KITTITAS COUNTY HEARINGS EXAMINER

In re Cluster Plat Application of: Becky Andrus	No. LP-07-00040 CLE ELUM RIDGE ASSOCIATION POST-HEARING MEMORANDUM OF AUTHORITIES

This Post-Hearing Memorandum of Authorities is submitted on behalf of Cle Elum Ridge Association with respect to issues raised by Hearing Examiner regarding vesting of the project application.[1]

I. Introduction

This is a very unusual case. The applicant – Becky Andrus – is seeking to proceed with a cluster plat subdivision based upon asserted vested rights arising from an application filed on June 20, 2007. The proposed subdivision is clearly contrary to existing zoning directives and violative of Growth Management Act (GMA) requirements regarding permissible rural densities. The application is simply an attempt to resurrect a stale application in order to achieve an impermissible result.

The statutory vesting rules are a two-way street intended "…to strike a balance between the public's interest in controlling development and the developers' interest in being able to plan their conduct with reasonable certainty." *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251 (2009). The recognition of vested rights in this case comes with a heavy public

[1] Hearing Examiner outlined a number of specific issues to be addressed in the post-hearing brief at the time of the hearing. The request for supplemental briefing was clarified by email dated April 29, 2015. *Exhibit 86.* We will address the issues raised by Hearing Examiner in both hearing comments and correspondence.

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cost – urban density development on rural lands. "If a vested right is too easily granted, the public interest could be subverted." *Id.*

Vesting is determined as a matter of law by Hearing Examiner. It is not a matter decided by staff or inferred from procedural acts or omissions. RCW 58.17.033 vests subdivision applications only upon filing of a "fully complete" application. The courts have recognized that the statutory mandate is "…taking a zero tolerance approach to completeness." *Lauer v. Pierce County*, 173 Wn.2d 242, 259 (2011).

Application requirements come from two sources: (1) ordinances for subdivision and cluster plat subdivisions, and (2) Ordinance 2006-57-the rezone ordinance for this specific property. Current CDS Staff *assumed* that the application was vested and the required Traffic Impact Analysis (TIA) was not a *"procedural submission requirement". Exhibit 79 (Staff Report).* This conclusion is in direct conflict with Ordinance 2006-57 which directed:

> At the time of a project action, the applicant *shall submit* analysis from a licensed engineer in the state of Washington considering among other factors, intersection spacing, site distances, traffic volumes, load bearing capacities of soils, pavement thickness design, etc. Reference Current Kittitas County Road Standards.

This application requirement was clear, unambiguous and certain. Board of County Commissioners established through the rezone ordinance a specific component required for a complete project permit application. Staff had no authority to waive this requirement. The application also failed to provide materials required by ordinance including critical area checklist and density bonus documentation. There can be no serious debate regarding the deficiencies. The application in this case was not *complete* until January 15, 2015. Applicant was told about the missing TIA but simply ignored the requirement until it was convenient to proceed.

Finally, the parties have attempted to resurrect the record but it is clear that the files are incomplete and contain significant gaps and uncertainties. The review has been compounded because none of the participants during the early stages have testified or provided evidence to the hearing examiner.[2] The project proponent bears the burden of proof to establish vesting. Significantly, the applicant neither attended the hearing nor provided testimony.

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[2] None of the CDS staff (Dan Valoff, Jan Ollivier, Christina Wollman) provided testimony or submitted declarations with regard to the application, vesting or extensions. Jeff Watson admitted that he did not have

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II. Procedural Application Background

Becky Andrus ("Andrus" or "Applicant") began the development process with a request to rezone the subject property. The application requested a general zone change from Forest & Range to Rural-3 zoning district for a 25 acre parcel of land.[3] Ordinance No. 2006-57. Board of County Commissioners approved the rezone on September 21, 2006. The rezone included specific "...[a]dditional conditions...to protect the public's interests." Ordinance No. 2006-57 Finding 8. The condition incorporated the SEPA mitigation measure:

> C. At the time of a *project action,* the applicant shall submit a stamped traffic analysis from a licensed engineer in the State of Washington considering among other factors, intersection spacing, site distances, traffic volumes, load bearing capacities of soils, pavement thickness design, etc. Reference Current Kittitas County Road Standards.

