencies. Those parties typically turn to the remaining responsible parties for contribution and participation in the funding of the investigative work, and for payments toward or participation in the performance of the remedy. The responsible parties will often form groups and steering committees for multiple purposes, including: (1) supervising and managing investigative work; (2) conducting negotiations with the agencies regarding the scope and direction of the investigation; (3) raising funds to pay for the investigative and remedial work; (4) managing the resolution of conflicts over which party should pay (and how much should be paid); and (5) negotiating with the agencies over the scope of the cleanup activities.

The parties involved at these sites have a strong incentive to find an efficient method of participation in site activities. Investigative and cleanup costs can be very significant. Projects typically take upwards of 10 years until completion, and the re-

sulting transaction costs incurred in participating at such a site, including attorneys' fees and consultant fees, can be enormous if not prudently managed.

Large aquatic sediment sites can also pose unique conflict issues. Responsible parties often find that the counsel with whom they have previously worked face conflicts resulting from their firm's historic representation of many of the other responsible parties at the site. These parties may then find it difficult to retain attorneys who have significant knowledge and skill with aquatic cleanup sites simply because the demand for skilled counsel can exceed the supply.

Responsible parties frequently share consultants and experts at cleanup sites. Additionally, they frequently share some aligned interests as well. Under these circumstances, it is logical to share counsel and to engage in multi-party representation for those phases of the remediation and cost allocation on which the parties' interests are aligned. In addition to the cost savings that can be associated with multi-party representation, such arrangements may be the only means for many parties, particularly "de minimis" parties, to have access to cost-effective representation and counsel.

Under Washington's ethical rules, multi-party representation is possible, and courts across the country have determined that it is permissible in some situations. For example in *Acushnet Co. v. Coaters, Inc.*, the court found that in a CERCLA cost recovery action, the plaintiffs may have had conflicts of interest among themselves with respect to the allocation of shares for past or future remediation costs; however, those conflicts were not so deep as to make it impossible or impermissible for them to agree to joint representation.¹ In the interest of efficiency, the plaintiffs could agree that their common interest in presenting a unified position against the defendants outweighed their conflicting interests among themselves, which could be resolved in separate actions later.²

However, key boundaries must be observed. For example, where parties with both aligned and diverging interests share counsel for one phase of the site remediation, that common counsel may be disqualified from representing either in subsequent stages when the aligned interests diverge.³ This article will discuss some of the dynamics that can affect possible multi-party representation arrangements, and ways by which such situations can be facilitated.

II. Multiple Issues Can Cause Conflicts at Cleanup Sites.

Responsible parties at aquatic cleanup sites often have common interests that can provide a foundation for joint representation. Parties typically have a common adversary in the regulatory agencies. Parties also have a common interest in minimizing the cost of the investigation and cleanup activities, and will typically share an interest in

getting to the remedy phase of the project quickly so as to minimize transaction costs.

Parties often will share an interest in developing an efficient, non-judicial method for allocating the costs among the parties, and in avoiding costly litigation over contribution matters. And subsets of the responsible parties frequently will share interests in focusing on particular parties to blame for the contamination problems.

But there are many issues that can divide the interests of responsible parties and impair their ability to gain access to shared counsel. Among those issues are:

1. Owner / Operator / Discharger Liability.

At aquatic sediment sites, liability typically falls differentially among the parties who have owned a contaminated site, parties who have operated contaminated properties at a site, and parties who have discharged or arranged for the discharge of contaminants at a site.

2. Investigative Costs/Remedy Costs.

Investigative costs are typically divided among the parties. That division is also typically different from the division of the costs of the remedy. Some parties may be more sensitive to the division of investigative costs, while others may be more concerned about the remedial costs.

3. Different Contaminants/Multiple Causation. Parties often are responsible for different contaminants in the waterway. The question of which contaminants are the principal causes of the need for remedial investigation, or cleanup activities, can be very contentious. This question can be particularly difficult to resolve where there are multiple problems affecting a site, and where each problem would individually trigger a requirement for remedial action.

4. Allocation of Orphan Shares. At any large aquatic site, a number of parties who have contributed to past contamination will be “orphans”—parties who are no longer viable from the standpoint of contribution to the costs of the remedy. The costs that would otherwise be allocated to orphan shares must then be divided among the remaining viable parties.

5. Conceptual Site Model. Parties may battle at length over the conceptual site model—*i.e.* the explanatory model that is used to diagnose the contamination situation at the site and to select an appropriate remedy. The conceptual site model is frequently the key scientific foundation for the selection of the

remedy. It also serves as the foundation for any allocation of comparative costs among the various responsible parties.

6. Downstream Transport Mechanism.

Parties who are “downstream” in a riverine or tidal environment may seek to place the blame for the contamination on parties who are located “upstream.” Sometimes the opposite scenario occurs, whereby analysis of turning areas, navigation pathways, and scouring / redeposition patterns results in an allegation that the “downstream” parties are responsible for the liability of the “upstream” parties. Such conflicts can become particularly acute when the parties are charged with responsibility for the same contaminants.

7. Remedy Triggers. Contaminants can sometimes extend for a considerable depth below the sediment surface, due to long historical discharge and gradual deposition of contaminants and sediment. The regulatory agencies are typically most concerned about contaminants in the biologically active zone—typically the top 2-3 feet of sediment. But cleanup remedies often affect the entire sediment column, not just the surface area. As a result, disputes can emerge among the parties as to which contaminants are truly responsible for the need to conduct the remedy.

8. Choice of Remedy. Some remedial actions have significant benefits beyond the environmental improvements that they offer. In particular, the chosen remedy can offer benefits to property owners that are disproportionate to their financial contribution. Alternatively, the potentially benefited property owner may push for a broader remedy than is necessary or is in the interest of other responsible parties because a broader remedy may provide a less expensive means of upgrading the value of that party’s property.

In dealing with these issues, one must be cognizant of the requirements and limitations of representation of multiple clients under the Rules of Professional Conduct (RPC).

