

**League of Women Voters of Washington**  
**Report**  
**Role of Vesting on the Growth Management Act**

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## Summary

The Washington State Growth Management Act (GMA) identifies thirteen goals to guide city and county jurisdictional bodies to create their own guidance for private property developers. Included among those goals are managing urban growth, reducing sprawl, and creating a timely and fair permitting process. This report seeks to evaluate the impact of the vested rights doctrine on the permitting process and these goals, and the Land Use position of League of Women Voters of Washington State (LWVWA).

Under the GMA and related legal decisions, the developer's right to proceed with a development is secured when the permit application is completed and becomes vested under the regulations in force at that time. In other words, when a developer's permit application is accepted as complete, the rights and responsibilities of the developer freeze in time along with the land use rules in effect at that time, independent of when the development takes place or any subsequent modifications of development requirements. The vested rights doctrine in conjunction with the jurisdictional differences has complicated the permitting process for developers, community residents, and local governments.

Concern that the practice of vesting is undermining some of the GMA goals and comprehensive planning goals of the LWVWA prompted this report. It evaluates the role of vesting by reviewing 1) its practice, 2) its relationship to the GMA, 3) the League's position on land use issues, 4) community feedback and research, and 5) proposes further action.

The committee reviewed relevant state and county documents, pending and decided legal cases, and interviewed people involved in both professional and civic capacities throughout Washington State.

Broadly, three complications prevent equitable permitting throughout the state.

First, the meaning of "completed" application varies based on jurisdiction. In practice, this can mean that some jurisdictions require more information from the developer than others. In some cases applications are returned for additional information but that doesn't render an application incomplete for the purposes of vesting, meaning that a development may proceed without changes.

Secondly, vested development plans cannot be amended, whether by the developer or community members and appeal of proposed developments is extremely challenging. Some jurisdictions accept an application and allow additions to it after the initial submission while others prohibit modifications, whether by the developer or based on new land use regulations.

Thirdly, permit applications are granted without a time limit, meaning that developers only have to follow the permit requirements at the time the permit was completed, not at the time of construction, which could be years, even decades later.

### **Interview Opinion Highlights**

Many perspectives were sought in the course of completing this report. The following are noteworthy.

- Projects that vest under old regulations add to the financial and planning burden on local government to deal with problems caused by development built to old standards.

- Because it is costly to monitor activities, there is a heavy reliance on developer information by both citizens and government agencies.
- Prior to changes in ordinances and regulations, permits may be hastily applied for (“rush to the counter”) and can be activated by a new owner, who may have had no prior investment in the land.
- Vested rights survive annexation. Expanding urban areas in Washington State is pressuring cities to annex areas of unincorporated county land. Urban areas tend to have more stringent development standards than the county or rural jurisdictions so when the rural land is annexed for urban development it may retain its loser vested development rights.
- Small developers consider the current situation more difficult for them but good for large, well-funded ones. Large companies can pay for variances and trade-offs to get around regulations. Smaller scale developers doubt there is good oversight or follow-up when trade-offs are made.
- Permitting and vesting are a local government issue. Hearing boards can’t do a lot about vesting. Local governments can use interim controls, but many local governments are OK with development because they see it as bringing in revenue.
- To assert an application isn’t complete may result in a suit by developers, so jurisdictions throughout the state must have the capacity to support their decisions, even if neighboring counties have different standards.
- There should be a definite time limit on the vesting of development rights and that should correspond with the actual investment by the developer. The vesting rules in Washington State should be evaluated for potential revision. This evaluation should include the issues of equity, efficiency and consistency with adopted city and county comprehensive plans.

## Preface

At the Washington State League of Women Voters 2015 Convention the membership directed the Board to address the question:

**Does the Growth Management Act (GMA) accomplish Goal 7 (Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability)?**

In addition some wanted to explore how well LWVWA positions on land use addressed permitting and vesting with regards to subdivisions and building permits.

During the course of the investigation it became evident that Growth Management Act (GMA) was only one area in which vesting and permitting was an issue, so a reiteration of the League's original goals for land use regulation is pertinent. This report focuses on the League's interest and work related to the aspect of vesting as it relates to Comprehensive Plans, the jurisdictional components of the GMA.

At this time a group from Washington State University and the University of Washington has been trying to raise funds to evaluate the entire Act, but do not have enough resources to begin their report.

This report is based on the work of League of Women Voters Committee members who interviewed professionals in government, development, and residents whose neighborhoods were affected by regulations associated with the vesting of subdivisions and building permits.

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## Introduction

The League of Women Voters of Washington State (LWVWA) has an important legacy in the drafting and evaluation of land use regulation, which culminated in the passage of the Growth Management Act (GMA) of Washington State in 1990.

Since that time, the League has sought to educate the public about this legislation and, in 2006, to assess its implementation with case studies. While that report focused on jurisdictional variation implementing the GMA and development outcomes, this report focuses on the role of vesting in addressing: urban growth (GMA goal 1); reducing sprawl (GMA goal 2); and development permitting (GMA goal 7).

At the 2015 LWVWA convention the delegates acknowledged that in Washington State the relationship between changing jurisdictional<sup>1</sup> land use changes and private property development<sup>2</sup> has been contentious and complex. Some League members expressed concern that some developments have had unintended consequences and the resulting developments may not have been in the best interest of the public in general and surrounding residents, potentially subverting the intention of land use planning. In particular they were unclear about some of the underlying conditions and reasons for how land use decisions came about and were considered during the planning and construction process for developments in Washington State.

This report was undertaken to help members and interested parties better understand vesting practices; how vesting relates to the GMA and development permitting issues; and present solicited feedback about how complications arising from the implementation of the GMA can be resolved. Although permitting rules are primarily determined at the jurisdictional level, vesting is legislated state-wide, necessitating a comprehensive state-wide overview of this complex issue. With a 2014 Supreme Court decision making vesting a statutory, not common law practice, there may be increased attention to vesting legislation going forward.