(Italics added). The rezone was processed as a "nonproject action." The term "project action" is drawn from SEPA regulations and directed specific application and environmental review conditions. WAC 197-11-704. The referenced project action was the contemplated cluster plat subdivision. Applicant was simply allowed to defer traffic impact analysis.

Andrus subsequently submitted a Long Plat Application (File no. P-07-40) on June 20, 2007. *Exhibit 5.* The project proposal was for a performance based cluster plat creating 14 one-acre parcels and approximately eleven acres of open space. *Exhibit 79.* Applicable zoning and

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personal knowledge of the handling of this file and only speculated with respect to matters associated with vesting. More significantly, the applicant did not provide any testimony with respect to the application, Staff argued:

> Convention dictates that a failure to respond or clarify the completeness of an application within the timeframes provisioned in Chapter 15A amounts to a *de facto* declaration of complete application. The request for the TIA was not a *"procedural submission requirement".*

Exhibit 79 - Staff Report.

[3] Andrus sought to rezone tax parcel no. 20-15-26010-0009, 0010. *Exhibit 11-Ordinance No. 2006-57.* CDS issued a Notice of Application on June 30, 2006. The application included an environmental checklist and a Mitigated Determination of Nonsignificance was issued on August 8, 2006. *Id.* The SEPA MDNS was attached to Ordinance No. 2006-57. The rezone was reviewed as a "nonproject action" for environmental review purposes. WAC 197-11-774 ("nonproject") means actions which are different or broader than a single site specific project, such as plans, policies, and programs. SEPA draws a distinction between "project actions" and "nonproject actions". WAC 197-11-704. Nonproject actions include amendments to zoning ordinances such as a rezone. *Id.*

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application requirements were set for in KCC (h). 16.09. *Exhibit 77.* The record also includes a SEPA Environmental Checklist that was also submitted with the application. *Exhibit 4.* The application did not include the following required materials, (1) a list of all land owners within 300 feet of the site's tax parcel; (2) a critical areas application; (3) density bonus documentation; or (4) traffic impact analysis from a licensed engineer. Each of these application components were established by ordinance.

Kittitas County reviewed the preliminary plat application and concluded that the application was incomplete and required additional information. *Exhibit 9.* Developer was notified on July 18, 2007 that an "...address list of all land owners within 300-feet of the site's tax parcel..." must be submitted as part of the required attachments to the long plat application. The instructions specifically noted as follows:

> When the additional information is received *and the application is complete*, our review of the application will continue.

(Italics added). The instructions required provision of additional information *and* that there be a subsequent determination of completeness. CDS did not issue a Notice of Completeness. Within days of the initial notification, CDS Staff sent an additional letter to Applicant reiterating the rezone requirement for a "...stamped traffic analysis from a licensed engineer in the State of Washington." The letter specifically noted:

> It has come to my attention as part of the Andrus Rezone (Z-06-23) and review of the SEPA Mitigated Determination of Nonsignificance, which I have attached, *one of the mitigation measures is that at the time of a project action, the applicant shall submit a stamped traffic analysis from a licensed engineer in the state of Washington.* It further states that the traffic analysis shall consider among other factors, intersection spacing, site distance, traffic volumes, load bearing capacity of soils, pavement thickness design, etc.

Exhibit 11. (Italics added) . Planning staff went on to state:

> So in order to comply with the SEPA mitigation, *the review of Big Buck Ridge Cluster Plat will require the submittal of the above-mentioned traffic analysis.* Also, the outcome of the road variance request will need to be completed.
>
> When the additional information is received, our review of the application will continue.

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Staff was clear with respect to the application deficiency – review was suspended until the required information was submitted. Applicant did not respond, question or appeal the notification. This is the substantive equivalent to a supplemental notice of incompleteness. They simply did nothing on the application over the next six years.

