KITTITAS COUNTY HEARINGS EXAMINER

Plat Application of:	LP-07-00040
Becky Andrus	APPLICANTS' SUPPLEMENTAL MEMORANDUM OF AUTHORITIES IN SUPPORT OF CLUSTER PLAT APPLICATION

At the conclusion of the open record hearing on the above-referenced application, the Hearings Examiner indicated he would like to receive supplemental briefing on several issues. In an email dated April 29, 2015 the Hearings Examiner clarified the issues he wanted supplemental briefing on as follows:

1. Vesting and, in particular, what a "project action" is and what constitutes vesting as a complete application as a matter of law when no letter of complete application is issued.
2. The legal effect of the lack of a letter of complete application in 2007, and the impact of it being issued in 2015.
3. The legal effect of the February 9, 2010 letter from the county to the applicant advising that the application would be deemed withdrawn if the TIA was not submitted April 10,

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2010, and then the TIA was not submitted by that date but the application continued to be processed by the County.

4. The legal impact of the original SEPA checklist submitted 6-19-2007 that mentions nothing of potential traffic impacts although the rezone ordinance applying to this property made note of traffic impacts supporting the requirement of a TIA at time of project action.

5. The related legal impact of the optional DNS process noticed 2-9-2015 and the MDNS issued 3-25-2015.

6. The legal authority of the County to set a "de facto" date of complete application almost 9 years before the date the application was noticed to the public.

I. DISCUSSION

1.1 Vesting and, in particular, what a project action is and what constitutes vesting as a complete application as a matter of law when no letter of complete application is issued.

1.1.1 The Vested Rights Doctrine

The Applicants provide a general outline of vesting in Applicants' Memorandum of Authorities in Support of Plat Application at page 3, line 4 to page 4, line 13. This application is a plat application that is vested under RCW 58.17.033, which 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 approval of the short subdivision, has been submitted to the appropriate county, city, or town official.
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> (2) The requirements for a fully completed application shall be defined by local ordinance.
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> (3) The limitations imposed by this section shall not restrict conditions imposed under chapter 43.21C RCW. (Emphasis added.)

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This statue now controls vesting in the context of a plat. In *Potala Village Kirkland, Llc, v. City of Kirkland*, 183 Wn. App. 191 (2014), the court held the statutory vested rights doctrine replaced, rather than supplemented, the common law vested rights doctrine. Under this decision, vested rights apply only in the context of building permit applications (RCW 19.27.095) and short subdivision and subdivision applications (RCW 58.17.033), although city or county policies may grant broader vested rights.

Submission of a completed plat/short plat application vests the developer with the right to both divide the property and to develop it in the manner disclosed in the application in accordance with the land use and zoning laws in effect on the date of submission of the application. *Noble Manor v. Pierce County*, 133 Wn.2d 269 (1997). The reliance and over emphasis on the phrase "zero tolerance approval for completeness" (see Cle Elum Ridge Association Post Hearing Memorandum; *Lauer v. Pierce County*, 173 Wn.2d 242, 259, 267 P.3d 988 (2011); *Friends of the Law v. King County*, 123 Wn.2d 518, 869 P.2d 1056 (1994)) is misplaced. *Lauer* involved vesting of a building permit application. The case stands for the proposition that the definition of a "fully complete" application depends on local law. 173 Wn.2d at 257; see also RCW 19.27.095(2). The real issues in that case were that the building permit application "falsely represented the site." *Id.* at 260. As a result of the misrepresentation the house should not have been built at that location. *Id.* at 260. In *Lauer*, the court did not reach the issue of whether there was a complete application because the court concluded the application was not "valid" and sought to permit a building that was not allowed under the then-existing ordinances. *Id.* at 262. Similarly in *Friends of the Law*, the court concluded what constituted a complete application is up to the local jurisdiction. *Friends of the Law,* 123 Wn.2d at 523. There, the court went on to deal with King County's confusing and unclear rules on what constitutes a complete application. *Id.* at 524-525.