The first section of this report provides an overview of vesting and the vested rights doctrine as it pertains to private property development and the permitting process. The second section provides a brief history of the League's relationship with the Growth Management Act, highlighting the intended goals of the legislation and corresponding League values. The third section reviews some ways in which those intended goals and objectives have been weakened or undermined through the practical application of the GMA (including the notion of timely and fair permits). The fourth section presents comments and observations solicited during the process of completing this report. They substantiate and illustrate how the vesting 'loophole' has confounded communities, neighbors, and developers alike and presents some suggestions for potential remedies. The conclusion summarizes questions to be put before the League in consideration of remedying this. Due to the nature of the GMA, which 1) places the burden on permitting process with various jurisdictions and 2) relies on court decisions for clarification, rather than legislation, substantial reform, rather than piecemeal alterations, may be worth serious consideration by the League in upcoming legislative sessions.

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<sup>1</sup> In this document, "jurisdictional" is used to refer to county or city-specific regulation, in contrast with statewide legislation.

<sup>2</sup> In this document, "development" is used to refer to the construction or renovation of buildings.

## Vesting Impact on Growth Management Act 2017

### What is Vesting and the Vested Rights Doctrine?

When private property owners or developers plan to build, construct, or remodel, they are required to have appropriate permits. What constitutes the appropriate permits depends on both the nature of the project and the location of the land parcel.

In Washington State a property owner's development rights become "vested" when the permit application is completed. From that point on, the developer's rights and responsibilities do not change, no matter what subsequent changes are made to the permit requirements or how long the developer may wait to complete the project. In other words, "Vesting is when development laws 'freeze' for a particular permit to develop land. So when a permit application vests, the application must comply with the policies and development laws, including local regulations, in effect at that time."<sup>3</sup> See [Noble Manor v. Pierce County](#) (1997).

Just as the permit requirements vary by jurisdictions, so does the definition of "completed application." For some counties and jurisdictions, incomplete submitted applications can still be considered complete. Furthermore...

If subsequent regulatory changes are made which would otherwise have impact on that development, the landowner or developer is currently under no obligation to conform to any regulation made after the initial application, under the legal precedent of "vesting". (<http://mrsc.org/Home/Explore-Topics/Legal/Planning/Vested-Rights.aspx>)

Vesting rights are invoked in three situations: building permits ([RCW 19.27.095](#)), subdivisions ([RCW 58.17.033](#)), and development agreements ([RCW 36.70B.180](#)). Development agreements are not considered in this report.

Outside these three areas there are still requirements for developers to get all the permits (federal, state, local) needed for a project and to have the plans confirmed as permissible before beginning construction. There are some circumstances where vesting rights have been determined by the courts to not apply. Statutory law, for example, does not apply vested rights to shoreline substantial development permit applications.

The vested rights doctrine is entirely statutory, with the statutory doctrine replacing, rather than supplementing, the common law (court-made) vested rights doctrine. In the first sentence of its opinion, the court states: "Washington's vested rights doctrine originated at common law but is now statutory." [Potala Village Kirkland, LLC v. City of Kirkland](#) (August 25, 2014).

There is an 'assumption of validity' with land use rules, meaning that if a project or land use boundary is challenged, the project will vest (i.e. be protected and the development can continue as originally planned), even if the new boundary is declared invalid. This results in confusion as permitting rules are refined and replaced, constituting a temporal challenge for communities that may think passing new permitting restrictions is sufficient to prevent particular developments, which may in fact proceed if vested under earlier rules.

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<sup>3</sup> Futurewise, 2016

## Growth Management Act: Background

Starting in 1968, the League has been active in *advocating* positions that were used to support Washington State's adoption of the Growth Management Act. When the GMA was adopted it was challenged by legislation and initiatives based on the assumption that it would decrease property values and rights, as well as contribute to government overreach. The League consistently educated voters and supported the Act (see Appendix A). Although there is legislation to serve as a guideline for jurisdictional rules, each jurisdiction has considerable flexibility in implementation, which has advantages and disadvantages.

The Growth Management Act (GMA) was adopted by the State of Washington in 1990 in the Revised Code of Washington (RCW) 36.70A.020. It identifies 13 planning goals used to guide the development and adoption of *jurisdictional* comprehensive plans and development *permitting* regulations. The Growth Management Act articulates goals for jurisdictional legislation, known as Comprehensive Plans, which are drafted and adopted by individual counties and districts. The topics of the goals are as follows, with the goals related to vesting underlined.

1. Urban growth. Encourage development in urban areas where adequate facilities and services exist or can be provided in an efficient manner.
2. Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
3. Transportation.
4. Housing.
5. Economic development.
6. Property rights.
7. Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.
8. Natural resource industries.
9. Open space and recreation.
10. Environment.
11. Citizen Participation and coordination.
12. Public facilities and services.
13. Historic preservation.<sup>4</sup>

In 2006 the League of Women Voters of Washington (Washington Education Fund) published "The Growth Management Act of Washington State: Successes and Challenges" which examined the results of several of the Act's planning goals. It has been referred to in League documents as both a study and a report. The document addressed some of the Act's goals, but did not address Goal 7 (Permits).

## Growth Management Act: Current Concerns

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<sup>4</sup> 2002 c154§ 1; 1990 1st ex.s. c 17 § 2.

In the intervening years since the Act's passage, concerns have arisen throughout Washington State that some developments appear to violate the intent of the Act because they are permitted based on outdated rules and conditions. The use of vesting, in other words, subverts some of the stated goals of the GMA.

One concern relates to how the expansion of urban growth area boundaries is impacted by vesting. Under the **Growth Management Act** jurisdictions adopt **urban growth areas (UGA)** that delineate what type of permit is necessary and what kind of development is allowed. As communities grow, the jurisdiction may choose to expand the urban growth boundary. Development requirements within the UGA may have more infrastructure requirements, for example, than outside the UGA. Developments that have vested under a particular development permit are not required to modify their development if the UGA expands to encompass their development, which can cause problems if, for example, the infrastructure is inadequate.