The application laid dormant for nearly three (3) years. During the following years, however, there was significant activity with regard to Kittitas County's rural zoning standards and compliance with the Growth Management Act (GMA). Zoning and development regulations were challenged in two proceedings – *Kittitas County Conservation v. Kittitas County,* No. 07-1-0004c, 2011 WL 2729590 (E) Wash. Growth Mgmt. Hr'gs Bd. August 20, 2007 ((*Kittitas Conservation I*) and *Kittitas County Conversation v. Kittitas County*, No. 07-1-0015, 2008 WL 1766717 (E. Wash. Growth Mgmt. Hr'gs Bd. March 21, 2008) (*Kittitas Conservation II*).[4] The Supreme Court summarized Board decisions as follows:

> The Board found that the regulations on rural densities and uses in rural areas. Specifically, regarding the County's cluster platting regulation, Ch. 16.09 KCC, the Board was troubled that it "does not include a limit on the maximum number of lots allowed on the land including the cluster; prohibit the number of connections to public and private water and sewer lines; nor include requirements to limit development on the residential parcel." *Kittitas Conservation I*, 2007 WL 2729590, at *34; See *Kittitas Conservation II*, 2008 WL 1766717, at *9, *36.

Kittitas County v. Eastern Washington Growth Management Hearings Board, 172 Wn.2d 144, 165 (2011). The Board's actual order provided:

> Kittitas County's adoption of Ordinance 2007-22 allows urban density in the rural areas with 3-acre zoning in the Agricultural-3 Rural-3 zones outside of the urban growth areas and limited areas of more intensive rural development (LAMIRDs) in Chapter 16.09, 17.08, 17.22, 17.28, 17.30, and 17.56 of the Kittitas County Code violate RCW 36.70A.070 and 36.70A.110 and substantially interferes with GMA Goals RCW 36.70A.020 (1-2, 8-10, 12) and the Board finds these provisions invalid.

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[4] Kittitas Conservation II specifically related to a challenge to Ordinance 2007-22. Ordinance 2007-22 was the ordinance applicable to the period. *Exhibit 77.*

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Kittitas Conservation II, 2008 WL 1766717 at *38. Kittitas County responded to the administrative and judicial determinations and adopted Ordinance 2013-001 which eliminated the three-acre zones and rezoned the subject property. Ordinance 2013-001 was adopted on February 11, 2013. *Exhibit 41.* The required TIA was not received until February 20, 2013. *Exhibit 32.*

Kittitas County reinstituted contact with Applicant by letter dated February 9, 2010. *Exhibit 13.* CDS Staff explained the process and reasoning for the correspondence as follows:

> In the wake of sweeping changes to the structure and makeup of CDS through 2009 an inventory was done in early 2010 to determine the status of, and make appropriate notifications to, the large cache of outstanding and pending land use applications on file. On February 9th, 2010 the Interim Planning Manager notified Mrs. Andrus that a request to withdraw application or the TIA would need to be submitted within 60 days (April 10th) for the application to remain active. On February 16th, 2010, Mr. Andrus requested an extension of the timeline because of uncertainty related to water withdrawal requirements in the Upper County; an extension was granted on June 25th, 2010.

Exhibit 79. Applicant responded with countless requests for extensions covered an additional three (3) year period. *Exhibits 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29,* and *30.* An incomplete Transportation Impact Analysis (TIA) was finally submitted on or about February 20, 2013. *Exhibits 31-33.* The TIA did not address intersection spacing, sight distance, load bearing capacity of soils, or pavement design thickness. Each of these items were defined components established by *Ordinance No. 2006-57.* Applicant did not file the required Critical Areas Checklist until January 21, 2015. *Exhibit 35.*

CDS finally issued a Notice of Application on February 9, 2015. *Exhibit 37.* The Notice of Application stated that the application was complete on August 16, 2007.[5] The Notice of Application also invoked environmental review for the first time. This was the first opportunity for the public to comment upon the application. Upon being advised of the application adjacent property owners immediately raised objections. *Exhibits 40-50, 52-60.* A Mitigated Determination of Non-Significance (MDNS) was issued on March 25, 2015. *Exhibit 69.*

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[5] This was the date on which CDS advised the Applicant that the TIA was required in order to continue processing of the application. There was no determination of completeness on that date.

