The Quest for the Best Test to Vest: Washington’s Vested Rights Doctrine Beats the Rest

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I. INTRODUCTION

"Vested rights" are the legal protections that a property owner can rely on when developing real property\(^1\) to ensure that a subsequently enacted regulation will not impair the project he or she initially applied to build.\(^2\) Determining the precise stage in the develop-

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1. The vested rights doctrine addressed in this Article applies only to the development of real property. Other kinds of rights “vest,” such as the point in time in which an employee’s right to receive a pension accrues, but these general rights are not part of the land development-related vested rights discussed in this Article. See generally Godfrey v. State, 84 Wash. 2d 959, 962-63, 530 P.2d 630, 632 (1975) (discussing the general concept of the vesting of nonland development-related rights).

2. A vested right is different from a “grandfather” clause. A grandfather clause is merely a “[p]rovision in a new law or regulation exempting those already in or a part of the existing system which is being regulated.” BLACK'S LAW DICTIONARY 699 (6th ed. 1990). A grandfather clause is the result of “legislative grace,” meaning that a local government chooses to allow citizens to benefit from the previous standard. Grayson P. Hanes & J. Randall Minchew, On Vested Rights to Land Use and Development, 46 WASH. & LEE. L. REV. 373, 379 (1989). In contrast to a grandfather clause, a vested right is not a local government’s choice, but rather a legal protection against government action.

A vested right is different from a nonconforming use. Westside Business Park v. Pierce County, 100 Wash. App. 599, 5 P.3d 713 (2000), rev. denied, 141 Wash. 2d 1023, 10 P.3d 1075 (2000) (distinguishing vested rights from nonconforming uses). “A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated.” Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wash. 2d 1, 6, 959 P.2d 1024, 1027 (1998). The fundamental difference is that a vested right allows the establishment of a use of property that is lawful at the time of application; the law of nonconforming uses involves the continuation of a now unlawful use. See Weyerhaeu-
ment process at which a developer is protected from changing regulations is the focus of the vested rights doctrine. Until a property owner acquires a vested right to complete a project, local governments can subject him or her to newly adopted regulations. Because they often involve the politically explosive issue of new growth in a community, vested rights are often a volatile issue.

Why should people care about vested rights? The most specific reason is that vested rights are absolutely critical in the real estate development process because they ensure certainty and fairness; without them, the economic engine of the building industry is stifled, resulting in unnecessary and unfair losses for property owners and lost tax revenues for local governments. But the more general reason to care about vested rights is the fact that they are the jurisprudential testing ground for a much bigger issue: the ebbs and flows of the protection of individual rights versus the power of the government to impose regulations. Therefore, everyone—not just land use practitioners—should pay close attention to which side is winning this contest between the individual and government.

See v. Pierce County, 95 Wash. App. 883, 893 n.11, 976 P.2d 1279, 1284 (1999), rev. granted sub nom. Weyerhaeuser v. Land Recovery, Inc., 139 Wash. 2d 1001 (1999), appeal dismissed as moot (Feb. 10, 2000); see also Donald G. Hagman, The Vesting Issue: The Rights of Fetal Development Vis a Vis the Abortion of Public Whimsy, 7 ENVTL. LAW 519, 525 (1977); Richard B. Cunningham & David H. Kremer, Vested Rights, Estoppel and the Land Development Process, 29 HASTINGS L.J. 625 (1978) (discussing differences between vesting and nonconforming use). Because nonconforming uses and vested rights are so different, it is not surprising that nonconforming uses are not allowed while vested rights are. Obviously, it is far less problematic for the government to have the power to prevent the continuation of an unlawful use than to prevent the establishment of a currently lawful use. Not surprisingly, the government has alarmingly broad power to prevent nonconforming uses as in Rhod-A-Zalea. Unfortunately, courts sometimes fail to recognize this crucial continuation/establishment distinction, and therefore confuse nonconforming use and vesting law; the result of this mix-up is often an erroneous decision against vested rights. See, e.g., State v. Thomasson, 61 Wash. 2d 425, 378 P.2d 441 (1963). See also Elizabeth Lynne Pou, Municipal Corporations Zoning Good Faith Expenditures in Reliance on Building Permits in a Vested Right in North Carolina, 49 N.C. L. REV. 197 (1970) (confusing nonconforming use and vested rights concepts); John S. Herbrand, Annotation, Zoning: Building in Course of Construction as Establishing Valid Nonconforming Use or Vested Right to Complete Construction for Intended Use, 89 A.L.R. 3d 1051 (1979) (confusing nonconforming use and vested rights concepts); ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D (1986) (confusing nonconforming use and vested rights concepts). It is a mistake to equate nonconforming uses with vested rights and then conclude that government possesses the same broad powers to thwart vesting as it does to abate nonconforming uses.


Traditionally, there have been two legal models for vested rights: the "majority" and "minority" rules. Under the majority rule, in order to acquire a vested right and be protected from subsequent changes in regulations, a developer must (1) make substantial expenditures (2) in good faith reliance (3) on a validly issued building permit. The majority rule is based on fuzzy and unpredictable equity principles; it is the least protective of property rights among the vesting models.

Under the second model, what we refer to as the "minority" rule, a developer's rights vest to the applicable zoning and building ordinances in effect on the date of project approval. The minority rule is based mostly on statute, but also on fuzzy equitable principles; it provides an intermediate level of vesting protection.

Most commentators agree that the majority and minority rules provide little certainty. Adding to the confusion is the fact that the majority and minority rules are sometimes indistinguishable. However, amidst all this vesting confusion, one state—Washington—developed a "date certain" vesting doctrine.

In this Article we propose that there are actually three models for vested rights in the nation, the majority and minority rules and the Washington rule. In the 1950s, Washington began following what

6. See John J. Delaney & Emily J. Vaias, Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims, 49 WASH. U. J. URB. & CONTEMP. L. 27 (1996). This outstanding piece of scholarship is one of the most important articles ever written about vested rights. John Delaney is perhaps the most prolific commentator on this topic; several of his articles are cited throughout this Article. See also John J. Delaney, Vesting Verities and the Development Chronology: A Gaping Disconnect?, 3 WASH. U. J.L. & POL'Y 603 (Fall 2000) [hereinafter Vesting Verities].

7. The equity principles at the heart of the majority rule look to the fairness of the result. See infra notes 91 and 157. Such a vague and pliable standard leads to uncertain outcomes. See supra notes 104-10 and accompanying text.

8. See infra notes 123-26 and accompanying text.


10. The majority rule is "amorphous at best." Id. at 304 (1999) (citing DANIEL R. MANDELKER, LAND USE LAW, § 6.12 (3d ed. 1993) [hereinafter MANDELKER]). Scholarly criticism of the majority rule is chronicled in Hartman's article, id. at 311-13 nn.105-13 and accompanying text.

11. See id. at 305 ("[A]ttempts to delineate [the] majority and minority rules are futile"); see also Hanes & Minchew, supra note 2, at 407 ("unclear" whether Virginia follows the majority or minority rule).

12. The third model is also followed by California and Texas. See infra notes 132-44 and accompanying text. However, this Article refers to the third model as the "Washington rule" for three reasons. The first reason is that Washington was the first state to provide strong vesting protections, creating them by case law in the 1950s. California recognized third-model protections decades later in 1984. See CAL. GOV'T CODE § 66498 (West 1994); infra notes 135-41 and accompanying text (discussing California law). Texas provided third-model vesting in 1989.
commentators usually refer to as the minority rule, but we assert that over the years our state's vesting doctrine has evolved into a distinct, third model. As we will show, the Washington rule is not only distinct, it is superior.

In essence, the Washington rule protects a property owner's right to have his or her land development proposal processed under the regulations in effect at the time a complete development permit application is filed, regardless of subsequent changes in zoning or other land use controls. In Washington, vested rights are derived from constitutional principles, common law, and statute. To top it off, the Washington legislature passed a unique vesting damages statute to compensate property owners whose vested rights have been violated.

TEX. GOV'T CODE ANN. § 481.143 (West & Supp. 2000). See infra notes 144-46 and accompanying text (discussing Texas law). Second, Washington has a stronger vested rights doctrine because it provides separate common law and constitutional foundations for vesting, not just statutory protections. See infra notes 172-87 and accompanying text (discussing Washington's common law doctrine); infra notes 287-307 and accompanying text (discussing separate constitutional vesting doctrine). California and Texas have no such common law or constitutional doctrine.

Third, this Article is primarily about Washington's vested rights doctrine, so we refer to the "Washington rule" for the sake of clarity.

13. Many commentators, and a few Washington cases, claim that Washington follows the minority rule, but closer inspection shows that Washington's doctrine is, in fact, unique.

14. See infra notes 288-97 and accompanying text. The fact that vested rights are constitutionally based serves as the foundation for the conclusion in this Article that a constitutional vested rights doctrine exists separately from the vesting statute. See infra notes 287-307 (discussing constitutional doctrine).

15. See infra notes 173-228 and accompanying text.

16. WASH. REV. CODE § 58.17.033 (1998). This statute applies to the vesting of plat applications. A second vesting statute, Revised Code of Washington (RCW) § 19.27.095, applies to the vesting of building permits. The two statutes are almost identically worded. The building permit vesting statute is not often invoked because a building permit is the last permit needed to finish a project. See infra note 48 (discussing why the vesting of building permits is less important than the vesting of earlier permit applications). Because the building permit statute is rarely invoked and is almost identical to the plat vesting statute, this Article refers only to the plat vesting statute, RCW § 58.17.033, as "the vesting statute."

17. See infra notes 282-87 (discussing RCW § 64.40). Vested rights in Washington can also be derived by contract. Under RCW § 36.70B.170 (1998), a developer and a local government can enter into a development agreement that, among other things, specifies vesting issues. This Article, however, does not analyze vested rights pursuant to development agreements. They are rarely used in small-scale development such as Mrs. Kennedy's proposed subdivision. See infra notes 24-42 and accompanying text (describing the Mrs. Kennedy hypothetical). Also, the analytical focus of this Article is that Washington's vested rights doctrine is a combination of common-law, statutory, and constitutional protections; analyzing contractual protections (especially rarely used ones) would reduce the clarity of our analysis. For a general discussion of other states' development agreement statutes, see Hartman, supra note 9, at 306-08; JULIAN CONRAD JUERGENSMeyer & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW, § 5.31, at 240-43 (1st ed. 1990); Barry R. Knight & Susan P. Schoettle, Current Issues Related to Vested Rights & Development Agreements, 25 URB. LAW. 779, 787-96 (1993); MANDElKer, supra note 10, § 6.23, at 233-34; Nadel, supra note 3, at 813-18; Robert M. Rhodes & Cathy M. Sellers, Vested Rights: Establishing Predictability in a Changing Regulatory System, 20 STETSON
Washington’s vested rights doctrine leads the nation in protecting development-related constitutional rights.\(^\text{18}\) It is not surprising that Washington, a renowned trailblazer in the protection of individual liberties,\(^\text{19}\) is once again ahead of its time. Other states should adopt Washington’s vested rights doctrine because its strong protections benefit both citizens and government by creating certainty and enforcing fairness, while at the same time allowing municipalities flexibility to exercise their health, safety, and welfare powers.\(^\text{20}\) In addition, both landowners and local governments benefit from strong vesting protections, because they are not consumed with lengthy and costly court battles.

This Article is primarily a comprehensive, practitioner-oriented analysis of Washington’s vested rights doctrine. However, in order to fully present our state’s doctrine, several other related topics must be

\[\text{L. REV. 475, 508-10 (1991).}\]

\(\text{18. The Washington Supreme Court noted, “our State’s [vested rights] doctrine is already one of the most protective of developer’s rights.” Erickson & Assocs., Inc. v. McLellan, 123 Wash. 2d 864, 875, 872 P.2d 1090, 1096 (1994). See also Richard L. Settle, Washington Land Use and Environmental Law and Practice, § 2.7(b), at 41 (1983) (compared to almost every other state, Washington “adheres to a far more permissive vesting doctrine.”). This Article reveals that Washington’s vested rights doctrine is, indeed, the most protective of constitutional rights in the nation. The only other states that come close to providing strong protection for vested rights are California and Texas. See supra notes 9, 132-45 and accompanying text.}\]


\(\text{20. The term “health, safety, and welfare” is purposefully used instead of “police power” throughout this Article to avoid confusion about which kind of regulations can trump vested rights. Later in this Article, we explain that local governments can still impose valid (that is, reasonable) health, safety, and welfare regulations (e.g., fire protection standards) on a vested project. However, activities that can be regulated under the “police power,” are much broader than activities subject to “health, safety, and welfare” regulations. Aesthetics, for example, can be regulated under the “police power,” but would not be considered a “health, safety, and welfare” measure. In our opinion, non-health-related police powers do not trump vested rights, so to avoid confusion, we use the more precise term “health, safety, and welfare” regulations when discussing regulations that can trump vested rights.}\]
presented to put Washington's law in perspective. Part II of this Article describes the basic process of land development to provide an understanding of how vested rights issues actually arise. To better illustrate the importance of vested rights, Part II introduces the reader to Mrs. Kennedy, a real-life-based hypothetical property owner seeking to develop her land into a small residential subdivision. This part also describes the public policy conflict that gives rise to the vested rights doctrine: certainty for the property owner in the development approval process versus the protection of public health, safety, and welfare by allowing new regulations to be applied to current projects. Part III describes the weak vesting protections provided elsewhere in the nation by analyzing the majority and minority vesting rules. Part IV, the heart of the Article, dissects Washington's vested rights doctrine. The authors also provide suggestions for clearer interpretations of Washington's unique vesting statute. This section also analyzes the previously overlooked and rarely argued constitutional vested rights doctrine that supplements Washington's statutory and common law protections. Finally, Part V concludes by reemphasizing why the Washington rule provides the best model for vested rights in the nation.

II. A BRIEF DESCRIPTION OF THE LAND DEVELOPMENT PROCESS

The costs, risks, and number of steps in the land development process have exploded in recent years. 21 Land use regulations are changing with greater frequency than ever before. 22 Predictably, more regulatory steps and quickly changing standards mean more vesting issues. 23 A fair and effective vested rights doctrine must take into account the nature of the development process. To fully appreciate how the vested rights doctrine affects the property owner, one must first understand the process by which land is developed.

21. In the past few years, "Washington has undergone a sea change with respect to land use regulation." Erickson & Assoc. v. McLerran, 123 Wash. 2d 864, 875, 872 P.2d 1090, 1096 (1994). See also Hanes & Minchew, supra note 2, at 389 ("Following World War II, land development became an intensely regulated process requiring compliance with a host of complex land use regulations and the issuance of multiple governmental approvals prior to ground-breaking.") (footnote omitted); Cunningham & Kremer, supra note 2, at 625; Siemon, supra note 5, at 3.

22. See Siemon et al., supra note 5, at 3.

23. "Vested rights issues arise more frequently today than in the past because of ever increasing volatility of land use regulations. . . . [L]ocal governments have become extremely creative in extending the scope of their police powers to address real and perceived concerns relating to population, transportation, and public facilities." Hanes & Minchew, supra note 2, at 377.
A. Introducing Mrs. Kennedy

To illustrate how the development process works, look for a moment at our hypothetical landowner, Mrs. Kennedy. She is a retired educator whose personal retirement plan included making small installment payments over the years on a twenty-five acre parcel of property in Washington. Her property is undeveloped and near the boundary of a medium-sized town. Mrs. Kennedy seeks to subdivide the property into twenty-five separate one-acre lots and sell the approved lots to a builder, who will ultimately build twenty-five single-family homes.

