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2 determining that the Tumwater Land Partners (Partners) did not establish vested
3 rights to City zoning requirements in effect at the time Partners filed a complete
4 application for a grading permit to develop property located at the intersection of
5 93rd and Kimmie road in the City. It is from this formal determination Partners
6 duly and timely appealed.
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8 2. Partners proposes the development of the 83-acre site located at
9 the intersection of 93rd and Kimmie Road with a distribution warehouse facility
10 known as "Tumwater Corporate Park" (Park). The Park would consist of two
11 buildings containing approximately 500,000 square feet each, two buildings of
12 approximately 300,000 square feet each, and a building of approximately 45,000
13 square feet. Loading areas abutting each of the warehouse buildings would be
14 provided along with off-street parking, stormwater detention facilities, and tree
15 retention tracts and landscaped areas.
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18 3. In April of 2006, Partners (or its predecessor development entity)
19 approached the City's Development Services (DS) staff to discuss development
20 of its site with a distribution warehouse facility. In October of 2006, a formal pre-
21 application meeting was held between staff and Partners for the purpose of
22 discussing the City's development process; the City application and zoning
23 requirements and development regulations; and studies, plans, and documents
24 that would likely be required to be submitted as a part of the application process.
25 In November 2006, DS staff mailed a site plan review letter to Partners setting

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2 forth the specific requirements for submittal of applications for permit approval.

3 Exhibit R-3.

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5 4. On December 6, 2006, Partners filed with the City a permit
6 application for grading of its site for the purpose of constructing building pads and
7 to establish the grade for loading areas, parking, and site drainage, as well as for
8 associated infrastructure. Accompanying the grading permit application, was an
9 environmental checklist prepared pursuant to *RCW 43.21C, State Environmental*
10 *Policy Act (SEPA)* and numerous supporting studies and documents, including
11 architectural master plan drawing; preliminary landscape plan,
12 lighting/photometric study; level one traffic impact analysis (TIA); wetland
13 reconnaissance study; report on potable water wells located within 200 feet of
14 the project site; a geo-technical engineering study; a Phase One environmental
15 assessment; a tree retention plan; a preliminary grading, drainage, utilities plan;
16 a demolition plan for existing structures on the site; a temporary erosion and
17 sedimentation plan; an erosion control report; and preliminary stormwater site
18 plan report.
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21 5. The cost to Partners for preparing the grading permit application,
22 *SEPA* checklist, and accompanying plans, studies, and other documents
23 approached \$300,000.
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25 6. Due to the project site being situated in the Salmon Creek Drainage
Basin, an area of the City with a high ground water table, and the 1,000-foot

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2 length of the two larger warehouse buildings, development of the grading plan
3 was unusually difficult and required completion of a number of the studies
4 accompanying the grading permit application, including groundwater monitoring
5 data and information concerning surface water infiltration rates. In part due to
6 the limited site tolerances and the type and size of structures proposed, the
7 grading plan presented to the City by Partners would only permit the specific
8 distribution warehouse layout proposed by Partners. Any materially different
9 development proposal would require preparation of an almost entirely new
10 grading plan.
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13 7. The City acknowledges that, pursuant to *RCW 36.70B.070(4)(a)*,
14 Partners' grading permit application was deemed complete 28 days after the
15 filing of the application since the City did not issue a Letter of "Incompleteness"
16 within the statutory 28 day limit for determining whether the land use permit
17 application is complete.
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19 8. While Partners' grading permit was complete in terms of the types
20 of required documents to be filed as a part of the permit application as required
21 by *Tumwater Municipal Code (TMC) 14.02.080* and *16.04*, both parties agree
22 that additional information in several areas was required for either the permit
23 process to proceed or a *SEPA* determination to be made. As example, Partners
24 submitted with its grading permit application a level one TIA even though earlier it
25 had been advised that a level two TIA was necessary and the noise impact
analysis, which

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3 was submitted by Partners to the City approximately a month after the grading
4 permit application was filed, indicated additional information data was required
5 regarding project noise impacts.
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7 9. Also, there were several major issues which required resolution
8 prior to completion of the review of Partners' grading permit application. One
9 was that Partners in its application was proposing far fewer on-site parking
10 spaces than required by the City's parking code. The other involved tree
11 retention. Partners' development site was previously used as a tree farm and, as
12 a result, a large number of trees were located on the property. Compliance with
13 the City's Tree Protection Ordinance would have required Partners to retain or
14 replace a very large number of trees – more than Partners was proposing in its
15 grading permit application.
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18 10. Prior to and following submission by Partners of its grading permit
19 application for its proposed distribution warehouse facility, substantial debate
20 was occurring within the City concerning the development of large distribution
21 warehouses. Apparently, the City Council adopted a short term emergency
22 moratorium on the development of large distribution warehouses in the City in
23 response to a distribution warehouse development proposed by ProLogis. That
24 moratorium was not extended by the City Council and it had expired prior to
25 Partners filing its grading permit application. However, the City was proceeding
with the development of draft regulations concerning large distribution