Another concern relates to the definition of "complete" application because it varies based on jurisdiction. Because the GMA tasks the jurisdiction with creating and implementing its own permitting process, the definition of 'complete' application can vary. A developer may apply for a **subdivision or building permit** by submitting a **complete application**, though it may have incomplete or limited information on it. If a development plan is missing information (or in the case of shifting UGA boundaries, has inaccurate information), then the notion of predictability in issuing permits becomes more difficult. Furthermore, if the community feedback opportunity is cut short or based on incomplete information, the community may have no recourse to clarify details of the project, let alone voice concerns.

Finally, the **Growth Management Hearings Board**, which is responsible for making informed decisions based on appeals arising from implementation of the Growth Management Act, may find the newly designated area (the expansion of the UGA) out of compliance with the GMA, but the developer is still vested and can proceed with the development despite the decision by the Hearings Board.

These scenarios illustrate that construction may proceed and there is no recourse for the neighborhood or community to challenge a construction. This way of developing is a newer practice that results in unintended consequences impacting neighborhoods, infrastructure, rural lifestyle, wildlife and natural areas, as well as creating an advantage for developers who know how to use this tactic to override or circumvent the land use designation. In other words, the regulations in effect at the time a project was vested, if not challenged at that time, cannot be challenged later. Developers who understand "vesting" can quickly file an application before a new law takes effect—and thus circumvent both a new land use designation/ regulations and any subsequent appeals to the new regulations.

The way permitting is currently handled in some counties (Benton, Kitsap, Pierce, Snohomish, Spokane, and Thurston) may result in subverting GMA Goals 1, 2, and 7 because there is no remedy for the permit and subsequent construction

One way the GMA goals may be undermined is by the vesting doctrine. Specifically, the way property owners and developers apply for permits, how those permits are issued or denied, and the recourses used by developers to circumvent a denied permit through appealing to their "vested interest" in the property, known as "vesting".

Washington State's vesting laws are among the most lax in the nation. Part of the reason for this is that Washington State Appeals and Supreme Courts have consistently upheld the state's



vesting law as reflecting legislative intent, but there have been a number of dissenting opinions as to its validity at both court levels. “The dissents should be reviewed.”<sup>5</sup> No cases have been brought to the Hearings Boards relating to GMA Goal 7 EXCEPT for those alleging excessive administrative discretion. Complaints are documented in the report of the Washington State Competitiveness Council and addressed by the Department of Ecology in a report that is no longer available on the DoE website.<sup>6</sup> Some interviewees believe the Department has improved in these situations and fewer complaints have been filed.

The Potala vs Kirkland Decision (2014) clarified that vesting rights are defined in statutory law, which means that building permits, full and short subdivision permits, and development agreements vest, while other permits do not.

### The League of Women Voters of Washington Positions

This report is a preliminary examination of the effect of vesting/permitting rules on land development as it relates to GMA and League positions. The League has been involved with land use for decades. There is concern that some of the GMA goals are being undermined by the permitting practices in different places in the state

A 2015 State Convention discussion centered on whether or not the League of Women Voters of Washington’s three land use positions adequately provide guidance to advocate on vesting and permit applications for development.

The three land use positions from *The Program In Action 2013-2015* include:

1. LU-2 p. 31 states: Local land use plans must be comprehensive and should consist of policies, goals, and a current inventory of pertinent planning elements. All local governments should be required to have a valid land use plan and to regulate land use consistent with such a plan. Exceptions to some planning requirements should have to be substantiated by the responsible government and granted conditionally and for cause.
2. LU-3 p. 31 states: A comprehensive statewide land use plan must address urban growth as well as long-range and use goals, policies and guidelines. All decisions made by other state agencies should be consistent with this plan.
3. LU-6 p. 31 states: The state should have one uniform code for planning and land use decisions. The code should be consistent yet allow flexibility to meet unique decisions and should provide for due process.

Other League positions that could be used to support action related to land use and the Growth Management Act can be found in Program in Action: Transportation and Natural Resources (Energy, Resource Management, Waste Management, Parks, Agriculture, public participation), and urban policy. LWVUW positions may also be used for advocacy, such as the Urban Policy position.

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<sup>5</sup> Anonymous, 2015

<sup>6</sup> Growth Management Hearings Board Member Interview (10-19-2015)

In recent legislative sessions bills have been proposed related to the Growth Management Act, to the State Environmental Policy Act, and Washington's vesting doctrine. League positions could inform LWVWA action on them.

The Land Use Positions (2, 3, 6) of the LWVWA require a valid land use plan and regulate land use consistently with it. It should address urban growth and long-range and use goals, policies, and guidelines. There should be one code for planning and land use decisions and it should be consistent, yet allow flexibility to address unique situations. Position 2 requires a 'valid' land use plan, providing the League with the basis for making recommendations and testifying about vesting and its impact on land use.

### **2017 Legislation (SHB)**

SHB 2023 provided that the effective date of certain land use actions will be the later of the two following dates: (1) 60 days after publication of notice of the action, or (2) the date on which the Growth Management Hearings Board issues its final order if a petition has been filed. The bill was a simple and clear solution to closing the loophole for certain comprehensive plan amendments that allow vesting of the most high-risk local land use amendments; including UGA expansion, rural center boundary adjustments and resource lands designation changes. The bill did not pass in the Senate, having suffered the fate of other bills related to changing Washington's vesting laws.

