The Honorable Carol Murphy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

SPANAWAY CONCERNED CITIZENS, Petitioner, v. PIERCE COUNTY; TACOMA RESCUE MISSION; AHBL, INC., Respondents.	NO. 24-2-03310-34 PETITIONER'S REPLY BRIEF

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I. SUMMARY

Good idea; wrong place. Spanaway Concerned Citizens unequivocally supports the development of affordable housing in its community. However, the public benefit of providing affordable housing does not outweigh the critical importance of upholding zoning regulations. Zoning laws exist to maintain the integrity and orderly development of the community, ensuring a balanced mix of residential, commercial, and industrial spaces that promotes long-term stability and prosperity. The zoning code must be enforced to ensure that every development occurs in the appropriate place. It is not enough to have a good idea; it must be implemented in the right location, in accordance with the law.

The parties agree that but for a six-week span in the spring of 2023, TRM's project would not have been allowed because it violated the zoning in effect before and after that brief window. The issue for the Court is whether TRM did what it needed to do to vest its right to the zoning code that fleetingly would have allowed TRM's project at this particular site: Did TRM file a complete application (signed or attested by every owner of property within the project's limits) and was that application consistent with the Comprehensive Plan (which, unlike the zoning code, had not been amended to allow certain dwelling units to be counted as one-fourth of a dwelling unit)?

In our opening brief and in this brief, we demonstrate that the application did not vest to the zoning that was in effect for six weeks and, therefore, the examiner's decision should be vacated. The result is not offensive. It honors the zoning code that for all but six weeks precluded this project at this site and honors appellate court guidance that apply a "zero tolerance" approach to vesting laws and do not countenance stretching them to grandfather-in projects that do not meet current code requirements.

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II. THE SOCIAL BENEFITS OF AFFORDABLE HOUSING ARE NOT THE ISSUE.

TRM discusses the social benefits of affordable housing. TRM Br. at 7. This case is not a debate about whether affordable housing is good or necessary. The issue is whether the proposal *at this location* is consistent with the zoning code. The zoning code does not allow affordable housing everywhere. Does the zoning code allow zoning affordable housing at this location? That is the issue—or, to a significant degree, which version of the zoning code is to be used to determine that issue?

III. TRM's APPLICATION DID NOT VEST BECAUSE IT WAS INCOMPLETE.

A. The "Complete Application" Issue is not Time Barred.

TRM seeks to avoid judicial review of the complete application issue by asserting that the challenge is untimely. Notably, the county does not join in this defense. Indeed, the County is precluded from raising this issue. In another case, the county argued that its "complete application" determination was valid because the staff's complete application review (upheld by the examiner) was consistent with its historic procedures. The superior court reviewed the county's complete application decision and rejected the idea that the staff determination could override the words of the code:

> The Hearing Examiner below found that the application here was complete based on the testimony of Pierce County employees that the County's method of determining application completeness is to ascertain whether the applicant has filed the correct number of copies. AR 38. "If they do it is deemed complete. No inspection of individual documents is done when the application is submitted it is merely a counting process." AR 38. Such lax practices are inconsistent with the requirements of the Pierce County Code. In any event, it is the Code, not the custom, of county employees that governs. The preliminary plat application filed on April| 25, 1996, was not complete. Therefore, the developer's rights did not vest on that date.

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Graham Neighborhood Ass'n v. F. G. Assoc. and Pierce Cy., (King Cy. Sup. Crt No. 09-2-39771-6 SEA), Order on Petition Under the Land Use Petition Act (Apr. 13, 2010) at 3; *affirmed on other grounds, Graham Neighborhood Ass'n v. F.G. Associates*, 162 Wn. App. 98 (2011).[1]

While superior court decisions have no precedential value for non-parties, the doctrine of issue preclusion makes them binding on the parties to that case. *Dotson v. Pierce Cnty.*, 13 Wn. App. 2d 455, 466–67 (2020) (issue applies if "(1) the issue decided in the earlier proceeding was identical to the issue in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom issue preclusion is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) the application of issue preclusion does not cause an injustice to the party against whom it is applied"). Thus, Pierce County does not argue that this Court lacks jurisdiction to review the "complete application" decision.

But Pierce County appears not to have learned the lesson the courts provided to it in *Graham Neighborhood.* The staff still does a perfunctory review, employing the "counting process" the superior court rejected as too "lax" in Graham Neighborhood. County planner Rob Jenkins explained to the examiner that staff still employs that same lax process:

> MR. JENKINS: So the -- the way it works in Pierce County, there -- Pierce County deems applications complete based on the numbers of items that are on a submittal standard checklist for each item. Whether it's a plat or a PDD, there's a -- there's a form that says you have to submit all of these different things, items of information. You submit all of those, and you pay the fees. Then -- then it's deemed complete.