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Hearing Examiner requested post-hearing briefing on various issues related to "vesting" of the application under RCW 58.17.033. Also included in the inquiry was a question related to "project action" under Ordinance No. 2006-57. The discussion incorporates matters of environmental review as well as staff authority to establish "*de facto*" vesting dates. We will address each of those issues.

III. Discussion

3.1 Statutory and Judicial Foundation for Vested Rights Doctrine.

As a beginning proposition, it is appropriate to review the vested rights doctrine under judicial and statutory authorities. Washington's vested rights doctrine grew out of case law rooted in notions of fundamental fairness and provided a measure of certainty to developers to protect their expectations against fluctuating land use policy. *Noble Manor Co. v. Pierce County,* 133 Wn.2d 269, 278 (1997), *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 870 (1994); and *Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 197-98 (2014). Washington's vested rights doctrine, as it was originally judicially recognized, entitled developers to have a land development proposal processed under the regulations in effect at the time of filing a complete building permit application. *Hull v. Hunt*, 53 Wn.2d 125, 130 (1958). The courts adopted a "date certain" vesting doctrine. *Erickson & Associates*, 123 Wn.2d at 867-68. Washington's rule is the minority rule.[6]

In 1987, the legislature codified vesting rules for building permits (RCW 19.27.095) and subdivisions (RCW 58.17.033). RCW 58.17.033 is applicable to this proceeding and provides as follows:

> (1) A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time *a fully completed application* for preliminary plat approval of the subdivision, or short plat

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[6] The majority rule provides that development is not immune from changes in regulations and is not vested until a building permit has been obtained *and* substantial development has occurred in reliance on the permit. *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250 (2009). Washington court's rejected the *reliance based rule* and adopted a date certain vesting point which ensured that "new land use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law." *Id.* 167 Wn.2d at 251. See also, *Valley View Industry v. City of Redmond*, 107 Wn.2d 621, 637 (1987).

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> approval of the short subdivision, has been submitted to the appropriate county, city or town official.
>
> (2) The requirements for a fully completed application shall be defined by local ordinance.
>
> (3) The limitations imposed by this section shall not restrict conditions imposed under Chapter 43.21C RCW.

(Italics added). While the vested rights originated at common law, the doctrine is now statutory. *Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 204-205 (2014) (holding that the vested rights doctrine is now statutory) and *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173 (2014). In *Potala,* the court referenced the Final Bill Report for the 1987 vesting legislation in 1987 which provided as follows:

> BACKGROUND:
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> Washington state has adhered to the vested rights doctrine since the supreme court case in *State Ex Rel. Ogden v. Bellevue*, 45 Wn. 2d 492 [275 P.2d 899] (1954). The doctrine provides that a party filing *a timely and sufficiently complete* building permit application obtains a vested right to have that application processed according to zoning, land use and building ordinances in effect at the time of the application. The doctrine is applicable if the permit application *is sufficiently complete*, complies with existing zoning ordinances and building codes, and is filed during the period the zoning ordinances under which the developer seeks to develop are in effect. If a developer complies with these requirements, a project cannot be obstructed by enacting new zoning ordinances or building codes. *West Main Associates v. Bellevue*, 106 Wn.2d 47 [720 P.2d 782] (1986).
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> SUMMARY:
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> The vested rights doctrine established by case law is made statutory, *with the additional requirement that a permit application be fully completed for the doctrine to apply*. The vesting of rights doctrine is extended through applications for preliminary or short plat approval. The requirements for a fully completed building permit application or preliminary short plat application shall be defined by local ordinance.

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Potala, 183 Wn. App. at 204-205. The primary legislative change related to the requirement for a "fully completed application." Under prior case law, the operative requirement was that the building permit or subdivision application must be (1) sufficiently complete, (2) comply with existing zoning ordinances and building codes, and (3) be filed during the effective period. The common law required only that an application be "sufficiently complete," while the legislature decided to change the standard and require a "fully completed application." *Lauer v. Pierce County*, 173 Wn.2d at 259. The legislature abrogated the common law rule when it substituted "fully" for "sufficiently" and took "… a zero tolerance approach for completeness." *Id.* and *Friends of the Law v. King County*, 123 Wn.2d 518, 524 (1994). *Valley View Indus. Park v. Redmond*, 107 Wn.2d 621, 638 (1987).[7] It was recognized that "…[i]f a vested right is too easily granted, the public interest could be subverted. *Abbey Road Group*, 167 Wn.2d at 251.

