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WASHINGTON'S CURRENT VESTING DOCTRINE WORKS WELL

BRIEFLY

Builders and local governments alike need the certainty that the state's current vesting law provides.

A game only works if the rules are the same from the beginning to the end, and the high stakes game of real estate development is no different. Washington's vested rights doctrine ensures that when developers commit to a project, governments cannot change the rules mid-game. Proposals to weaken Washington's vesting rules would result in a chaotic environment for real estate development, force local governments into continual battles over projects, and make it impossible for cities and counties to meet their obligations under the state's Growth Management Act (GMA).

As it has evolved over the past 50 years, Washington's vested rights doctrine (codified in RCW 19.27.095) states that the regulations governing the construction of a project are those that were in effect on the date the developer submitted a building permit application. To vest the project under current regulations, the application must be substantially complete and the proposed project must comply with existing regulations. The application may be missing a detail or two, but otherwise it must fully describe the project: a developer cannot submit a few sketches and hope to vest a project. Once a building permit application is submitted, the project is vested not only with respect to building regulations, but also land use and most, but not all, other regulations that define the parameters of the project.

Proposals have been introduced in the legislature in recent sessions that would vest projects only at the end of the process, after the local government has issued the building permit. Under these proposals, during the entire time a permit application is pending, local governments would be free to change building codes, zoning or other regulations governing the project, forcing the developer back to the drawing board. Thus, any project that attracts controversy would be subject to revisions originating at a political level. With the infill development and higher densities encouraged by GMA, nearly all projects attract local opposition, and a weakened vesting doctrine would empower project opponents to reduce the size of projects, force delays and require expensive changes to plans.

Washington's doctrine vests projects earlier than in most other states. But given the complexity of land use law in the state and the huge expense of simply getting to the application stage, this doctrine is needed to protect the up-front investment of project developers. The doctrine is based on years of careful court decisions and legislative action, and is far from the "loophole" that detractors claim. The Legislature has wisely declined to make changes to our vesting laws, and should continue to do so.

A doctrine rooted in first principles

Washington's vesting doctrine has its origins in a series of court cases beginning in 1954 and extending through the 1980s, when the Legislature adopted the current code. Legislative and court actions have refined the doctrine since then, adapting to changes in land use law.

In developing the doctrine, the courts have reached back to basic principles of U.S. law. In the landmark case of *West Main Associates vs. Bellevue* in 1986, the state Supreme Court quoted James Madison in *Federalist No. 44*:

Ex post facto laws and laws impairing the obligations of contracts are contrary to the first principles of the social compact. . . . The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the community.

Although the Constitution's prohibition of ex post facto laws was determined not to apply to civil matters, the principle is broader: it is not sound public policy to change the rules after an action is taken and then enforce those rules retroactively.

In its 1982 *Norco Construction vs. King County* decision, the State Supreme Court addressed a question that gets to the heart of the recent challenges to the state's vesting doctrine:

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. While local governments exist to provide necessary public services... [E]xercise of this authority must be reasonable and rationally related to a legitimate purpose of government such as avoiding harm or protecting health, safety and *general, not local or parochially conceived, welfare* (emphasis added).

Local governments in Washington engage in a substantial amount of planning and undertake broad, complex policy development processes in order to arrive at regulations governing land use and construction that reflect the "general" welfare. The sorts of challenges to specific projects that would take advantage of weakened vesting rules nearly always reflect "local and parochial" concerns.

Although some have characterized the current vesting doctrine as a "loophole," nothing could be further from the truth. The doctrine evolved over 30 years of carefully considered court cases, based in fundamental principles, and was codified through deliberate legislative action. Since their first adoption, the state's vesting laws have been amended after careful study, as other land use laws have changed. Some of the most important changes made by the legislature were the result of recommendations made by the Governor's Task Force on Regulatory Reform in 1995, an open process guided by a diverse and knowledgeable group.