TR Vol. III at 173:7-18.

While the County is precluded from challenging this Court's jurisdiction to review the vesting decision, TRM is not, thus, we address the defense on its merits. TRM's arguments are not entirely

[1] The superior court decision is attached as Appendix A.

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clear, but it appears TRM argues that neither the examiner nor this Court have (or had) authority to review the vesting decision. We address each of those separately.

TRM asserts that the hearing examiner had no authority to "rescind" the completeness determination. TRM Br. at 20:21. But TRM cites no code provision precluding the examiner from determining which code to apply when he reviewed TRM's application.

TRM discusses county code provisions that set forth the mechanics of the county's determination of whether an application is complete. *Id*. at 19 – 21. But those are not statutes governing the examiner's authority. Those statutes specify the staff's duties. Nowhere in TRM's discussion is there citation or reference to a county code provision that precludes the examiner from reviewing the complete application determination as part of the examiner's determination of whether the application meets the requirements of the applicable code.

Contrary to TRM's efforts to read into the code a limitation on the examiner's authority to determine which version of the code applies, the code provides the examiner with unbridled authority to review any issue that inheres in a permit decision:

> B. The Examiner shall receive and examine available relevant information, including environmental documents, conduct public hearings, cause preparation of the official record thereof, prepare and enter findings of fact and conclusions of law, and issue final decisions for:
>
> 1. Land Use Matters.
>
> * * *
>
> d. Applications for, and major amendments to, Planned Development Districts – PDDs.

PCC 1.22.080.

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This section provides the examiner with the authority to determine all factual and legal issues necessary to decide whether the application should be approved. Inherently, that includes the authority to determine which version of the code to apply and, thus, to determine the date the application vested.

The staff has only an advisory role. The county's initial and final decision on a planned development district application is made by the examiner. *Id.; see, e.g.,* AR 21 - 104 (staff report providing the examiner with staff recommendations, including recommended conditions of approval). Given that the examiner, not staff, was the first and only person to make a decision on the application's compliance with the code, it is almost incomprehensible that the examiner would not have the authority to determine which code applies. There certainly is no code provision precluding the examiner from making that determination. TRM cites no such limitation on the examiner's authority. And consistent with this reading of the code, the examiner addressed the complete application issue and rendered a decision on it. AR 11422 (FF 8). The Court should reject TRM's argument that the examiner could not address the vesting issue.

TRM also seems to argue that this Court lacks jurisdiction to review the examiner's complete application (vesting) decision. But rather than precluding this Court from reviewing the completeness determination, LUPA provides an expansive statement of the Superior Court's jurisdiction. Nothing in the statute suggests a limitation that would preclude this Court from reviewing a county's decision as to which code provision applies:

> The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:
>
> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

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> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
> (d) The land use decision is a clearly erroneous application of the law to the facts;
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

Consistent with this grant of judicial authority, the county's determination of which zoning code applies is reviewable as either "an erroneous interpretation of the law" or a "clearly erroneous application of the law to the facts." TRM's efforts to avoid judicial review of this issue should be rejected.

Notably, in arguing that this Court lacks jurisdiction to address the completeness issue, TRM does not discuss the superior court's jurisdiction conferred by statute. TRM's arguments are vacuous—ignoring the single most important statute (LUPA) relevant to the Court's jurisdiction.

Not only does TRM ignore LUPA's jurisdictional grant, it also fails to cite any other statute that addresses or limits the Court's jurisdiction. Understandably so. We are aware of no other statute that limits the jurisdiction conferred on the superior court by LUPA.

Instead of addressing statutes that pertain to this Court's jurisdiction, TRM cites statutes that impose the requirement on counties to make completeness determinations. TRM Br. at 21. TRM also cites the statute that establishes time limits for a county to take action measured from the date the completeness determination was made. *Id.* We agree that such limits exist. For instance, RCW 36.70B.070(4)(c) provides that a "notice of application shall be provided within 14 days after the determination of completeness." Similarly, RCW 36.70B.080(1) requires a decision on a complete

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application within 120 days of the completeness determination ("unless the local government makes written findings that a specified amount of additional time is needed"). But, again, these statutes pertain to the county planning department's obligations, not this Court's jurisdiction. There is not the slightest hint in those statutes that they in any way neuter this Court's authority to review land use decisions as provided in LUPA (RCW 36.70.C.130(1)).