III. Conflicts - RPC 1.7.

RPC 1.7 governs how attorneys may resolve the conflicts situations that arise at multi-party aquatic sites. RPC 1.7 covers two key types of conflict situations: (a) situations involving direct adversity between parties, and (b) situations where an attorney’s efforts may be “materially limited” by the lawyer’s responsibilities to another client.

RPC 1.7, as amended in September 2006, provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be *directly adverse* to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be *materially limited* by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

Id. (emphasis added).

The RPCs do not contain definitions for key terms such as “conflict,” “direct adversity,” or “material limitation.” For general purposes, a “conflict” can be recognized as any circumstance where the attorney’s ability to consider, recommend, or carry out an appropriate course of action may or will be materially limited or impaired. In short, a conflict exists any time a conflicting loyalty would preclude one’s ability to recommend or advocate on another’s behalf. The standard 4-part test for resolution of a conflict requires the attorney to: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict (*i.e.* is the conflict “consentable”?); and (4) consult with clients affected and obtain informed consent in writing.⁴

In both situations of “direct adversity” and “material limitation,” the common thread for the attorney considering a multiparty representation is to ensure that the risks and implications of a shared counsel relationship are disclosed in writing to the clients. The attorney must then obtain the informed written consent of the clients to the arrangement.

Though it is important that the disclosure be thorough, this can be very difficult to accomplish.

The implications of a shared counsel relationship are often not apparent at the outset of a representation engagement. The attorney must make the best effort possible to satisfy the requirement of disclosure under the circumstances. And, because potential conflicts are not necessarily evident at the outset of representation, attorneys should ensure that the initial written disclosure is as precise as possible and should update the disclosure and re-secure waivers from jointly represented clients when circumstances change giving rise to new potential conflicts.⁵

A. Direct Adversity.

Direct adversity between two clients in the context of a multi-party aquatic site can develop in a number of situations. For example, two clients may share the past ownership and operation of the same property located within the site boundaries. Under such circumstances, the parties could find themselves arguing over whose actions led to the contamination that was released from the property, how much their actions contributed to the overall site problems, and who should pay for the cleanup of the harm. Similarly, two parties who have owned or operated adjoining sites, and who are charged with having contributed the same contaminant, also face a degree of direct adversity of interest.⁶

Parties who are, or were, located upstream or downstream of one another, and who were responsible for the same types of contamination, may also face direct adversity. Parties whose interests conflict with respect to the choice of the site remedy or the site conceptual model also have adverse interests, as do parties who are members of groups with opposing interests. For example, a company which is a member of a group of performing parties that intend to seek contribution from a group of non-performing parties has an interest which is directly adverse to the non-performing parties. Additional examples of direct adversity include corporate purchases or mergers (*i.e.* when one potentially responsible party purchases or merges with another during the representation) and family disputes. And while not as common, direct adversity does exist when a position taken for one client may create a precedent that will weaken or limit the separate representation for another client.

The issue of adversity arising from corporate mergers was thoroughly examined in *United States v. Nabisco, Inc.*, involving a CERCLA recovery action where the firm Rivkin Radler represented Sag Harbor, which had asserted cross claims against its co-defendant Nabisco.⁷ At the time Rivkin Radler was retained to represent Sag Harbor in the CERCLA action, it was representing a company named Standard Brands in several unrelated lawsuits.⁸ Approximately five years after the commencement of the CERCLA case, Standard Brands and Nabisco combined in a stock transaction; Nabisco became the party-in-interest in what had been the Standard Brands lawsuits. Nabisco moved to dis-

qualify Rivkin Radler from representing Sag Harbor in the CERCLA case.⁹ To determine whether Rivkin Radler should be disqualified, Rivkin argued the court should apply the “substantial relationship” test—whether the matters at issue in the CERCLA suit were substantially related to the matters or cause of action at issue in the Standard Brands litigation. However, the court adopted Nabisco’s argument that the “per se” test of material limitation and impropriety should apply: “[w]here the relationship is a continuing one, adverse representation is prima facie improper.”¹⁰ Applying this test, the court found that the continued representation of Sag Harbor was *prima facie* improper (1) because of the close, ongoing working relationship between Sag Harbor and Nabisco attorneys in the CERCLA matter; (2) because Nabisco attorneys were reviewing Rivkin Radler bills on the former Standard Brands matters; and (3) because there was no buffer corporation between Nabisco and Standard Brands. The court concluded that even though they were wholly unrelated matters, Rivkin was too materially limited to continue the representation.

B. Techniques for Dealing with Direct Adversity.

Many types of direct adversity are beyond remedy. For example, two parties whose interests lead them to a fundamental clash over what should constitute the preferred remedy, or cause deeply seated disagreements about the proper diagnosis of the site’s environmental conditions or the site conceptual model, are probably too diametrically opposed to be represented on a joint basis. Similarly, parties who, by virtue of the site conditions or their operational history, must advocate against the interests of the other in the context of cost contribution/allocation proceedings probably cannot be jointly represented. In those circumstances, the attorney must bow out.

However, there are a couple of ways in which some matters of direct adversity can be bridged, at least temporarily:

1. Standstill and Joint Representation.

The jointly represented parties could agree to set aside, temporarily, their differences. Under such a situation, joint counsel can pursue their common interests throughout the course of the representation. The clients would have a standstill agreement that would delay their mutual dispute until a later date. Such an arrangement is particularly appropriate for addressing the requirements of RPC 1.7(b)(3).

This kind of arrangement is reasonably common in the context of multiparty allocation processes. It is also often a prudent strategy for clients who have a history of operating the same site, regardless of whether they decide to pursue a shared counsel arrangement. By preparing a joint defense,

they can avoid drawing attention to the flaws in their respective positions.

Providing for a shared counsel relationship requires that the parties agree beforehand that shared counsel will not advocate on behalf of one client against the interests of the other(s). Such an arrangement often can work out quite effectively, especially where the parties sharing counsel can expect that other parties involved in the allocation process will advocate effectively on behalf of the issues that are subject to the standstill agreement.