Create good policy – then stick with it

When it comes to the "general" interest, Washington has no shortage of laws and policies regarding land use and development. Since the adoption of the GMA, all urbanized and many rural jurisdictions have undertaken extensive comprehensive planning processes, including assessments of the probable impacts of the development anticipated in the plans. After plans are adopted, jurisdictions are required to review their zoning and development regulations to ensure that these regulations are consistent with and supportive of the plans.

In other words, when a developer proposes a project that is consistent with existing plans, zoning and regulations, its “general” impact will have been anticipated by the city or county. Many projects, of course, also stir up controversy about their “local or parochial” impacts, resulting in NIMBY opposition. But a central tenet of GMA and the comprehensive planning it entails is to put the general interests of the community ahead of parochial interests and to cut down on project-by-project battles.

So, if a local government has done a good job of planning and has crafted its regulations to implement the plan, it should have no difficulty vesting an application that is consistent with those regulations. The elaborate planning required in the state is supposed to reduce the “fluctuating policy” that Madison warned against, and allow communities and builders the predictability that both desire.

A strong vesting doctrine is especially important in the era of growth management. A central goal of the GMA is to increase densities in urban areas through infill development. This means fewer greenfield projects and more projects built in existing neighborhoods where residents will raise objections. Addressing neighborhood concerns has become a standard part of development, and vesting keeps that process confined within the existing plans and regulations. A weakened vesting doctrine would put continual pressure on local governments to back down on their commitments to infill and density, threatening their ability to meet their housing and job targets.

What is at stake?

Vesting is about more than good public policy in the abstract: a lot of money is at stake. By the time developers have submitted the permit applications that trigger vesting, they have already made a substantial investment in planning the project and assessing its potential impacts. A change in regulations after the building permit application is received would require the developer to revisit its plans and make expensive changes.

Very few projects can be submitted for building permits (and thus be vested) without first taking care of the relevant land use matters. This means undertaking analysis that will be required under SEPA, such as projecting traffic, parking, storm water and other environmental impacts. In Seattle, and some other jurisdictions, projects need to go through Design Review, which requires extensive site planning, architectural design work and landscape design work. Projects near a body of water must comply with the state’s Shoreline Management Act.

Because of the complexity of the land use process and the uncertainty of the outcome, no developer can risk submitting a building permit without first having completed the project’s land use process and gaining approval of the envelope within which the project can be designed. So, by the time the actual building permit has been submitted, the applicant has already invested tens or hundreds of thousands of dollars. The state’s current vesting doctrine protects that investment by ensuring that the rules under which the planning and analysis was done will not change, at least as far as that project is concerned.

The certainty that vesting provides allows a developer to get project financing. Before submitting a building permit application the developer may not have secured debt financing for construction of the project and

will likely be using their own equity to pay the upfront soft costs. Once the project is vested, the developer can get construction loans, ensuring the project can be built. If vesting were to be moved to the permit approval stage, it is unlikely a bank would lend money needed to keep the project moving forward.

Safety valves for local governments

Although the primary beneficiaries of changes to vesting laws would be those who oppose projects and want to change the rules in order to stop or shrink them, proponents of vesting law changes point to two less parochial concerns: unanticipated consequences, and the rush to the permit counter. These two concerns, while understandable, have other remedies.

The first concern is rooted in the obvious fact that no policy process can anticipate every possible outcome. Projects can be proposed that, while in conformance with well-considered regulations, have unacceptable impacts on the surrounding environment that no one could predict. But there is a remedy for such a situation: SEPA. If the impact analysis done for SEPA uncovers a clear negative impact, the local government can require the developer to mitigate that impact.

Using SEPA to address the unanticipated consequence, rather than revisiting the underlying zoning or regulations, has the advantage of relying on a relatively objective measure of the impacts and the application of a remedy that is tied to those measured impacts. A political process to change zoning or regulations would not be bound by SEPA's requirement for sound technical work. Furthermore, SEPA is administered within the permitting agency and often through a hearing examiner or a quasi-judicial process, and does not take place in an overtly political setting.

