

# SENATE BILL REPORT

## SB 5507

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As Reported By Senate Committee On:  
Government Operations & Elections, February 19, 2007

**Title:** An act relating to Washington's vesting laws.

**Brief Description:** Changing Washington's vesting laws.

**Sponsors:** Senators Kline, Kohl-Welles, Fairley, Pridemore and Jacobsen.

**Brief History:**

**Committee Activity:** Government Operations & Elections: 2/06/07, 2/19/07 [DP, DNP].

**Brief Summary of Bill**

- Revises vesting-related provisions with respect to various state laws pertaining to land use and property development.
- Repeals all statutes in chapter 36.70B RCW pertaining to "development agreements" and thus eliminates the legal basis for the creation of development agreements as part of the local project review process created under that chapter.

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### SENATE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

**Majority Report:** Do pass.

Signed by Senators Fairley, Chair; Oemig, Vice Chair; Kline and Pridemore.

**Minority Report:** Do not pass.

Signed by Senators Roach, Ranking Minority Member; Benton and Swecker.

**Staff:** Cindy Calderon (786-7784)

**Background:** The "Vested Rights Doctrine" in the State of Washington. In the context of land use law, the concept of "vesting" is used to determine the point in time at which the laws and regulations controlling the division, use, or development of real property become fixed with respect to the development of a specific property, thus preventing such use or development from being subject to subsequent regulatory changes. Over the years, the determination of when a property owner's development rights become vested has been a key issue for the Washington courts, resulting in the courts' development of what is known as the "vested rights doctrine."

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

In the case of *Noble Manor v. Pierce County*, 133 Wn.2d 269 (1997), the Washington Supreme Court summarized the "vested rights doctrine" as it had been developed by the courts' under the common law:

In Washington, "vesting" refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission.

At common law, this state's doctrine of vested rights entitled developers to have a land development proposal processed under the regulations in effect at the time that a complete building permit application was filed.

The Court went on to quote from a legislative report issued in 1987 in order to explain how the common law vesting doctrine operates in the context of a property owner's application for a building permit:

The doctrine provides that a party filing a timely and sufficiently complete building permit application obtains a vested right to have that application processed according to zoning, land use and building ordinances in effect at the time of the application. The doctrine is applicable if the permit application is sufficiently complete, complies with existing zoning ordinances, and building codes, and filed during the period the zoning ordinances under which the developer seeks to develop are in effect. If a developer complies with these requirements, a project cannot be obstructed by enacting new zoning ordinances or building codes.

This common law vesting doctrine has been codified by the Legislature, various forms, in several chapters of the Revised Code of Washington pertaining to land use, property development, and construction permitting.

Vesting of "Subdivisions" and "Short Subdivisions". A property owner must have a proposed division of land reviewed and approved by the county, city or town in which the land is located. Such divisions of land are generally categorized as either "subdivisions" or "short subdivisions." Subdivisions are defined as land divisions resulting in five or more lots, tracts, or parcels. Short subdivisions are defined as land divisions resulting in four or fewer lots, tracts, or parcels. However, a city, town, or Growth Management Act (GMA) planning county may adopt a local ordinance increasing to a maximum of nine the number of lots, tracts, or parcels that may be contained within a short subdivision.

State law distinguishes between subdivisions and short subdivisions with respect to the vesting of development rights. For a period of five years following approval by the local planning authority of the final plat, the development of a subdivision is governed by the pertinent laws and regulations in effect at the time of such approval. In other words, subdivision development rights are vested for a period of five years following approval of the final plat. If the property is not developed within this five year period, the property is divested and the subdivision may be subject to development regulations enacted subsequent to final plat approval. In addition, a local government may make changes to the applicable development regulations prior to the expiration of this five year period in response to a change of conditions that creates a serious threat to public health or safety.

Short subdivisions, on the other hand, are not subject to the five year vesting limitation applicable to subdivisions. Development rights with respect to short subdivisions become fully vested at the time that a complete application for short plat approval is submitted to the local planning authority and, therefore, are not subject to subsequent changes in land use or development regulations.

Washington State Building Code: Building Permits and the Vesting Doctrine. The Washington State Building Code (Code) consists of a series of national model codes and standards that regulate the construction of residential, commercial, and industrial buildings and structures. The general purpose to the Code is to create minimum performance standards and requirements for construction and construction materials, consistent with accepted standards for engineering and safety. Counties and cities are authorized to create local amendments to the Code, provided such amendments are consistent with the Code's objectives and minimum performance standards.

The Code does not contain regulatory provisions pertaining to land use, property division, zoning, or site development. Rather, the Code explicitly states that such regulations are "reserved to local jurisdictions". However, the Code does contain vesting provisions pertaining to applications for building permits. Under these provisions, a land owner's development rights vest at the time a permit is submitted to the local building authority and, thereafter, the land owner is subject to only those permitting, zoning, or land use ordinances in effect at the time of permit submission.