TRM also resorts to policy arguments. According to TRM, the policy of locking in vested rights would be undermined if a court could review the issue of whether a vested rights claim was valid. That is a policy argument that TRM can take to the Legislature. Until and unless the Legislature amends LUPA, superior courts retain jurisdiction to decide *all* legal and factual issues that inhere in a final land use decision.

We doubt the legislature would accept TRM's policy argument. The limitation TRM seeks would grossly limit the jurisdiction of the Superior Court to ensure that permit decisions were not based on arbitrary, illegal, or factually flawed grounds. We agree that if a court determines that a vesting determination was incorrect, the "certainty" sought to be achieved through vesting will be undermined. But so would any judicial decision reversing or remanding *any* local government land use decision. Simply because local land use decisions are subject to judicial review and may, on occasion, be reversed, does not mean that the superior courts lack jurisdiction to so rule—even though it adds some uncertainty to an otherwise final local land use decision. As the Supreme Court has stated, vesting is not a free lunch. A price is paid. Vesting allows applicants to proceed with projects that would not be allowed by current laws—laws that presumably were adopted to serve 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

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> embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

Erickson & Associates v. McLerran, 123 Wn.2d 864, 875 (1994).

In any event, TRM's policy arguments are being presented to the wrong branch of government. It is for the Legislature to balance these competing interests. Until and unless the Legislature restricts the superior courts' jurisdiction to review local land use decisions, applicants will need to deal with the uncertainty inherent in any judicial review. As the Supreme Court stated in a more recent Pierce County case nixing an applicant's argument that a complete application decision was unreviewable:

> [T]he Garrisons' interpretation of RCW 36.70B.070(4)(a) [the complete application statute] 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 statutes should receive a sensible construction to effect the legislative intent and ... to avoid unjust ... consequences."

Lauer v. Pierce Cnty., 173 Wn.2d 242, 263 (2011).

In our case, a "sensible construction" that avoids "troubling result[s]" is a construction that allows the superior court to review the hearing examiner's complete application determination. TRM's efforts to block judicial review should be rejected.

B. Petitioners have Standing to Challenge Vesting.

TRM attempts to create a standing issue in the context of our challenge to the vesting issue. Part of the vesting issue involves determining whether TRM owned all the land included in its application. TRM tries to re-characterize the issue as a quiet title action and argues the Spanaway Concerned Citizens lacks standing to commence a quiet title action. TRM Br. at 21 - 24.

TRM does not question our standing under LUPA. *See* RCW 36.70C.060. This is a LUPA action. LUPA's standing provisions apply, not those applicable to a quiet title action.

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It is not Spanaway Concerned Citizens that has injected real property ownership issues into this application. That was accomplished by the Pierce County Code which requires an inquiry into ownership as part of the complete application analysis. PCC 18.40.020.C.2.[2] Indeed, TRM concedes (as it must) that the examiner had the responsibility to determine whether the application was "consistent with state and local laws for the type of development at issue." TRM Br. at 23:14. One of those "local laws" is that an application is to be evaluated in relation to the version of the county code in effect when the application was complete, PCC 18.160.050, and another county code that makes title issues a part of the complete application determination, PCC 18.40.020.C.2 (2023). Because the examiner is charged with the responsibility to determine compliance with county code, the examiner must determine which version of the code applies and, in doing so, must determine when a "complete" application—including certain title information—was filed with the county. And indeed, he did. AR 11422 (FF 8). The examiner had the authority and duty to resolve title issues if they arise in the context of the complete application determination.[3] Pursuant to LUPA, petitioners have standing to challenge that part of the land use decision.

C. The Examiner Committed an Error of Law in Construing the 1920 Condemnation Decree as Conveying Only an Easement, Not a Fee Interest.

The Order and Judgment Decreeing Necessity (AR 10089) states that "the real property, particularly above described, is necessary for the construction of said drainage improvement, and that it is necessary and proper that it should be appropriated and used for said purpose." Likewise, the

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[2] This section has been amended recently. We have quoted and refer to the version in effect in 2023 when the application was submitted.

[3] TRM's reference to *Chaussee v. Snohomish County Council*, 38 Wn. App. 630. 636 (1984) is inapposite. In that case, a hearing examiner had declined to resolve an equitable claim raised by one of the parties. No state or county code gave the examiner authority to resolve common law claims. The Court of Appeals upheld the examiner's decision not to address the common law claim. That situation is obviously distinct from the current situation where the county code expressly provides for an assessment of title ownership issues as part of determining whether an application is complete and thereby requires the examiner to resolve that issue if it is raised in proceedings before him.