In applying the vested rights doctrine, the courts have been sensitive to the inherent conflict between developer and public rights and interests. The courts have recognized, however, that a liberal vesting rule necessarily comes at a price:

> 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.

Erickson, 123 Wn.2d at 873-74; See also *Abbey Road Group*, 167 Wn.2d at 251. This balancing consideration is particularly significant in this proceeding. Applicant seeks to vest to a zoning density found to be violative of the Growth Management Act (GMA). *Kittitas County Conservation v. Kittitas County*, Case No. 07-1-0015 (Final Decision Order – March 21, 2008). The approval of this cluster plat subdivision is antithetical to GMA mandates and subverts clear statutory and judicial determinations.

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[7] The court has historically adhered to submission of a complete application as a prerequisite to the application of the vested rights doctrine. *Parkridge v. Seattle*, 89 Wn.2d 454 (1978). In *Parkridge*, the court created a limited exception to the requirement of completeness of building permit applications. The issue there was whether a right to develop land could vest despite an incomplete building permit application when the developer's diligent attempts to complete the application prior to the zoning change had been obstructed by the local government. The court held that a development right had vested, notwithstanding the incompleteness of the application, because the developer's good faith conduct merits recognition of the vested right. *Parkridge*, 89 Wn.2d at 465-66.

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The courts have held "that statutes should receive a sensible construction to effect the legislative intent and …to avoid unjust…consequences." *Lauer v. Pierce County*, 173 Wn.2d 242, 263 (2011). It is unjust to validate noncompliant zoning standards under the guise of vesting.

3.2 **Hearing Examiner Determines Application of the Statutory Vesting Doctrine as a Matter of Law.**

It is well-established that a Hearing Examiner is authorized to interpret and apply statutory vesting provisions. *See e.g. Abbey Road Group, LLC v. City of Bonney Lake,* 167 Wn. 2d 242 (2009) (a review of Hearing Officer's decisions that denied developer vested development rights for condominium project applying statutory vesting rules); *Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 599 (2000)(affirming Hearing Examiner's determination that developer's completed short plat application vested under water drainage ordinance). It is the Hearing Examiner that determines if there is a *fully completed application.* The decision is based on the facts and applicable ordinance requirements for application. There is no case authority that supports an argument that "vesting" occurs as a matter of law based upon staff interpretations or omissions.

The court in *Lauer v. Pierce County*, 173 Wn.2d 242 (2011) addressed a similar issue. In *Lauer,* the County failed to issue a Notice of Incomplete Application under 36.70B.070(1) and (4). The applicant asserted that their building application was made complete by operation of law. *Lauer*, 173 Wn.2d at 261. The court rejected this argument and held that the failure of the County to inform landowners that their building permit application was incomplete did not cause the application to become complete for vesting purposes.[8]

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[8] The court in Lauer was also cognizant about the impact of misrepresentations in the context of an initial application package. The court commented:

> Further, the Garrisons' interpretation of RCW 36.70B.070(4)(a) would yield a troubling result: building permit applicants could misrepresent facts on their application, and the county would have the daunting task of investigating every application to determine its accuracy within a 28-day period. Failure on the part of the county to do so would cause the dishonest applicants' rights to vest. This court has held "that statute should receive a sensible construction to effect the legislative intent and … to avoid unjust … consequences." *State v. Vela,* 100 Wn.2d 636, 641 (1983).

Lauer, 173 Wn.2d at 263. In a similar way, the Applicant in this proceeding consciously failed to provide the TIA required by Ordinance 2006-57. Vesting rights should not be extended to circumstances in which there has been a conscious and knowing failure to submit required information.