If a zone or development regulation is found to not comply with the Growth Management Act, the noncompliance does not affect the vesting. *Town of Woodway v. Snohomish County*, 180 Wn.2d

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165, 322 P.3d 1219 (2014); see also, *King County v. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 181, 979 P.2d 374 (1999). Thus, the County's Comprehensive Plan and development regulations being deemed to not comply with the GMA after the date the application was filed by the Applicants does not impact the Applicants' vested rights.

KCC 15A.03.040[1] applied when this application was submitted. This statute sets out the terms and conditions under which an application is determined to be complete. KCC 15A.03.040(1) requires the County, within 28 days after receiving a project permit application, to determine if it is complete or incomplete.[2] In this case, Kittitas County did that, sending Ms. Andrus a letter indicating she needed to submit the address list of the landowners. Ms. Andrus then submitted the address list and the County proceeded forward with processing the application. The only part of Kittitas County Code that defines a complete application is KCC 15A.03.040(3), which provides as follows:

> A project permit application is complete for the purposes of this title when it meets the procedural submission requirements of Kittitas County and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently. The determination of completeness shall not preclude Kittitas County from requesting additional information or studies either at the time of the notice of completeness or subsequently if new information is required or substantial changes in the proposed action occur. (Emphasis added.)

In *Friends of the Law v. King County*, 123 Wn.2d at 522, the court ruled a developer's good faith attempt to comply with the terms of a vesting ordinance is sufficient to vest when the ordinance fails to define what constitutes a complete application or the definition of a complete application is vague. KCC 15A.03.040(4) provides that within 14 days of the Applicants providing the additional information the County is required to notify the application whether the application is complete or identify additional information needed. Mr. Valoff's July 18, 2007 letter only says the address of

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[1] See Exhibit 5 to Applicants' Memorandum of Authorities in Support of Plat Application, Item 80 of the record before the Hearings Examiner (hereinafter referred to as the "Record").

[2] See also, Exhibit 1 to Applicants' Memorandum of Authorities in Support of Plat Application, Staff Report, § 111, pp. 2-3.

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adjoining property owners is missing.[3] That is the only reason given for an incomplete application. The last sentence infers that when the additional information (address list) is received the application will be complete. The County did not respond to the submission of the addresses within 14 days and as a result the application should be deemed complete by the County. In Mr. Valoff's August 16, 2007 letter he indicates the TIA referenced in the rezone is additional information the County will need, along with the road variance. This request for additional information does not impact whether there is a complete application. KCC 15A.03.040(3). Neither the TIA nor the road variance were identified by Mr. Valoff as materials necessary to have a "complete application in his July 18, 2007 letter.

The rezone of the Andrus property in 2006 referenced by Mr. Valoff was approved by the Board of County Commissioners and implemented through Ordinance No. 2006-57.[4] The Ordinance, at page 3, indicates the following at Condition 8:

> 8. Additional conditions are necessary to protect the public's interest. The Condition is as follows:
>
> a. SEPA review will be required for any future development regardless of the exemption status at time of development. **(See attached Exhibit B)**

The attached Exhibit B referenced in Ordinance No. 2006-57 is the rezone SEPA Mitigated Determination of Non-Significance (MDNS). It provides under subsection I.c. the following language:

> At the time of a project action, the applicant shall submit a stamped traffic analysis for a licensed engineer in the State of Washington considering among other factors, intersection spacing, sight distances, traffic volumes, load bearing capacity of soils, pavement thickness design, etc. Reference Current Kittitas County Road Standards. (Emphasis added.)

The rezone ordinance did not make the TIA a required part of any subsequent development activity application. Ordinance No. 2006-57 does not suggest, nor can it be construed, that the Board of County Commissioners intended to alter the definition of a "project permit application" under County Code. Project Permit Application is defined as follows:

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[3] Item 9 of the Record.

[4] Attached as Exhibit 3 to Applicants' Memorandum of Authorities in Support of Plat Application.