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decree filed after the jury trial fixing the compensation referenced "said lands" that were "necessary to be taken and appropriated by" the drainage district. AR 10091. TRM argues that because these judicial statements referenced the appropriation of "land" but did not use the term "fee interest" that only an easement was being condemned. Notably, TRM cites no case law to support the proposition that the purchase or condemnation of "land" does not refer to a fee interest.

Judges and lawyers know that when less than a fee interest is being conveyed, the more limited interest is expressly called out in the conveyance. In the absence of any limiting words, the presumption is that a fee estate is conveyed:

> In Washington, and generally in other states, courts disfavor conditional estates. Thus, unless the language in the deed clearly indicates that a lesser estate is intended, a court will construe a grant as a fee simple absolute, without conditions or restrictions. *King County v. Hanson Inv. Co.*, 34 Wn.2d 112, 208 P.2d 113 (1949).

Wash. Real Property Deskbook (4th ed.), §5.8(1).

There are no limiting words in the decree and order at issue here. The public use and necessity order refers to "the real property, particularly above described" (by metes and bounds). AR 10089. The decree following the valuation trial refers to compensation for the "taking and appropriation of the lands hereinafter described." AR 10091. In neither judicial statement are any limiting words included. The presumption that a fee interest was being conveyed applies. "Courts may not disregard the language in a deed nor revise it under a theory of construing it." *Lawson v. Bankers Ins. Co.*, ___ Wn. App. ___, 562 P.3d 785, 789, *as modified on recon.* (Feb. 25, 2025).

After decreeing that the drainage district was acquiring title to "the lands" described therein, AR 9843:26 – AR 9844:10, the court provided that the condemnee (Schulz) would retain "an easement" to cross the land and make other limited use of it, AR 9845:25. Clearly, the court knew that when only a limited interest was being conveyed or reserved that the limitation would be expressed

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by using a word like "easement." It is a standard rule of statutory and contractual construction that when a term is used in a document in one place and not another the omission of the term in the second instance is intentional. "[T]o express one thing in a statute implies the exclusion of the other." *State v. Delgado*, 148 Wn. 2d 723, 729 (2003).

Moreover, TRM's argument is inconsistent with the reservation of an easement to Schulz to cross the land condemned by the drainage district. If the district had only condemned an easement for itself, then Schulz would still own the fee and would not need an easement to use the land in a manner that did not unreasonably interfere with the district's use. That an easement was reserved for Schulz makes clear that the district was condemning the fee.

TRM is correct that when an entity initiates a condemnation action, it generally is limited to condemning only as much land (or an interest in the land) as is reasonably necessary for its purposes. TRM Br. at 26 – 27. But that is a rule that has been applied only in the original condemnation action when a condemnee contests appropriation of the entire fee. TRM cites no case in which that rule is applied in later litigation regarding the meaning of an earlier condemnation decree. In the condemnation action, if the court determines that less than a fee interest is reasonably necessary, the judicial decree and order would specify that something less than a fee interest was being condemned. But as demonstrated above and in the words of the judicial decrees, no such limiting words were included when the drainage district condemned Schulz's "land" and "real property."

TRM argues that examiner's determination that only an easement was condemned by the district is consistent with the deeds in the chain of title subsequent to the 1920 decree. But TRM does not dispute the axiom that subsequent grantors in a chain of title cannot convey more title than they own: "A landowner cannot convey by deed a greater interest in property than she possesses." 26A Corpus Juris Secundum, Deeds § 277 (footnotes to caselaw omitted). Upon entry of the condemnation

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decree, Schulz no longer owned the land condemned by the drainage district. Because he no longer owned that land, when Schulz conveyed his remaining land, he could not convey to his grantee the land the district had condemned. It matters not a single whit whether Mr. Schulz's deed *purported* to convey land the district had condemned. Schulz could not convey land he did not own. *Id*. Nor could any of his successors-in-interest convey that land.

Even less relevant are TRM's reference to title insurance policies. Needless to say, if a grantor cannot convey land that the grantor does not own, a title policy does not somehow create title where it does not exist. Title insurance does not enable the grantor to sell land the grantor does not own. The import of the title policy is that an insurance company is willing to accept the risk that the grantor does not own the property. The insurance policy creates no rights in land itself. In sum, TRM's discussion of the subsequent deeds and title policies is wholly irrelevant.

TRM's argument also ignores that the staff was to make the completeness determination based on the application materials and those materials stated that TRM did not own the disputed property. Instead, in the application, that strip was called out as an exception from the land that TRM has acquired from Ober. AR 3744. Staff erred in determining that the application was complete when the application acknowledged TRM had not acquired that strip from Ober yet did not include a signature from the current owner of that strip.