"Local Project Review" by Local Governments (Chapter 36.70B.RCW). In order to ensure that a proposed development project is consistent with a local government's Growth Management Act (GMA) development regulations or the applicable GMA comprehensive plan, local governments planning under the GMA are required to implement a "local project review" (project review) process. The project review process is designed to integrate land use and environmental impact analysis so as to enable the concurrent analysis of the projects consistency with GMA development regulations and the requirements of the State Environmental Policy Act (SEPA). Local governments not planning under the GMA are also required to develop a process for the review of project permit applications that combines the environmental review process, both procedural and substantive, with the procedure for review of project permits.

In GMA planning jurisdictions, the project review must include provisions for:

- establishing an integrated and consolidated project permit process that may be included in the jurisdictions's development regulations;
- establishing a process that provides for the integrated and consolidated review on two or more project permits relating to a proposed development action;
- establishing time periods for local government action on specific project permit applications and providing timely and predictable procedures to determine whether a completed application meets requirements;
- notifying the public and pertinent government departments and agencies of a notice of application;
- notifying permit applicants within 28 days whether the application is complete as determined by specified criteria; and
- providing for a notice of decision on project permit applications.

In using the project review process to determine whether a proposed development project is consistent with GMA development regulations or a GMA comprehensive plan, a local government must consider:

- the type of land use;
- the level of development, such as units per acre or other units of density;
- infrastructure, including public facilities and services needed to serve the development; and
- the characteristics of the development, including development standards.

With the exception of "development agreements", discussed below, the statutes outlining the local project review process do not contain any vesting provisions.

"Development Agreements" and Vesting Provisions (RCW 36.70B. 170 through 36.70B. 210). The statutory scheme for "local project review" contains a series of provisions allowing local governments to enter into "development agreements" with respect to land use projects meeting specified criteria. A local government may enter into a development agreement with a person having ownership or control of real property within its jurisdiction. Such agreement must state the development standards and other provisions that must govern and vest the development and use of the property for the term of the agreement. The agreement must be consistent with the GMA development regulations adopted by the local government. However, the statutes authorizing the creation of development agreements appear to give local governments broad discretion in determining the specific requirements and conditions set forth in an agreement.

Development agreements are subject to specified vesting provisions. Under these provisions, the development agreement, and the development standards it contains, must govern during the term of the agreement, or for all or that part of the build-out period specified in the agreement. Accordingly, a development agreement may not be subject to either new or amended ordinances, regulations, or standards adopted after the effective date of the agreement.

"Determination of Invalidity" by a Growth Management Hearings Board. A growth management hearings board (GMHB) may determine that all or part of a comprehensive plan or development regulation is invalid. In determining such invalidity, a GMHB must:

- make a finding of noncompliance and issue an order of remand;
- issue a final order stating their determination that the part of the plan or development regulation declared invalid would in fact substantially interfere with the goals of the GMA; and
- specify in the final order which portion of the plan or regulation is invalid and state the reasons for this decision.

The effect of a determination of invalidity is "prospective" and does not effect property or development rights vested under state or local law before receipt of the board's order by the city or county. Accordingly, a development permit application by a property owner that is already vested to local development regulations before the issuance of the GMHB's order is not affected by the order.

Certain development permit applications which are not vested prior to the order determining invalidity are nevertheless not subject to invalidation by such order. Subject to specified criteria, the permits and applications subject to this exception include:

- permits for the construction of a single-family home;
- permits for remodeling, tenant improvements, or expansion of an existing structure; and
- permits for a boundary line adjustment or a division of land that does not increase the number of buildable lots existing before the issuance of the GMHB's order.

Procedures for the Siting of Energy Facilities. The Energy Facility Site Evaluation Council (EFSEC) was created in 1970 to provide one-stop licensing for large energy projects. The EFSEC's membership includes mandatory representation from five state agencies and discretionary representation from four additional state agencies. The EFSEC's membership may include representatives from the particular city, county, or port district where potential projects may be located.

The EFSEC's jurisdiction includes the siting of large intrastate natural gas and petroleum pipelines, specified electric power plants, new oil refineries, large expansions of existing facilities, and underground natural gas storage fields. The EFSEC is granted the authority to develop and apply ecological and environmental guidelines regarding the type, design, location, construction, and operational conditions of energy facilities falling within its jurisdiction.

The EFSEC siting process generally involves six steps: (1) a potential site study followed by an application; (2) a State Environmental Policy Act review; (3) a review for consistency with applicable local land use laws and plans; (4) a formal adjudication on all issues related to the project; (5) certain air and water pollution discharge permitting reviews as delegated by the U.S. Environmental Protection Agency; and (6) a recommendation to the Governor who then decides whether to accept, reject, or remand the application. The EFSEC must report its siting recommendations to the governor within twelve months of the EFSEC's receipt of an application for certification, or at such later time as is mutually agreed by the EFSEC and the applicant.

The statutes pertaining to the EFSEC siting process contain no vesting-related provisions.

**Summary of Bill:** Vesting of "Subdivisions" and "Short Subdivisions". The development rights of a property owner to divide his or her land into a subdivision or short subdivision vest at the time the local government issues its preliminary approval of the proposed land division. However, if applicable zoning or development regulations are changed prior to both the final plat approval and the beginning of "substantial construction" in good faith reliance on the preliminary plat approval, then the property owner is divested and the property in question may be subject to the new regulatory requirements. In other words, if applicable development regulations change prior to the beginning of substantial construction and the approval of the final plat, then the preliminary plat may be revised in accordance with the changes in development regulations.