### **Comments and Observations from Interviewees: GMA Goal 1 - Urban Growth**

One of the interviewees noted that high growth rates and rapid development (in Snohomish County) change the landscape and new regulations attempt to deal with these changes. However, projects that vested under old regulations add to the burden on local government to deal with problems caused by overdevelopment built to old standards. This is a broader issue than Urban Growth Area extensions. There are also Critical Area Ordinances and drainage requirements that may be circumvented as well because there is essentially no time requirement for construction once a permit has been given.

A Snohomish County Councilman and former mayor of Mill Creek identified one main concern as the problem of providing infrastructure for the anticipated developments in areas where it does not now exist. He was frank in saying that he really doesn't see a good solution for the problems. It has been estimated that it would cost around a billion dollars to solve the east/west traffic congestion problems in South Snohomish County to accommodate current and future projected development, money that is not there. Because it is costly to monitor activities, there is a heavy reliance on developer information from both citizens and government agencies, which impacts the confidence and usefulness of data.

### **Comments and Observations from Interviewees: UGA Goal 2 - Reduce Sprawl**

Vested rights survive annexation. Because of development pressures cities are annexing areas of unincorporated county land. Most of these cities have more stringent development standards, but they have to take the projects with vested rights being built under different development standards. Because of vesting, there is no authority to advocate and enforce new (more stringent, safer) rules.

Regarding who has influence to shape how development occurs in a community, interviews revealed some neighborhoods don't seem to have as much political clout as development investments. This situation is highly variable. Neighborhoods and communities experience the cumulative effect of large projects. As one interviewee notes, the possibility of using individual, isolated impacts of a development, instead of addressing the cumulative impact of developments is inherent in the way projects are approved. Furthermore, sometimes it is another jurisdiction that creates an issue, for example school districts, not just private entities.

#### **Comments and Observations from Interviewees: UGA Goal 7 - Timely and Fair Permits**

Because of the large sums and time involved in developments, delays are expensive for landowners and developers. Thus, there has been increased attention to improving the process to reduce uncertainty and the financial impact of a delay. This was addressed in the *Hull v. Hunt* Decision in which predictability was seen as central to the issue.

However, to some, the characteristics of timeliness, fairness, and predictability seem to be prioritized for developers, rather than residents and community concerns. What is fair and predictable for residents may be an area of increased focus in the future. How should the concerns of timeliness, fairness, and predictability be applied to all stakeholders? How does this get balanced with private property rights?

Currently, there are reporting requirements for permit performance (RCW 36.70B.080(2)) relating to development project permit applications. However, it requires jurisdictions to prepare annual performance reports and post them on their website. No reports were found when a random selection of jurisdiction websites was searched by committee members.

A Legislative Analyst and Land Use Attorney both identify the 'rush to the counter' phenomenon. Prior to changes in ordinances and regulations permits are applied for and can be activated by a new owner who has had no prior investment in the land. "Washington's laws are the least responsive to public values as they change over time."<sup>7</sup>

There may be legislation introduced that would address the scope of permitting based on vested rights, such as amending the permit application process to consider regulation changes which might affect the project under application. Another suggestion was to change the permit duration (sunset).

#### **Comments and Observations from Interviewees: Vesting Issues**

In addition to reading reports and related documents the League committee members interviewed members of the Growth Management Hearings Board, elected officials, government staff, planning and building industry officials, and neighborhood residents impacted by the vesting/permitting situation in counties in Washington State with a range of experiences with vesting policies and practices. The ideas they presented and situations described offer perspectives of the effect of the vesting rules, and some suggestions to **change the current status**. Note these are interviewee opinions and observations, not League conclusions.

Interviewees pointed out several issues revolving around Vesting, Permits and the Growth Management Act.

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<sup>7</sup> Anonymous government staff, 2015

Expenses: developments built to old standards are expensive in terms of cumulative effects requiring a retrofit of utilities and infrastructure. Even when mitigation is required the cost of monitoring over time is a burden for staff and finances, activities. Relying on developer information is not consistently reliable. To challenge a vested right will be costly for jurisdictions, and there is fear about the expense and the alienation of the development community.

According to smaller developers, it is now more difficult for small developers but better for large, well-funded ones. They can pay for variances and trade-offs to get around regulations. “There are always loopholes.” They can go to local governments for rezones, density allowances, etc.”<sup>8</sup> An example is Kirkland’s Private Amendment Request (PAR). Other jurisdictions have different names.

Fairness: A sense of fairness is called into question when an application has little detail and no work has been done on project engineering or feasibility. The permit and property can be vested with minimal investment in some jurisdictions. There is no recourse if a project is found to be invalid because the window when it vested has closed. An owner is vested even if the land is annexed into a jurisdiction that would not have granted the permit. The current state of affairs seems to advantage larger developers who have the resources to make trade-offs in large developments.

Timing: Some interviewees recommended a definite time limit on the vesting of development rights and that should correspond with the actual investment by the developer. Some recommend creating a sunset, or postpone vesting until cases are resolved, but some go on for years, which is expensive for everyone. This idea has not prevailed in the legislature.

Jurisdictional Consistency: One issue is the relationship between different state, municipal, and federal jurisdictions. According to a City of Shoreline’s Planning Director, current Washington law and practice regarding vested development rights has created a major loophole allowing development that undermines the intent of the GMA. Both private land owners and governments have taken advantage of this loophole. Issues arise not only around individual property owners but also between government jurisdictions, notably cities and counties. The state Supreme Court ruled in 2016 that state vesting practices cannot override federal laws. See *Snohomish County et al v. Pollution Control Hearings Board, Department of Ecology et al.* December 2016.<sup>9</sup>

One interviewee concluded that the vesting rules in Washington should be evaluated for potential revision. This evaluation should include the issues of equity, efficiency and consistency with adopted city and county comprehensive plans.

Reliance on case law (rather than legislation): Until recently decisions on challenges and appeals were based on a long, and sometimes confusing, history of case law as well as the few direct statutes. This lack of clear direction in the law has created a cumbersome and often frustrating process for handling land use changes, challenges and appeals. Most likely there will be more legislation addressing the vesting issue. Collaborative efforts to achieve greater clarity regarding vesting (duration of a permit, for example) have broken down in part because of the potential impact a change would have.