TRM argues that the former drainage district property is not integral to TRM's development plans. TRM Br. at 11:2 - 5. TRM's statement of the proposed use of that property may not be accurate[4] but, more importantly, it is irrelevant to the code mandate that all owners of the property described in

[4] The drainage district parcel is straddled by plan recreation spaces including a trail path, picnic area, and community farm as well as water supply lines. (AR 37, 40, 41, 154). The drainage area is a part of the open space amenity which allows TRM to trumpet this "beautiful" site. TRM Br. at 8:6. Moreover, various versions of TRM's plans have included bridges spanning the drainage. *See, e.g.,* AR 167. While the most recent plans do not include a bridge, TRM has acknowledged that further features of that type might be included at the time of "design/construction." AR 120, 167.

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the application join in the application. PCC 18.40.020.C (2023). The code does not provide an exception for owners of property that are included in the proposal but are not critical to its purpose.

TRM tries to trivialize the significance of the ownership issue, by arguing that the land at issue is only 0.048% of the project site. TRM Br. at 10:15, But the calculation is not shown, and it is off by a factor of 10.[5] More importantly, the size of the parcel is not the issue. The parcel is part of the project; TRM does not own it and has not obtained the consent of its owner. The absence of the parcel owner's consent renders the application incomplete regardless of the parcel's relative or absolute size.

The courts have recognized that state statutes require "complete applications" for the vesting of plat and building permit applications and that because the legislation does not expressly allow for "substantial" compliance with complete application requirements, a "zero tolerance" approach is required for the completeness determination. *Lauer v. Pierce Cnty.*, 173 Wn.2d 242, 259 (2011). The Pierce County Code includes a provision that allows the planning director to exercise discretion and deviate from the code's strict requirements for a complete application. PCC 18.40.020.C (2023) ("application shall be considered complete when it contains the following, *unless otherwise authorized by the Director*") (emphasis supplied). But the County acknowledges that discretion was not employed here to excuse strict compliance. Cy. Br. at 7:8. Consequently, strict compliance (a "zero tolerance" approach) was applied—or rather misapplied. Regardless of the size or function of the subject parcel, it was clearly included as part of the proposal. AR 194. Its owner had to sign or attest to the application—but did not. This Court should not approve a vesting claim that is based on an application that does not meet the code's detailed complete application requirements.

[5] Using the figures in TRM's brief (at 9:10 and 10:32), 18,000 square feet of a 3,760,099 square foot site would be 0.48% of the site. This may be calculated by dividing 18,000 by 3,760,099, which equals 0.0048, or 0.48%. This is ten times TRM's stated figure of 0.048%.

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TRM misconstrues our claim as suggesting that a defunct drainage district owns the disputed parcel. TRM Br. at 3:17. That is not our claim nor our burden. The issue is whether TRM owns it. There is no evidence that after the district condemned the land that that strip was later conveyed to TRM (or TRM's predecessor). There is no evidence in this record of who acquired the property when the district dissolved. Nor is there any evidence that the district's immediate successor later conveyed the property to TRM (or to Mr. Ober, TRM's predecessor-in-interest). The chain of title is broken. Without evidence completing the chain of title to demonstrate that TRM now owns the land, there is no evidence (let alone "substantial evidence," RCW 36.70C.130(1)(c)) that TRM's application was signed/approved by owners of all of the project property. Given that evidentiary void, the application was (and remains) incomplete.[6]

IV. THE APPLICATION DID NOT VEST BECAUSE THE PROPOSAL IS INCONSISTENT WITH THE COMPREHENSIVE PLAN.

In our opening brief, we demonstrated that when ordinance 2023-5S applied the 4:1 conversion factor to the Parkland-Spanaway-Midland (PSM) planning area, it created an inconsistency with the Comprehensive Plan. The Comprehensive Plan does not include a 4:1conversion factor. Only by borrowing the zoning code's 4:1conversion factor can TRM claim that its project meets the density provisions in the PSM Community Plan. In response, TRM and the county argue, variously, that consistency is not required, that the challenge is too late, and that there is no inconsistency. We address these issues below.

[6] TRM incorrectly references the district as a "ditch" district. It was a "drainage district" created pursuant to statute (currently codified at ch. 87.03 RCW) with broad powers to condemn land, impose assessments and provide for adequate drainage and irrigation. *Id.;* AR 11199.

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A. Consistency is Required.