1 warehouses. Many of the draft regulations being considered in the legislative
2 process would have had an adverse affect on Partners' proposed distribution
3 warehouse development such as limiting of building sizes well below that which
4 was being presented by Partners in its grading permit application. One Code
5 amendment being considered by the City's Planning Commission and City
6 Council which would benefit Partners was a change in the City's tree protection
7 code that would reduce the number of trees to be retained or replaced in
8 instances where a development site was previously used as a tree farm.

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11 11. On March 16, 2008, the City Council enacted Ordinance No.
12 02006-037. Partners' distribution warehouse development, as depicted in the
13 grading permit application submitted to the City in December 2006, does not
14 satisfy the requirements of the City's new ordinance, particularly in regard to
15 limitations placed on the size of distribution warehouse buildings.

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17 12. Partners, prior to the submission of and during the pendency of its
18 grading permit application, was substantially involved in the City's legislative
19 process concerning the development and consideration of regulations for
20 distribution warehouse facilities. Partners recognized that enactment of some of
21 the legislative proposals could adversely impact its interest regarding the
22 development of a large distribution warehouse facility on its property at 93rd and
23 Kimmie Road. From City permit staff's perspective, it appeared that Partners
24 had become fully engaged in the City's legislative process and disengaged
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1 in the permit process. The staff view was buttressed by the fact that Partners
2 and its consultants had limited contacts with City staff following submission of
3 grading permit application and accompanying studies, and a level two TIA was
4 not filed nor was the additional noise information identified by Partners' noise
5 consultant in its initial submission. The Hearing Examiner on this record does
6 not find that City permit staff engaged in a deliberate effort to frustrate Partners'
7 efforts to gain approval of its grading permit application or was responding to
8 higher level instructions to delay processing of the application. There would
9 seem to be little benefit to such a delay, if the City was attempting to prevent
10 Partners' development from proceeding, since the City consistently maintained
11 its position that only a complete building permit application would vest Partners'
12 right to have its project considered under existing regulations and not the filing of
13 a grading permit application. At most, the Hearing Examiner finds that
14 communications between City permit staff and Partners could have been better
15 on both sides so that the grading permit process would have appeared less like
16 "two ships passing in the night."
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20 14. The weight of the evidence, including testimony by Partners' own
21 witnesses, establishes that City staff repeatedly communicated to Partners its
22 view that only the filing of a complete building permit application pursuant to *TMC*
23 15.44 would allow Partners to vest its development rights. Moreover, Partners .
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1 acknowledges that without known tenants, Partners was unable to proceed with
2 preparation of building permit plans for its project and that, at the time of its
3 grading permit submission, it did not have any tenants secured for its proposed
4 distribution warehouse development.
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6 15. Any conclusion hereinafter stated which might be deemed to be a
7 finding herein is adopted as such.

8 From these Findings of Fact come the following:

9 **CONCLUSIONS OF LAW**

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11 1. The Hearing Examiner has jurisdiction in regard to appeals of
12 official determinations or interpretations made by the DS Director in applying or
13 enforcing the City's land use regulations. *TMC 14.08.010C and 18.62.010.*

14 2. Partners, the appellant in this proceeding, bears the burden of
15 establishing that the determination or interpretation made by the Director was
16 erroneous.
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18 3. The issues presented in this proceeding are:

19 a. Whether the Director's determination that Partners'
20 filing of a complete application for a grading permit did not vest
21 any right for Partners' distribution warehouse proposal described
22 in Finding of Fact 2, to be processed under applicable City
regulations in effect at the time of the filing of the permit
application; and

23 b. Whether the City frustrated timely processing of
24 Partners' grading permit application and, thus, providing the basis
25 for finding that Partners' rights to develop were vested at the time
of submission of the grading permit application.