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Determinations of completeness are not linked statutorily to the vesting provisions of RCW 58.17.033. Rather, the concept was adopted as a part of Regulatory Reform which was intended to address and establish procedural requirements for permit applications. RCW 36.70B.010.[9] The issuance of a determination of completeness means only that the application is ready for "regulatory processing". In this case, there was no Notice of Completeness issued with respect to the application. It was also clear that Kittitas County advised the applicant that the application failed to include the required traffic impact analysis established by Ordinance 2006-57. There is no authority to support the proposition that a fully complete application can arise as a matter of law simply through omission or a delay of only a few days.

3.3 **Ordinance 2006-57 Incorporates the Concept of "Project Action" in the Rezone Determination.**

Kittitas County rezoned the subject property from Forest & Range to Rural-3 zoning district. *Ordinance No. 2006-57 (Exhibit 11)*. The rezone was reviewed and processed as a "nonproject action" under State Environmental Policy Act (SEPA). Under SEPA, a broad plan is called a "nonproject" action. See e.g. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 630 (1993). "Nonproject" means actions such as plans, policies, or programs which are different or broader than a single site-specific project. WAC 197-11-774. Kittitas County processed rezones as "nonproject" actions.

Since the Andrus rezone did not require site specific project review, the rezone ordinance set forth specific conditions with respect to submissions for a "project action". SEPA MDNS stated:

> At the time of *a project action*, the applicant shall submit a stamped traffic analysis from a licensed engineer in the state of Washington considering among other factors, intersection spacing, site distances, traffic volumes, load bearing capacity of soils, pavement thickness design, etc. Reference Current Kittitas County Road Standards.

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[9] RCW 36.70B.050 required local governments to establish regulatory processes and procedures by ordinance with respect to permit applications. Included in the required review components were provisions related to determinations of consistency (RCW 36.70B.040); Determinations of completeness (RCW 36.70B.070); Notice of Application (RCW 36.70B.110); Permit review processes (RCW 36.70B.120); and Notices of Decision (RCW 36.70B.130). The requirements were established for purposes of processing and not intended or designed to be a substitute for vesting determinations under the applicable statutory provisions.

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Exhibit 11. Hearing Examiner requested comment on "what is a project action." SEPA establishes two categories of "action". WAC 197-11-704(2).

> (2) Actions fall within one of two categories:
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> (a) **Project Actions.** A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects are limited to agency decisions to:
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> (i) license, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.
>
> (ii) purchase, sell, lease, transfer or exchange natural resources, including publically owned land, whether or not the environment is directly modified.
>
> (b) **Nonproject actions**. Nonproject actions involve decisions on policies, plans, or programs.
>
> (i) the adoption or amendment of legislation, ordinances, rules or regulations that contain standards controlling use or modification of the environment;
>
> (ii) *the adoption or amendment of comprehensive land use plans or zoning ordinances;*
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> ***

The reference to "project action" relates to the site specific development application. Board of County Commissioners required the submission of a traffic impact analysis at the time of application for the project. The submission would be in the context of the Environmental Checklist and required as an integral part of the application. It was part of a "fully completed application."

3.4 **Kittitas County Ordinances Define Requirements for Fully Completed Applications**.

Applicant submitted a performance based cluster plat for creation of 14 one-acre single family parcels and approximately eleven acres of open space. The applicable ordinance

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provisions are set forth in the record.[10] *Exhibit 77.* Application requirements include the following: (1) preliminary plat in conformance with KCC Title 16.12 (Preliminary Plats and Title 12 (Road Standards); (2) SEPA Environmental Checklist in conformance with KCC 15.04; (3) Critical areas application consistent with KCC Title 17A.C.; and (4) documentation demonstrating consistency with density bonus. In addition, Ordinance No. 2006-57 required submission of a traffic impact analysis signed by licensed engineer. *Exhibit 11.* Applicant failed to include any of the identified materials. The application was deficient as a matter of law.

RCW 58.17.033(1) requires a "fully completed application" and imposes a "zero tolerance" policy. *Lauer*, 173 Wn.2d at 259. KCC 15A.03.010 defines a "complete application" as including those items required by zoning code, subdivision code and development agreements. Staff has no authority to modify, revise or waive these application requirements. See e.g. *Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn. App. 252, 296 (2014) (Equitable estoppel against government). Hearing Examiner is to determine as a matter of law whether a "fully completed application" was filed for purposes of RCW 58.17.033.