Mrs. Kennedy must begin the development process by filing a preliminary plat application with the municipality in which the property lies. Overall, the preliminary plat application is "essentially a map of the general layout of the proposed subdivision." Even though it is only a "general layout" map, a preliminary plat application is very detailed. It must show how, for example, the project provides for open space, drainage, streets, and sidewalks. To prepare the preliminary plat, Mrs. Kennedy must hire a surveyor and an engineer with land planning capabilities, which costs several thousand dollars.

24. Mrs. Kennedy is a hypothetical person, but the facts of her situation are very common. Mrs. Kennedy is based on a real person who was a client of one of the authors in an amicus curiae brief to the Washington Supreme Court on a vesting issue.

25. This is what we call a "401(k) development," meaning that the property owner is not a professional developer but rather a retirement investor. Mrs. Kennedy's 401(k) project is much more common than the reader might think; a surprisingly large amount of development in Washington is undertaken by small 401(k) investors, not giant corporate developers. See, e.g., Association of Rural Residents v. Kitsap County, 141 Wash. 2d 185, 4 P.3d 115 (2000) (property owned by family partnership of nondevelopers).


28. RCW § 58.17.110(1) requires a preliminary plat to contain details showing adequate provision is made for "open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds [and] sidewalks." A typical plat application covers dozens of regulatory topics.
After receiving the preliminary plat application, the planning staff of the municipality reviews the hundreds of details in the application to ensure that it complies with current regulations. 29 Months later, the planning staff makes a recommendation to the local government’s legislative body, 30 which would be a county council in Mrs. Kennedy’s case. The county council will conduct a public hearing and then approve, disapprove, or conditionally approve the application. 31

In Mrs. Kennedy’s case, let’s say the county council conditionally approves the application. 32 The council conditions approval on Mrs. Kennedy setting aside ten acres of open space; she can now only build fifteen, instead of twenty-five, one-acre lots. Mrs. Kennedy reluctantly accepts the space condition and proceeds with the project, hoping to recapture some value from her investment.

Preliminary plat approval in hand, Mrs. Kennedy contracts with a professional developer. He surveys out the lots, builds the streets, and installs utility main lines in conformity with the preliminary plat. The streets, utility mains, and other infrastructure must be donated to the public at no cost upon final plat approval. 33 To finance the soon-to-be public infrastructure she is paying for, Mrs. Kennedy takes out a substantial loan and secures it with the property.

Because Mrs. Kennedy has complied with the preliminary plat (e.g., actually set aside the ten-acres of open space, built the streets, etc.), the county council grants final plat approval. Thereafter, the lots depicted on the now-final plat are legal parcels and can be sold. 34 At this point, Mrs. Kennedy sells the platted lots to a homebuilder.

Preliminary plat approval is only the beginning of the development process. Numerous other stand-alone regulatory schemes pepper the process. Mrs. Kennedy’s project must comply with county

29. WASH. REV. CODE § 58.A.070 (1998). “A preliminary plat of proposed subdivisions and dedications of land shall be submitted for approval to the legislative body of the city, town, or county within which the plat is situated.” Id. The legislative body of the municipality delegates plat review duties to its planning staff.


31. Id.

32. Conditional approval is the most common outcome. Usually the municipality’s planning staff informally suggests numerous changes to a preliminary plat application, almost all of which increase the cost of the project. The property owner often incorporates those suggestions into an amended application. If the property owner fails to incorporate them, the planning staff will almost certainly recommend conditional approval with the planning staff’s “suggestions” serving as the conditions. Planning staffs’ recommendations are usually followed by busy local elected officials.


wetlands regulations, drainage manuals, landscaping ordinances, water and sewer line standards, street construction specifications—the list goes on and on.35 Hundreds of these platting and stand-alone standards must be satisfied before the lots can be sold.

Yet another set of regulations must be satisfied before building on the platted (but vacant) lots. The homebuilder must submit the blueprints of the proposed home to the county building department for the building permit approval.36 The blueprints must comply with thousands of extremely detailed standards in the building code.37 If the blueprints comply with all these standards, the building department issues a building permit.38 While the home is being built, county building officials inspect the job as it progresses to ensure that it is being constructed in conformity with the building permit.39 Only then is the house ready for sale to the public.

No description of the land development process would be complete without acknowledging the enormous role played by politics.40

35. To get a flavor for the multitude of regulatory requirements involved in the development process, see generally WASH. ADMIN. CODE § 197-11-960 (1999) (SEPA checklist).
40. "Politics has always played a part in land-use law." Patricia E. Salkin, Land Use in the 21st Century: Political Challenges and Opportunities, LAND USE L. & ZONING DIG., May 1999 at 3. See Donwood, Inc. v. Spokane County, 90 Wash. App. 389, 395, 957 P.2d 775, 778 (1998) (describing local governments' land use regulatory power as a "broad constitutional grant of political authority . . .") (emphasis added). The fact that a Washington court has characterized the land use approval process as part of a local government's "political authority" should dispel any myth that politics plays no role in the development approval process.

One Washington case provides a stunning illustration of the politics behind many antidevelopment land use decisions. In Mission Springs, Inc. v. Spokane County, 134 Wash. 2d 947, 954 P.2d 250 (1998), an applicant vested to land use standards allowing a large apartment building. Id. at 952, 954 P.2d at 252. Neighbors opposed the already-approved and lawful project and, at the next election, put politicians in power who similarly opposed the apartment project. When the property owner began construction, the newly elected city council members decided not to grant the property owner a routine, nondiscretionary grading permit to start the project. Id. at 957, 954 P.2d at 254. The city attorney told the new council members that denying the grading permit would violate the city charter, state statute, and the federal Constitution. Id. at 955, 954 P.2d at 253. After learning that denying the permit would violate all these laws, the new antidevelopment mayor amazingly asked, "I want to know what the downside is." Id. at 956, 954 P.2d at 254. Proving that courts are needed to rectify local politicians' occasional unconstitutional actions, the property owner eventually won a statutory and constitutional damages suit. Id. at 972, 954 P.2d at 262.

Justice Talmadge, in his dissent opposing the reversal of the city council's decision in Mission Springs, wrote that politics is a "'power struggle.'" Id. at 985 n.12, 954 P.2d at 268 (Talmadge, J., dissenting) (citation omitted). Justice Talmadge is correct in a sense, but he failed to acknowledge that in the development process "power struggle," the local government—not the property
To put it mildly, "[l]ocal governments generally are not reluctant to use [restrictive land use regulations] to mollify complaints sounded by the electorate."\(^{41}\) Perhaps in the old days, when local governments generally wanted growth, politics favored property owners.\(^{42}\) This is not the case any more. Now, politics usually work against property owners. For example, if a group of neighbors does not want new houses near them, they might exert pressure on local elected officials. Using "environmental protection" or "growth management" as cover, local politicians may respond by attempting to prevent the development.

Changing the previous Mrs. Kennedy hypothetical to factor in the local political process, suppose that after she submitted her complete preliminary plat application, the county council—caving in to political pressure from a handful of neighbors who do not want new houses near them—decided to pass a new "antisprawl" ordinance. The new ordinance increases the minimum lot size in the area around Mrs. Kennedy’s property from one acre to five acres. Suddenly, under the new rules, Mrs. Kennedy’s twenty-five acre parcel can only be divided into a total of five five-acre lots, just one-fifth of the twenty-

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41. Hanes & Minchew, supra note 2, at 377 (footnote omitted). See generally Daniel J. Curtin, Jr. & M. Thomas Jacobson, Growth Control by the Ballot Box: California's Experience, 24 LOY. L.A. L. REV. 1073 (1991) (describing how local governments respond to political pressures by imposing restrictive land use regulations); Delaney & Kominers, supra note 26, at 219-20 (permitting process described as a "war" between developers and politically powerful anti-growth neighborhood groups); DePalma, supra note 26, at 499 n.68 ("traditional zoning disputes are generally conflicts between private parties [neighbors and developers], the public welfare is usually subordinated to the interests of the groups of litigants.") (citation omitted); R. ROBERT LINOWES & DON T. ALLENsworth, THE POLITICS OF LAND-USE LAW: DEVELOPERS VS. CITIZENS GROUPS IN THE COURTS (2d ed. 1976) (describing politics of land development process); John W. Witt & Janis Sammartino-Gardner, Growth Management v. Vested Rights: One City's Experience, 20 URB. LAW. 647, 647-48 (1988) (describing how political pressures caused a local government to impose restrictive regulations).

Politics plays a role not only in land use permitting decisions by local governments, but also in the resolution of vested rights cases by some courts. See Cunningham & Kremer, supra note 2, at 668 (constitutional protections such as vested rights should not vary with latest political trends); SIEMON, supra note 5, at 10 (vesting protections from courts vary with popular trends in economics and politics).

42. Decades ago developers "could swagger as ostentatiously as robber barons when it came to developing whatever and whenever they wished." Donald G. Hagman, Estoppel and Vesting in the Age of Multi-Land Use Permits, 11 Sw. U. L. REV. 545, 578 (1979). But, with the explosion of regulations and antidevelopment political pressures, developers “have more need for [vesting] protection now than they did [then].” Id.
five one-acre lots allowed under the rules in effect when she applied. Here is where the vested rights doctrine steps in.

In Washington, the vested rights doctrine protects Mrs. Kennedy from changes in the rules after her preliminary plat application has been submitted. That is, Mrs. Kennedy "vests" to the regulations in effect (one-acre lots) on the date she submitted her complete preliminary plat application.

B. Building Permits Are Outdated: The Growing Trend Toward Multiple Permit Approvals

Decades ago, when few, if any, controls existed on the development of land, a single building permit was the only permit needed to build a massive office building. This is when the vested rights doctrine was born; it provided that an application or approval for a building permit triggered vesting. The majority rule (and sometimes the minority rule) still looks primarily to a building permit to trigger vesting.

Looking to building permits to trigger vesting protections is no longer appropriate today. For instance, in our example of Mrs. Kennedy, the building permit was granted only after plat application and hundreds of stand-alone standards were met. Commentators criticize a building-permit focused vested rights doctrine as outdated because

43. See, e.g., Hull v. Hunt, 53 Wash. 2d 125, 126-27, 331 P.2d 856, 856-57 (1958) (building permit approval necessary to build twelve-story apartment building). Developers must still comply with zoning laws, but these do not technically constitute a "permit."


45. Cunningham & Kremer, supra note 2, at 644-45.

46. See Leroy Land Dev. Corp. v. Tahoe Reg’l Planning Agency, 543 F. Supp. 277, 281 (D. Nev. 1982) (looking only to the building permit stage to vest rights not “consistent with the realities of modern land development practices”); Cunningham & Kremer, supra note 2, at 627 (cases focusing solely on building permits “are generally unsuited to resolution of the complexities presented by modern, multiphase, large-scale projects which represent a period of several years and perhaps millions of dollars in planning, preparation, and land acquisition costs”); DePalma, supra note 26, at 493 ("Hence, the developer today faces an approval process that has grown from a one-step nuisance control device [building permit] into a multiple-permit approval system of uncoordinated and overlapping veto points lodged in a variety of agencies, each with its limited sphere of regulatory authority.") (footnote omitted); Hanes & Minchew, supra note 2, at 390 (“In spite of the development of this multiple approval process, many courts have continued to hold that the validly issued building permit remains as the principal benchmark for satisfaction of the governmental act requirement.”) (footnote omitted); Hagman, supra note 2, at 537, 550 (focusing solely on building permits “may have been appropriate in the past.” However, “[i]t is further not obvious to me why a building permit should be regarded as some kind of talisman regardless of the amount of construction occurring before and after that permit.”); see also WASHINGTON REAL PROPERTY DESKBOOK ZONING § 97.8(2)(c) (“Many local governments have adopted provisions and procedures for a variety of preliminary approvals prior to building permits. These include such things as site plan review, design review, and other discretionary manners.”).
the modern development process is far more complex and requires dozens of permits. In fact, the building permit is now the last permit issued, not the first.

To show how multiple approvals can affect vested rights, Professor Hagman describes the development process as "65 stop and go lights." Noting that one large project required 65 permits from 12 separate agencies, Professor Hagman described each of the 65 permits as a separate stoplight; failure to obtain one of the 65 permits would end the entire project.

The developer gets to finish the [project] only if 65 stop and go lights, all set at random, turn green as the developer goes through. The odds are not good. Regardless of the cost of driving through the first 64, one still only has a 50 percent chance of hitting the 65th when it is green.

One may well doubt whether the [majority] vesting rule, which evolved in an era of one, or a few stop and go lights, is appropriate in a world with many.

Now that the development process has been described, one can see that a property owner would greatly value a vested rights doctrine that assured the 65th light would not suddenly turn red. In sum, the building-permit focused vesting rule of the past needs a "make over" to be current with the modern development approval process.

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47. Cunningham & Kremer, supra note 2, at 635 n.33.
48. DePalma, supra note 26, at 493 ("[T]he developer today faces an approval process that has grown from a one-step nuisance control device [building permit] into a multiple-permit approval system of uncoordinated and overlapping veto points lodged in a variety of agencies . . . .") (footnotes omitted); see also Cunningham & Kremer, supra note 2, at 644-48; Hanes & Minchew, supra note 2, at 389; Hagman, supra note 42, at 572-73.
Site plans, for example, have replaced many of the old functions of a building permit. See JUERGENSMeyer & ROBERTS, supra note 17, § 5.28, at 231-32 (site plan is "seen by some as having 'virtually replaced the building permit as the most vital document in the development process' . . . .") (footnote omitted); WASHINGTON REAL PROPERTY DESKBOOK, Zoning, § 97.8(2)(c) ("Many local governments have now adopted provisions and procedures for a variety of preliminary approvals prior to building permits. These include such things as site plans . . . ."). The vesting of site plans is discussed infra, notes 275-77 and accompanying text.
49. Cunningham & Minchew, supra note 2, at 634.
50. Hagman, supra note 2, at 538.
51. The permitting of the project at issue in Professor Hagman's example, a petrochemical plant, is admittedly more complex than most residential or commercial projects, but conceptually the analogy applies with equal force to common projects such as Mrs. Kennedy's.
52. Hagman, supra note 2, at 538.
C. Two Competing Policy Interests: Fairness to the Property Owner Versus Protecting Public Health, Safety, and Welfare

Before analyzing the different vesting models in the nation, we must also examine the public policy conflict that sets the stage for the vested rights doctrine. The vested rights doctrine is a legal mechanism that chooses who wins in the conflict between the property owner and the local government.\(^{53}\) Traditionally, when a weak vested rights doctrine is applied, this conflict has been counterproductive to both the government and landowners.\(^{54}\) However, a strong vested rights doctrine balances these two competing policy interests. This Article will show that it is not necessary for one party to be the absolute winner on this issue: both municipalities and developers can win by following the Washington rule.

1. The Certainty Provided by Protecting Vested Rights Benefits Both Property Owners and Local Government

The Washington Supreme Court recognizes that "[s]ociety suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin."\(^{55}\) A commentator adds, "[b]oth landowners and governments are ill-served by [weak vesting protections] and often are forced to make business and policy decisions involving land use without knowing what the ultimate effect of these will be."\(^{56}\)

In the strongly worded warning of Professor Hagman, the lack of vested rights "is an open invitation to lawlessness on the part of the

\(^{53}\) Nadel, supra note 3, at 792 ("In all real estate development projects, an inherent conflict exists between the private land developer's need for certainty and predictability in the governmental approval process during development and the concern of local government agencies with issues of public health, safety and welfare."). See also DePalma, supra note 26, at 487; MANDELMER, supra note 10, § 612, at 223-24; Witt & Sammartino-Gardiner, supra note 41, at 648. For a discussion of Washington law on the competing policy interests at stake, see MANDELMER, supra note 10, at 158. See also infra notes 165-69 (discussing Washington courts' resolution of the policy conflict from vested rights).