However, the attorney must be cognizant of issues involving attorney-client privilege. The prevailing rule is that between commonly represented clients, the attorney-client privilege does not attach to communications. It must, therefore, be assumed that the privilege will not protect communications if future litigation occurs between the two clients. See RPC 1.7, Comment 30. The commonly represented clients should be advised of this risk in advance of the common representation.

2. Limited Representation.

Common counsel may be hired for a limited set of purposes. So long as the clients’ interests are aligned with respect to the scope of the assigned representation, the joint counsel relationship is sustainable without conflict. On issues where the clients’ interests differ, the clients would need to secure separate counsel. Under no circumstances could, or should, shared counsel advocate for one client at the expense of the other client’s interests.

In effect, the route to resolving “direct adversity” conflicts in the context of a multiparty representation is to move the representation to a limited scope. There, such a situation can be resolved more specifically under RPC 1.7(b), provided that the clients approve the specifics of the limitation on the representation.

C. Material Limitation.

A joint representation arrangement may result in a material limitation on an attorney’s representation of a client. Under RPC 1.7, such a limitation is permissible, provided that the limitation is discussed with both clients and consented to in writing.

A representation engagement may be materially limited at aquatic Superfund sites in a couple of key contexts. First, if two clients would ordinarily advocate differently on an issue, then counsel cannot argue both sides of the issue. For example, consider the situation of an attorney representing two parties, one that has little history of discharge of hazardous substances to the affected waterway, and the other with an extensive history of such discharges. On the issue of how site investigation costs should be apportioned, the former party might favor a distribution of investigation costs based on comparative contributions of hazardous substances. The other would likely favor a pro rata distribu-

tion of such costs. Counsel must either choose one position or forego taking a position on the issue. In either event, the issue must be disclosed as one that could materially limit counsel's representation of the two parties. The limitation must be acknowledged and consented to by the clients in writing.

Second, if counsel would ordinarily advocate on an issue on behalf of one client, but must avoid doing so because of potentially damaging the interests of the other client, then the representation is materially limited. For example, if one of the jointly represented parties has unique information about the other, counsel cannot use that information against the other client and the representation is materially limited. Again, such a limitation is permissible, provided the clients approve it in writing.

IV. Confidentiality - RPC 1.6(a).

RPC 1.6(a), amended in September 2006, states that:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) [relating to prevention of death, bodily harm, to prevent a crime, etc.].

RPC 1.6(a) requires that an attorney maintain the confidentiality of client matters. This can be particularly difficult in the context of a multi-party representation. Almost inevitably in the course of a multi-party representation, the attorney will learn confidences from each of his clients that he would not learn outside of the representation. In some instances, this information will be of material interest to the attorney's other clients.¹¹

There are some instances where an attorney may reveal information relating to the representation of a client, but those circumstances rarely arise with large aquatic sediment cleanup sites. Interestingly, the comments to RPC 1.6 discuss the exception regarding the prevention of certain death or substantial bodily harm, and include a hypothetical scenario where an attorney knows that a client "has accidentally discharged toxic waste into a town's water supply." In such circumstances of imminent and substantial endangerment where there is an immediate threat to public health, safety and welfare, the attorney must reveal the confidential information to the appropriate authorities.¹²

RPC 1.6 offers two means by which to deal with such disclosures, with one alternative representing the clearly superior option.

1. Impliedly Authorized Disclosures.

As RPC 1.6(a) makes clear, some disclosures of client confidences are impliedly authorized by the nature of the representation. Arguably, in a multi-party representation, it is foreseeable that material

confidences will be disclosed to counsel by both parties, and that both parties would expect that those confidences would be shared with the attorney's other client(s). Thus, such confidences might be viewed as impliedly authorized to be disclosed.

In general, however, this is a risky way of approaching the issue. Such disclosures, if not properly authorized, or if they later come to serve to the detriment of the client, may lead to dissatisfaction with the joint counsel's services.

2. Consented Disclosures.

The superior route for handling disclosures is to obtain the consent of the client before disclosing. In a multiparty representation context, any information learned by the attorney from one client is implicitly disclosed to the other client. As a result, it is critical that this situation be discussed with both clients, and that the implications of such disclosures be understood and managed effectively. In many instances, the confidential information will not be harmful to the interests of the disclosing party, and can therefore be released to the other client. However, where such a disclosure is harmful to the interests of the client, shared counsel may be faced with an impossible situation, and may be forced to withdraw from the shared representation.

To avoid this potential problem as effectively as possible, counsel should consider establishing a confidentiality protocol with the clients. Such a protocol can be approached in one of two ways. First, the client could affirmatively limit the information provided to the shared counsel. This is a cumbersome method, which can impair counsel's ability to effectively represent the client. Second, the clients can agree to limit what counsel can do with the information. For example, the attorney may be prohibited from passing the information onto future counsel who will handle any subsequent disputes between the parties who are using common counsel. However, if the client ever provides information and then demands that the information not be shared with the common client, the attorney must immediately recognize the irreconcilable conflict and withdraw from representation.

Ultimately, however, the disclosure of confidential information in the context of multiparty representation can present the biggest impediment to a shared counsel arrangement. Of the available options, an arrangement of consented disclosures offers the best opportunity to resolve the problem early in the process.

V. Structuring a System to Facilitate Multi-Party Representation.

Potential conflicts in multiparty representation at aquatic sites arise most frequently in the context of cost recovery/contribution/cost allocation proceedings. Increasingly in recent years, contribution claims at such sites are handled through nonjudicial allocation proceedings. For larger sites where

multiparty representations are most valuable and needed, counsel may wish to design and structure such nonjudicial allocation proceedings to facilitate multiparty representation arrangements while effectively protecting the interests of the participating clients. The following are a few examples of such structural accommodations:

1. **Respect Standstill Agreements.** An allocation process could permit standstill and tolling agreements between parties to be respected by the allocation. This would allow jointly represented parties to hold their differences in abeyance until later.
2. **Appoint Lead Advocates.** The allocation process could assign certain parties to serve as lead advocates against other parties, or in favor of particular issues. By appointing lead advocates, the parties could rely on the efforts of others in advocating on some issues, and thereby free joint counsel from facing a difficult issue or party-specific conflict. This action could also conserve resources by avoiding duplicative efforts and spreading costs among multiple parties with similar interests.
3. **Open process.** The process could be designed to include as many parties as possible. By doing so, it would minimize group tensions and conflict issues.