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> "Project permit" or "project permit application" means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical areas ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations.

KCC 15A.02.080. What the County rezone ordinance said was future development, regardless of whether it was exempt from SEPA, would require compliance with SEPA.

The Hearings Examiner referenced WAC 197-11-704, which provides as follows:

> (1) "Actions" include, as further specified below:
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> (a) New and continuing activities (including projects and programs) entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies;
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> (b) New or revised agency rules, regulations, plans, policies, or procedures; and
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> (c) Legislative proposals.
>
> (2) Actions fall within one of two categories:
>
> (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 include and 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 publicly 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;
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> (ii) The adoption or amendment of comprehensive land use plans or zoning ordinances;
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> (iii) The adoption of any policy, plan, or program that will govern the development of a series of connected actions (WAC 197-11-060), but not including any policy, plan, or program for which approval must be obtained from any federal agency prior to implementation;

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(iv) Creation of a district or annexations to any city, town or district;

(v) Capital budgets; and

(vi) Road, street, and highway plans.

(3) "Actions" do not include the activities listed above when an agency is not involved. Actions do not include bringing judicial or administrative civil or criminal enforcement actions (certain categorical exemptions in Part Nine identify in more detail governmental activities that would not have any environmental impacts and for which SEPA review is not required). (Emphasis added.)

This definition has significance in SEPA and project actions generally refers to a specific activity on land, such as construction, etc. It should be read in context with WAC 197-11-704(2)(b), which defines "nonproject activities" as activities that do not involve decision specific actions but instead involve decisions on rules, policies, etc. The Andrus rezone was a nonproject activity because it had no development proposed with the rezone request. The reference to "Project Action" in the rezone MDNS is thus logical because an application for a specific project on the rezoned property would require compliance with SEPA even if existing code did not require compliance with SEPA (e.g., a short plat).

The phrase in the rezone ordinance and attached SEPA MDNS says the TIA should be "at the time of a project action." That language does not change the definition of a complete application. The only interpretation that makes sense is that the TIA, as Mr. Valoff notes, is additional information that would have to be submitted as a part of the processing and not a necessary requirement to have a complete application.

1.2 The legal authority of the County to set a "de facto" date of complete application almost 9 years before the date the application was noticed to the public, and the legal effect of the lack of a letter of complete application in 2007 and the impact of it being issued in 2015.

As part of the application process the County is required to send out notice of application (KCC 15A.03.060). However, that notice does not affect whether the application is complete for vesting purposes. Item 7 of the Record is the Notice of Application. The Notice of Application describes the

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application, sets comment periods and a date for a public hearing. The notice also discusses SEPA and the SEPA process (see Section 1.4 below). The Notice of Application under KCC 15A.03.060 should be provided within 14 days of the "determination of completeness." It is unclear if the phrase "determination of completeness" is the same as a complete application.

The Applicants, the Andruses, have no control over when this notice goes out. The Hearings Examiner should not now penalize the Applicant for the County's failures.[5] No interested parties were precluded from commenting as a result of the delay by the County. The parties who did comment had the benefit of the current circumstances in the neighborhood and vicinity on which to base their comments as opposed to the situation that existed when the application was filed. The only parties prejudiced by the delay are the Applicants because over time there has been more development in the area and thus more potential impacts as a result of the development that must be addressed.

The statute makes it clear it is the County's obligation to send the notice out. There is nothing in the Record other than Mr. Watson's verbal statement on the night of the hearing to the Hearings Examiner to explain why the County did not send the Notice of Application out earlier. The County code does not contain any provisions that impacts the status of the application because the County failed to send the notice out in accordance with the County Code.

1.3 The legal effect of the February 9, 2010 letter from the county to the applicant advising that the application would be deemed withdrawn if the TIA was not submitted April 10, 2010, and then the TIA was not submitted by that date but the application continued to be processed by the County.