\(^{54}\) See Witt, supra note 4, at 327-28.

\(^{55}\) West Main Assocs. v. City of Bellevue, 106 Wash. 2d 47, 51, 720 P.2d 782, 785 (1986).

\(^{56}\) Hanes & Minchew, supra note 2, at 407-08 (footnote omitted). See also Wendy U. Larsen & Steven M. Elrod, An Update on Vested Rights, LAND USE L., Aug. 1983, at 4 ("For the sake of preserving both public and private resources, it is essential that an exact point be determined at which the developer can be certain that all unlawful requirements have been met and the project can be finished as planned without the fear of having to meet new requirements."); Knight & Schoettle, supra note 17, at 786 (strong vesting statutes "alleviate uncertainties and problems associated with municipal approval of development projects which resulted in wasted resources, increased land prices, and discouraged investors.") (footnote omitted).
government." 57 Another commentator asserts that society has a general interest in the certainty protected by the vested rights doctrine. 58 Thus, vested rights further society's interest in the government following the law and establishing certainty.

As previously described, the present land development process takes an enormous amount of time and money. Therefore, it is understandable that a property owner needs some assurances that she will be able to complete her development. Interest payments on development loans mean (almost literally) that time is money. 59 In addition, without clear vesting rules, landowners must enforce their rights in court, a lengthy and costly undertaking that many property owners cannot afford. 60 Consequently, building projects are halted or, at best, delayed, wasting huge sums of money, 61 primarily on interest payments. 62 In addition, as a direct result of the uncertainty of a weak vesting doctrine, the cost of development increases and housing needlessly becomes less affordable for low- and middle-income families. 63

In the legislation reauthorizing its strong vesting statute, the Texas Legislature summed the situation up well when it observed that the lack of adequate vesting protections "result[ed] in unnecessary governmental regulatory uncertainty that inhibit[ed] the economic development of the state and increas[ed] the cost of housing," thereby often

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57. Hagman, supra note 42, at 574. Professor Hagman's warning cannot be dismissed on the theory that he is simply "pro-developer." As he described his philosophy, "Property rights per se are not high on my personal list of major causes for concern." Hagman, supra note 2, at 520.


59. Delays cost money. See Norco Constr. Inc. v. King County, 29 Wash. App. 179, 184, 627 P.2d 988, 991 (1981) ("A common complaint of subdividers and developers everywhere is that plat review procedures often involve harmful and expensive delay.").

60. See SIEMON ET AL., supra note 5, at 2. The costs of vested rights litigation also affect local governments—both their defense costs, and the possible award of attorney's fees to developers if the municipality is held to have violated the developer's vested rights. See Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 972, 954 P.2d 250, 262 (1998) (award of attorney fees against city under 42 U.S.C. § 1988 and RCW § 64.40.020 for denial of vested rights).

61. For examples of costly delays, see DePalma, supra note 26, at 487 n.1.

62. See Norco Constr., Inc., 29 Wash. App. at 183, 627 P.2d at 991 ("with interest payments growing and patience declining" property owners filed suit to enforce vested rights).

63. Cunningham & Kremer, supra note 2, at 711; Frederick D. Huebner, Washington's Zoning Vested Rights Doctrine, 57 WASH. L. REV. 139, 150 (1981); Hagman, supra note 2, at 544; SIEMON ET AL., supra note 5, at 3. Washington's legislature has consistently decried the affordable housing crisis. See, e.g., WASH. REV. CODE § 43.180.010 (1998) ("[I]t is declared to be the public policy of the state and a recognized governmental function to assist in making affordable and decent housing available throughout the state and by so doing to contribute to the general welfare.").
"causing decreased property and related values, bankruptcies, and failed projects."  

Just as the development process takes time and money for developers, it is also burdensome for local governments. Most comprehensive land use plans take months or years to complete and cost huge sums of taxpayers’ money. Vesting-related legal battles waste enormous sums of money in litigation costs and waste other valuable government resources. Local governments do not benefit when, after years of costly planning, the resulting development standards can be changed overnight and applied to pending development projects. Therefore, local governments have an interest in sticking to their land use plans. Vested rights allow a local government to know that its land use plans have meaning. Several scholars specifically point to the benefits of strong vesting protections enjoyed by local governments.

2. Protection of Public Health, Safety, and Welfare

At first blush, the vested rights doctrine allows land uses that contravene the public’s power to protect health, safety, and welfare. In other words, the vested rights doctrine allows a land use that would not be lawful but for the legal protections the doctrine provides. For example, if an elected body thinks the public health, safety, and welfare requires less housing density, it exercises its regulatory powers and passes a new antisprawl ordinance increasing minimum lot sizes. However, under a strong vested rights doctrine, a property owner who vested to the old ordinance can still build homes at the previously allowed lot size. Some would say the vested rights doctrine allows developers to be exempt from public health, safety, and welfare regulations.

64. TEX. LOC. GOV’T CODE ANN. ch. 245 (West 1998 & Supp. 2000) (previously H.B. 1704, 76th Leg. (Tex. 1999)).
65. See supra note 61.
66. The common reason local governments sometimes radically change their land use standards, despite their obvious interest in stable planning, is the political pressure asserted on local politicians. See supra notes 40-42 and accompanying text.
67. Hagman, supra note 2, at 533; Hartman, supra note 9, at 302 (strong vesting protections lauded as “promoting economic development while at the same time increasing the ability of municipalities to sustain ordered growth.”) (footnote omitted); Rhodes & Sellers, supra note 17, at 510 (strong vesting protections “lend desirable predictability to the regulatory system; as such, they benefit both the [property owner] and the government official charged with administering a program”); SIEMON ET AL., supra note 5, at 10 (“The result of [weak vesting protections] is that the development community and the public sector are forced to act in an atmosphere of uncertainty, risk, and contention, with inevitable conflicts and disappointments.”).
The truth, however, is that vested rights are not an exemption from valid health, safety, and welfare regulations. Contrary to the popular myth, the vested rights doctrine is not a loophole granting developers an “exemption” from the law. Vested rights do not guarantee project approval. Instead, vested rights merely provide a developer the right to have an application considered under the rules and regulations in effect at the time he submitted his application—no more, no less.

There are several limits on vested rights to ensure that the public interest can be carried out. Because vested rights only protect a citizen from changes in the existing law after a development application has been submitted, it is not surprising that the vested rights doctrine does not affect a person’s obligation to follow the laws existing before the change. For example, there is no vested right to ignore state environmental statutes such as SEPA. Under SEPA, a local government has the discretion to deny a vested land use application because of adverse environmental impacts even if the application meets all other non-SEPA requirements.

Vested rights may also be terminated by reasonable legislation enacted to protect public health, safety, and welfare. As early as

vested rights doctrine).


70. Adams v. Thurston County, 70 Wash. App. 471, 481, 855 P.2d 284, 290 (1993) ("Vesting of development rights at the time of application or submittal does not defeat the County's discretionary ability to condition or deny any plat based on environmental impacts") (footnote omitted); West Main Assocs., 106 Wash. 2d at 53, 720 P.2d at 786 (1986) ("[U]nder the State environmental Policy Act of 1971 a municipality has the discretion to deny an application for a building permit because of adverse environmental impacts even if the application meets all other requirements and conditions for issuance") (citation omitted). See also Eastlake Comm. Council, 82 Wash. 2d at 487, 515 P.2d at 44. For a description of how the procedural requirements of the SEPA statute affect the process by which a local government must evaluate a land use application, see id. at 492, 515 P.2d at 46.

The effect of the vested rights doctrine on SEPA is discussed infra notes 72-73.


73. See Huebner, supra note 63, at 146. Note, we do not claim vested rights may be terminated by any conceivable “police power” regulation, such as an ordinance governing aesthetics. See supra note 20 (discussing use of term “police power” versus “health, safety, and welfare”). Note also that only a reasonable health, safety, and welfare regulation can terminate a
1905, the Washington Supreme Court held, "[T]here is no such thing as an inherent or vested right to imperil the health or impair the safety of the community." Examples of ordinances related to public health, safety, and welfare that Washington courts have held to trump vested rights are ones relating to on-site sewage disposal systems, health ordinances, railroad safety, and fire protection ordinances. Vested rights are not "scofflaw" rights, so it is not surprising that the vested rights doctrine "does not suggest that existing [preapplication] zoning ordinances, rules and regulations may be ignored." Furthermore, the vested rights doctrine does not allow the continuance of a nonconforming use, excuse the failure to obtain a permit, allow a person to violate a new postapplication ordinance or any other ordinance, or authorize the violation of permit conditions.

vested right. See infra note 74.

74. City of Seattle v. Hinkley, 40 Wash. 468, 471, 82 P. 747, 748 (1905). See also West Main Assocs., 106 Wash. 2d at 53, 720 P.2d at 786 ("Municipalities can regulate or even extinguish vested rights by exercising the police power reasonably and in furtherance of a legitimate public goal.") (citing Hass v. City of Kirkland, 78 Wash. 2d 929, 931, 481 P.2d 9, 10 (1971)); Washington Real Property Deskbook, Zoning § 97.8(2)(d), at 97-45 ("Generally Washington courts have refused to apply vested rights to rules and regulations which are health and safety related . . . .") (citation omitted); Heubner, supra note 63, at 147 ("Vested rights to develop land may also be terminated by legislation enacted to protect public health or safety which has the effect of prohibiting a proposed development.") (footnote omitted).

The fact that valid health, safety, and welfare regulations trump vested rights does not mean that local governments can pass any "police power" regulation they want to cleverly thwart vesting. There are strict limits on what qualifies as a valid health, safety, and welfare regulation. See West Main Assocs., 106 Wash. 2d at 52, 720 P.2d at 786 (health, safety, and welfare regulations must be reasonable); Norco Constr. Inc. v. King County, 97 Wash. 2d 680, 685, 649 P.2d 103, 106 (1982) (use of health, safety, and welfare power cannot be unreasonable; giving local government discretion to determine what qualifies as need for regulation without any criteria violates due process); Carlson, 41 Wash. App. at 407, 704 P.2d at 664.

A health, safety, and welfare regulation that prevented vesting would be carefully scrutinized by a Washington court. See infra note 203.


80. Hass, 78 Wash. 2d at 931, 481 P.2d at 10-11 (vested right to standards in building code not a license to violate fire protection ordinance).

There is also no vested right to build to standards contained in an unlawfully passed ordinance. 82

Additionally, vested rights do not permanently shield developers from new laws. While the vested rights doctrine protects a citizen from postapplication changes to development regulations, it does not freeze the law in time. 83 For example, no one has a "vested right" to be immune from zoning laws because his or her parcel of property was platted in the 1890s, before zoning laws existed. 84 One of the reasons a vested right does not freeze the law in place forever is that all land use permits expire after a period of years. 85 Local governments can require construction to commence in a reasonably short period of time after permit approval. In addition, local governments may respond to new emergencies 86 by adopting a valid interim building moratorium 87 or interim zoning ordinance. 88 In sum, there are several controls on vesting to ensure that the government retains the ability to exercise its reasonable health, safety, and welfare powers when necessary. This creates a good balance between the needs of local governments and property owners.

82. Juanita Bay Valley Community Ass’n v. City of Kirkland, 9 Wash. App. 59, 73, 510 P.2d 1140, 1149 (1973) (because issuance of permit violated SEPA statutory procedural requirements, no vested right to proceed under illegally issued permit).


88. Interim zoning is authorized by statute but contains limitations to ensure that it is used only for actual emergencies. See WASH. REV. CODE § 36.70A.390 (1998) (public hearing required; interim controls expire after six months). See generally SETTLE, supra note 18, at 45 for a discussion of how interim zoning affects vesting in Washington State.
III. THE VESTED RIGHTS DOCTRINE IN THE
REST OF UNITED STATES

Now that the need for vested rights and the competing policy
interests at issue have been discussed, the three models for vesting
protection can be analyzed in their proper context. This Part first
describes the majority and minority rules. In addition, it describes
how states have responded to problems arising from weak vesting case
law by enacting legislation. After the flaws in these models have been
highlighted, the reader will be able to more fully appreciate the
strengths of the third model, the Washington rule.

A. Majority Rule: Fuzzy Equitable Principles Lead to
Unpredictable and Harsh Results

As previously mentioned, the majority rule of vested rights is
 premised on equitable principles. The most common description of
the majority rule provides that "a landowner will be protected when:
(1) relying in good faith, (2) upon some act or omission of the govern-
ment, (3) he has made substantial changes or otherwise committed
himself to his substantial disadvantage prior to a zoning change."89
Forty states90—depending on how you count them91—adhere to the
majority rule.92

The majority rule has many varieties.93 It is a combination of
equity and constitutional principles.94 The two concepts are so inter-

89. Delaney & Vaias, supra note 6, at 31 (footnote omitted).
90. Id. at 40-44 (lists each state). See also Erickson & Assocs. v. McLerran, 123 Wash. 2d
864, 868, 872 P.2d 1090, 1093 (1994) ("overwhelming" number of states adhere to majority
rule).
91. Because the majority rule is so fuzzy, it is often difficult to tell whether a state adheres
to the majority or minority rule. For example, one commentator concludes that it is "unclear"
whether Virginia follows the majority or minority rule. Hanes & Minchew, supra note 2, at 407-
08. Another commentator concludes that the two rules blend, making "attempts to delineate
majority and minority rules futile." Hartman, supra note 9, at 304 (footnote omitted). This Arti-
cle will not attempt to sort out the majority and minority rules; they are presented merely to
show how sharply they contrast with the Washington rule.
92. See supra note 90. The final tally is: majority rule (38 states), minority rule (6 states),
Washington rule (3 states: Washington, California, and Texas), and no cases on vested rights (3
states).
93. Commentators disagree about how many prongs the majority rule has, as well as the
contents of each prong. See, e.g., Larsen & Elrod, supra note 56, at 4 (four prongs); DePalma,
supra note 26, at 500 (five prongs for Oregon majority rule); Delaney & Vaias, supra note 6, at 31
(3 prongs); MCGUILLAN MUNICIPAL CORPORATIONS § 25.152, at 683 (3d ed. 1990) (three
prongs) (footnote omitted); Hanes & Minchew, supra note 2, at 386 (footnote omitted) (three
prongs); Cunningham & Kremer, supra note 2, at 649 (three prongs).

The fact that several scholarly commentators cannot agree on the number of prongs in the
majority rule, let alone what each prong is, shows that the majority rule is hopelessly unpredicta-
ble. How can a property owner tell if she has a vested right when several law professors cannot
twined that commentators cannot agree on where equitable and constitutional principles begin and end.  

This Article will not scrutinize the majority rule, but will merely note in passing that various strains of the majority rule look to the following factors to determine if a vested right exists: equity in general, estoppel, reliance in general, good faith, the government's conduct, the "new peril" subdoctrine, laches and the "pending zoning change" rule.

The majority rule is a jumbled mess of contradictory cases that come to a wide range of unprincipled, subjective outcomes. Not surprisingly, it has been criticized by every scholar addressing the

agree on the number and content of the prongs in the test that is supposed to answer the question?