VI. Additional Ethical Considerations.

Finally, some additional considerations when representing common clients include:

1. **RPC 1.18.** Discussions with a prospective client are also subject to protection, and an attorney shall not represent a client with interests that are materially adverse to those of a prospective client in the same or substantially related matter if the attorney receives information from the prospective client that could be significantly harmful to the existing client. Obtaining informed consent in writing does offer an opportunity for representation. Regardless, when interacting with prospective clients, the interests of the existing client must be a top priority. As a rule of thumb, the initial interview with the prospective client should be limited only to the discussion of information that is reasonably necessary for determining whether to undertake representation.
2. **RPC 1.9(c)(2).** Prior representation of a client shall not reveal any information relating to the representation of an existing client. So when an attorney has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that same transaction is clearly prohibited.¹³ The issue becomes more

complicated with attorneys who end their associations with a particular firm or company.¹⁴

3. **RPC 1.8(b) & 1.9(c)(1).** Attorneys may not use any information obtained in representation to the disadvantage of that client without informed consent. However, this restriction does not preclude a lawyer from utilizing generally known or available information about one client when representing another client.
4. **RPC 1.8(g) & RPC 1.2(a).** When an attorney settles a matter while representing two or more clients, the attorney may not participate in an “aggregate” settlement without informed consent from all clients in writing. As a matter of course, the RPCs protect the rights of the clients to have the final say in settlement.

VII. Restrictions on Former Government Attorneys.

Attorneys transitioning from government service to private practice, especially those leaving agencies such as EPA or the Department of Ecology, may be an attractive choice to serve as counsel at a complex aquatic site given their specialized knowledge of agency operations. However, they are also subject to an additional set of ethical restrictions:

RPC 1.11(a). Former government attorneys are subject to the RPC 1.9(c) limitation on the use of information from previous representations, i.e. their time with the governmental agency. And, former government attorneys cannot represent a client in connection with a matter in which the attorney participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

RPC 1.11(b). If a former government attorney is prevented from representing a client due to his or her previous government service, no other attorney in that firm may represent the client, unless the firm implements a timely screen and provides prompt, written notice to the former government agency.

RPC 1.11(c). A former government attorney with confidential government information about a person that the attorney acquired as a public officer may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that former government attorney is associated may undertake or continue representation only if the disquali-

fied lawyer is timely screened from any participation and is apportioned no part of the fee therefrom.

The restrictions in RPC 1.11(a) apply only to an attorney's personal involvement with the particular matter in question. They do not extend to general employment experience that may have given the attorney insight into the practices of a particular agency. However, RPC 1.11(c) could operate to disqualify a former government attorney where, for example, a former EPA attorney reviewed a response to a 104(e) Request where the responding party claimed confidential treatment for some or all of the response. That attorney may not later participate in a private representation adverse to the responding party where the confidential information would be useful.

VIII. Conclusion.

Large aquatic cleanup sites frequently lead clients to seek to limit their transactions costs by sharing counsel. Such arrangements are a very sensible way for a party to avoid unnecessary expenses without precluding that party from obtaining adequate representation. But, such representation arrangements can be tricky to manage.

A broad array of situations can give rise to conflicts among parties at a cleanup site. These situations should be catalogued and explored with clients before a multiparty representation is undertaken. Counsel should consider carefully voluntarily limiting the scope and extent of the representation in order to avoid conflicts. All such representation arrangements should be undertaken in the context of a written conflicts waiver and disclosure. As circumstances and interests change throughout the cleanup and settlement process, counsel should continually monitor the relationships between clients to ensure that new conflicts are disclosed, addressed and resolved.

If suitable precautions are undertaken, multiparty representations are feasible and often advantageous. Without such disclosures and arrangements, they can be perilous.

For further reading:

1. *Ethics for Environmental Lawyers*, Pamela R. Esterman, Prac. Real Est. Law. (Mar. 2016)
2. *Assessing Conflicts of Interest at Multi-Party Superfund Sites: From First Involvement to Litigation*, Andrew Kenefick, Steve Krchma, Leonard Sorin, and Sara Beth Watson, 4 *Envtl. Law.* 721 (1998).
3. *The Ethics of Multi-Party Representation in Superfund Proceedings*, Arthur J. Harrington and Diane M. Marchik, 66-SEP *Wis. Law.* 32 (1993).
4. *Sharing Counsel at Multi-Party Waste Sites: Reducing Transaction Costs and Conflict of*

Interest Considerations, David B. Graham and William S. Hood, Jr., 10 *NO. 1 ACCA Docket* 28 (1991).

5. *Consent and Disclosure in Superfund Negotiations: Identifying and Avoiding Conflicts of Interest Arising From Multiple Client Representation*, David Littell, 17 *Harv. Envtl. L. Rev.* 225 (1993).

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1 972 F. Supp. 41 (D. Mass. 1997).

2 *Id.*

3 *See City of Kalamazoo v. Michigan Disposal Serv. Corp.*, 125 F. Supp. 2d 219 (W.D. Mich. 2000) (serving as common counsel for a joint-defense group of plaintiffs in one cost recovery matter may disqualify the firm from representing any of that group in subsequent cost actions related to the same matter).

4 *See* RPC 1.7, Comment 2.

5 *See generally* *Roosevelt Irr. Dist. v. Salt River Project Agr. Imp. & Power Dist.*, 810 F. Supp. 2d 929 (D. Ariz. 2011) (firm's representation of two PRPs at the same site required disqualification, because firm failed to accurately describe the nature of the representation

of the second client to the first, and because the firm failed to update its conflict disclosure to the first client to inform the client that its representation of the second client was transitioning from representation in negotiations to representation in litigation).

