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Reply to: Seattle Office

October 28, 2010

Jeff Thomas
Planning & Community Development Department
210 Lottie Street
Bellingham, WA 98225

Dear Mr. Thomas:

I write on behalf of Responsible Development regarding the pending request by Mr. Tull for another extension for the pending application for the Fairhavens Highlands project. Time does not allow me to provide a full recitation of the underlying facts, but I believe you are familiar with them in any event.

Primarily, I write to respond to a threat from Mr. Tull to the effect that you cannot deny his client yet another extension because state and federal law prohibits "governmental bodies[from] using their police power jurisdiction to reduce the value and thus the costs of acquisition of lands for public purposes." Mr. Tull is guilty of mis-leading you with a statement that is only half true and which is totally inapplicable here.

The legal principle to which Mr. Tull refers is that, in a condemnation action, a government agency may not assert that the value of the property being condemned has been reduced because of some recent government regulation or permit denial. But that prohibition comes with a huge qualification. The exercise of police powers is presumed to be undertaken for legitimate purposes (not to manipulate property values). For the rule to apply, the property owner must prove that the police power action was motivated primarily or solely by the condemning jurisdiction's intent to depress the value of the property. Merely proving there is some relationship (a mere "nexus") between the permitting decision and the condemnation action is not sufficient. The property owner must demonstrate something on the order of bad faith or a conscious and improper manipulation of its police powers with the intent to depress the land's value.

This issue has been addressed in a multitude of federal cases and all have reached the same conclusion. *See, e.g., United States v. 480.00 Acres of Land,* 557 F.3d 1297 (11th Cir. 2009); *United States v. Land,* 213 F.3d 830 (5th Cir.2000) ; *United States v. 27.93 Acres of Land,* 924 F.2d 506 (3d Cir.1991); *United States v. Meadow Brook Club,* 259 F.2d 41 (2d Cir.1958).

As was said in *U.S. v. 480 Acres:*

> A "mere nexus" rule also endangers the Government's right as a landowner to play a role in zoning and land use decisions. As such, we adopt the standard applied by the district court and find that in order to have a zoning restriction excluded from a calculation of a property's value, a landowner must show that the primary purpose of the regulation was to depress the property value of land or that the ordinance was enacted with the specific intent of depressing property value for the purpose of later condemnation.

557 F.3d at 1311 (footnote omitted).

The rule is the same in Washington. "[W]here a governmental body has **intentionally manipulated** the zoning to depress the value of the property being condemned, the property owner has the right to present evidence of such conduct to the jury on the issue of the reasonable probability of a rezone." *City of Bellevue v. Kravik*, 69 Wn. App. 735, 738 (1993) (emphasis supplied). Indeed, *Kravik* relied on some of the foregoing federal cases in adopting that rule for Washington and the 11th Circuit returned the favor in *U.S. v 480 Acres (supra* at 1301), citing and quoting *Kravik* when it adopted a similar rule for that federal circuit.

The facts of the Chuckanut Ridge development provide absolutely no basis for the city to be concerned that its decision to deny yet another extension of the application would lead any rational jury or judge to conclude that the city's denial was intended primarily or solely to depress the property's value or was due to the city's bad faith. To the contrary, as you well know, the applicant has no right to one extension, let alone multiple extensions. You also know that extensions are disfavored when they would operate to allow a project to remain vested to a regulation that is increasingly outdated. As our Supreme Court stated in *Erickson & Assoc. Inc. v. McLerran,* 123 Wn. 2d 864, 874 (1994):

> Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

The city's clear and overriding motivation in denying yet another extension would be to preserve the integrity of the city's duly adopted critical areas ordinance. The ordinance was adopted **five years ago** and yet Mr. Tull claims his client, though not moving on the application, remains entitled to ignore the restrictions included in that no-longer-so-new ordinance. The city cannot be faulted for not granting yet another extension when the result would be to prolong a vested right that might be used to create not just a minor, new nonconforming use, but a nonconforming use of gigantic proportions. Extending vesting in this situation truly would be "inimical to the public interest embodied" in the critical area ordinance and would be an utter subversion of the public interest.

The city's refusal to grant another extension under these circumstances is the polar opposite of an action motivated by bad faith. Instead, such action would be motivated by the city's duty to protect the public interest and to resist being a pawn in the applicant's efforts to extend its vesting rights claim yet again. (I refer to the applicant's vesting rights "claim" because, as you

probably know, we do not agree that the applicant enjoys vested rights as to the critical area ordinance, but that is a discussion for another day.)

Thank you for your attention to this matter. I trust you will do what is right for the city and the public interest and not be mis-led by the inaccurate, incomplete, and unsubstantiated claims put forth by the applicant.

Very truly yours,

BRICKLIN & NEWMAN, LLP

David A. Bricklin

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