As a beginning proposition, Kittitas County rezoned the property and imposed a specific application requirement of a transportation impact analysis. The requirement was clear and unambiguous and directly applicable to Andrus. KCC 15A.01.040(1) sets forth applicant responsibilities with respect to permit applications and provides:

> 1. **Applicant**. An applicant is expected to read and understand the county comprehensive plan and code and be prepared to fulfill the obligations placed on the applicant. Pre-application conferences are available to anyone who wishes to discuss such obligations prior to submittal.

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[10] CDS Staff summarized the project proposal in its Staff Report. The project was described as a performance based cluster plat application to create 14 one-acre single family parcels in approximately 11 acres of open space. *Staff Report I.* The performance based cluster plat provisions were eliminated from the zoning code in 2013 (Ordinance 2013-001). *Id.* The application sought to utilize the performance based cluster plat provisions to increase densities beyond the maximum of what would be normally permitted for the R-3 zone based on public benefit rating system. The applicant sought to utilize three public benefit categories to decrease the minimum lot size from three-acres to one-acres. *Id.*

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It was Applicant's responsibility to comply with the Ordinance No. 2006 filing requirements. *Ordinance No. 2006-57.* Applicant was fully aware of the rezone requirement for submission of a traffic impact analysis.[11] This proposition is also consistent with the fundamental legal premise that a project proponent bears the burden of proof to establish rights with respect to the application. On August 16, 2007, Applicant was specifically advised of the requirement and that the processing of the application would not proceed without the report. Applicant then sat quietly for 3 years. There can be no serious contention that Applicant failed to submit the required TIA. The TIA was finally submitted on February 20, 2013 – days after the zoning was amended to prohibit the proposed density.

Second, the Applicant failed to comply with the application requirements for cluster plats under KCC 16.09.080. The application requirements include: (1) a critical area application; and (2) documentation demonstrating consistency with bonus requests. KCC 16.09.090. The critical areas checklist was not submitted until January 21, 2015. *Exhibit 35.* The record contains no demonstration of compliance with the density bonuses.

Third, current staff incorrectly *assumed* that the application was complete on August 16, 2007. These determinations are pure conjecture and speculation. No evidence was presented with respect to specific determinations at the time of the early communications. In fact, the communications were clear that the application was incomplete (*Exhibit 9)*; continued processing required submission of the traffic analysis from a licensed engineer (*Exhibit 11)*; and that review of the application will continue only upon receipt of the identified information. *Id.* Applicant did not object to the suspension of processing and did not submit the required information. The applicable ordinance provisions are also clear that the failure to submit required information within 180 days will result in voiding of the application. KCC 15A.03.040(4)(g). Kittitas County was clear in its description of the process which was that "...[w]hen the additional information is received *and the application is deemed complete, our review of the application*

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[11] Applicant argues that there is a distinction between a project "action" and development activity "application". Applicant's Memorandum of Authorities – 5-6. This distinction makes little sense. The requirement for a traffic impact analysis arose in the context of a "nonproject action" (i.e. a rezone) as a part of the SEPA analysis. The rezone ordinance simply deferred preparation of the traffic impact analysis until there is a project application. It is illogical to argue that a traffic impact analysis (which is a SEPA component) should be submitted at a later point in the project review process. It is a necessary component of the SEPA submissions.

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will continue." (*Exhibit 9).* Planning Staff did not issue a Notice of Complete Application and it did not further process the application.

Fourth, the record is consistent with a determination of incompleteness. KCC 15A.03.060 provides that "...[t]he Notice of Application *shall be provided within 14 days after the determination of completeness*." See also, WAC 365-196-845 ("Notice of Application must be provided with fourteen days of determining an application is complete). If the application was deemed complete in 2007, the county was required to issue a Notice of Application. CDS specifically advised Applicant that it would advise when the application is complete and would begin review process only when the TIA was submitted. Kittitas County did not issue the Notice of Application until February 9, 2015. *(Exhibit 37).* It should also be noted that the Notice of Application specifically requires identification of "...existing environmental documents that evaluate the proposed project." KCC 15A.03.060. Public comment would have been impossible without the TIA.