- 6 Direct adversity can also arise among members of a class of plaintiffs seeking relief under CERCLA. In *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156 (8th Cir. 1999), the Eighth Circuit affirmed the district court's decision to approve a class settlement in a case brought against a refinery under CERCLA, but disqualified the law firm representing the class plaintiffs under Arizona's corollary rule to RPC 1.7, because two of the named class representatives were closely related to a partner in the firm. The court reasoned that close ties to the named plaintiffs might cause counsel to make decisions in the interest of the class representatives that did not serve the class as a whole. The court also held that the disqualified firm was not entitled to attorney fees for work performed before or after disqualification, because the conflict constituted a serious violation of the firm's duty to class.
- 7 1987 WL 14085 (E.D.N.Y. July 10, 1987). 8 *Id.*
- 9 *Id.*
- 10 *Id.*
- 11 Confidential information may also include knowledge of one client's strategies, which could be used to its detriment by a second, jointly represented client. See *Sarbey v. Natl. City Bank, Akron*, 66 Ohio App. 3d 18, 27, 583 N.E.2d 392, 398 (1990). Attorneys should be careful to disclose the potential conflicts that may arise from strategic knowledge as well.
- 12 See RPC 1.6, Comment 6.
- 13 See RPC 1.9, Comment 2.
- 14 See RPC 1.9, Comment 4.

Land Use Case Law Update



By Richard L. Settle, Of Counsel, Foster Pepper PLLC

I. United States Supreme Court Decision

Clean Water Act Jurisdictional Determination is Subject to Judicial Review as a "final agency action for which there is no other adequate remedy in a court." *United States Army Corps of Engineers v. Hawkes Co. Inc.*, No.15-290, U.S. Supreme Court (May 31, 2016).

The Clean Water Act regulates "discharges" into "waters of the United States." Owners of land containing such "jurisdictional" "waters" who discharge pollutants without a permit are potentially subject to substantial criminal and civil sanctions, while those who apply for permits face a difficult, costly, and time-consuming process.

The threshold determination of whether waters of the United States are present on a given parcel involves a number of uncertain variables and is often difficult and controversial. For example, the U.S. Army Corps of Engineers (Corps) definition of "waters of the United States" relevant to this case included "all wetlands, the "use, degradation or destruction of which could affect interstate or foreign commerce." 33 CFR §328.3(a)(3).

Because of the critical threshold importance of this determination, the Corps allows property owners to obtain a "jurisdictional determination" (JD) of whether particular property contains "waters of the United States." A JD may be either "preliminary," advising that such waters "may" be present, or "approved," definitively stating the presence or absence of such waters. An "approved" JD is an administratively appealable "final agency action," and is binding for five years on both the Corps and the Environmental Protection Agency (EPA). The issue in this case was whether the decision in an administrative appeal of a JD is subject to judicial review.

In this case, three companies engaged in mining peat sought a permit from the Corps to discharge material into wetlands located on property they owned. They each obtained an approved JD from the Corps stating the presence of jurisdictional waters on their properties because their wetlands had a "significant nexus" to the Red River of the North, located 120 miles away. After exhausting administrative remedies, they sought judicial review of the approved JD in federal district court. The District Court dismissed for lack of jurisdiction, holding that the approved JD was not a "final agency action for which there is no other adequate remedy in a court." The Eighth Circuit reversed.

The Supreme Court held that the Corps' approved JD is a final agency action judicially re-

viewable under the Administrative Procedures Act (APA), reasoning that under all relevant doctrinal considerations, the JD was a final agency action. The Court recognized that “final” agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court. The Corps contended that the property owners had two such alternatives: proceeding with a permit and defending, in any enforcement action, that a permit was not required; or completing the permit process and then seeking judicial review. The Court held that neither alternative was adequate because (1) parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of “serious criminal and civil penalties,” and (2) completing the arduous permitting process before obtaining judicial review of the JD is costly and time-consuming and also irrelevant to the finality of the approved JD and its amenability to judicial review.

Chief Justice Roberts authored the Court’s opinion in which Justices Kennedy, Thomas, Breyer, Alito, Sotomayor and Kagan joined. Justice Kennedy filed a concurring opinion in which Justices Thomas and Alito joined. Justice Kagan filed a concurring opinion; Justice Ginsburg filed an opinion concurring in part and concurring in the judgment.

II. Washington Court of Appeals Published Decisions

Creation of Undevelopable Lot by City’s Boundary Line Adjustment Was Not a Regulatory Taking. *Kinderace LLC v. City of Sammamish*, 2016 WL 3660798 (Wash. Ct. App. July 5, 2016).

Through a boundary line adjustment obtained from the City of Sammamish (City), Kinderace LLC (Kinderace) created a new 32,800 square-foot lot of which all but 83 square feet had been designated by the City as environmentally critical areas and buffers precluding development. Kinderace’s requested reasonable use exception (RUE), which would have allowed development of the new parcel, was denied because a larger parcel that included the new lot already had obtained reasonable use as the site of a detention pond required for a previous multi-parcel development. Kinderace brought a regulatory taking claim against the City, claiming that denial of the RUE deprived the new lot of all economically viable use.

Kinderace argued that the City’s approval of the boundary line adjustment as authorized by RCW 58.17.040(6) had two consequences that supported the regulatory taking claim. The City’s approval: first, created “a new legal lot endowing the owner with the right to some economically viable use”; and second, necessarily determined that the new lot would qualify as a building site. As a result, Kinderace argued that it has the right to develop the new lot separate and distinct from any benefit

derived from the previous development made possible by the utilization of the new lot, as part of a former larger parcel where a detention pond required for the previous development was located.

Division I of the Court of Appeals disagreed, affirming the trial court’s dismissal of the regulatory taking claim. The court reasoned that the new parcel already had obtained economically viable use as part of a larger parcel that was jointly developed with other parcels: “We reject the argument that Kinderace can use a boundary line adjustment to isolate the portion of its already developed property that is entirely constrained by critical areas and buffers, and then claim that the regulations have deprived that portion of all economically viable use.”