TRM claims that consistency with the Comprehensive Plan is not required. TRM Br. at 19. Certainly, in many situations, consistency with the comprehensive plan is not required for an individual development application. But the rule is different when a development regulation expressly requires consistency with the comprehensive plan. In that case, an individual project must also be consistent with the comprehensive plan.

While TRM refuses to acknowledge this well-known exception to the general rule, the county acknowledges it: "However, where the zoning code itself expressly requires compliance with a comprehensive plan, the proposed use must satisfy both the zoning code and the comprehensive plan. *See Weyerhaeuser v. Pierce County*, 124 Wn. 2d 26, 43, 873 P.2d 498 (1994)." Pierce Cy. Br. at 9.

There is no dispute that Pierce County's code requires applications like this (for a "Planned Development District" and a conditional use) to be consistent with the Comprehensive Plan. PCC 18A.75.050.K.1; PCC 18A.75.030.B.1.b. Consequently, one of the required findings for this project is "[t]hat the proposed development is in substantial conformance with the Comprehensive Plan and adopted Community Plans." AR 854. Indeed, the code prohibits the County from even accepting applications that are not consistent with the Comprehensive Plan: "Proposals that are inconsistent with the use and/or density provisions of the Comprehensive Plan and/or development regulations shall not be accepted." PCC 18.40.020.B.[7] Because it is undisputed that the code requires conformity with the Comprehensive Plan, the *Weyerhaeuser* rule applies; consistency is required here.

[7] This is the language of the code in 2023. This section was subsequently amended.

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B. The Consistency Challenge is Not Time Barred.

TRM (but not the county) characterizes our appeal as a challenge to an earlier ordinance, Ord. 2022-49s. *See* TRM Br. at 16 -17. That earlier ordinance added a definition of "sleeping unit" and the 4:1 ratio. But that earlier ordinance did not apply to the property at issue. Nor did it apply anywhere within the entire part of Pierce County covered by the applicable Parkland-Spanaway-Midland (PSM) Community Plan. There was no need nor basis for Spanaway residents in the Parkland-Spanaway-Midland planning area to challenge a zoning code amendment that added a definition that had no applicability to their community.

It was only when Ordinance 2023-5s was adopted that lands in the PSM planning area were, for the first time, subject to the 4:1 conversion factor definition. It was only at that time that Spanaway residents would have had an interest in or standing to challenge application of that ratio in the Parkland-Spanaway-Midland neighborhoods.

TRM claims to be vested to the code *as amended by Ordinance 2023-5s*. It was that ordinance that made TRM's proposal possible by applying the 4:1 ratio to the Spanaway community generally and the TRM property in particular.

The respondents do not challenge the record evidence that Ordinance 2023-5s (which first applied the 4:1 ratio in this zoning district) was challenged by the petitioner in this case, Spanaway Concerned Citizens, on grounds that it was inconsistent with the Comprehensive Plan. (Futurewise joined the challenge, too.) *See* Op. Br. at 5. Nor do they dispute that the County Council then repealed the ordinance to resolve that appeal. *Id.* Far from Spanaway residents sitting on their rights, the

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neighborhood has been diligent in contesting the illegal zoning in their community every step of the way.[8]

In our opening brief we explained that the net effect of the convoluted legislative history was that the 4:1 conversion was in effect in this zoning district for just six weeks—from May 1, 2023 to June 15, 2023. Before and after, the density allowed by the county zoning would not have allowed this project in the PSM planning area. Op. Br. at 5. While the respondents provide their own telling of the legislative history, they never challenge that bottom line. The Court should reject TRM's argument that Spanaway residents should have challenged the adoption of the definition at an earlier time when it had no relevance to their area.

Relatedly, the county mentions that the 4:1 definition remains applicable elsewhere. Cy. Br. at 10:19. But that is irrelevant to the issue of whether Ordinance 2023-5s applying the 4:1 ratio in the PSM planning area was in effect for only 6 weeks. That is not disputed by anyone.

C. The Project is Inconsistent with the Comprehensive Plan.

No one disputes that if the 4:1 ratio is not applied, the project's density exceeds that allowed by the P-S-M Community Plan. No one disputes that the P-S-M Community Plan is a part of the Comprehensive Plan. Thus, the issue is whether the zoning code's 4:1 ratio definition may be used when determining conformity with density limits established in the P-S-M Community Plan.