94. Hartman, supra note 9, at 305.
95. Knight & Schoettle, supra note 17, at 780-81 (four sources for vested rights doctrine are equitable estoppel, constitution, legislation, and contract (development agreements)); MANDELKER, supra note 10, § 613 at 224 (The "vested rights doctrine has a constitutional base."); Hartman, supra note 9, at 302; SIEMON ET AL., supra note 5, at 9 (identifying "vesting" and "zoning estoppel" as the two types of rules; "It is often difficult to ascertain which of the two vesting rules a court is employing. One reason for this confusion is that there is no consistent, discernible difference between the two approaches, at least as they are applied"); Rhodes & Sellers, supra note 17, at 476 ("Although the doctrines of equitable estoppel and vested rights arise from distinct theoretical bases, Florida courts have employed these concepts interchangeably.").
97. Cunningham & Kremer, supra note 2, at 651 ("The generally accepted rule of zoning estoppel appears to place primary emphasis on the conduct of the landowner or developer rather than the equally important conduct of the governmental body") (footnote omitted); Hagman, supra note 2, at 523 (estoppel "supplies the theoretical basis for vested rights") (footnote omitted); JUERGENSMEYER & ROBERTS, supra note 17, § 5.27, at 228 (vesting and estoppel similar).
98. See Tucker, supra note 96, at 756; Ackerman, supra note 58, at 1235-37; DePalma, supra note 26, at 497-505; JUERGENSMEYER & ROBERTS, supra note 17, § 5.28, at 228-30. A reliance-focused vesting rule has been criticized as too "subjective." Ackerman, supra note 58, at 1269; Hartman, supra note 9, at 305.
100. Rhodes & Sellers, supra note 17, at 482-86. See also Huebner, supra note 63, at 162 (conduct of parties should not be an element).
103. Ackerman, supra note 58, at 1238; DePalma, supra note 26, at 503-05; Hagman, supra note 42, at 564. Washington courts have specifically rejected the "pending zoning rule change" variation of the majority rule. See Allenbach v. City of Tukwila, 101 Wash. 2d 193, 195-96, 676 P.2d 473, 474 (1984) (citing Hardy v. Superior Court, 155 Wash. 244, 284 P. 93 (1930)).
104. The authors of this Article could not find a single commentator who found that the merits of the majority rule outweighed its disadvantages.
topic. They describe the majority rule as being "unenlightened" and "muddled," having "little predictive value," and so on. After all, as one commentator noted, the good faith element of the majority rule is a tricky standard to apply.

The majority rule has also been criticized by scholars for its "harshness" because it provides so little protection to property owners. One commentator suggests the only thing predictable about the majority rule is an unjust result. One example of an unjust result is illustrated in *Oceanic California Inc. v. North Central Coastal Regional

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105. See, e.g., Cunningham & Kremer, supra note 2, at 626 ("Judicial reliance on the [majority rule] vested rights doctrine, however, is unfortunately characterized by inconsistent application and confused rationales."); Delaney & Vaias, supra note 26, at 248 (under majority rule “there is a need for some clear and certain standard on which both sides may rely."); Huebner, supra note 63, at 148-49 ("vesting under the [majority] rule is both late and uncertain") (footnote omitted); Jaslow, supra note 26, at 189 (neither property owner nor local government knows if a project is truly vested); Larsen & Elrod, supra note 56, at 10 (under majority rule “the rules and their applications vary depending on the personal philosophy and proclivity of the court involved, the attitude of the local public toward the development industry, and plain good luck."); JUERGENSMEYER & ROBERTS, supra note 17, § 5.30, at 238 ("The case-by-case, equitable determinations of [majority] vested rights and estoppel are difficult to reconcile and result in great uncertainty"); Pou, supra note 2, at 198 (majority rule has no "formula," determining majority-rule good faith element "elusive"); Nadel, supra note 3, at 793 (majority rule only provides "modest assurances" of project completion).

106. Hagman, supra note 2, at 519.

107. SIEMON ET AL., supra note 5, at 10.

108. Nadel, supra note 3, at 796. Perhaps the ultimate example of the unpredictable majority rule comes from a Utah case holding that a builder vests—unless there is a “compelling, contravening public interest” in preventing the project. Western Land Equities, Inc. v. City of Logan, 617 P.2d 388, 396 (Utah 1980). What could be a more unpredictable standard than a “compelling, contravening public interest?”

109. For additional commentators' characterizations of the majority rule, see Delaney, *Vesting Verities*, supra note 6, at 603 (2000) (majority rule is “a hodgepodge of ad hoc analyses giving rise to rules based mostly on subjective standards and providing little in the way of reliable guidance to landowners and agencies involved in the development process."); Cunningham & Kremer, supra note 2, at 710 (“arbitrary” and “inefficient”); Delaney & Vaias, supra note 6, at 32 (“little predictability,” “often inconsistent and confusing,” and “highly subjective”) (footnotes omitted); DePalma, supra note 26, at 510 (majority rule produces unprincipled outcomes); Hagman, supra note 2, at 536 (majority rule “not a clear one”); Hanes & Minchew, supra note 2, at 379 ("amorphous body of vested rights" law); Hartman, supra note 9, at 305-07 (majority rule provides “few if any bright line rules, . . . and the case law is inconsistent and confusing,” resulting in “substantial injustices and hardships”); MANDELKER, supra note 10, § 6.12, at 224 (“amorphous”); Tucker, supra note 96, at 757 (“inconsistent”) Roland F. Chase, Annotation, *Retroactive Effect of Zoning Regulation, in Absence of Saving Clause, on Validity Issued Building Permit*, 49 A.L.R.3d (1973).

110. Hagman, supra note 41, at 575. See also Allenbach v. City of Tukwilla, 101 Wash. 2d 193, 198, 676 P.2d 473, 475 (Washington chose a date-certain test that “avoids the morass and uncertainties of trial on ‘good faith’ and ‘reliance.’").

111. Hagman, supra note 2, at 522. See also Delaney, *Vesting Verities*, supra note 6, at 1 (majority rule "is generally insensitive to the uncertainties faced by landowners who must cope with an increasingly complex land use approval process.")

112. Hartman, supra note 9, at 317 (footnote omitted).
Commission, a California case applying the majority rule. In Oceanic, a local government issued a multitude of permits for a large project, including building permits for some of the project. The property owner spent $27 million on property acquisition and engineering costs, then the law suddenly changed. Applying the majority rule, the California court held that the property owner had no vested right to proceed.

In another amazing case from California, Pardee Construction Co. v. City of Camarillo, a local government entered into a stipulated judgment providing that the regulations governing a particular project would not be changed. Subsequently, a shift in local politics brought a new attitude to the city council. The city passed a new ordinance changing the regulations applicable to the project, directly violating the stipulated judgment it had entered into earlier. Politics triumphed over the law; under the majority rule, the property owner had no vested right to proceed.

One case summed up the majority rule well:

The mechanisms at work here combined to “protect” the environment by protracted and undependable administrative procedures followed by years of litigation. Only the most hardy and well-heeled [property owner] can run so harsh a gauntlet. Burdened by land costs, loan interest, architectural, engineering and attorney fees, many entrepreneurs run out of money or heart or both long before the finish line.

[T]he handmaiden of [this] prevailing administrative anarchy is the [majority] vested rights rule . . . which allows] administrative vacillation virtually up to the moment the builder starts pouring concrete.

114. Nadel, supra note 3, at 800-81 (discussing Oceanic California Inc.).
115. Id.
116. Id.
117. The unjustness of these two California common-law cases shows why the 1984 California vesting statute was so needed. See infra notes 134-40 (discussing California statute).
119. Id.
120. Id.
121. For other majority-rule horror stories, see Hartman, supra note 9, at 300-01; Hagman, supra note 2, at 520-22.
B. The Minority Rule: A Little Better but Still Not Good Enough

The minority rule, followed by six states,\textsuperscript{123} is a middle ground position. As previously mentioned, Washington is generally listed as a state adhering to the minority rule, but we will show in the next section why Washington’s doctrine is distinct.

Admittedly, the minority rule provides more certainty and fairness than the majority rule. Under the minority rule, the regulations in effect at the time of project approval are applied.\textsuperscript{124} However, the minority rule is still fatally flawed. It allows regulators to change the rules between the date of the project application and final approval, a period of time often extending for months or years, forcing a property owner to guess whether the project will ever be built. During this guessing period, a property owner often expends huge sums of money on engineering and consulting costs without knowing whether the proposed project will still be permissible. Because the guessing period is so long, it is difficult to know if a project is economically viable. The guessing period also makes it more difficult for lenders to determine if the underlying property will ever be capable of producing enough income to repay loans, let alone whether it will have any value as collateral.

The minority rule, which is sometimes indistinguishable from the majority rule,\textsuperscript{125} does not provide property owners with enough certainty. Most of the cost and risk in developing property lies in the preapproval phase (e.g., Mrs. Kennedy’s preliminary plat). The minority rule only provides certainty after project approval, that is, after most of the cost and risk is over. However, by allowing property owners to at least proceed with approved projects, the minority rule gives property owners and financial lenders some limited certainty. The minority rule means that a citizen need not worry about whether he or she can proceed with an approved project. This provides very little direction—what does an “approved” project mean if not the ability to complete the project?\textsuperscript{126}


\textsuperscript{124} The minority rule is statutorily created. See supra note 123 and accompanying text.

\textsuperscript{125} See supra notes 11 and 91.

\textsuperscript{126} One is reminded of an episode of the television situation comedy Seinfeld. In it, Jerry had a “reserved” rental car. When he arrives at the airport, he is told by the car rental clerk that his “reserved” car has been rented to someone else. To paraphrase his question to the clerk, “What does ‘reserved’ mean if you can give my ‘reserved’ car away?” Similarly, what does “approved” mean if the government can nonetheless halt your “approved” project?
The unpredictability and harshness of both the majority and minority rule led several states to enact legislation recognizing vested rights. This next section will analyze such legislation.

C. Vested Rights Through Legislation

During the past decade, several states have enacted legislation limiting the power of municipalities to apply new regulations to ongoing land development projects. These statutes were enacted to alleviate uncertainties and problems associated with late vesting rules.

While each state statute varies, most apply to procedures established in the map, plan, or plat approval process. After careful analysis of the statutes, they can basically be divided into two types: approval statutes and application statutes. The first type of statute allows landowners to obtain vested rights after a landowner receives approval from a local government. These statutes carry out the


128. See Knight & Schoettle, supra note 17, at 786.

129. Id.

130. Two states have statutes that do not fit into these categories. Florida has a weak vesting statute that merely recognizes majority rule vested rights in general. See FLA. STAT. ANN § 163.3167 (West 2000). Virginia has chosen to codify the majority rule. See VA. CODE ANN. § 15.1-49.1 (Michie 2000). The Virginia law provides that a landowner’s rights vest and are not subject to later enacted zoning ordinances when the landowner (1) is the beneficiary of a significant affirmative governmental act allowing development of a specific project; (2) relies in good faith on the act; and (3) incurs substantial obligations or expenses in pursuit of the specific project.

131. ARIZ. REV. STAT. ANN. §§ 9-1202, 11-1202 (West 1997) (protects rights established in protected development right plan); COLO. REV. STAT. ANN. § 24-68-101 to 106 (West 1998) (protection developers for three years after local approval of a site-specific plan); MASS. GEN. LAWS ch. 40A § 6 (1994) (protects holder of a building or special permit and approved subdivision from a zoning change if the permit was granted before notice was given of the zoning change, if construction began within six months after the permit was issued and proceeded as continuously and expeditiously as possible); N.C. GEN. STAT. §§ 153a-344.1 (1999) (approved site-specific development plan protected for two years); N.J. STAT. ANN § 40:55D-49 (West 1993) (protects an applicant who receives preliminary subdivision or site plan approval from any change in use requirements, and generally from any requirements applicable to layout or design, for three years); PA. STAT. ANN. tit. 53 § 10508(4)(ii) (West 1997) (no subsequent change or amendment in the zoning, subdivision, or other governing ordinance can be applied to adversely
minority rule. As mentioned above in the section discussing the minority rule, granting vesting rights after approval is not very protective of property rights and still leads to great uncertainty. Thus, for our purposes, the application statutes are more beneficial to analyze and compare to Washington. These statutes essentially codify the Washington rule.\textsuperscript{132}

Texas and California are the two states with application statutes similar to Washington.\textsuperscript{133} Both states enacted such legislation because their common law rules for vesting resulted in substantial hardship for landowners.\textsuperscript{134}

California was the first state to adopt legislation similar to that of Washington. In 1984, the California legislature enacted the Vesting Tentative Map statute.\textsuperscript{135} The legislation was based on the view that the "private sector should be able to rely upon an approved vesting tentative map prior to expending resources and incurring liabilities without the risk of having the project frustrated by subsequent action by the approving local agency."\textsuperscript{136} This was a breakthrough, because several of the most unfair majority-rule cases came from California.

In California, any subdivision creating five or more parcels must obtain a tentative subdivision map known as a "tentative map."\textsuperscript{137} The Vesting Tentative Map statute permits the filing of a Vesting Tentative Map (VTM) which, if accepted as complete, gives the developer a vested right to proceed with its development in accordance with the local ordinances, policies, and standards that are in effect at the time the VTM is submitted.\textsuperscript{138} A local government is required to accept and process a VTM.\textsuperscript{139} By simply stamping on the face of a standard tentative map the words "Vesting Tentative Map," a devel-

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\item affect the right of one with an approved plan for five years).
\item \textsuperscript{132} \textit{CAL. GOV’T CODE} §§ 66498.1-66498.9 (West 1994); \textit{TEX. LOC. GOV’T CODE ANN.} § 245 (West 1998 & Supp. 2000).
\item \textsuperscript{133} See \textit{WASH. REV. CODE} §§ 58.17.033, 19.27.095 (1998).
\item \textsuperscript{134} California enacted vested rights legislation due to the courts’ reluctance to expand the limited protections of the vested rights rule in California. See Hagman, supra note 2, at 793. The Texas common law rule for vesting created hardships for property owners. See Hartman, supra note 9, at 4.
\item \textsuperscript{135} Id. at 793. The Texas common law rule for vesting created hardships for property owners. See Hartman, supra note 9, at 4.
\item \textsuperscript{136} Id. at 819. The California statute cited refers to an “approved” vesting tentative map. \textit{Id.}
\item \textsuperscript{137} \textit{CAL. GOV’T CODE} § 66426 (West 1994).
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} DANIEL J. CURTIN, JR., \textit{CALIFORNIA LAND USE AND PLANNING LAW} 72 (16th ed. 1996).
\end{itemize}
oper gains the right to proceed with the development for a specified period of time.\textsuperscript{140}

Case law interpreting the California vesting statute reveals that the statute is to be construed broadly. For example, a court has held that a property owner was not required at his own expense to "underground" existing off-site utilities, because at the time the property's owner's map application was deemed complete, the regulations in effect did not expressly require this expensive procedure.\textsuperscript{141} In another example, a court held that a landowner vests to the applicable impact fees at the time the Vesting Tentative Map is deemed complete.\textsuperscript{142} Because the Washington and California statutes are virtually identical, Washington courts should follow California's lead and hold that impact fees vest under the statute.\textsuperscript{143}

In 1987 Texas adopted a vested rights statute that provided for early vesting of rights upon the filing of an initial permit application. Before enacting the statute, Texas followed the majority rule, which produced weak protections and unpredicted outcomes.\textsuperscript{144} To remedy uncertainty, the Texas statute provides that when a series of permits is required for a development, and the original application for the first permit in that series is filed, all permits required for the project should be considered to be a single series of permits.\textsuperscript{145} This language shows how imperative it is that the vested right to develop property continues throughout the permitting process, including the several series of permit approvals. In 1997 the Texas legislature inadvertently repealed the Texas vested right statute.\textsuperscript{146} However, at the next available opportunity, the Texas legislature quickly reenacted it.\textsuperscript{147}

In essence, Washington has been a trailblazer for states like California and Texas, which have adopted vesting legislation similar to

\textsuperscript{140} Id. at 71.
\textsuperscript{141} Bright Development v. City of Tracy, 24 Cal. Rptr. 2d 618 (1994). "To 'underground' means 'to lay utility cables below ground level.' Id. at 620 n.1 (citing 9 Oxford English Dictionary 1073).
\textsuperscript{142} Kaufman v. City of Modesto, 30 Cal. Rptr. 2d 904 (1994).
\textsuperscript{143} A Washington court seems to have declined to accept our suggestion. In New Castle Investments v. City of La Center, 98 Wash. App. 224, 989 P.2d 569 (1999), rev. denied, 140 Wash. 2d 1019, 5 P.2d 9 (2000), the court held that impact fees do not vest. (For a detailed discussion of New Castle, see infra note 252).
\textsuperscript{144} See Hartman, supra note 9, at 409.
\textsuperscript{145} TEX. LOC. GOV'T CODE ANN. ch. 245 (West Supp. 2000) (previously H.B. 1704, 76th Leg. (Tex. 1999)).
\textsuperscript{147} TEX. LOC. GOV'T CODE ANN. ch. 245 (West 1998 & Supp. 2000) (previously H.B. 1704, 76th Leg. (Tex. 1999)).
Washington's. In fact, California and Texas have used Washington's law as a starting point. However, Washington still has the strongest vesting law because, unlike California or Texas, Washington's vested rights doctrine supplements its statutory protections with a long history of strong common law and constitutional protections. Washington also provides a statutory cause of action for damages resulting from the denial of vested rights.\(^{148}\)

**IV. Washington's Vested Rights Doctrine**

Now that the flaws of the majority and minority rules have been examined, the reader can more fully appreciate the Washington rule. This section will analyze the Washington rule in detail.