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<sup>8</sup> Anonymous small developer, 2015

<sup>9</sup> <http://caselaw.findlaw.com/wa-supreme-court/1763707.html>

Insufficient Legislative Guidance: In addition to the levels of government involved in permits and vesting, the lack of some relevant statutes, a major issue is the involvement required on the local level for the Growth Management Act to be successful for people. For example, all land use plans are considered valid until they are challenged. If no one challenges them, they are assumed in effect. This means local individuals and groups must be vigilant and engaged to ensure the process and goals are working in their jurisdiction.

Scope of permitting on vested rights: The Potala vs Kirkland Decision (2014) clarified that vesting rights are defined in statutory law, which means that building permits, full and short subdivision permits, and development agreements vest. Other permits do not. There may be legislation introduced that would address the scope of permitting based on vested rights, such as amending the permit application process to consider regulation changes which might affect the project under application.

GMA Hearing Boards: Permitting is addressed through local governments. Growth Management Hearings Boards can't do a lot about vesting. Local governments can use interim controls, but some observe that many local governments are comfortable with development because they see it as bringing in revenue. And to assert an application isn't complete may result in a suit by developers, so jurisdictions throughout the state must have the capacity to support their standards.

Enforcement: The enforcement of conditions of development is an issue brought up by both smaller developers and neighbors: Smaller scale developers doubt there is good oversight or follow-up when trade-offs are made. For example when fees are supposed to go for traffic mitigation for a particular site or where developers are allowed to fill in wetlands in exchange for the creation of a comparable wetland elsewhere. There is no apparent mechanism to confirm these conditions of development.

### **Comments and Observations: Suggestions**

There were a number of suggestions about vesting made during interviews. A frequent one was about timing, for example several suggested waiting to see if there would be a dispute related to development in a new area. Even though some cases take years to resolve, there would at least be an early indication of a challenge, which interviewees thought would be helpful. Some recommended having a six month waiting period for vesting to occur after land use changes. This would allow for appeals without impacting vesting.

The idea of a moratorium was mentioned, recognizing something would have to be done to make sure people didn't rush to get their projects in 'under the wire.' Some believe moratoria are politically impossible, so it is a tenuous solution at best. The failed 2017 MB2023 would have required a challenge to a Comprehensive Plan to be resolved prior to vesting.

Some observed that there was little financial and/or time investment made for vesting to occur, as a 'completed application' can be quite brief and require comparatively little time to fill out. Some suggested that specifying how much time and money should be spent on a project prior to vesting might make it more evident that an investment was being made, not just an application submitted. Some permits require more investment in time and money than others and should not have equal standing, according to some interviewees. Building permits are issued after considerable money has been spent. This seems to align with other states that require evidence

of investment prior to vesting. Another popular idea was to have permits expire after a certain period, a technique used by jurisdictions outside Washington State.

One suggestion presented in the interviews included how multiple permits are acquired. This idea is not specifically addressed in the Land Use positions, but could be explored as a way to ease the complexity and expense of multiple permits. The accusation of ‘too many regulations’ is a theme and this bundling idea (one permit covering multiple activities) might be a way to address it.

Agreement on the definition of “completed application” would also help create consistency between counties in Washington State. Some applications, although many pages long, are full of ‘n/a’ responses are accepted as ‘complete’. If they were more thorough it might be a better safeguard for action as well as make the permit seeker eligible for more permits based on the original application.

Despite the impression that it is difficult in a politicized environment for elected officials to challenge developments, it is possible. A preliminary plat was revoked in (*HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451 (2003)). Cities and counties have authority under state subdivision law to revoke preliminary plat approvals if a local ordinance provides that authority. “[W]hen conditions of approval of a preliminary plat cannot be satisfied or are deliberately violated, remedial action, such as revocation, may be the only remedy.”<sup>10</sup> Other jurisdictions might want to investigate this option.

According to numerous interviewees, the vesting rules in Washington should be evaluated for potential revision. This evaluation should include the issues of equity, efficiency and consistency with adopted city and county comprehensive plans. An evaluation of potential revisions to Washington’s vesting laws should include a survey of how these issues are addressed in the vesting rules of comparable states. The process should be carefully revised with statute clearly spelling out how much effort and expenditure be required in order for a permit to vest. Short plat applications, according to some, require too little investment in time and money to be able to vest.

Representatives Roger Goodman (D) and Drew Stokesbary (R) hosted a series of meetings with stakeholders in late 2015. Among the stakeholders were representatives from the Association of Washington Businesses, local governments, Futurewise, and the Department of Ecology. The intent of the meetings was to develop consensus and draft a bill for consideration by the 2016 legislature. The League of Women Voters of Washington observers were included. Despite the meetings, legislation was not introduced. However, interest in changing current vesting practices was evident. Over the past few years there have been several legislative attempts to promote both stricter and more generous vesting rules in Washington State.

Several interviewees said jurisdictions could be more assertive on behalf of the public. For example, a meaningful public hearings process should be adopted. The counter argument is that public hearings occurred at the time of permitting. There should be agreement on what ‘meaningful’ is.

One way jurisdictions deal with the effect of new development is through impact fees, which can be assessed under the Growth Management Act. These can pay for needed infrastructure. A

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<sup>10</sup> <http://caselaw.findlaw.com/wa-supreme-court/1005571.html#>

number of suburban cities use this tool to mitigate impacts. Many jurisdictions note the difficulty of assigning cost and the political capital it would take to implement. (Seattle does not do this because it prefers to use SEPA mitigation, which they believe is a more targeted and useful tool). Seattle had some success by using interim controls, which meant that projects could not become vested to existing regulations and laws once amendments to these were under serious consideration by the legislative body. This essentially put a freeze on the acceptance of completed applications and their ability to trigger vesting for the project

Another suggestion, beyond the scope of this report, was to separate the adoption of zoning adjustments and Comprehensive Plan Amendments so that greater public input on zoning could be made prior to inclusion in a Plan Update. This would involve changes in the Growth Management Act itself, and some are reluctant to 'open it up' as it might result in revising the entire document in such a way that other goals would be subverted.