The respondents stand on the rationale provided by the examiner. We had argued to the examiner that the application described the proposal as consisting of 285 "homes," AR 110, and alternatively as 285 "housing units," AR 120, and that "homes" and "housing units" readily fall within

[8] The county asserts that the repeal of the ordinance applying the 4:1 ratio to the PSM planning area was not due to the Growth Management Hearings Board appeals that challenge the ordinance on grounds that it created an inconsistency with the Comprehensive Plan. Cy. Br. at 10:15. But the county provides no evidence that contradicts the sequence of events that we set forth in our opening brief, which clearly reveals that the county repealed the ordinance to settle the comprehensive plan inconsistency issue among others raised in those appeals. *See* Op. Br. at 5 - 6.

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the meaning of a "dwelling unit." The respondents tout the examiner's reasoning that there are policy reasons for treating the "homes" and "housing units" described in TRM's application as something other than "dwelling units." Cy. Br. at 9 -10; TRM Br. at 17 – 18. But our opening brief explains that the examiner lacks policy-making authority. It is not for the examiner to decide whether the Comprehensive Plan should be modified to treat the proposed "homes" and "housing units" as something other than a "dwelling unit" as that term is used in the Comprehensive Plan. *See* Op. Br. at 30 - 31. That is a decision for the County Council to make in the Comprehensive Plan. Nor could the examiner justify importing that ratio by pointing to evidence that the County has consistently construed the Comprehensive Plan in that manner. There was no such evidence. *Id.* at 13 -14; 31.

The respondents have no answer to those flaws in the examiner's reasoning. They never address those defects. But ignoring them does not make them go away or lessen their import. If anything, it should magnify them.

Instead of looking outside the Comprehensive Plan to assess the meaning of the plan's use of the word "dwelling unit," the Court should consider the words of the Comprehensive Plan itself. Those words make clear that the term "dwelling unit" includes more than "traditional units," but also a variety of "non-traditional" dwellings. It does not exclude the dwelling units at issue here:

> Housing is typically thought of in terms of multifamily apartment developments, duplexes and triplexes, and single-family homes. It includes stick-built homes, modular homes, manufactured housing and mobile homes. The arrangement of dwelling units includes traditional units, accessory units, and a variety of non-traditional housing techniques designed to provide for people's wants and needs at a wide range of costs.

Pierce County Comprehensive Plan, Housing Element at 9-2.[9]

[9] A copy is provided to the Court as App. B.

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Because the Comprehensive Plan does not exempt "homes" and "housing units" from its density limitation (the application's description of the proposed uses), those proposed uses cannot be given special 4:1 treatment for purposes of determining whether this project complies with the Comprehensive Plan. The density of the "homes" and "housing units" proposed in the application is greater than the density for "dwelling units" allowed by the P-S-M Community Plan. The proposal should have been disallowed.

V. CONCLUSION

For the foregoing reasons and the reasons set forth in our opening brief, the court should vacate the examiner's decision and direct the county to rescind its approval of TRM's project.

Respectfully submitted this 13th day of March, 2025.

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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR KING COUNTY

GRAHAM NEIGHBORHOOD ASSOCIATION, a Washington Non-profit corporation, RAY STRUB, GEORGE F. WEARN, and JAMES L. HALMO, Petitioners, V. F.G. ASSOCIATES, and PIERCE COUNTY, Respondent.	Case No. 09-2-39771-6 SEA ORDER ON PETITION UNDER THE LAND USE PETITION ACT **(CLERK ACTION REQUIRED)**

THIS MATTER came on for hearing on April 6, 2010, before the Honorable Theresa Doyle. Petitioners appeared by and through their attorney, Keith P. Scully; Respondent Pierce County appeared through Jill Guernsey, Deputy Prosecuting Attorney; and Respondent F. G. Associates appeared through its attorney, William T. Lynn.

Pursuant to RCW 36.70C.130(c) & (d), this Court holds that the Hearing Examiner erred in determining that the developer's rights vested on April 25, 1996. The preliminary plat application filed on that date was not a "fully completed application" as required by RCW 58.17.033 and the Pierce County Code. The Hearing Examiner's decision is reversed, and the matter is remanded for entry of an order consistent with this decision.

Theresa B. Doyle, Judge
King County Superior Court
516 Third Avenue
Seattle, WA 98104
(206) 296-9140

DECISION

Under RCW 58.17.033(1), an application for a preliminary plat is considered under the land use ordinances in effect on the date the application is filed, provided that the application is "fully completed". Whether the application is "fully completed" is governed by local ordinance. RCW 58.17.033(2); Friends of the Law v. King County, 123 Wn.2d 518, 529, 869 P.2d 1056 (1994). The Pierce County ordinance in effect on April 25, 1996 provided that the application include, inter alia, "an approved environmental worksheet . . . ." Former PCC 16.06.020.