Washington State Building Code: Building Permits and the Vesting Doctrine. Under the permitting statute of the Washington State Building Code, development rights of an applicant for a building permit vest on the day the permit is approved by the local building authority and, therefore, the permit must be subject to the applicable development regulations in effect

on that day. However, if the applicable development regulations are changed prior to the beginning of "substantial construction" in good faith reliance on the building permit, then the permit must be revised or rescinded as necessary to be consistent with the new regulations.

"Local Project Review" by Local Governments (Chapter 36.70B.RCW). The act adds vesting-related provisions to the statutes governing the "local project review" process. Under these provisions, the decision of a local government to approve or deny a project permit application must be based on the development regulations in effect at the time of the decision. Decisions relating to requests for reconsideration or those following appeals must also be based on current development regulations.

In addition, if the applicable development regulations are changed prior to the beginning of "substantial construction" in good faith reliance on the project permit, then the permit must be revised or rescinded as necessary to be consistent with the new regulations.

"Development Agreements" and Vesting Provisions (RCW 36.70B. 170 through 36.70B. 210). All statutes in chapter 36.70B RCW pertaining to development agreements are repealed. Accordingly, there is no longer a legal basis for the creation of development agreements as part of the local project review process created under that chapter.

"Determination of Invalidity" by a Growth Management Hearings Board. The consequences of a determination of invalidity (invalidity order) by a GMHB are revised with respect to vesting-related statutory provisions. Rather than being prospective in effect and preserving vested rights existing prior to the issuance of the invalidity order, under the act an invalidity order is "remedial and retrospective" and does not preserve preexisting vested rights. Specifically, if an order invalidates a comprehensive plan or development regulation, then a project permit approved by a local government under the invalidated plan or regulation may itself be invalidated. In other words, an invalidity order may serve to divest a property owner of rights previously vested under a local government's comprehensive plan or development regulation if such plan or regulation is later found to be invalid by a GMHB.

Procedures for the Siting of Energy Facilities. The act adds a vesting-related provision to the requirements pertaining to the EFSEC's recommendation procedures for the siting of an energy project. Under the act, the EFSEC's siting recommendation must be based on the ecological and environmental siting guidelines in effect on the date the recommendation is made, rather than those in effect on the date of the filing of the siting application.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: A vested right in property is a constitutionally protected right. What this bill does is exercise the state's right to determine when a right vests. This bill does not, in any way, tamper with constitutional protections. Once the right vests, it becomes constitutionally protected. The state can determine when a right vests. There are three timelines for vesting. The majority of states allow vesting with permit

approval and some construction expenditure. A few states vest with permit approval or likely approval. The remainder of states allow vesting when a complete application is filed. This bill will not retroactively deprive anyone of a property right. The bill is prospective only.

Washington has exceptionally liberal vesting laws. Irresponsible builders can take advantage of the loopholes that exist. This bill will allow communities more time to participate in the planning of their communities. Currently, a builder can come in at anytime prior to a law changing, file an application, and vest their rights to build. This allows builders who know the laws or regulations will be changing in the future to secure their rights early, and the local jurisdiction can do nothing to change this. It is unfair that a builder can vest just by filing an application even though they may not be in any position to go forward with actual construction. The blunt instrument of a moratorium on building is not a viable solution.

CON: The vested right doctrine goes back at least 50 years. The Washington Supreme Court has said vesting laws in our state are constitutionally based. Builders do not just file an application. Plans are drawn up, drawings are drafted. A great deal of planning and resources goes into an application process. For example, King County has expended close to \$30 million on planning for a particular project. These expenditures were prior to or directly related to the application process. If rights did not vest until the application was approved and the law changed between the time of submitting an application and approval, King County would be out a substantial sum of money. Where does that money come from? If building rules and regulations are subject to change even after a builder has submitted an application, the cost of building and home buying will increase. The costs of increased risks will simply shift onto the public. The term substantial construction is not defined. An open term such as this will only lead to an increase in litigation. Washington currently has a bright line rule. Why would we adopt a system that will create such uncertainty?

OTHER: The idea to change vesting from the date of application to a later time is a good one. The idea of tying vesting to substantial construction creates a layer of uncertainty.

**Persons Testifying:** PRO: Senator Kline, prime sponsor; Kaleen Cottingham, FutureWise; Julie Hankins, Indian Creek Neighborhood; Peggy Bruton, League of Women Voters of Washington; Susie Kyle, citizen.

CON: Greg Wright, Washington Realtors; Abbie Birmingham, Murray Franklin; Pat Schneider, Chris McCabe, Association of Washington Business; Andrew Cook, Building Industry Association of Washington; Stuart Drebeck, Adroit Contractors, Olympia Master Builders, Building Industry Association of Washington.

OTHER: Esther Larsen, Washington Chapter of American Planning Association.