Although there were advocates for policies and procedures to be consistent across jurisdictions, part of the attractiveness of the Growth Management Act was the ability for jurisdictions to shape its local application and implementation in a way that considered unique situations. It was driven by owners and residents as much as from the top by legislators. Addressing this by making permitting uniform will infringe on local control and will be a challenge.

Although League members heard interest in changing current vesting practices in their discussions with community stakeholders and interested elected officials, there was an awareness of the difficulty e.g. timing, power, and economics. As of the legislative session of 2018 no legislation was introduced to impact the vesting situation, although counties have individually tightened some of their rules; a definite timeline and performance requirement for keeping an application 'open', for example.

## Conclusion

The adoption of Washington's Growth Management Act (GMA) in 1990 was intended to clarify the development rights of private property holders. Tension between those rights and the public's interest in how urban expansion occurs, its impact on farmlands, natural resources, and livability continues throughout Washington State. This tension has been complicated by how vesting has been used to circumvent the changing requirements of developments.

This report reveals that since the adoption of the Growth Management Act, there have been instances where the intended result of ensuring public safety and welfare, the use of tax dollars to repair or mediate private interests has clashed with the permitting goal of timeliness and fairness in order to ensure predictability. Since the adoption of the Act, Futurewise along with appellants across the state have made legal challenges to land use, vesting, and permit issues. When Growth Management Act issues have been addressed by committees and stakeholder groups in the hopes of passing legislation there seems to have been no successful way around the polarization of the vesting issue. Recommendations have been made for potential legislation, but thus far there has been no successful legislation either loosening or tightening the current situation.

Suggestions to address the fairness and predictability values have included the use of moratoria, impact fees, waiting periods for applications after land use changes, sunset or put a limit on how long vesting lasts, and redefining 'complete application'.

Each jurisdiction determines what a 'complete' application is. Addressing the applications instead of the state-wide vesting issue might be an action to consider if the League believes the Permitting/Vesting process in some jurisdictions should change. Thus, what constitutes 'complete' might be re-visited. Following one of the interviewee's suggestion, a 'complete' application might include a thorough investigation and description of impacts, the investment of time and resources. Some application, although multiple pages, are full of 'n/a'. A benefit of this would be that more inclusive permits for a project could be granted.

Several interviewees mentioned the idea of having a timeline for permits to expire, so that they wouldn't live forever despite new land use plans being attempted. The vesting rules impede the application of improved knowledge about how the natural and built infrastructure and environment actually interact and work. If, for example, activity permitted previously is discovered to be no longer safe or has an injurious impact on a neighborhood, current vesting rules may prohibit a community or neighbor taking advantage of the new information.

The interviews indicate that a builder/developer will have predictability if the permit application is made even if there is a reversal of the urban growth boundary. Interestingly, this means there may be little predictability for property owners or people living at the edge of the growth boundary because the boundary may be changed and changed back to the original boundary, allowing the 'loophole' to allow unforeseen development. It appears Goal 7 is not accomplished for all parties. Goal 6: "Property rights of landowners shall be protected from arbitrary and discriminatory actions" may be useful in resolving this issue because it might make all property owners eligible for predictability.



The question from 2015 Convention was: **Does the Growth Management Act (GMA) accomplish Goal 7 (Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability)?**

Although this is a report, and not a full study, the interviews indicate that predictability is accomplished for the permit holder per Washington State Supreme Court, but it may be at the expense of the application of what communities are actually learning about the impacts of development. Vesting prevents changing rules and practices to take advantage of new learning, as well as community interests and values. Washington State values citizen participation, particularly prior to enacting rules and regulations, but after rules have been made there is less opportunity for influence. In other words, according to a Commerce Department executive, citizen input is considered when the rules are made, but once made, the process takes over and there is less opportunity for citizen input. Thus, citizens' recourse is through the Growth Management Hearings Board and the state system. The committee interviews and research revealed that the remedy issue, (rescinding a vested permit based on a land use decision that is later reversed) is unresolved, and important. In other words, the way the rules are administered creates what some consider a 'loophole' that has an impact long after the current developers and neighbors are gone.

The information from the reports and interviews indicated areas where a solution that incorporates current scientific and ecological understanding, resident impacts, owner property rights, predictability, and cumulative effects is still needed.

This report explores vesting and permitting. The LWVWA positions advocate creating a valid land use plan in urban growth areas where facilities and services exist or can be provided in an efficient manner, and sprawl is reduced. Interpreted broadly this implies a lack of support for the complete application being merely a place holder for old permit criteria to be extended to new, reversed, land designations.

We are left with *three* questions for the League of Women Voters:

1. What kind of work needs to be done, and what legislation or policies do our positions support?
2. Is it more productive to support local jurisdiction efforts through a network of league members or would it be better to continue to try for resolution in the state legislature?
3. Should the League address the 'too many regulations' complaint in the vesting situation, and at least investigate the bundling of permits? This seems to address the concerns of those who would keep vesting as it is.

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Futurewise: It's Time to Reform Washington 2014

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## Appendix A Land Use Positions History

Land Use (from 2015 – 20172 LWV WA Program in Action page 25)

Revisions to the State Environmental Policy Act were passed by the legislature in 1982, followed by development of implementing rules to be in effect by 1984. League participated in each phase, calling for early and meaningful citizen input. In 1984, the League co-sponsored a public information seminar on the new rules. In 1990 and 1991 LWVWA convened a broad-based group of business, environmental, government, and community leaders who successfully proposed amendments that influenced the development of the 1990-91 growth management legislation. Since that time LWVWA have lobbied vigorously against weakening amendments and for full funding of the Growth Management Act (GMA).