1 4. Washington's vesting doctrine is rooted in constitutional principles
2 of fundamental fairness and recognize that development rights constitute a
3 valuable and protected property right. *Erickson and Associates v. McLerran*,
4 1.23 Wn.2d 864, 870, 872 P.2d, 1090 (1994). The purpose of the doctrine as
5 pronounced by this State's courts is to establish a "date certain" or "bright line"
6 rule as to when a property owner's development rights vest in order to satisfy
7 minimum due process requirements. *Erickson and Associates* at 870, *citing Hull*
8 *v. Hunt* 53 Wn.2d 125, 130, 331 P.2d 856 (1958). By establishing a date certain
9 for vesting, a greater emphasis on certainty in predictability in land use
10 development is created.
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13 5. The establishment of Washington's vesting doctrine dates back to
14 at least *State ex rel. Ogden v. Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954) and
15 *Hull v. Hunt*, *supra*. In each case, the court determined that development rights
16 vested at the time a complete building permit application is filed. A long line of
17 subsequent cases have adhered to the doctrine announced in the *Ogden* and
18 *Hull* decisions, e.g., *West Main Assocs. V. Bellevue*, 106 Wn.2d 47, 720 P.2d
19 782 (1986); *Valley View Indus. Park v. Redmond*, 107 Wn.2d 621, 733 P.2d 132
20 (1987). In a number of cases the vested rights doctrine was extended to other
21 permits besides building permits. See e.g. *Talbot v. Gray* 11 Wn.App 807, 525
22 P.2d 801 (1974); *Juanita Bay Vly Comm'ty v. Kirkland*, 9 Wn.App 59, 510 P.2d
23 1140
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1 (1973) (Grading Permit); *Ford v. Bellingham—Whatcom Cy Dist. Bd of*
2 *Health*, 16 Wn.App 709, 558 P.2d 821 (1977) (Septic Tank Permit).

3 However, the State Supreme Court in *Norco Constr., Inc. v. King County*,
4 97 Wn.2d 680, 649 P.2d 103 (1982) declined to extend the vested rights
5 doctrine to preliminary plats and the Court of Appeals Division II declined
6 to extend the vested rights doctrine to site plan approvals in *Abbey Road*
7 *Group LLC v. Bonney Lake*, 141 Wn.App 184, ___ P3d ___ (2008)
8 (petition for review granted, 163 Wn.2d 1045).

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11 6. The State legislature in 1987 codified the constitutionally and
12 common law based vested rights doctrine as set forth in the various prior
13 Supreme and Appellate court decisions (See Conclusion of Law 5 above) by
14 enacting *RCW 19.27.095* and *RCW 58.17.033*. *RCW 19.27.095* provides as
15 follows:

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17 A valid and fully complete building permit application
18 for a structure, that is permitted under the zoning or
19 other land use control ordinances in effect on the
20 date of the application, shall be considered under
21 the building permit ordinance in effect at the time of
22 application, and the zoning or other land use control
23 ordinances in effect on the date of application. . .

24 *RCW 58.17.033* provides as follows:

25 A proposed subdivision of land, as defined in *RCW*
58.17.020, shall be considered under the subdivision
or short plat subdivision ordinance, and zoning or
other land use control ordinances, in effect on the

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2 land at the time a fully completed application for
3 preliminary plat approval of the subdivision, or short plat
4 approval of the short subdivision, has been submitted to
5 the appropriate county, city, or town official. . .

6 7. The City has enacted *TMC* Chapter 15.44 which is entitled "Vesting
7 of Development Rights." The express intent of *TMC* 15.44 is ". . . to comply with
8 *RCW* 19.27.095 by defining when a valid and complete building permit
9 application for a structure exists for the purpose of establishing the point of
10 vesting of development rights." *TMC* 15.44.020. Moreover, the City's codified
11 vested rights rule expressly provides that the filing of a "complete building permit
12 application" vests not only provisions of the City's building permit code but other
13 zoning and land use environmental control ordinances in effect at the time of the
14 application. *TMC* 15.44.040. Of note, is that the City's vesting code, in defining
15 a "valid and fully complete building permit application" along with other things,
16 requires the following:
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18 H. Accompanying the building permit application, a
19 completed application and all information required to be
20 filed for:

- 21 1. Preliminary Site Plan Review Application;
- 22 2. Zoning Conditional Use Permit;
- 23 3. Zoning Variance;
- 24 4. Zoning Planned Unit Development;
- 25 5. Zoning Certificate of Appropriateness;
6. Shoreline Permit, Conditional Use Permit
or Variance;
7. Clearing and Grading Permit;

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- 8. Land Clearing Permit;
- 9. Wetland Permit;
- 10. Any other land use or environmental permit in effect on the date of application. (Emphasis supplied).

TMC 15.44.030.H. Thus, under Tumwater’s vesting code, a grading permit while permit application is but one piece of a “valid and fully complete building permit application.”