**A. What the Washington Rule Is and Why It Was Created**

While the details of the Washington rule are analyzed below, the following is a general description of the rule. In Washington, "a land use application . . . will be considered only under the land use statutes and ordinances in effect at the time of the application's submission."\(^{149}\) The Washington rule does not look to fuzzy equity principles, as the majority rule does. Instead, the Washington rule looks to a "date certain" to determine vesting. The Washington rule also differs from the minority rule in that vesting occurs at the time of application, not approval.

Washington courts provide three reasons why they chose the Washington rule: certainty, fairness, and the Washington Constitution. In choosing the Washington rule, the courts have considered the competing policy interests of landowners and local government and developed a rule that balances both.\(^{150}\)

Washington's vesting doctrine was created to increase administrative convenience and predictability. Washington courts have held, "The purpose of the vested rights doctrine is to provide a measure of certainty to developers and to protect their expectations against fluctuating land use policy."\(^{151}\) As previously mentioned, certainty is not

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149. Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 275, 943 P.2d 1378, 1381 (1997) (citation omitted). This quote from Noble Manor describes protections of the plat-vesting statute, but also accurately describes the protections of the common-law and the constitutional vesting doctrines.

150. See infra notes 156-57 and accompanying text.

151. Noble Manor, 133 Wash. 2d at 278, 943 P.2d at 1383 (citations omitted). As another Washington court put it:

The purpose of the vesting doctrine is to allow developers to determine, or 'fix,' the
just good for developers; it is good for local governments\(^\text{152}\) and the law in general.\(^\text{153}\) As Justice Oliver Wendell Holmes wrote, "The tendency of the law must always be to narrow the field of uncertainty."\(^\text{154}\) The Washington rule accomplishes this.

One of the ways the Washington rule narrows the field of uncertainty is to establish a "date certain" for vesting.\(^\text{155}\) The combination of the contents of the application and the date it was submitted makes it easy to determine which uses the property owner applied for and which specific rights have accrued as a result.\(^\text{156}\) As the Washington

rules that will govern their land development. The doctrine is supported by notions of fundamental fairness. As James Madison stressed, citizens should be protected from the 'fluctuating policy' of the legislature. The Federalist No. 44, at 301 (J. Madison) (J. Cooke ed. 1961). Persons should be able to plan their conduct with reasonable certainty of the legal consequences.


\(^{152}\) See supra note 67. See also Hartman, supra note 9, at 302 (strong vesting protections aid in "increasing the ability of municipalities to sustain ordered growth."); Huebner, supra note 63, at 162; Hagman, supra note 2, at 533 ("[W]hen the City of Monterey's own urban renewal project was halted because of a change in the law . . . , the City squealed like a stuck pig all the way to the California Supreme Court.") (discussing Urban Renewal Agency of the City of Monterey v. California Coastal Zone Conservation Comm'n, 15 Cal. 3d 477 (1975)); SIEMON ET AL., supra note 5, at 10; Rhodes & Sellers, supra note 17, at 510-11.

\(^{153}\) Ackerman, supra note 58, at 1269 (state has constitutional interest in "concern for certainty in the law"). See generally Hartman, supra note 9, at 298-99 (quoting cases on the goal of certainty in the law).

\(^{154}\) OLIVER WENDELL HOLMES, COMMON LAW 127 (1881).


\(^{156}\) Valley View Industrial Park, 107 Wash. 2d at 637, 733 P.2d at 192. For an example of how Washington's date certain vesting rule can be easily applied, even to seemingly complicated questions concerning which uses an application contemplated, see Westside Business Park v. Pierce County, 100 Wash. App. 599, 5 P.3d 713, rev. denied, 141 Wash. 2d 1023, 10 P.3d 1075 (2000).
Supreme Court described it, "we prefer to have a date certain upon which the right vests . . . . We prefer not to adopt a rule which forces the court to search through . . . 'the moves and countermoves of . . . parties . . .' The more practical rule to administer, we feel, is that the right vests [upon application]." 157

Fairness is also a fundamental part of the Washington rule. 158 After all, when invoking the vested rights doctrine, "the property owner is asking no more than official permission to use his or her land in accordance with the . . . laws." 159 As the Washington Legislature put it, "it is unfair to penalize applicants that have submitted permit applications that meet current requirements." 160

The third purpose of the Washington rule is the protection of constitutional rights. 161 Some cases couch the constitutional purpose

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157. Hull, 53 Wash. 2d at 130, 331 P.2d at 859. See also Norco Constr., Inc. v. King County, 97 Wash. 2d 680, 684, 649 P.2d 103, 106 (1982) (purpose of vested rights doctrine is to "avoid tactical maneuvering between [the] parties . . . .") (citation omitted); Allenbach v. City of Tukwilla, 101 Wash. 2d 193, 198, 676 P.2d 473, 475 (1984); Valley View Industrial Park, 107 Wash. 2d at 642, 733 P.2d at 195 (when property owner filed application, "it fixed, and firmly imprinted upon the parcel, the zoning classification it carried at the moment of the filing."). See also Carlson v. Town of Beaux Arts Village, 41 Wash. App. 402, 704 P.2d 663 (1985) (vague approval standard of "best interests of the citizens" prevents property owners from having certainty).

A commentator on Washington’s vesting rule writes:

The rule of vesting the right to develop land on the date of application is easy to apply. The Washington doctrine creates a mechanical standard—[ ] application compliance, timeliness, and completeness. This standard makes it unnecessary for a court to undertake a case-by-case inquiry into the fundamental vested rights issue of whether it is fair to divest a party of property expectations through retroactively applying a subsequently effective zoning ordinance. By applying the mechanical rule in deciding a case, a court can avoid the difficult inquiry. Rather, it may simply decide on which side of the bright line a developer’s permit application falls.

Huebner, supra note 63, at 148 (footnote omitted). See also Ackerman, supra note 58, at 1269-74 ("It is helpful to have a specific point in time when all vesting analysis begins . . . . [H]aving a specific point in time that triggers vesting avoids much of the protracted maneuvering that often characterizes zoning controversies . . . . [A date-certain vesting rule] would establish the kind of certainty in the law that decreases the need for litigation.")

158. Huebner, supra note 63, at 155. The "fairness" component of Washington’s vested rights doctrine is different than the "equity" basis of the majority and minority rules. Washington’s analysis focuses solely on fairness to the property owner, in a constitutional fundamental fairness sense, whereas the majority and minority rules’ "equity" analysis focuses on a balance of interests of both the property owner and the government.


161. Valley View Indus. Park, 107 Wash. 2d at 636, 733 P.2d at 191 ("due process considerations require that developers be able to take recognized action under fixed rules governing the development of their land"); Erickson & Assocs. v. McLerran, 123 Wash. 2d 864, 870, 872 P.2d 1090, 1093 (1994) ("Our vested rights cases thus establish the constitutional minimum: a 'date certain' standard that satisfies due process requirements"); Norco Constr., Inc., 97 Wash. 2d at
of the Washington rule in terms of how vesting provides citizens with "fundamental fairness,"162 which is a due process concept. Other cases point to the constitutional purpose of the Washington rule by recognizing that the vested right to develop one's land is a valuable property right protected by the due process clause. Still other Washington cases and commentators address the constitutional purpose of Washington's vested rights doctrine by equating vesting protections with yet another due process concept, the prohibition against retroactive legislation.165

The competing policy interests of the vested rights doctrine have already been analyzed in general, but this section describes how Washington law in particular has addressed the conflict. In a nutshell, the Washington courts and legislature clearly recognize the two competing interests, and have consciously chosen one side: that of the property owner. The Washington Supreme Court wrote:

Development [concerns] and the 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

684-85, 649 P.2d at 106 (when attempting to impose new standards on a project applicant, "[d]ue process requires governments to treat citizens in a fundamentally fair manner"); West Main Assoc. v. City of Bellevue, 106 Wash. 2d 47, 50, 720 P.2d 782, 785 (1986).

Washington courts have not specified whether it is the federal or state constitution at issue. The constitutional principle protecting vested rights is the due process, not takings, clause. See Knight & Schoettle, supra note 17, at 785; DePalma, supra note 26, at 487.


163. See Erickson & Assoc., 123 Wash. 2d at 870, 872 P.2d at 1093 (fundamental fairness a due process concept).

164. Valley View Industrial Park, 107 Wash. 2d at 636, 733 P.2d at 191 (citation omitted); Erickson & Assoc., 123 Wash. 2d at 870, 872 P.2d at 1093. See also Delaney & Vaias, supra note 6, at 30; Hartman, supra note 9, at 303; Nadel, supra note 3, at 796.

165. Hardy v. Superior County of King County, 155 Wash. 244, 248, 284 P. 93, 95 (1930) (statutes should be interpreted prospectively). See also Huebner, supra note 63, at 155 (fairness of vested rights doctrine and prohibition against retroactive legislation similar); Cunningham & Kremer, supra note 2, at 660 ("For several centuries the common law courts have therefore generally accepted the proposition that legislation that has such a retroactive effect is unfair and perhaps unconstitutional"). See generally Ray H. Greenblat, Judicial Limits on Retroactive Civil Legislation, 51 NW. L. REV. 540, 540-44 (1956) (discussing retroactive legislation).

The economic efficiency fostered by strong vesting protections—that a property owner and lender can rely upon the law on the books at the application stage—is probably an unspoken purpose behind the Washington rule. See generally Hagman, supra note 2, at 534 (discussing economic efficiencies of strong vesting protection).

166. See supra note 150 (protection of property rights) and note 131 (protection against retroactive legislation).
the creation of a new nonconforming use. A proposed development that 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.

... [However,] [t]his court recognized the tension between public and private interests when it adopted Washington's vested rights doctrine. The court balanced the private property and due process rights against the public interest by selecting a ["date certain"] vesting point . . . .167

Washington's deliberate choice in favor of the property owner is less one-sided than it might seem. Recall that vested rights do not shield developers from valid health, safety, and welfare regulations or SEPA, so the public interest can still be protected even with a strong vested rights doctrine.168 Because the public interest remains protected, the net effect of Washington's strong vested rights doctrine is the protection of property owners' rights and expectations with no loss of valid government powers. In fact, the only government power sacrificed by Washington's strong vesting protections is the ability of local politicians' to retroactively prevent currently lawful—but politically unpopular—land uses.

Washington's vested rights doctrine appears to have succeeded in balancing the two competing policy interests of the individual and the government. As one commentator notes, "[t]he vested rights doctrine should balance the competing policy goals of eliminating wasteful risk and uncertainty in the land development permit process and retaining sufficient local government flexibility to respond to changed community conditions by rezoning. The present Washington [vested rights] doctrine . . . protects both of these goals."169

168. See supra notes 73-75 and accompanying text.
169. Heubner, supra note 63, at 162.
Given that local governments retain a wide assortment of regulatory powers immune from the vested rights doctrine,\textsuperscript{170} it is perfectly reasonable to provide property owners all the certainty and fairness of strong vesting protection. To do otherwise would dramatically tip the balance of interests one-sidedly in favor of the government.

**B. Detailed Analysis of the Washington Rule**

The following section is organized into two\textsuperscript{171} main parts, the common-law vested rights doctrine and the vesting statutes that codify the existing common law. For reasons described below, the common-law doctrine continues to remain in force separately from, and supplementary to, the statutes. However, for organizational clarity, the following sections break Washington cases into two categories, pre-1987 and post-1987, reflecting the effect of the 1987 plat-vesting statute.\textsuperscript{172}

1. The Origins of the Common-Law Vested Rights Doctrine

The first\textsuperscript{173} Washington vesting case, *Odgen v. City of Bellevue*,\textsuperscript{174} was decided in 1954. In those days, a building permit was the only permit necessary to finish a project.\textsuperscript{175} The *Odgen* court held that a property owner vested to the "prevailing zoning ordinances" in effect when he or she applied for a building permit.\textsuperscript{176}

The *Odgen* building permit-vesting rule was purely a common-law judicial creation.\textsuperscript{177} The *Odgen* court did not claim to be directly

\textsuperscript{170} See supra notes 20, 68-88.

\textsuperscript{171} The third basis of Washington's vested rights doctrine, the constitutional doctrine, is analyzed separately. See infra notes 288-308.

\textsuperscript{172} This Article does not provide summaries of each vesting case. Instead, the body of law is analyzed by categories, such as the elements of each doctrine.

\textsuperscript{173} One case, claims that *Hardy v. Superior Court*, 155 Wash. 244, 284 P. 93 (1930) was the first vesting case. See Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 636-37, 733 P.2d 182, 191-92 (1987). *Hardy* did not apply the vested rights doctrine because the property owners never applied for a plat or building permit; instead, *Hardy* is a straightforward retroactive legislation case, merely holding that laws usually operate prospectively. See *Hardy*, 155 Wash. 244 at 248, 284 P. 93 at 95. Another case (correctly) states that *Odgen v. City of Bellevue*, 45 Wash. 2d 492, 275 P.2d 899 (1954), was the first vesting case. See Friends of the Law v. King County, 63 Wash. App. 650, 654, 821 P.2d 539, 541 (1991), rev. denied, 119 Wash. 2d 1006, 832 P.2d 488 (1992).

An earlier case, *City of Seattle v. Hinkley*, 40 Wash. 468, 82 P. 474 (1905), is sometimes cited as a very early "vesting" case. It is not. Rather, *Hinkley* involved a nonconforming use, which is different than vesting. See supra note 2.

\textsuperscript{174} *Odgen*, 45 Wash. 2d 492, 275 P.2d 899 (1954).

\textsuperscript{175} See supra note 46.

\textsuperscript{176} *Odgen*, 45 Wash. 2d at 496, 275 P.2d at 902 ("The [vested] right accrues at the time an application for a building permit is made.")

\textsuperscript{177} Schneider Homes, Inc. v. City of Kent, 87 Wash. App. 774, 778, 942 P.2d 1096, 1098
interpreting the constitution, a statute, or previous Washington cases; it simply announced a new rule of law. The main rationale for Odgen was that a building permit in compliance with the applicable laws must be issued “as a matter of right,” rendering its issuance a “ministerial” function. The court contrasted such ministerial functions with “discretionary” functions, which are the initial legislative choices made by elected officials to establish standards, such as adopting a zoning code. According to the court after discretionary standards have been set, issuance of a permit in conformity with those standards is ministerial, meaning that the local government now lacks the power to decide not to apply the standards on the books. The ministerial/discretionary distinction has continued through Washington common-law vesting cases.