Shoreline Management Act (SMA) Savings Clause Immunizes Existing Fills from SMA Regulation and Abatement Under Public Trust Doctrine; SMA Savings Clause does not Violate the Public Trust Doctrine or Constitutional Limitations. *Chelan Basin Conservancy v. GBI Holding Co.*, 33196-2-III, 2016 WL 3361470 (Wash. Ct. App. June 14, 2016).

GBI Holding Co. (GBI) owned land commonly known as the “Three Fingers” on the southeastern shoreline of Lake Chelan immediately west of the filled shoreline parcel that was held to violate the public trust doctrine in *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 212 (1969). GBI and its predecessors filled and maintained their shoreline property raising the level 12 feet from an elevation of 1,090 to 1,102 feet above sea level. As a result of the fill, the land, which formerly was submerged by the waters of Lake Chelan during the spring and summer, was above lake level year round.

There are no structures on the Three Fingers fill. It has been used in the past for growing corn, parking, and as a staging area for work on the Holden Mine hazardous waste cleanup. In 2010, GBI filed an application with the City of Chelan (City) to develop the site as a planned development district. Chelan Basin Conservancy (CBC), a local group interested in protecting the “use and enjoyment of the navigable waters of Lake Chelan,” and others objected to the proposed development. Thereafter, GBI withdrew its planned development application and filed a new application to subdivide the land into six parcels. CBC again objected and requested removal of the Three Fingers fill. In 2011, the City approved a short plat to subdivide the property subject to conditions which included requiring (1) a public park be developed from two of the lots, and (2) public access to the lake for recreation. Both CBC and GBI appealed the short plat decision to the City Hearing Examiner. In a preliminary ruling, the examiner concluded that the City lacked authority to order removal of the fill.

CBC subsequently withdrew its administrative appeal and, in late 2011, filed an action in superior court seeking removal of the fill, claiming (1) the

fill constituted a trespass against the public right of access to Lake Chelan, (2) violated the public rights of navigation under *Wilbour*, and (3) violated rights to use and enjoy the waters of Lake Chelan, as protected by the public trust doctrine. The superior court ordered abatement of the fill. CBI appealed.

The Court of Appeals reversed. The trespass claim was not pursued on appeal and was not addressed in the court's decision. After determining that CBC had standing to challenge the Three Fingers fill under the public trust doctrine, the court held that the plain language of the Shoreline Management Act (SMA) "Savings Clause," RCW 90.58.270(1), which protected fills and other alterations of shorelines that occurred before the 1969 date of the *Wilbour* decision from abatement under the public trust doctrine, protected the challenged fill from abatement and that the savings clause, itself, did not violate the public trust doctrine.

The court also held that the statutory exceptions in the savings clause for trespass and violation of state statutes should be narrowly construed in light of the legislative history of the SMA and, so construed, were inapplicable to the challenged fill.

The court recognized that CBC's proposed narrow construction of the savings clause would undermine the clear legislative intent of the SMA and its savings clause. The legislative history emphasized that most if not all of the numerous landfills in the state, including most of the state's industrial areas, violated the public trust doctrine under *Wilbour's* holding and reasoning. The court recognized that the "goal of the savings clause was to avoid the automatic removal of preexisting fills" that was threatened by *Wilbour*.

In upholding the savings clause, the court relied heavily on the holding and reasoning in *Caminiti v. Boyle*, where the Supreme Court rejected the claim that a Washington statute allowing residential property owners to maintain private docks without charge violated the public trust doctrine.

Failure to Exhaust Administrative Remedies as Prerequisite to Damages Action Under RCW Ch. 64.40; Constitutional Regulatory Taking and Substantive Due Process Claims Dismissed. *Emerson v. Island County*, 194 Wn. App. 1, 371 P.3d 93 (March 28, 2016, publication ordered, May 16, 2016).

A lengthy, acrimonious dispute between Kelly and Kenneth Emerson and Island County over a sunroom addition to their Camano Island home began in 2010. At one point the County and the Emersons entered into a settlement agreement that did not resolve the dispute. The trial court's dismissal of Emersons' action for damages based on multiple statutory and constitutional theories was affirmed by Division I of the Court of Appeals.

In August 2010, Kenneth Emerson began construction of the sunroom addition without a building permit. Someone anonymously notified

Kelly Emerson's opponent in the then-upcoming election for Island County Commissioner that the construction involved unlawful filling of wetlands. The anonymous complaint reached the County Department of Planning and Community Development prompting an inspector to visit the site and post a stop-work order.

Soon after issuance of the order, Mr. Emerson filled out and filed forms seeking to obtain an after-the-fact building permit for the addition in which he stated that no wetlands existed on the property. In several letters to the Emersons during the next several weeks, the County claimed to have information indicating the presence of a wetland on their property.

Over the following several years, the County imposed fines of \$37,000, and the Emersons filed several consultant reports concluding there were no wetlands on their property. The County and the Department of Ecology disagreed with the methodology used in these reports. In 2013, the County and the Emersons entered into a settlement agreement reducing the fines to \$5,000 and requiring Emersons to submit a third wetlands report and dismiss an administrative appeal. The Emersons paid the reduced fine, dismissed their administrative appeal, and submitted a third wetland report. The County and Ecology rejected the methodology in the third wetland report, as well. The County's repeated requests for access to the property to investigate potential wetlands were refused by the Emersons.

The Emersons then sued the County for damages and injunctive relief under a number of legal theories including breach of the settlement agreement, RCW Ch. 64.40, 42 U.S.C. §1983, and constitutional regulatory taking and substantive due process claims. The trial court's summary judgment in favor of the County was affirmed.

In the course of this litigation, the County finally gained access to the Emersons' property pursuant to CR 34(a)(2), found no wetlands, issued the after-the-fact building permit, and successfully moved for summary judgment.

The Court of Appeals, noting the County's repeated requests to gain access to the Emersons' property to quickly resolve the dispute, affirmed the trial court's dismissal of all of the damages claims.