The application here was not fully completed as mandated by statute and by the Pierce County Code. The required "environmental worksheet" seeks information pursuant to the State Environmental Protection Act (SEPA) regarding potential environmental effects of the proposed development. The "environmental worksheet" here asks for a "Description of proposal and uses". To that question, developer answered, "Do not know". AR 272. In this eight- page document, the developer answered "do not know" or "unknown" or "N/A" to the vast majority of the questions regarding potential adverse impacts. Many answers were flippant. A question about noise impact was answered, "Screams of exasperation from filling out tedious environmental checklist questions for preliminary plats". AR 277. An inquiry about prior agricultural use of the land was answered, "Yes, 20 years ago a few cows ate some of the grass on the site." AR 277. "Sedatives" was the response provided to a question about proposed efforts to mitigate noise. AR 277.

Pierce County apparently decided at some point that the environmental worksheet filed in 1996 was inadequate. In a new "ENVIRONMENTAL CHECKLIST" properly completed and filed in 2009, the developer noted that "Previous SEPA checklist prepared but found to be incomplete". AR 127.

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The Hearing Examiner below found that the application here was complete based on the testimony of Pierce County employees that the County's method of determining application completeness is to ascertain whether the applicant has filed the correct number of copies. AR 38. "If they do it is deemed complete. No inspection of individual documents is done when the application is submitted it is merely a counting process." AR 38. Such lax practices are inconsistent with the requirements of the Pierce County Code. In any event, it is the Code, not the custom, of county employees that governs. The preliminary plat application filed on April 25, 1996, was not complete. Therefore, the developer's rights did not vest on that date.

Finally, this Court rejects the argument that the vesting issue was decided in a prior administrative proceeding, and hence cannot be litigated here. For collateral estoppel to apply, the issue must have been actually litigated. Stevens County v. Futurewise, 146 Wn. App. 493, 507, 192 P.3d 1 (2008). Here, the 1998 administrative proceeding addressed Pierce County's claim against the developer that a conditional use permit was required. The issue of vesting was not litigated. Hence, collateral estoppel is inapplicable here.

The Hearing Examiner erred in determining that the developer's rights vested as of April 25, 1996. This issue is dispositive. Therefore, this Court need not address the remaining issues Petitioners raise. The decision is reversed, and matter is remanded to the Hearing Examiner.

DATED: April 13, 2010.

JUDGE THERESA B. DOYLE

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APPENDIX B

Comprehensive Plan

Pierce County, Washington

Honor the Past › Look Ahead

Ordinance Number: **2015-40**

As Amended by Ordinance Numbers:
2016-34s
2017-23
2018-39s
2019-15s
2020-16s
2020-103s
2021-26s
2021-49

Effective Date: **October 1, 2021**

Introduction

Housing is one of the most regulated commodities in our society to ensure the health, safety, and general welfare of its inhabitants. Housing of all types is closely related to economic and social conditions. Availability is influenced by national, regional, and local conditions. A complex series of costs affecting housing production result from changes to government assistance programs, private investment, interest rates, lending practices, local government zoning codes, environmental regulations, development and building costs, market, and availability. Price increases adversely affect the ability of households at or below median income levels to obtain adequate housing.

Housing is typically thought of in terms of multifamily apartment developments, duplexes and triplexes, and single-family homes. It includes stick-built homes, modular housing, manufactured housing, and mobile homes. The arrangement of dwelling units includes traditional units, accessory units, and a variety of non-traditional housing techniques designed to provide for people's wants and needs at a wide range of costs.

Other types of housing are necessary to meet the needs of the changing population and social conditions. Planning for housing means more than providing enough land for residential development; it means encouraging the construction of housing to meet the needs of a changing population.

Housing Profile

The housing stock in unincorporated Pierce County comprised of 140,160 dwelling units in 2010. This was a 21.6% increase from the 2000 housing unit estimate of 115,227. Table 9-A shows that single-family (one unit) housing was the predominant housing type equaling 72.8% of the total housing stock.

Table 9-A: Number of Dwelling Units by Housing Type (Unincorporated Pierce County)

Housing Type	Number of Units	Percent
One Unit	102,070	72.8%
Two or More Unit	15,722	11.2%
Mobile Homes and Specials	22,368	16%
Total	**140,160**	**100%**

Source: OFM reporting of 2010 Census

Table 9-B shows that of the total dwelling units, 129,236 were occupied. The 2010 vacancy rate of 7.79% exceeded what is considered a *healthy* vacancy rate (6%). Household size decreased from 2.81 persons per household in 2000 to 2.77 in 2010.