Odgen is the foundation of Washington's common-law vesting doctrine. Its black-letter law holding has been reaffirmed by numerous Washington cases. The next vesting case, Hull v. Hunt, more

(1997).

178. The closest the Odgen court came to invoking a constitutional basis for its holding was a reference to art. 1, § 12, the Washington constitution's privileges and immunities clause. Odgen, 45 Wash. 2d 492 at 495, 275 P.2d at 902. The court noted that forcing citizens to obtain discretionary, as opposed to ministerial, permits would violate this constitutional protection. Id. at 495, 275 P.2d at 902.

179. Odgen cited Hardy for the proposition that “A property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto.” Odgen, 45 Wash. 2d at 495, 275 P.2d at 901. As previously described, Hardy was a retroactivity case, not a vesting case. See supra note 172.

Odgen did not discuss the majority rule of vesting followed by other states; it simply announced that a property owner in Washington vests to the zoning law in effect at the time of a building permit application.

180. Id.

181. Id.


fully developed Odgen.\textsuperscript{184} Specifically, Hull discussed the supposed merits\textsuperscript{185} of the equity-based majority rule.\textsuperscript{186} After carefully considering the majority rule used across the country, the Hull court unequivocally rejected it:

Notwithstanding the weight of authority, we prefer to have a \textit{date certain} upon which the right vests to construct in accordance with the building permit. We prefer not to adopt a rule which forces the court to search through . . . "the moves and countermoves of . . . parties . . ." The more practical rule to administer, we feel, is that the right vests when the [property owner] applies for his building permit . . . .\textsuperscript{187}

Thus, Hull gave Washington its much coveted "date-certain" vesting rule.

In the following decades, Washington vesting case law branched out; the cases developed rules on what constitutes an "application," and addressed the competing public health and safety interests, SEPA\textsuperscript{188} issues, and many others. Each element of this body of law is categorized and synthesized below.

2. Elements of Common-Law Vesting Doctrine

Professor Settle, undisputedly one of the most prominent commentators on Washington land use law,\textsuperscript{189} provides a two-part framework for analyzing vesting: (1) what kinds of applications "trigger" vesting, and (2) to which laws does an application vest?\textsuperscript{190} We will call them the "trigger" and "vest-to-what" questions. The reader should

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\textsuperscript{184} Seattle University Law Review, Vol. 23:1043

\textsuperscript{183} Hull, 53 Wash. 2d at 125, 331 P.2d at 856.
\textsuperscript{184} Norco Constr., Inc., 29 Wash. App. at 189, 627 P.2d at 994 (citations omitted).
\textsuperscript{185} Hull described the rationale for the majority rule as "that the police power, exercised for the benefit of the public as a whole, supersedes [a property owner's] permit." Hull, 53 Wash. 2d at 128-29, 331 P.2d at 858. This rationale, that the will of the public almost always supersedes private rights, is at odds with Washington's constitutional history. See supra note 19 (discussing Washington's broad state constitutional protections).
\textsuperscript{186} Hull, 53 Wash. 2d at 128-29, 331 P.2d at 858.
\textsuperscript{187} Id. at 130, 331 P.2d at 859 (emphasis added).
\textsuperscript{188} "SEPA" refers to the State Environmental Policy Act. WASH. REV. CODE ch. 43.21C (1998). See generally Settle, supra note 71.
\textsuperscript{189} Understating Professor Settle's stature, the Washington Supreme Court calls him "a well-respected commentator on land use law." Presbytery of Seattle v. King County, 114 Wash. 2d 320, 323, 787 P.2d 907 (1990).
\textsuperscript{190} E-mail correspondence from Professor Richard Settle to the authors (Jan. 11, 2000) (on file with authors) (to analyze vested rights properly "[y]ou have to distinguish between the kinds of applications that trigger vesting and the regulations into which a proposal vests.").
\end{flushleft}
ask him- or herself these two questions while reading the following description of Washington's vesting law.\footnote{191}

Washington's common-law vesting doctrine has three primary elements.

In the ordinary course of events, a developer's right to develop in accordance with a particular zoning designation vests only if the developer files a building permit application that (1) is sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which the developer seeks to develop.\footnote{192}

The first element of a complete permit application addresses the "trigger" question. Washington's early vested rights doctrine substantially limited the kinds of applications that triggered a vested right. The basic rule was (and still is) that ministerial permits vest, while discretionary ones do not.\footnote{193} Therefore, a building permit application triggers vesting because it is the quintessential ministerial permit.\footnote{194}

In the past, plat approval was thought to be a "discretionary" act because it required approval from a local legislative body. Therefore,

\footnote{191. The "trigger" and "vest-to-what" analysis applies to all forms of vesting: common-law, statutory, and constitutional.}


But see Norco Constr. Inc. v. King County, 29 Wash. App. 179, 190, 627 P.2d 988, 994 (1981) (implying vesting applies to some discretionary permits: "The county and council argue that the vesting rule in the land use permit cases is premised on the assumption that no discretion is involved in cases where it is applied. That is incorrect."). modified, 97 Wash. 2d 680, 649 P.2d 103 (1982).

Allowing local governments "discretion" to do something as ministerial as processing a land use application would be unconstitutional. Odgen, 45 Wash. 2d at 495, 275 P.2d at 902 (1954); Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash. 2d 475, 482, 513 P.2d 36, 41-42 (1973).

Washington's vested rights doctrine is based upon the view that land use permits are "ministerial." Huebner, supra note 63, at 142. For a general description of "discretionary" versus "ministerial" permits, see Hanes & Minchew, supra note 2, at 381; Cunningham & Kremer, supra note 2, at 638-39.}

\footnote{194. Odgen, 45 Wash. 2d at 495, 275 P.2d at 902.
in the past, plat applications did not vest.195 This rule changed in 1987, and plat applications now vest.196 Rezoning is considered discretionary because it is a legislative act by a local government’s elected officials;197 accordingly, applications for a rezone do not vest.198

A property owner cannot obtain vested rights until he or she submits an application.199 An application must be “complete” to vest.200 The complete application requirement ensures that a court can determine whether the application complies with the applicable standards and deters “permit speculation.”201 Local governments are


This is not surprising, because a rezone is a future change in the law. The vested rights doctrine protects a citizen’s right to have current rules applied to his or her land use application; it is conceptually impossible to “vest” to a future change in the law. However, a local government’s refusal to rezone can be unlawful on nonvesting constitutional grounds. See, e.g., State ex rel. Wenatchee Congregation of Jehovah’s Witnesses v. City of Wenatchee, 50 Wash. 2d 378, 386, 312 P.2d 195, 199 (1957) (refusal to rezone held to be “arbitrary and capricious”).


An application can be “complete,” even though postapplication information may still be required, if the application complies with the previous ordinance; a local government’s assurance to a property owner that processing will still continue is also a factor. See Mercer Enterprises Inc., v. City of Bremerton, 93 Wash. 2d 624, 631, 611 P.2d 1237, 1241 (1980). See also Valley View, 107 Wash. 2d at 639, 733 P.2d at 193; Huebner, supra note 62, at 145.

An incomplete application can vest if it is later cured. Juanita Bay Valley Community v. City of Kirkland, 9 Wash. App. 59, 83-84, 510 P.2d 1140, 1155 (1973). The rule allowing the curing of an initially deficient application should not to be confused with the rule that an illegally granted permit cannot be cured. Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash. 2d 475, 483, 513 P.2d 36, 42 (1973).

A local government’s delay tactics to prevent an applicant from completing her application can violate due process and allow a court to consider the application to be “complete” as of the date it was originally submitted. See infra note 223.

201. Valley View, 107 Wash. 2d at 657, 733 P.2d at 205 (Dore, J. (dissenting)). “Permit speculation” is the frowned-upon practice of applying for grandiose land uses without any real intention of building the project. Once the permit is obtained for such a grandiose use, the value of the land skyrocketed and the speculator sells it for a windfall profit. By requiring the applicant to spend the time and money necessary to submit a complete application, permit speculation is eliminated. Washington courts realize that permit speculation is not a problem in the real world. See Hull v. Hunt, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958); Eastlake Community Council,
allowed to define a complete application by ordinance, but there are limits on this power to ensure that such an ordinance does not become an antivesting device.

Pre-1987 Washington cases have held the following specific permits "trigger" vesting: a building permit, a grading permit, a conditional use permit, and a shoreline permit. The only thing held not to vest under the pre-1987 common-law doctrine was a septic permit, but that is debatable.

The second element, compliance with existing laws, addresses the "vest-to-what" question. A property owner's rights only vest to


Commentators agree that due to the enormous costs of preparing land use applications, permit speculation is not a problem. See Hagman, supra note 2, at 531.


203. An ordinance cannot define a "complete application" so narrowly as to become an antivesting device. Such ordinances must be consistent with constitutional and statutory requirements. See West Main Assocs. v. City of Bellevue, 106 Wash. 2d 47, 52, 720 P.2d 782, 786 (1986) (antivesting ordinances carefully scrutinized; courts disfavor antivesting ordinances); Erickson, 123 Wash. 2d at 873, 872 P.2d at 1090 (city is free to develop vesting schemes best suited to a particular locality within parameters of vesting doctrine established by statutory and case law); Adams v. Thurston County, 70 Wash. App. 471, 479, 855 P.2d 284, 290 (1993) (ordinance delaying vesting until completion of final EIS violated vesting rule).

Wholly separate from the issue of when an application is "complete," it is worth noting that two separate laws require a local government to complete the processing of an application within a certain time. For all types of land use permits (including plat applications), a local government faces damages and attorneys fees liability under RCW § 64.40 for not processing a permit within the time limits specified by local ordinance. The time limit provided by ordinance in most cities and counties is 120 days. A recently expired statute required local governments to have 120-day time-lines; most local governments have not amended their 120-day ordinances formerly required by the statute. See WASH. REV. CODE § 36.70B.080 (1998) (requiring municipalities to establish time-limits for permit decisions); WASH. REV. CODE § 36.70B.090 (1998) (requiring final decisions within 120 days). Significantly, a statute immunizing local governments from RCW § 64.40 liability for failing to process applications within the time established by time-limit ordinances expired concurrently with the 120-day statute. See WASH. REV. CODE § 64.40.50 (expired July 1, 2000). The expiration of the time-limit immunity statute makes it clear that the legislature intended to provide a cause of action under RCW § 64.40 against a local government for failing to meet its own timeline ordinance.


208. Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wash. App. 709, 714, 558 P.2d 821, 825 (1977). Instead of holding that septic permits do not vest, Ford suggested that, had the applicant applied for a permit, the project would have vested.
the previous law—that is, the preapplication standard—in effect on the date she submitted a complete application.²⁰⁹ This means that if the preapplication standard does not allow the project, even a vested project cannot be built.²¹⁰ It also means that if no preapplication standards were in effect, the project could not go forward²¹¹ because a person cannot vest to a nonexistent standard. Thus, a preapplication standard must have been validly enacted before a person can vest to it.²¹² Additionally, only proposed uses disclosed in the application vest.²¹³

Washington's pre-1987 common-law vested rights doctrine provides that a property owner can vest to the following categories of standards: "zoning and procedures,"²¹⁴ a "comprehensive plan, planning standards, [and] specifications,"²¹⁵ "applicable codes,"²¹⁶ and a "use permit."²¹⁷ The following categories of standards have been held in pre-1987 cases not to vest under Washington's common-law doctrine: a preliminary plat,²¹⁸ and "subdivisions"²¹⁹ (both later overruled by statute), health safety and welfare standards,²²⁰ and "fees."²²¹

²⁰⁹ Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 638, 733 P.2d 182, 192 (1987). See also Huebner, supra note 63, at 143-44.
²¹⁰ Hass v. City of Kirkland, 78 Wash. 2d 929, 931, 481 P.2d 9, 10 (1971); Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash. 2d 475, 486, 513 P.2d 36, 43 (1973) ("No consistent argument can be made for the vesting of rights on an invalid permit allegedly cured by a subsequent event under a code which does not allow any such curing.").
²¹³ Mercer Enterprises, Inc. v. City of Bremerton, 93 Wash. 2d 624, 631, 611 P.2d 1237, 1241 (1980) (implying that only uses disclosed in application vest by noting local government is "entitled to rely on the representations made by [property owner] in the site plan."). This pre-1987 common-law rule has been applied to the post-1987 vesting statute, but not very strictly. See Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 285, 943 P.2d 1378, 1386-87 (1997); see also Westside Business Park v. Pierce County, 100 Wash. App. 599, 5 P.3d 713 (2000), rev. denied, 141 Wash. 2d 1023, 10 P.3d 1075 (2000) (storm water drainage standard discussed by local government in pre-application talks vests even though standard is not actually part of the plat application).
²¹⁵ Norco Constr., Inc., 29 Wash. App. at 192, 627 P.2d at 996.
²¹⁶ Allenbach, 101 Wash. 2d at 200, 676 P.2d at 476.
²¹⁷ Beach v. Board of Adjustment, 73 Wash. 2d 343, 347, 348 P.2d 617, 620 (1968).
²¹⁸ Norco Constr., Inc. v. King County, 97 Wash. 2d 680, 687, 649 P.2d 103, 107-08 (1982).
²²⁰ Hass v. City of Kirkland, 78 Wash. 2d 929, 931, 481 P.2d 9, 10 (1971).
²²¹ Lincoln Shiloh Assocs. v. Mukilteo Water Dist., 45 Wash. App. 123, 128, 724 P.2d 1083, 1086 (1986). This case held that only those things affecting the amount of land that can be
The final element, filing during the effective period of the previous standard, is rarely at issue; it is relatively easy to determine what the regulations were at the time the application was submitted. However, one difficult factual determination is sometimes involved in this otherwise uncomplicated element. When a local government intentionally delays a property owner's application and then enacts stringent new regulations, a court is able to apply the previous standard. Due process protections allow Washington courts to "look beyond [the three elements]... where city officials clearly frustrate a developer's diligent, good faith efforts to complete the permit application process." Therefore, when a local government delays a property owner or otherwise interferes with the application process, an incomplete application can be considered "complete." Similarly, the futility of applying can excuse the lack of an application. This power of the courts to look beyond the three elements in certain situations emphasizes the fairness at the heart of the Washington rule.

Because Washington consciously chose not to adopt the majority rule, equity and reliance are not an element of the Washington rule. Therefore, a property owner need not exhibit good faith or show reliance on the preapplication standards.

utilized vest; things affecting the cost of developing do not. Id. There was no precedent for a "land" versus "cost" distinction in the vested rights doctrine. In fact, the entire purpose of vesting protection is to protect property owners from changes affecting the cost of developing, thus making the rationale for Lincoln Shiloh very questionable. Unfortunately, this erroneous rationale has been applied to the vesting statute. New Castle Investments v. City of LaCenter, 98 Wash. App. 224, 233-34, 989 P.2d 569, 573-74 (1999) (impact fee ordinance does not vest because such a fee "merely affects the ultimate cost of the development.").


225. WASHINGTON REAL PROPERTY DESKBOOK Zoning § 97.8(2)(a) (good faith not a requirement for vesting in Washington); Huebner, supra note 63, at 162 (conduct of the parties should not be an element).

While "good faith" is not the test for determining a property owner's vested rights, two courts have noted that a local government must process permits in "good faith." See Valley View Indus. Park, 107 Wash. 2d at 642, 733 P.2d at 195; Erickson & Assocs. v. McLerran, 123 Wash. 2d 864, 871, 872 P.2d 1090, 1094 (1994). A third court has held that a property owner is entitled to rely on a city's representations during the application process. See Mercer Enterprises, Inc. v. City of Bremerton, 93 Wash. 2d 624, 631, 611 P.2d 1237, 1241 (1980).