8. In the case of *Erickson and Associates*, the Supreme Court addressed the same question that is here before the Hearing Examiner and that is can a local government through the adoption of a local vesting rule limit vesting to the filing of a valid and complete building permit application. The Court answered that question in the affirmative. The Court stated:

Erickson next argues the vested rights doctrine is not limited to building permit applications, but instead applies to other development permits. Erickson contends the Court of Appeals’ decision in this case (holding that Erickson’s right to a master use permit did not vest for Seattle’s critical areas ordinance was enacted) conflicts with prior decisions applying the vested rights doctrine in other contexts. (Citation omitted).

Erickson at 871-72.

In response to this argument the Court held:

We agree with Erickson that our prior cases apply to vested rights doctrine in other contexts besides building permits. However, none of these cases prevent a municipality from developing a vesting scheme like the one in place in Seattle. Our

1 vesting rights doctrine is not a blanket rule requiring cities
2 and towns to process all permit applications according to
3 the rules in place at the outset of the permit review.
4 Instead, the doctrine places limits on municipal
5 discretions and permits landowners or developers “to
6 plan their conduct with reasonable certainty of the legal
7 consequences.” *West Main Assocs.* 106 Wn.2d at 51.
8 Within the parameters of the doctrine established by
9 statutory and case law, municipalities are free to develop
10 vesting schemes best suited to the needs of the
11 particular locality. *Erickson* at 872-73.

12 Here, the City has, within the parameters of applicable statutory case law vesting
13 doctrine, enacted a local vesting rule, like Seattle’s, that establishes that the point
14 at which a land development proposal vests is at the time a complete building
15 permit application is filed. Further, the City communicated to Partners its vesting
16 requirements numerous times virtually from the outset of project review.

17 9. Partners argues that its grading permit application, along with
18 accompanying plans, studies and environmental analysis was very detailed, was
19 specifically prepared for the precise distribution warehouse development
20 proposed, and was costly to prepare. The same arguments were raised in the
21 *Erickson* case and rejected by the court. The Court in *Erickson* noted that a cost
22 or complexity based argument introduces the case-by-case review rejected by
23 the Washington courts at the inception of the vested rights doctrine in favor of a
24 “bright line rule.” *Erickson* at 874.

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14. Therefore, Partners' appeal should be denied and the Director's decision should be affirmed.

15. Any finding hereinbefore stated which might be deemed a conclusion herein is hereby adopted as such.

From the foregoing Conclusions of Law comes the following:

DECISION

Partners' appeal of the Director's determination in regard to vesting is hereby denied and the Director's decision is hereby affirmed.

DATED this 17th day of September 2008.



RODNEY M. KERSLAKE
HEARING EXAMINER

POST-DECISION PROCEDURES

Reconsideration: A party may request reconsideration by filing a written request with the Department of Development Services within five working days of the Examiner's written decision. The request must state the grounds therefore. The Examiner has ten working days to render a final decision. TMC 2.58.135.

Appeals: The Examiner's decision will become final and conclusive in fourteen days unless appealed to the Tumwater City Council. The appeal must be in writing and contain all grounds on which error is claimed. TMC 2.58.150. TMC 2.58.150 provides in part:

In cases where the examiner's jurisdictional authority is to render a decision (following an open record pre-decision hearing), the decision of the examiner shall be final and conclusive unless within fourteen days following rendering of such decision an appeal there from is filed with the Director of Development Services by the applicant, a department of the city, county, or other agency or a party of record defined in Section 2.58.140. Person not in attendance at the hearing but who submit written information prior to the hearing that becomes a part of the record of the hearing shall also have appeal rights. Such appeal shall be in writing, shall contain all grounds on which error is assigned to the examiner's decision and shall be accompanied by a fee as established by resolution of the city council; provided, that such appeal fee shall not be charged to a department of the city or to other than the first appellant.

The Examiner's decision that is timely appealed comes before the City Council within thirty days after the final day upon which an appeal may be filed. TMC 2.58.160 and 2.58.180 describe the time limits for appeals.



HEARING EXAMINER EXAMINER'S DECISION

PROJECT: Tumwater Land Partners Vesting Appeal

DECISION DATE: 9-17-08

EMAILED TO:

APPELLANT(S): Tumwater Land Partners, attn: Ted Knapp & Mike Wurtsbaugh

CONTACT PERSON: William T. Lynn & Steve Victor

DISTRIBUTED VIA EMAIL TO:

CHRIS CARLSON, PLANNING MANAGER

ROGER GELLENBECK, DIRECTOR

PARTIES OF RECORD (LIST ATTACHED) *Same as appellants*

SHERYLE WYATT, CITY CLERK (ORIGINAL)

KERRI GACKE (HEARING EXAMINER FILE)

STAFF ATTENDING MEETING

CITY COUNCIL

DOUG BAKER

MAYOR

OTHERS: Jeffrey S. Myers

SIGNED Chris Carlson DATE 9-17-08