The second concern is one that is often voiced but seldom seen. The fear is that once a jurisdiction begins to consider a change to plans, zoning or development regulations that would lower the development potential of land, the owners of the subject land will immediately file applications in order to vest under existing rules. There are two problems with this argument.

First, vesting requires a complete application for a building permit, and it is just not that easy to assemble such an application. As noted, few building permit applications are submitted before land use permits are obtained, so not many projects could be submitted quickly. And if developers submit hasty applications that are not well planned, just to get vested, they cannot make substantial changes to them and remain vested: They are stuck with the projects as submitted.

Second, and perhaps more important, local governments can impose moratoria on development while they consider new zoning or regulations. Cities and counties can impose moratoria for six months, with a six-month extension. A year is ample time to develop new statutes with all the required planning and public input. During a moratorium no projects can be submitted and no developer can get vested. Moratoria have been used successfully throughout the state, allowing local governments to address legitimate concerns while not imposing unfair costs on developers.

A third safety valve for many jurisdictions is design review. Whether administrative or through volunteer boards, design review allows a jurisdiction to work with the developer to ensure that a project fits well into its surroundings. Some programs allow departures from existing zoning and

regulation in exchange for design concessions on the part of the developer. Like the SEPA safety valve, design review operates on a project-specific basis to address concerns unique to that project without changing any of the underlying laws that apply to it.

The only certain outcome: litigation and politics

The legislative histories of the vesting bills that have been introduced in past sessions have one thing in common: no sign of support from local governments. Although vesting would seem to tie the hands of cities and counties and reduce their ability to control their built environment, local governments seem to like the rules the way they are. Consider two likely results of a change: litigation and politics.

Since the first vesting cases were decided in the 1950s, the state Supreme Court has consistently upheld and solidified the state's vesting doctrine, with reasoning grounded in the federal and state constitutions. The legislature, in turn, closely followed the opinions of the courts when it codified the doctrine in the 1980s. Although in the past decade the courts have been somewhat less willing to expand the doctrine to provide vesting for new regulations, such as impact fees, the courts have also not taken any actions that would weaken the basic doctrine.

Given this history of uninterrupted support of vesting on the part of the state Supreme Court, property owners would have a high expectation of prevailing should the legislature act to weaken the doctrine. After all, to uphold a weakened vesting law, the court would need to reverse 55 years of case law. The inevitable result would be litigation in cities and counties across the state, imposing substantial legal costs on cities.

If a new law that vested projects at the time of permit issuance were to stand up in court, local governments would face the prospect of political challenges to every potentially unpopular project. Currently, most local governments are insulated from the politics of projects through vesting laws. Land use procedures, such as SEPA, are often carried out by hearing examiners, and if cases do make it to a city or county council, they are addressed in a quasi-judicial setting that does not allow public input or lobbying.

If, however, cities and counties could change land use or building codes after the public got wind of a project through an application, council members and commissioners would be besieged by angry neighbors demanding policy changes. These demands would need to be addressed in open settings, and not behind the screen of quasi-judicial decision making. The already ugly politics of land use would get even uglier, so it is no wonder that cities and counties do not support a weakened vesting doctrine.

In search of the problem

Since the advent of growth management, local governments have given careful consideration to their plans and zoning and have cleaned up their codes, such that there should be few surprises turning up at the permit counter. And when the occasional surprise does turn up, there are legitimate and legal ways to address those unanticipated outcomes while leaving underlying regulations alone. In short, proponents of a weakened vesting doctrine in Washington have difficulty identifying the exact problem that needs to be solved.

But if they cannot identify the “general” problem, it is certain that some people in the state would very much like to have a tool to attack “local or parochially conceived” problems. In the current policy and legal environment, the only reason to want a weakened vesting doctrine is to be able to oppose specific projects that are unpopular. But local governments should not be in the business of holding popularity contests on a project-by-project basis. Builders and local governments alike need the certainty that the state’s current vesting law provides.