226. Hull v. Hunt, 53 Wash. 2d 125, 129, 331 P.2d 856, 858 (1958); Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash. 2d 475, 484, 513 P.2d 36, 43 (1973) (looking only to
The reader must remember that the 1987 vesting statute, described immediately below, only codified existing common law; it did not supersede the common law. For example, at least one post-1987 case recognizes vested rights outside the scope of the statute. This is proof that the common-law vesting doctrine exists as a separate, supplementary source of vesting protection.

3. The 1987 Vesting Statute: Even More Protections

While Washington’s common-law vesting doctrine is fairly coherent, the passage in 1987 of a vesting statute further clarified the law. The statute provides:

A proposed division of land... shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat... has been submitted to the appropriate county, city, or town official.


227. The reason that good faith is not an element of Washington’s vested rights doctrine, unlike the majority rule, is that it is presumed to exist. Good faith is presumed to exist on the property owner’s part because “[t]he cost of submitting an application and the time limitation on commencing construction after a permit is issued are sufficient commitments to eliminate any need for the courts to inquire into the good faith of the applicants.” Allenbach v. City of Tukwilla, 101 Wash. 2d 193, 199, 676 P.2d 473, 476 (1984). Good faith is presumed to exist on the government’s part because “the citizen has a right to expect the same standard of honesty, justice and fair dealing in his contact with the state or other political entity... which he is legally accorded in his dealing with other individuals.” Finch v. Matthews, 74 Wash. 2d 161, 176, 443 P.2d 833, 842 (1968) (not a vesting case).


In addition to RCW § 58.17.033, Washington passed a vesting damages statute providing a cause of action for the violation of vested rights and other related rights. See WASH. REV. CODE § 64.40.010(6) and .020 (1998), discussed infra notes 282-87.

230. WASH. REV. CODE § 58.17.033(1) (emphasis added).
The vesting statute: "(1) codified the traditional common law vested rights doctrine regarding vesting upon application of building permits, and (2) enlarged the vesting doctrine to also apply to subdivision . . . applications."231 Thus, the vesting statute enlarged the protections of the common-law doctrine.232

\[\text{a. Statutory Vesting Doctrine, In General}\]

On many points, the 1987 vesting statute did not alter the common-law doctrine. For example, under the vesting statute, an application233 must still be "complete" to trigger the vesting doctrine.234 In addition, local governments still have the power to reasonably235 define a "complete" application by ordinance.236 Another unchanged feature


232. Friends of the Law, 123 Wash. 2d at 525 n.3, 869 P.2d at 1060, rev. denied, 119 Wash. 2d 1006, 832 P.2d 488 (1992); Noble Manor Co., 81 Wash. App. at 144, 913 P.2d at 419 (1987 statute changed two things: application must be complete, and land division—not just building permits—is now protected), aff'd, 133 Wash. 2d 269, 943 P.2d 1378 (1997); Noble Manor Co., 133 Wash. 2d at 275, 943 P.2d at 1378 (1987 statute extended vested rights doctrine to plats, overruling Norco Constr., Inc. v. King County, 97 Wash. 2d 680, 649 P.2d 103 (1982)).

233. In addition to plat applications, the vesting statute arguably also covers binding site plans. Binding site plans are essentially the equivalent of a plat and are covered in the Plat Act. See WASH. REV. CODE § 58.17.035 (1998) (describing binding site plan). A binding site plan is a proposed "division of land," id., and therefore should vest under the vesting statute. See WASH. REV. CODE § 58.17.033(1)(1) (1998) ("proposed division of land" vests).

234. WASH. REV. CODE § 58.17.033(1) (1998) (vesting triggered by "fully complete" application). In contrast to the common-law doctrine that an incomplete application can be excused if the local government frustrates the applicant's diligent efforts, one case claims that the 1987 statute takes "a 'zero tolerance' approach to completeness." Friends of the Law, 123 Wash. 2d at 525 n.3, 869 P.2d at 1060 (1994) (citation omitted). This is probably an overstatement for two reasons. First, "vesting procedures which are 'vague and discretionary' cannot be used to deny an applicant vested rights." Id.

Second, under the common-law doctrine, a local government's frustration of a property owner's attempt to submit an application violates due process. See supra note 222. The vesting statute did not amend the due process clause, so the vesting statute—"zero tolerance" policy or not—cannot be interpreted to allow a local government to frustrate vesting with unreasonable "complete" application demands.

235. See supra note 234.

236. WASH. REV. CODE § 58.17.033(2) (1998) ("The requirements for a fully completed application shall be defined by local ordinance."). See also Erickson & Assocs., 123 Wash. 2d at 873, 872 P.2d at 1095 ("municipalities are free to develop vesting schemes best suited to the needs of a particular locality"); Noble Manor Co., 81 Wash. App. at 147, 913 P.2d at 420 (citation omitted). See generally Friends of the Law, 63 Wash. App. 654, 821 P.2d at 541 (providing example of how local government defined "complete" application and how it affected vesting).
of the statutory vesting doctrine is that only those proposed land uses requested by the property owner in the application vest\textsuperscript{237} although the minimal information in a "bare bones" application has been held to trigger vesting.\textsuperscript{238}

The statutory vesting doctrine did, however, add several meaningful features to the Washington rule. Most importantly, statutory vested rights protect the right to "develop" property—not just divide it into lots.\textsuperscript{239} This is very significant, because the right to "develop" property is essentially the right to finish a project as contemplated in a land use application. The supreme court has acknowledged that allowing anything short of the right to "develop" would merely be an "empty right."\textsuperscript{240} The court's holding that a vested right protects the broad right to "develop" is consistent with commentators' observations that vesting protections should extend to "development rights that are critical to the landowner's investment-backed expectations."\textsuperscript{241}

Another important addition of the statutory vesting doctrine is that additional, related permits, such as a planned unit development,\textsuperscript{242} vest along with the underlying application.\textsuperscript{243} Thus, applications "in-

\begin{itemize}
  \item While the ordinance defining "complete" controls, a local government's 20-year practice of not requiring certain information in a plat application is given great deference. \textit{Friends of the Law}, 63 Wash. App. at 656, 821 P.2d at 542 (1991). If a local government has no "complete" application ordinance, then courts look to the local government's plat processing ordinance. \textit{Adams}, 70 Wash. App. at 477, 855 P.2d at 289. A local government's decision that an application is "complete" is reviewed de novo. \textit{Id.}

  Before RCW \$ 58.17.033(2) specified that local governments have the authority to determine what constitutes a "complete" application, case law implied such a power. \textit{Mercer Enterprises, Inc. v. City of Bremerton}, 93 Wash. 2d 624, 628, 611 P.2d 1237, 1240 (1980).

  237. \textit{Noble Manor Co.}, 133 Wash. 2d at 285, 943 P.2d at 1386-87. This requirement is not strictly applied against property owners. See infra note 238.

  238. Westside Business Park v. Pierce County, 100 Wash. App. 599, 5 P.3d 713, rev. denied, 141 Wash. 2d 1023, 10 P.3d 1075 (2000) (property owner submitting a "bare bones" application, without specifically addressing storm water drainage standard, enough to satisfy the requirement to "revel" intended use to local government).

  239. \textit{Noble Manor Co.}, 133 Wash. 2d at 283, 943 P.2d at 1385; \textit{Schneider Homes, Inc.}, 87 Wash. App. at 778-79, 942 P.2d at 1099.

  240. \textit{Noble Manor Co.}, 133 Wash. 2d at 280, 943 P.2d at 1384.

  241. Hanes & Minchew, supra note 2, at 403 (footnote omitted). Even though we agree with this commentator that "investment-backed expectations" form a general conceptual guide to the kinds of rights protected by vesting, we decline to choose the very specific "investment-backed expectations" test—and the horrible mess of takings cases that interpret this phrase—as the test for the parameters of Washington's constitutional vesting doctrine. For an explanation, see infra, note 306.


  243. See \textit{Nadel}, supra note 3, at 802; \textit{Hagman}, supra note 2, at 542-43. See also \textit{DePalma}, supra note 26, at 507; \textit{Hagman}, supra note 42, at 559-60 ("interrelated projects" should vest toge-
extricably linked” to the plat application vest together.\textsuperscript{244} Similarly, a proposal or application that “determines what the configuration of lots will be” vests with the underlying plat application.\textsuperscript{245}

\textit{b. Cases Defining “Land Use Control Ordinances”}

The 1987 statute provides that a plat application vests to the “zoning and other land use control ordinances” in effect at the time of application. Defining what constitutes “zoning” ordinances is easy: they are contained in a local government’s zoning code.\textsuperscript{246} The hard part is determining if a particular standard is a “land use control ordinance.”

Because the vesting statute is codified in the Plat Act,\textsuperscript{247} at first blush it might seem that statutory vesting is narrowly limited to only one kind of application, a plat application. However, that single application encompasses many regulatory areas: open space, drainage, streets, water supply, and many others.\textsuperscript{248} Therefore, statutory vesting encompasses open space, drainage, street, water supply standards, and other regulatory areas covered in a plat application. By specifying a preliminary plat—an application encompassing so many regulatory topics—as the trigger for statutory vesting, the legislature intentionally extended vesting protection to all the many kinds of development standards contained therein.

Reflecting the broad coverage of statutory vesting, a Washington case has held that a “land development proposal”—an extremely

\textsuperscript{244} Schneider Homes, Inc., 87 Wash. App. at 778, 942 P.2d at 1098. \textit{See also} DePalma, \textit{supra} note 26, at 507-08.

\textsuperscript{245} Association of Rural Residents, 141 Wash. 2d at 194, 4 P.3d at 120.

\textsuperscript{246} However, practitioners must be careful of ordinances adopted but not yet codified. A good tip is to have the developer obtain a copy of the zoning ordinances in effect at the time of application and save them for future reference. A suggestion would be to include compliance statements on the preliminary plat or accompanying materials, i.e., storm drainage to comply with a specific ordinance number, or road and sidewalk design to comply with a specific ordinance number.

\textsuperscript{247} WASH. REV. CODE § 58.17 (1998).

\textsuperscript{248} WASH. REV. CODE § 58.17.110 (1998).
broad category of applications—triggers vesting. Examples of a "land development proposal" triggering statutory vesting include planned unit developments, storm-water drainage standards, septic regulations, and anything that "determines what the configuration of the lots will be." Under what we call the "control rationale," if a standard controls the attributes of the project, that standard statutorily vests, because it is a "land use control ordinance." As an example of the control rationale, Washington cases hold that any standard that exerts a "restraining or directing influence" over land use or is a "mandatory prerequisite" to plat approval is a "land use control ordinance" that statutorily vests.

In addition to the control rationale, case law has added another large category of permits to the coverage of statutory vesting. As previously mentioned, all permit applications "inextricably linked" to the plat application statutorily vest. Between the dozens of standards covered in the plat application and those "inextricably linked" to it, statutory vesting covers almost every kind of land use standard in the development process.

Further evidence of the broad coverage of statutory vesting comes from cases holding that a property owner vests to the "rules [and] policies," "regulations," "land use laws," and "laws" in

249. Erickson & Assocs. v. McLerran, 123 Wash. 2d 864, 867-68, 872 P.2d 1090, 1092-93 (1994). Another case interpreting "land use control ordinance" extremely broadly, to apply vesting to numerous regulatory standards, is Association of Rural Residents v. Kitsap County, 141 Wash. 2d at 195, 4 P.3d at 120 (anything that "determines what the configuration of the lots will be" vests).

250. Schneider Homes, 87 Wash. App. at 775-76, 942 P.2d at 1097 (defining "Planned Unit Development"). Planned Unit Developments are a progressive planning tool, the use of which the law should encourage. See DePalma, supra note 26, at 492 n.27, 494; Hanes & Minchew, supra note 2, at 390-392.


253. Association of Rural Residents, 141 Wash. 2d at 194, 4 P.3d at 120. While not invoking the "inextricably linked" language, another case holds that a standard that is not required to be addressed in the plat application statutorily vests. See Westside Business Park v. Pierce County, No. 24259-1-II, 2000 WL 238493 (Wash. Ct. App. Mar. 3, 2000).


256. Schneider Homes, 87 Wash. App. at 778, 942 P.2d at 1098. Also, applications that "determine what the configuration of the lots will be" statutorily vest. Association of Rural Residents, 141 Wash. 2d at 194, 4 P.3d at 120.


effect on the date of application. These very broad categories encompass almost every land use standard imaginable. The only regulatory scheme that has been held not to be a "land use control ordinance" is an impact fee ordinance. The court held that impact fees did not vest because they were analogous to taxes rather than a standard that controlled the attributes of the project. While the court held that impact fees do not statutorily vest, the question of whether impact fees vest under the separate constitutional doctrine was not raised and remains an open question.

C. Guidelines for Interpreting the Vesting Statute

For those kinds of permits that have not yet been litigated, Washington law provides several guidelines for defining the term "land use control ordinances." First, every statutory phrase should be interpreted in light of the statute's purpose. The purpose of the vested rights doctrine is to ensure certainty and fairness. Therefore, every standard that gives a property owner certainty about the economic viability of the project he or she is applying for should be considered a "land use control ordinance" that vests upon filing the application. The legislature's declaration that it is "unfair to penalize applicants that have submitted permit applications that meet current requirements" should provide guidance regarding which applications vest upon filing. Additionally, Washington's legislature and courts have intentionally and consistently balanced the vested rights doctrine in favor of the individual and against the government; accordingly, interpretations of the vesting statute should tilt toward the property owner.

Several interpretive guides provide valuable assistance when analyzing the vesting statute. One is the rule of statutory construction that a law should not be construed to have a retroactive effect.

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260. Noble Manor Co., 133 Wash. 2d at 278, 943 P.2d at 1383.
262. Id. at 229, 989 P.2d at 572.
263. See infra notes 288-308.
267. See supra notes 166-67.
268. Hardy v. Superior Court of King County, 155 Wash. 244, 248-49, 284 P. 93, 95 (1930).
Interpreting the vesting statute broadly in favor of vested rights prevents retroactivity. Legislative history is another aid to interpretation. The legislative history of the vesting statute shows that it was meant to provide vesting to the broad category of “standards” in place at the time of application. The common-law doctrine, which also provided broad protections, should assist in the interpretation of the statutory doctrine in light of the similar rationales.

Of course, one of the best interpretive guides to the vesting statute is to remember that everything in a plat application, and those things “inextricably linked” to it, vests. Additionally, under the control rationale, if a particular standard controls the attributes of a project, it statutorily vests. These guidelines for future interpretations are well illustrated by applying them to currently undecided vesting issues. For example, site plans should vest. A site plan is a depiction of a proposed project, usually a commercial use, that in many ways defines the intended use. All the standards that a property owner must meet for a site plan (setbacks, density, etc.) “control” the use of the property, making the site plan standards the quintessential “land use control ordinance.”