Fifth, Planning Staff asserts that the failure to respond or clarify the additional ordinance requirement within the 14 day time period covered by KCC 15A.03.040(4) was a "...de facto declaration of a complete application." *Exhibit 79.* No legal authority or factual foundation is provided to support this proposition. In fact, the argument is contrary to the prior correspondence in which the applicant was advised that the application would not be further processed until the required information was submitted to CDS. *Exhibit 9* ("when the additional information is received *and the application is deemed complete*, our review of the application will continue"); and *Exhibit 11* ("when the additional is received, our review of the application will continue"). The argument is also contrary to required procedures. That is, if the application was *de facto* complete CDS was required to issue the Notice of Application. All of CDS actions were contrary to the speculative assumption that there was a fully completed application.

3.4 **SEPA Checklist Failed to Incorporate or Reference Rezone Ordinance and MDNS Requiring TIA.**

Hearing Examiner specifically requested comment upon applicant's failure to reference prior environmental determinations with respect to SEPA mitigation measures for potential traffic impacts. Applicant submitted a SEPA environmental checklist dated June 19, 2007. *Exhibit 4.* Environmental Checklist A.3. provides the following question and response:

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3. List any environmental information you know about that had been prepared, or will be prepared, directly related to this proposal.

None known or currently required.

This statement is patently false. Applicant knew that a TIA was required for the cluster plat application. Where an applicant submits false or misleading information in the context of an application, the courts have recognized that vesting provisions may be denied with respect to the proposed action. *Lauer*, 173 Wn.2d at 263. The court stated:

> Further, the Garrisons interpretation of RCW 36.70B.070(4)(a) would yield a troubling result: building permit applicants could misrepresent facts on their application, and the County would have the daunting task of investigating every application to determine its accuracy within a 28-day period. Failure on the part of the County to do so would cause the dishonest applicants' rights to vest.

In this case, the County did identify the error and specifically the applicant of the mitigation requirement. Applicant simply argues that the notification was a few days late. As noted in *Lauer,* our courts have held "that statues should receive a sensible construction to affect the legislative intent and … to avoid unjust …consequences." It would be unjust to allow this applicant to consciously misrepresent the status of prior environmental determinations; ignore written directives regarding application requirements; sit on an application for nearly six years; and claim vested rights.

The requirement for TIA submission is a SEPA mitigation measure specifically applicable to this property and application. When there are gaps in relevant information regarding significant impacts, agencies shall make clear that such information is lacking and is necessary for environmental review. WAC 197-11-080(2). Kittitas County specifically identified the traffic impact analysis as an essential component of environmental review. Agencies may rely upon applicants to provide the information. WAC 1979-11-080(4). The SEPA Environmental Checklist contained no reference or information required with respect to potential traffic impacts or traffic impact analysis. It was incomplete by definition and directive contained in the rezone ordinance. Environmental Checklist A.3. also requires a listing of environmental information that has been or will be prepared with respect to the proposal. *Exhibit 4*. Applicant failed to disclose or reference the TIA required by the rezone ordinance.

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CONCLUSIONS

Hearing Examiner is responsible for legal determinations related to a project permit application. A fundamental and critical determination relates to application of the statutory vesting doctrine premised upon a *fully completed application.* The application in this proceeding was clearly deficient – it failed to include the required traffic impact analysis, critical area application and demonstrable facts related to the density bonus. The application components were set forth in applicable ordinances and binding on the parties. The application was not fully completed until at least February 20, 2015. The applicable law at that time precludes this development.

Dated this 22nd day of May, 2015.

MEYER, FLUEGGE & TENNEY, P.S.
Attorneys for Cle Elum Ridge Association

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CERTIFICATE OF SERVICE

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

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DATED at Yakima, Washington, this 22 day of May, 2015.

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Deborah Girard, Legal Assistant

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DATED at Yakima, Washington, this 22nd day of May, 2015.

Deborah Girard

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