The Applicant responded to this letter (see Declaration of Jeff Slothower in Support of Motion to Supplement the Record, Exhibit 1, which the Hearings Examiner admitted into the Record based upon the stipulation of the parties). The County acknowledged that response and set a new deadline before the withdrawal became effective (see Declaration of Jeff Slothower in Support of Motion to

[5] This is another area where the status of the Record is confusing. The Notice of Application is dated February 9, 2015 yet there is a comment letter from the City of Cle Elum dated July 13, 2012 (Item 25 of the Record). Cle Elum certainly had notice prior to February 2015. In addition, some of the comment letters infer the neighborhood was aware of this development proposal. (See Items 52 and 59 of the Record, which contains specific references to objecting to the plat in 2007).

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Supplement the Record, Exhibit 2, which was also admitted into the Record based upon the stipulation of the parties). Thus, this issue should now be moot.

1.4 The legal impact of the original SEPA checklist submitted 6-19-2007 that mentions nothing of potential traffic impacts although the rezone ordinance applying to this property made note of traffic impacts supporting the requirement of a TIA at time of project action and the related legal impact of the optional DNS process noticed 2-9-2015 and the MDNS issued 3-25-2015.

Whether the contents of the SEPA checklist, the mitigation measures imposed by the County in the MDNS and the process used by the County to process SEPA were proper is not properly before the Hearings Examiner at the present time. The County issued an MDNS. Kittitas County has an administrative SEPA appeal process (see KCC 15.04.210). Any party who objected to the validity of the SEPA checklist, the SEPA process or the MDNS and whether it adequately identified and/or mitigated impacts to the environment had to administratively appeal that MDNS. RCW 36.70C(2)(d) requires a petitioner in a LUPA to exhaust its administrative remedies before challenging a decision such as a SEPA determination. No one appealed the SEPA MDNS and as a result the MDNS is now not properly the subject of review.

Having said that, a SEPA checklist identifies the environmental issues. This one failed to properly identify traffic issues. The County required additional information on the roads before the County accepted comment on the SEPA checklist. Ultimately, the Applicant submitted a TIA and the County issued a transportation concurrency letter (Item 32 of the Record). Thus, the fact that the Applicant failed to identify the traffic impacts in the checklist is of no consequence because the County required the TIA as additional information and based on the TIA concluded the application met County transportation concurrency requirements. The legal authority of the County to set a "de facto" date of complete application almost 9 years before the date the application was noticed to the public.

1.5 The Fire Marshal Late Comments.

The Applicant doesn't object to the Fire Marshal's comments but instead believes they are not appropriate plat conditions. The plat conditions should not reference the comments because they must

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be met when the owner of a lot applies for a building permit not at preliminary or final plat approval. The International Fire Code requirements and similar building code requirements change periodically and thus it makes sense to ensure the most recent code requirements in existence when a building permit is applied for are what control the construction of structures on the property. If any comment or condition is placed on the face of the plat it should be "all residential structures constructed in the future on the lots created as a result of this plat shall meet all applicable building and fire codes then in effect."

Respectfully submitted this 22 day of May, 2015.

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CERTIFICATE OF SERVICE

I certify that I have this day caused a copy of the document to which this is attached to be served on the individual(s) listed below and in the manner noted below:

Andrew L. Kottkamp, Hearings Examiner Kottkamp & Yedinak PLLC 435 Orondo Ave Wenatchee, WA 98801	☐ BY U.S. MAIL ☐ BY HAND DELIVERY ☐ BY OVERNIGHT DELIVERY ☒ BY EMAIL: andy@wenatcheelaw.com
Jeff Watson, Staff Planner Kittitas County Community Development Services 411 N. Ruby Street, Suite 2 Ellensburg, WA 98926	☐ BY U.S. MAIL ☒ BY HAND DELIVERY **[original and 1 copy]** ☐ BY OVERNIGHT DELIVERY ☒ BY EMAIL: jeff.watson@co.kittitas.wa.us
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I certify, or declare, under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Ellensburg, Washington this 22nd day of May, 2015.

Heather L. Hazlett
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