271. Id.
273. See supra note 255.
274. See supra notes 254-55.
275. The term “site plan” used herein is not a “binding site plan” as described in RCW § 58.17.035. A “site plan” may or may not involve the division of land. See infra note 276 (citing treatises describing a "site plan"). For reasons described infra, a site plan—whether it involves the division of land or not—should vest, most notably because a site plan “controls” the project. See supra notes 253-54 and accompanying text (describing the control rationale). On the other hand, a “binding site plan” always involves a “division of land,” thus triggering the vesting statute. See supra note 232 (describing site plans).
276. See G. PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, § 33C.01 (1996). See, e.g., GIG HARBOR, WASH. MUNICIPAL CODE § 17.48 (site plans must include SEPA checklist, vicinity map topographic map, landscape plan, general utility plan, building elevations, and architectural style). Site plans are an innovative planning tool that is replacing plats and building permits, in some ways, as the primary land use application. See 2 NORMAN WILLIAMS, JR., AMERICAN PLANNING LAW § 48.01 (1987).
277. In addition to the control rationale, a site plan satisfies another vesting test because a site plan “determines the configuration” of the lot or lots involved. Association of Rural Residents v. Kitsap County, 141 Wash. 2d 185, 195, 4 P.3d 115, 120 (2000) (a proposal that “determines the configuration” of the lots vests with the preliminary plat accompanying it). An ultrastrict reading of Association of Rural Residents would require the site plan to accompany a preliminary plat to qualify for “determines-the-configuration” vesting, but a site plan often stands alone, without a plat application. Because a site plan also “determines the configuration” of the project, it too should vest under Association of Rural Residents.
Another illustration is exempt wells. These small water wells are exempt from water permits that are nearly impossible to obtain. Therefore, an exempt well is the only practical way to supply water to a rural home, which is located away from municipal water pipes. Several local governments are considering adopting ordinances to virtually eliminate exempt wells. Plat applications require the property owner to disclose the method of water supply to proposed lots. An application of the control rationale to a new, stringent antiexempt well ordinance would yield a decision in favor of applying the previous standard. Exempt wells certainly “control” the development; without them, no water can be supplied to the project as a practical matter. In addition to the control rationale, exempt wells standards should vest because water supply is part of a plat application.

D. Statutory Damages for Violations of Vested Rights

Washington not only has a vested rights statute, it boasts a unique vested rights damages statute. The vested rights damages statute provides that a governmental entity is liable for damages and attorney’s fees if it “places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application is filed.”

280. The local governments are considering restrictive ordinances in response to 1997 Op. Wash. Att’y Gen. No. 6, which interprets the exempt well statute (RCW § 90.44.050) to permit only one well per subdivision.
281. A plat application must describe how the lots will receive water. Wash. Rev. Code § 58.17.110(1)(a) (1998). See also Wash. Rev. Code § 19.27.097 (requiring building permit applicant to “provide evidence of an adequate water supply for the intended use of the building.”). Therefore, whether under the plat-vesting statute (RCW § 58.17.033(1)) or the building-permit vesting statute (RCW § 19.27.095(1)), an applicant should vest the exempt well ordinance in effect at the time he or she applies. Friends of the Law v. King County, 123 Wash. 2d 518, 523, 869 P.2d 1056, 1060 (1994).
283. The damages recoverable are:
[R]easonable expenses and losses, other than speculative losses or profits, incurred between the time a cause of action arises and the time the holder of an interest in real property is granted relief as proved by RCW 64.40.020. Damages must be caused by an act [the denial of vested rights], necessarily incurred, and actually suffered, realized, or expended, but are not based upon diminution in value of or damage to real property, or litigation expenses. Wash. Rev. Code § 64.40.010(4) (1998) (defining “damages”).
285. Wash. Rev. Code § 64.40.010(6) (1998). Note that the vesting damages statute, RCW § 64.40, covers all permit applications, not just plat applications. The all-permits coverage of RCW § 64.40 overlaps the plethora of varieties of permit applications are already covered under the plat-vesting statute, RCW § 58.17.033. See supra notes 248-60 (discussing coverage of
damages are available for the temporary denial of vested rights—the period beginning with the denial of vested rights and ending with a final judicial decision holding that a property owner’s vested rights have been violated.\(^{286}\) Therefore, because of the vesting damages statute, each violation of vested rights has two components (and two causes of action): one for a declaratory judgment and injunctive relief forcing the local government to apply the preapplication standard, and a second for damages and attorney’s fees to compensate the property owner for the costs of going to court to force the local government to honor the preapplication standard.\(^{287}\)

\[E. \text{Constitutional Vested Rights Doctrine}\]

This Article also describes a previously overlooked constitutional vested rights doctrine based on due process. Washington’s constitutional vested rights doctrine provides protections supplemental to our state’s statutory and common-law protections.\(^{288}\) While no Washington case directly holds that there is a separate constitutional doctrine, Washington courts, at least indirectly, have been deciding vesting cases on constitutional grounds, both before and after the enactment of plat-vesting statutes. The vesting damages statute also applies to the state, not just local governments. See WASH. REV. CODE § 64.40.010(1) (1998) (defining “agency” to include the state).

The vesting statute, common-law, and constitutional vesting doctrines presumably also apply to state agencies. However, the state never approves plats, so vesting issues rarely arise with state agencies in the traditional land development context. See generally WASH. REV. CODE § 58.17 (1998) (plat decisions made by local governments). The state, of course, issues a variety of incidental, but crucial, permits such as hydraulics permits. See WASH. REV. CODE § 75.20.100 (1998) (requiring state hydraulic permit for construction affecting waters and waterways). The common-law and, certainly, the constitutional vesting doctrines apply to the state and its agencies; every rationale for protecting property owners from local governments applies equally to the state.

The federal government issues a growing number of land use permits. It appears, perhaps in dicta, that state-law vested rights can protect a property owner against a change in federal standards. See Westside Business Park v. Pierce County, 100 Wash. App. 599, 5 P.3d 713 (2000), rev. denied, 141 Wash. 2d 1023, 10 P.3d 1075 (2000) (state-law vesting could protect landowner from local government’s change in ordinance to comply with its federal Clean Water Act permit conditions because the Clean Water Act does not preempt local platting ordinance).

\(^{286}\) See WASH. REV. CODE § 64.40.010(4) (1998). See also Hayes v. City of Seattle, 131 Wash. 2d 706, 934 P.2d 1179 (1997) (applying RCW § 64.40.010(4)).

\(^{287}\) Given that local governments must compensate property owners for violating vested rights, one wonders why such violations are so common. One reason is that few property owners have the resources to litigate, so local governments often get away with it. The second reason is that sometimes—legal liability or not—elected local officials will bow to political pressures to stop unpopular projects.

\(^{288}\) See Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 638, 733 P.2d 182, 192 (1987) (due process considerations of fundamental fairness allow the court to look beyond statutory requirements).
of the 1987 vesting statute. Whether it is labeled "constitutional" or not, a constitutional vested rights doctrine exists.

It should not be surprising that vested rights are constitutionally protected in Washington. Washington's constitution provides broad due process protections, and vested rights are the quintessential expression of due process: the government cannot change the law midstream and apply the new law retroactively. Remember that under the vested rights doctrine, "the property owner is asking no more than official permission to use his or her land in accordance with the . . . laws." This is an apt description of due process. The "process" of "law" that is "due" under the Washington or United States Constitution is to have the legal standards in effect at a specific point applied to a person—without the fear of retroactive changes causing severe and unnecessary hardships to an innocent citizen.

Evidence of the constitutional doctrine comes from two primary sources: (1) Washington courts' constitutional analysis of vesting issues in case law, and (2) the existence of constitutional remedies for violations of vested rights.

In the 1994 Erickson case, the Washington Supreme Court held:

"Our vesting doctrine is rooted in constitutional principles of fundamental fairness. The doctrine reflects a recognition that development rights represent a valuable and protectable property right. By promoting a date certain vesting point, our doctrine insures that new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law. Our vested rights cases thus

289. Prior to the vesting statute, vesting cases were decided on constitutional grounds. See West Main Assocs. v. Bellevue, 106 Wash. 2d 47, 51, 720 P.2d 782, 785 (1986) (due process requires the government to treat citizens in a fundamentally fair manner). Since the adoption of the vesting statute, the courts have still decided cases based on constitutional grounds when the statute was not triggered (no building permit or plat application involved). See Real Progress, Inc. v. City of Seattle, 91 Wash. App. 833, 842, 963 P.2d 890, 895 (1998). "The vested rights doctrine, on the other hand, implicates constitutional protections and prevents a retroactive application even when the legislative intent is clear." Matson v. Clark County Board of Commissioners, 79 Wash. App. 641, 648, 904 P.2d 317, 321 (1995) (interim zoning ordinance analyzed on constitutional, not statutory, grounds to determine vesting).

290. Both the federal and state constitutions contain due process protections. See U.S. CONST. amend. V; WASH. CONST. art. 1, § 3. Washington courts have never specified which constitution forms the basis for the constitutional vested rights doctrine.


establish the constitutional minimum: a ‘date certain’ standard that satisfies due process requirements.293

Numerous other cases confirm Erickson’s constitutional analysis of vested rights,294 leaving no doubt that vested rights are constitutional rights. Still more cases presume the constitutional nature of the vesting doctrine by characterizing a local government’s delay of the application process to thwart vesting as a due process violation.295 The constitutional vesting doctrine has been applied before296 and after297 1987, leading to the inescapable conclusion that the 1987 vesting statute merely supplemented the constitutional doctrine.

An even stronger reason to conclude that a constitutional doctrine exists is the fact that a constitutional remedy exists for the violation of vested rights. Following Erickson’s holding that Washington’s vested rights doctrine “reflects a recognition that development rights represent a valuable and protectable property right,”298 several other cases held that a constitutional remedy exists for the denial of vested rights.299 The denial of a property owner’s vested rights is an uncon-
constitutional denial of due process, entitled him or her to obtain monetary damages. Of course, a constitutional remedy would not be necessary to cure violations of mere common-law or statutory rights, so one is forced to conclude a constitutional doctrine protects vested rights—and Washington courts have done so.

The application of constitutional principles to the vesting doctrine makes sense: if a person has a due-process property right to build under the laws she vested to, then protecting these vested rights is a constitutional matter. Thus, the constitutional vested rights doctrine is merely the constitutional recognition of vested rights and the subsequent protection of those rights under the due process clause.

Given that a constitutional vested rights doctrine exists, one must identify its parameters. The constitutional doctrine provides a "constitutional minimum" of vesting protections. Because the constitutional vesting doctrine exists to protect due process-related property rights to develop one's property, one commentator argues that the doctrine should at least protect a property owner's investment-backed expectations. We disagree with an "investment-backed expectations" analysis because it is unnecessarily complicated.

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300. *West Main Assocs.*, 106 Wash. 2d at 50, 720 P.2d at 1094. See also Delaney & Vaias, *supra* note 89, at 31; Hartman, *supra* note 9, at 303; Ackerman, *supra* note 58, at 1222 (vested rights determine amount of constitutional damages because they define the level of development that would have been allowed); Nadel, *supra* note 3, at 798. See also *supra* note 163.

301. Delay can violate due process. See *Noric Constr., Inc. v. King County*, 97 Wash. 2d 680, 685, 649 P.2d 103, 106 (1982).


The nonconstitutional remedy of mandamus is also available. See *Craven v. City of Tacoma*, 63 Wash. 2d 23, 28, 385 P.2d 373, 375-76 (1963) (vested building permit "shall issue as a matter of right"). These constitutional remedies are in addition to Washington's statutory damages cause of action for the violation of vested rights. See WASH. REV. CODE § 64.40 (1998), discussed *supra* notes 268-307 and accompanying text. The vesting damages statute specifically provides that its remedies "are in addition to any other remedies provided by law." WASH. REV. CODE §64.40.040.

303. *Erickson & Assocs.*, 123 Wash. 2d at 870, 872 P.2d at 1094.

304. *Valley View*, 107 Wash. 2d at 636, 733 P.2d at 191.

305. See generally Delaney & Vaias, *supra* note 89.

306. We believe it would be problematic to look at "investment-backed expectations" to define the scope of the constitutional vested rights doctrine for two reasons. First, "investment-backed expectations" is a test for determining whether a taking has occurred. "The criteria to establish a taking are 'quite different' from that required to establish a deprivation of property for want of due process . . ." Mission Springs, Inc., v. City of Spokane, 134 Wash. 2d 947, 964, 954 P.2d 250, 258 (1997) (citation omitted). Employing a taking standard to determine whether a
Instead, we offer our own simple two-step definition of the parameters of the constitutional doctrine by utilizing the "trigger" and "vest-to-what" questions described earlier in the Article.\textsuperscript{307} Accordingly, we conclude that Washington's constitutional vested rights doctrine provides that (1) the date a land use application is submitted triggers vesting; and (2) due process requires that all the laws and standards relating to the application in effect on that date must be applied to that project, notwithstanding any postapplication changes.

The remedy for a violation of the constitutional doctrine, not surprisingly, is the same remedy for the violation of other due process rights: damages, attorneys fees, and injunctive relief.\textsuperscript{308} In effect, the parameters of the constitutional vested rights doctrine covers, at a minimum, the current (very broad) scope of Washington's common-law and statutory vested rights. But the parameters of the constitutional doctrine—reflecting the legislature's and courts' unmistakable decision to favor property owners—must be broader that the common-law or statutory doctrines. The exact parameters will work themselves out in future cases. The important point, however, is the acknowledgment that a separate, more protective constitutional vested rights doctrine exists.

\textbf{F. Suggested Legislation to Improve Washington's Vested Rights Doctrine}

Returning to the statutory vested rights doctrine, very little legislation is needed to improve Washington's vesting statute, because almost every kind of permit necessary to property owners is already protected.\textsuperscript{309} Furthermore, the common-law and constitutional vested rights doctrines supplement vesting statutes, so little is left unprotected.\textsuperscript{310} The Washington Legislature thought of everything—under our state's unique vesting damages statute, property owners can be

due process violation of vested rights has occurred would unnecessarily complicate the issue. Besides, takings law is a jurisprudential mess, and we would rather not import this clutter to the vested rights doctrine. The second reason is that an "investment-backed expectations" analysis sounds very similar to the majority rule's fuzzy equity analysis of a property owner's expenditures in reliance on the current law.

\textsuperscript{307} See supra note 190.


\textsuperscript{309} See supra notes 249-60.

\textsuperscript{310} See supra notes 231-32 (statutory doctrine supplements common-law doctrine) and note 287 (constitutional doctrine supplements statutory and common-law doctrines).
compensated for violations of their vested rights. 311 The only possible substantive legislative improvement would be the codification of case law holding that permits "inextricably linked"312 to a plat application also vest. 313 The Texas vesting statute provides this protection by defining vesting protections to include a "series of permits." 314 Although legislation is probably not absolutely needed because case law already protects accompanying permits, the certainty of statutory protection for a "series of permits" could only improve the development process.

V. CONCLUSION

Washington should be proud. Our state's vested rights doctrine is the most protective in the nation. The Washington rule does not look to outdated building permits or fuzzy equity principles to establish vesting dates; we have a "date certain" vesting doctrine that ensures vesting upon application, not approval. Washington's vesting statute also covers almost every kind of standard confronting a property owner, because these standards are contained in, or "inextricably linked" to, a plat application and any standard that controls the development. Washington's common-law, statutory, and constitutional vesting doctrines are all separate and complimentary. A statutory cause of action for damages supplements the constitutional remedies available to property owners whose vested rights have been violated.

With regard to permit situations not yet litigated in Washington, we provide a two-part analytical framework—"trigger" and "vest-to-what"—to assist practitioners and courts in the interpretation of the Washington vested rights doctrine in future situations.

We have identified a constitutional vested rights doctrine in Washington and suggest a two-step analysis to define its general parameters: a vested right is triggered on the date of application, and due process protections require the laws and standards relating to the project on the vesting date be applied to the application. In general, we suggest that the guiding principles for future interpretation of the doctrine should be certainty and fairness, with all doubts resolved in favor of the property owner. Finally, we wholeheartedly urge other states to adopt, by case law or statute, the Washington rule.

311. See supra notes 282-87 and accompanying text (discussing vesting damages statute).
312. See supra notes 250, 256, 273.
313. Id.
314. See supra note 145.