The court held that the Ch. 64.40 RCW claim was barred by failure to exhaust available administrative remedies to appeal the County's building permit denial or wetland inspection condition. The Court disagreed that the Emersons waived such administrative appeals in the settlement agreement.

The court affirmed the trial court's dismissal of the Emersons' state constitutional regulatory taking claim because they failed to provide any substantive argument in response to the County's motion to dismiss the claim.

The substantive due process claim also was rejected on the basis of traditional deferential federal

constitutional due process doctrine, holding that the County's actions were rationally related to legitimate public purposes.

Growth Management Act: Adoption of Ordinances by City of Airway Heights Potentially Allowing Multifamily Development as a Conditional Use in the Vicinity of Fairchild Air Force Base and Spokane International Airport Invalidated Under RCW 36.70A.530(3) Because Such Development Would be Incompatible With Current or Future Missions of FAFB. *City of Airway Heights v. Eastern Washington Growth Management Hearings Board*, 193 Wn. App. 282, ___ P.3d ___ (April 12, 2016).

The City of Airway Heights attempted to address a housing deficiency by adopting ordinances that redesignated commercially zoned property in the vicinity of Fairchild Air Force Base (FAFB) and Spokane International Airport (SIA) into a classification that potentially would allow multifamily housing as a conditional use. The City adopted the ordinances in the face of strong opposition by Spokane County, the City of Spokane, the Federal Aviation Administration, the Department of Defense, the Fairchild base commander, the aviation division of the Washington State Department of Transportation, and Greater Spokane, Incorporated, which includes the Spokane Chamber of Commerce and the Spokane Economic Development Council. FAFB is the largest employer in the region with an economic impact "approaching \$1 billion."

A 2004 Growth Management Act (GMA) amendment finds that "[m]ilitary installations are of particular importance to the economic health of the state of Washington and it is a priority of the state to protect the land surrounding our military installations from incompatible development." RCW 36.70A.530(1). A more extensive codified legislative finding recognizes that "[t]he department of Defense evaluates continued utilization of military installations based upon their operating costs, their ability to carry out missions, and their ability to undertake new missions." The amendment substantively provides that "[a] comprehensive plan, amendment to a plan, a development regulation or amendment to a development regulation, should not allow development in the vicinity of a military installation that is incompatible with the installation's ability to carry out its mission requirements."

The Eastern Washington Growth Management Hearing Board (Board) invalidated the ordinances under three GMA provisions: RCW 36.70A.530(3), because the ordinances potentially allowed development that is incompatible with FAFB's ability to carry out its current or future missions; RCW 36.70.547, because the ordinances failed to discourage siting or expansion of incompatible uses adjacent to SIA, a general aviation airport; and RCW 36.70A.200, because the ordinances could

preclude the siting or expansion of FAFB or SIA, both essential public facilities.

The Court of Appeals upheld the Board's ruling that the ordinances violated RCW 36.70A.530(3), but reversed the Board's ruling that the ordinances also violated RCW 36.70.547 and RCW 36.70A.200, stressing the deference owed by the Board to local policy choices. Because the court upheld one of the Board's three bases for invalidating the ordinances, the Board's decision was affirmed.

Permit-Exempt Well Was Not Adequate Water Supply for Building Permit Issuance under RCW 19.27.097(1). *Fox v. Skagit County*, 193 Wn. App. 254, ___ P.3d ___ (April 11, 2016).

The Foxes applied for a building permit to construct a single-family dwelling in Skagit County near Sedro-Woolly. The County determined that the building permit application was incomplete because the Foxes failed to provide sufficient evidence of an adequate water supply to serve their proposed home. Under RCW 19.27.097(1), "[e]ach applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the Department of Ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply."

The Foxes only source of domestic water was a well on their property that was exempt from water permit requirements under RCW 90.44.050. The parties agreed that the well was in hydraulic continuity with the Skagit River. The 2001 instream flow rule for the Skagit River curtails the exercise of water rights when minimum flow requirements for the river are not met. The parties also agreed that the Skagit River regularly fails to meet the minimum flow requirement. The County's determination of inadequate water supply was based on likely curtailment of use of the well under the instream flow rule.

The Foxes argued that the County's determination was erroneous because it was based on the assumption that permit-exempt wells are subject to the instream flow rule, contending that only wells granted permits by the Department of Ecology (Ecology) are subject to curtailment under the rule. The County disagreed, and the Foxes filed a petition for writ of mandamus seeking to compel the County to issue the building permit. The trial court, after granting motions to intervene by the Swinomish Indian Tribal Council and Ecology and considering briefs and oral argument, denied the Foxes petition, agreeing with Ecology that the instream flow rule under WAC 173-503 governs permitted and permit-exempt groundwater wells, alike. The Foxes appealed.

Division I of the Court of Appeals, in a lengthy opinion addressing all of the parties' arguments,

affirmed the trial court, reasoning that (1) under RCW 19.27.097(1), water must be both factually and legally available to be an adequate water supply, (2) that an exempt well is exempt only from permitting requirements and not from the prior appropriations doctrine that earlier appropriations have priority over later ones (“first in time shall be first in right”), (3) that the Skagit River instream flow rule constitutes an “appropriation,” and (4) the 2001 instream flow rule “appropriation” was earlier in time and, thus, had priority over Foxes subsequent “appropriation” by establishing their permit-exempt well.

Landowner has Absolute Right to Sever Tree Roots Encroaching From Adjoining Land Without Duty of Reasonable Care. Jennifer Mustoe v. Xiaoye Ma and Anthony Jordan, 193 Wn. App. 161, 371 P.3d 544(April 4, 2016).

Jennifer Mustoe had two large Douglas Fir trees on her property. Their trunks were entirely on her land about 2.5 feet from the boundary line separating her lot from one owned by Xiaoye Ma where she and Anthony Jordan resided. For unexplained reasons, Jordan dug a ditch on Ma’s property along the property line, 18-20 inches deep. In doing so, Jordan exposed and removed the trees’ roots that had encroached into Ma’s property, resulting in loss of nearly half of the roots, all on the south side of the trees, eliminating much of their support, and they were exposed to southerly winds. As a result of the removed roots, the trees posed a high risk of falling onto Mustoe’s home. The landscape value of the trees was estimated to be \$16,418, and cost of removal would be \$3,913.