In the fall of 1992, LWVWA co-sponsored a major conference on the interface between the Growth Management Act and the State Environmental Policy Act. In 1992 and 1993, LWVWA provided advice, assistance and support to local Leagues monitoring and shaping action by their local governments in planning under the Growth Management Act. In 1995 several amendments to GMA were adopted. The land use permit process was streamlined; environmental and land use laws were consolidated. Best Available Science requirement was added to the development of critical areas ordinances. Goals and policies of Shoreline Management Act were added as the fourteenth goal of the GMA.

League was actively involved in the Land Use Commission, reviewing and supporting these proposed changes. Despite these changes, in 1995 the Legislature enacted I-164 into law. Proponents of I-164, an initiative to the Legislature, had claimed it was needed to protect the property rights of citizens whose property lost value through the effects of regulation.

League and many others opposed this initiative because it would have severely restricted governments' ability to regulate land use by requiring governments to pay for ANY reduction in property value brought about by regulation, no matter how beneficial the regulation to the community. Believing that the public should have a right to vote on this measure, League joined with a variety of groups to file Referendum 48, and gathered sufficient signatures to place the measure on the November 1995 ballot. League then campaigned actively against the measure and it was soundly defeated. During the latter part of the 1990's League fought efforts to weaken the Growth Management Act while supporting practical modifications to make it more workable. In 1997 League sponsored a program of growth management awards to bring public recognition to many successful actions taken by local officials and citizens to implement GMA. At its convention in 2005 LWVWA adopted a one-year study of growth management in Washington State. In August 2006 this study produced the report, *The Growth Management Act of Washington State: Successes and Challenges*, The report is a guide to the Growth Management Act, what it is and how it works, a retrospective look at some of its history, an examination of some current issues, and a look forward. This report was intended for use in educating League members and the public about growth management issues in Washington. In November 2006 another property rights initiative was on the ballot. LWVWA opposed I-933 for reasons similar to its opposition to I-164 and Referendum 48 in 1995. LWVWA was part of a large coalition that resoundingly defeated I-933.

## Appendix B Examples

Some of these and other examples are provided by Futurewise, others are documented in Investigate West's series on the problems created by Washington's early vesting. The series includes:

*Odd provision in state law severely undercuts growth management* available at:

<http://www.invw.org/article/odd-provision-in-state-la-1134>

*How Washington's unusual developer-friendly laws allow suburban sprawl* available at:

<http://www.invw.org/content/how-washingtons-unusual-developer-friendly-laws-allow-suburban-sprawl>

*Redmond Ridge: Showing power of "vesting" development* available at:

<http://www.invw.org/content/redmond-ridge-an-oldie-but-a-goodie-for-showing-power-of-vesting-development>

*Rural town's takeover by big-box developments highlights vexing vesting question* available at:

<http://www.invw.org/content/rural-towns-takeover-by-big-box-developments-highlights-vexing-vesting-question>

### Benton County

***Rural Densities*** Benton County enacted a comprehensive plan update with rural zoning at densities of one dwelling unit per 2.5 acres – a density all three growth boards have repeatedly ruled is urban sprawl and prohibited by the GMA. Following comments from citizens and Futurewise, Benton County agreed to fix most of the problem, but provided a delayed implementation date of the fix in order to allow developers to vest. In this case, Washington's vesting law allowed a jurisdiction to keep in place illegal zoning in order to allow a few individuals to break the law – even after the County recognized that its densities were illegal, and had to be changed.

### Clark County

***Cannot rely on county GMA decisions that are timely challenged*** until either (1) the Growth Board's final order is not appealed; or (2) the county's decisions are affirmed and a final order or mandated opinion is filed by a court sitting in its appellate capacity. In the context of this case, the Court merely stated that the Growth Board had authority to enter findings regarding the annexed parcels' lack of compliance with the GMA but refused to address how to "undo" the cities' annexation. The case's effects on a party's vested rights when an ordinance is declared void in other contexts remains unclear.

***Set Asides reversed*** in 2007. Nearly 1,000 homes were permitted in Clark County in Southwest Washington where 10 would have been allowed otherwise, and 514 lakeside acres previously set aside for farming were designated instead as industrial and office park land.

### King County

King County now has relatively stringent regulations; however, there is an issue with storm water. There are subdivisions that are 15 to 20 years old that are still working under the storm water ordinances adopted on the 1990s. Those storm water ordinances aren't based the best available science, nor are they adequate to manage storm water effectively. There is no

authority to require more stringent standards, because the projects have already been vested to the storm water standards of yesteryear.

### Kitsap County

***Urban Growth Areas*** In Kitsap, the County's Urban Growth Areas were invalidated by the Growth Board, meaning that no development can proceed until they are fixed. However, the Growth Board takes six months to decide a case, and during that time several subdivision applications in rural areas vested.

### Pierce County

***Last minute applications*** In Orting (The Buttes), a 350 home subdivision vested the day before Pierce County's comprehensive plan went into effect. Had the application been submitted a day later, only 35 homes would have been permitted. This last-minute application frustrated the public's will to keep the area rural.

Grand Firs in Graham adjacent to 86<sup>th</sup> Ave East between 228<sup>th</sup> and 237<sup>th</sup> Street East, a development project vested to 1993 development regulations before County Comprehensive Plan was adopted. Project will place 402 single family homes on 206 acres in a rural area with 57 acres of wetlands. If built under today's regulations, approximately 15 homes would have been allowed. Subdivision will be built next to red wolf breeding facility.

### Snohomish County

***Critical Areas Protection was impacted*** by 42 applications received at the last minute before the County's 2007 critical areas ordinance went into effect, meaning that the County's expanded protections on wetlands, wildlife habitat, and safety regulations near hazards such as landslides will not apply to a small group of developers who rushed to the permit counter.

### Spokane County

***Urban Growth Area Boundary expanded and denied by Growth Management Hearings Board*** – but project was vested (despite airport, chamber of Commerce, two neighborhood groups, and individual citizen's complaints).

Spokane County approved the expansion of its Urban Growth Area to include the Five Mile Prairie neighborhood. Citizens' groups appealed to the Growth Board because the neighborhood contains extensive critical areas, including landslide prone areas and aquatic sensitive areas, and there are inadequate police, roads, and schools to serve an urban expansion. Despite the appeal, development permits were filed and vested. The Hearings Board later not only found the expansion noncompliant with the law, but also issued an order of invalidity, meaning that from the date of the order no further development could occur. The permits applied for prior to the invalidity order can be built, even if they are in dangerous areas and underserved by police, schools, and adequate road access.

### Thurston County

***Just before a moratorium vote*** Wal-Mart approached the Tumwater City Council requesting they vacate a road to turn it into a 1000 space parking lot. Citizens organized in protest to the additional traffic and impacts on local business. The City Council responded with a moratorium enacted to prevent any retail store larger than 125,000 square feet in December.

Wal-Mart submitted its application to build a 207,000 square foot super center, meaning that the City Council could do nothing to stop them.

*Moratorium – last resort* to provide order to the City of Olympia’s transportation planning, and road building. The City of Olympia imposed a six month building ban preventing the development of roads leading to all lots blueprinted before 1969, putting nearly 2,000 of the older lots temporarily out of reach for developers. Washington’s vesting laws hurt developers, who might have been able to build on some of the lots under either the old rules or the new – but who couldn’t even apply for a permit once a moratorium was imposed.

#### Whatcom County

*Long vesting shadow* apparent in citing a 1992 development application, resulted in 47 homes on built on 25 acres, where five would be allowed under today’s rules. This project was hard-fought by protesting neighbors of the Sleepy Hollow development, but a 2009 hearings examiner ruling went in developer’s favor. He will also benefit from a 2001 ruling allowing him to leave 50-foot stream buffers to protect fish instead of the currently required 100-foot buffers.<sup>11</sup>

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<sup>11</sup> Futurewise It’s Time to Reform Washington 2014

## Appendix C Studies and Recognition

There have been several studies and recognition celebrations related to Growth Management which have touched on permitting and vesting. The following are highlights from the most significant.

- LAND USE STUDY COMMISSION FINAL REPORT 1998 (David Evans)

“Despite the shortage of hard data, several general observations were made during the course of the study.

First, none of the jurisdictions participating in the study complained of a widespread vesting problem. These jurisdictions did not perceive it to be an issue and were not dedicating resources to address it.

Second, vesting problems that did arise appear to have localized impacts that were magnified by local land use issues. These cases often formed the basis for litigation and thereby received elevated attention. To the local residents and participants in the land use debate, these cases were very important, but from a programmatic perspective of the jurisdiction, they were the exception, not the norm. In conclusion, vesting during the period of a GMA appeal is a localized issue involving relatively few properties and does not present a widespread undermining of GMA.”

- WASHINGTON STATE COMPETITIVENESS COUNCIL 2003 REVIEW

Several improvements have been made in permitting (Department of Ecology was a focus) but to ensure continued progress, according to the report, permitting agencies must set targets for permit processing time and be held accountable for meeting them. The Legislature created an Office of Regulatory Assistance in the 2003 session, it does not have the authority to require that permitting agencies set performance benchmarks and hold them accountable.

- GROWTH MANAGEMENT ACT 2006 League of Women Voters of Washington

The study did not address vesting/permitting.

- GMA AT 25: LOOKING BACK, LOOKING FORWARD December 12, 2014 by Joseph W. Tovar

Washington State Department of Commerce estimates that over the last five years, 99 percent of local actions in the six rapidly growing “buildable lands” counties comply with the GMA, meaning that actions were not appealed, or if appealed, were found in compliance. This reality is very different that the popular but erroneous perception that local actions are frequently appealed and overturned. The overriding issue of the day remains the challenge of adapting to and mitigating the effects of climate change. This will require strategic and coordinated action among state, regional and local governments, the private sector and the general citizenry. The recent report of the Governor's Carbon Emissions Reduction Task Force

(CERT) does not address how to link the Green House Gas (GHG) reduction targets to regional or local land use plans, investments, regulations, or actions. Because transportation priorities and land use policy affect two of the major contributors to GHG emissions, their omission is a significant gap in an effective statewide strategy. <http://mrsc.org/Home/Stay-Informed/MRSC-Insight/December-2014/GMA-at-25-Looking-Back,-Looking-Forward.aspx>

- GOVERNOR'S ACHIEVEMENT AWARDS - Growth Management Act (GMA) 25th Anniversary October 26, 2015

#### Appendix D: Vesting Rights and the Court

The Washington State Supreme Court has differed from most other states' interpretations of vesting which conclude that there must be substantial development that relied on an issued permit for it to be valid. See [Hull v. Hunt](#) (1958). The court also used the rationale of providing certainty and predictability in land use regulations. The court wrote "Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin". See [West Main Assocs. Inc. v. City of Bellevue](#) (1986). The Washington approach is, according to the courts, based on "constitutional principles of fairness and due process, acknowledging that development rights are valuable and protected property interests." See [Weyerhaeuser v. Pierce County](#) (1999).

In order to keep development options open, the 2013 State Legislature extended the time a final plat (a map or representation of a subdivision showing lots, blocks, streets, etc. RCW 58.17) needed to be filed after a subdivision (plat development) had been approved. This postpones the effect of new requirements on development. These requirements (ordinances, resolutions, rules, regulations, orders) may be based on local preferences, new understanding of the impact of development, or new safety considerations, for example, but there will be a lag time in using them if a preliminary plat has already been approved.