Mustoe sued Ma and Jordan, seeking damages for negligent, reckless, and intentional damage to her trees and emotional distress.

In Mustoe’s appeal of a trial court summary judgment in favor of Ma and Jordan, Division I of the Court of Appeals affirmed.

The court applied the rule of a 1921 Washington Supreme Court decision recognizing the general rule that encroaching tree limbs and roots are nuisances to the extent of their encroachment and may be severed and removed at the property line, while acknowledging that the right to self-help does not extend to removing the tree itself. *Gostina v. Ryland*, 116 Wash. 228, 199 P. 298 (1921).

Mustoe urged the court to hold as a matter of first impression that in exercising such self-help the adjoining landowner has a duty of care to prevent unreasonable damage to the trees. The Court declined to extend Washington law as Mustoe proposed. The court disagreed that the due care exception to the right to divert unwanted surface water under the common enemy doctrine was analogous and apposite. The court also rejected Mustoe’s claim under nuisance law, because the claim had to be predicated on negligence and Ma/Jordan owed no duty of care, and under Washington’s timber tres-

pass statute, RCW 64.12.030, because Ma/Jordan did not trespass and acted within their legal authority.

LUPA Petitioners Lacked Standing. Thompson and Misselwitz v. City of Mercer Island, 193 Wn. App. 653 (March 14, 2016, publication ordered, May 4, 2016).

Thompson and Misselwitz opposed a short plat approved by a Mercer Island city planner. Thompson formally appealed the short plat approval to the Planning Commission. Misselwitz did not appeal the short plat approval but attended the Planning Commission hearing and was allowed to speak in opposition to the short plat for 3 minutes. The Planning Commission issued a written decision upholding the city planner’s approval and denying Thompson’s appeal.

Thompson and Misselwitz filed a Land Use Petition Act, Ch. 36.70C RCW (LUPA), appeal in superior court. The trial court granted the short plat proponent’s motion to dismiss their petitions for lack of standing. The Court of Appeals affirmed.

Misselwitz lacked standing because he did not file an appeal to the Planning Commission but merely spoke in the Planning Commission hearing on the appeal filed by Thompson. Merely testifying in the hearing on the appeal filed by Thompson did not exhaust the administrative remedy available to Misselwitz and, thus, under RCW 36.70C.060(2)(d), he did not have standing under LUPA. The Court so held under the plain language of LUPA even though the City’s notice mistakenly indicated that persons who testified would have the right to appeal.

Thompson lacked standing because he failed to plead and prove that the Planning Commission’s decision “prejudiced him” by causing immediate, concrete, and specific injury. His alleged abstract interest in lawful administration of land use regulatory requirements was not sufficient.

Preexisting Easements Not Depicted on Short Plat Are Not Thereby Extinguished; Formal Plat Alteration Was Not Required for Subsequent Creation of New Easements Where Nothing in the Plat or its Notes Prohibited Creation of New Private Easements and They Were Not in Conflict with the Terms of the Plat. Hanna v. Margitan, 193 Wn. App. 596, ___ P.3d ___ (April 28, 2016).

The Hannas, owners of a lot created by a short plat, argued that recorded easements granted by a previous property owner, prior to application for and approval of the short plat, were extinguished when the easements were not depicted on the short plat application or approved plat. The Court of Appeals, Division III, disagreed, holding that the existing recorded easements were not extinguished because they were not depicted on the short plat. The court noted that no authority was cited in support of the argument, that “termination of ease-

ments is disfavored under the law,” and that the legislature would have required notice to all easement holders before a short plat is approved if their easements could be extinguished by approval of the plat. “We hold that easements omitted from a short plat are not, solely by their omission, extinguished.”

The Hannas also argued that once a short plat is recorded, a party cannot alter the subdivision by granting a private easement without formally amending the short plat under RCW 58.17.215. The court disagreed, holding that because there was no risk that any of the challenged post-plat approval easements were in conflict with the terms of the short plat, formal amendment of the short plat was not required to create the private easements.

Richard L. Settle, Professor of Law at Seattle University (formerly University of Puget Sound) School of Law from 1972 to 2002, now is Professor of Law Emeritus at the Law School, teaching and lecturing in land use, environmental, administrative, and property law on an occasional basis. He has been of counsel with Foster Pepper PLLC since 1985 and continues to actively practice land use, environmental, administrative, and municipal law, representing a wide variety of clients, consulting with public and private law offices, serving as expert witness, and mediating disputes. He has written numerous articles and papers on land use and environmental law, including Washington’s Growth Management Revolution Goes to Court, 23 Seattle U. L. Rev. 5 (1999); The Growth Management Revolution in Washington: Past, Present, and Future, 16 U. of Puget Sound L. Rev. 867 (1993); Regulatory Taking Doctrine in Washington: Now You See It, Now You Don’t, 12 U. Puget Sound L. Rev. 339 (1989). He is the author of two treatises: Washington Land Use and Environmental Law and Practice (Butterworth Legal Publishers, 1983); and The Washington State Environmental Policy Act, A Legal And Policy Analysis (1987, 1990-2012 annual revised editions). He has been an active member of the Environmental and Land Use Law Section of the WSBA, having served on the Executive Board (1979-1985) and as Chairperson-elect, Chairperson, and Past-Chairperson (1982-1985); and Co-editor of the Environmental and Land Use Law Newsletter (1978-1984). Recently, he was Co-Lead of the Washington State Climate Action Team SEPA Implementation Working Group and also served on the Advisory Committee on SEPA and Climate Change Impacts to the Washington State Department of Ecology. Most recently, he served as a member of the Department of Ecology SEPA Rule-Making Advisory Committee established by the 2012 Legislature in 2ESSB 6406.

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