To:

Annie Taylor, Town Councilperson

As a private citizen of La Conner, as well one who is directly impacted by the "Center Street Project", I've taken liberty to acquaint you with a second legal perspective on the Center Street issue, that you be made aware that other 'expert counsel' exists that stands in opposition to the position(s) taken by the attorneys engaged by the Town of La Conner and other counsel as may be.

Please see the enclosed letter addressed to Michael Davolio from David Bricklin, of Bricklin & LLP and Newman, LLP.

Sincerely,

William H Smith MD
409 Center St, La Conner, WA

Reply to: Seattle Office

August 26, 2022

VIA E-MAIL TO planner@townoflaconner.org

Michael Davolio
Town of La Conner Planner
204 Douglas Street
La Conner, WA 98257

Re: Atkinson/KSA Project: Comments on Hearing Examiner's Remand

Dear Mr. Davolio:

I represent Deborah Aldrich and Linda Talman. I am writing in response to your solicitation of comments on the issues remanded by the Hearing Examiner with regard to the above-referenced project. The specific questions the Examiner remanded are listed and responded to below.

A. Is the Contract Rezone a valid contract with provisions applicable to the proposed 2022 development on the subject site?

This question includes two parts: Is the Contract Rezone a valid contract and, if so, are its provisions applicable to the proposed development.

Validity: The Contact Rezone is a valid contract. Municipalities have the authority to establish zoning designations by way of a contract with the property owner. *State ex rel. Myhre v. City of Spokane*, 70 Wn.2d 207, 216 (1967). This contract was duly adopted by the Town and executed by both parties to the contract (the Town and Gerald and Donna Blades). It is valid.

Applicability: The Contract Rezone is applicable to the proposed development. Ordinarily, there would be no question but that the Contract Rezone is applicable. But, we understand, an issue has arisen because the Contract Rezone was not recorded with the County Assessor. The lack of recording does not affect its applicability to the current development proposal for the reasons discussed below.

First, it is important to understand the purpose of recording a document. Recording is a process designed to ensure that persons considering the purchase of real estate are on notice of encumbrances that may impact the property (like easements and financing documents). The failure

to record a document does not affect its validity. It just means that subsequent purchases may not have had notice of it when they purchased the property and *may*, therefore, not be bound by it.[1]

But notice (actual or constructive) is not the issue when it comes to zoning. Property owners do not need to have notice of zoning laws to be subject to them.

Here, because the Contract Rezone was not recorded, the current owner of the property apparently did not have notice of the restrictions at the time he purchased the property. But that lack of notice does not impact the applicability of the Contract Rezone to the current proposal. That is because its applicability is determined by reference to the State's vesting laws, not by reference to whether it was recorded.

If a property owner were subject only to the zoning that was in effect when the property was purchased, jurisdictions would be unable to modify their zoning – or at least they would be unable to have those modifications applied to the current owners of the property. That, of course, is not the rule. New zoning regulations apply to a parcel regardless of whether there is a change in ownership subsequent to the adoption of the new regulation. A property owner's knowledge of the zoning in effect when the property is purchased is irrelevant to determining what zoning laws apply.

Instead, the applicability of zoning laws to development applications is determined by reference to Washington's vesting law. Under certain circumstances, a property owner is protected against changes in the zoning regulations. Thus, the applicant here may contend that if he did not have notice of the contract rezone until after he filed his conditional use permit application, the contract rezone would not apply to his CUP application. This theory, however, fails because Washington vesting law does not provide protection for those who apply for a CUP.

Oftentimes, the vesting rule is stated as mandating that *all* land use applications are judged in accordance with the regulations in effect on the date that the application was filed. But several cases in the last decade have clarified that the vesting rule is not nearly so broad. Rather, an application vests to the rules in effect on the date of the application **only for building permits and subdivisions applications.** There is no vesting under Washington State law for any other land use application.

The Legislature has adopted vesting rules for building permits and subdivision. *See* RCW 19.27.095 (building permits); RCW 58.17.033 (subdivisions). The State Supreme Court has narrowed vesting to only those applications that vest pursuant to one of those statutes: "While it originated at common law, the vested rights doctrine is now statutory." *Town of Woodway v.*

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[1] "[B]ecause '[a] person who has knowledge or notice of a prior conveyance is not prejudiced by its not appearing in the public record ... most states' recording acts do not protect purchasers with knowledge or notice against the prior conveyance.' 1 Palomar, *supra*, § 12, at 58. The same is true of Washington's recording act jurisprudence, which specifically exempts subsequent purchasers with actual knowledge from protection. *See Miebach [v. Colasurdo]*, 102 Wash.2d [170] at 175, 685 P.2d 1074 [1984]." *Carpenter v. Glenn*, 156 Wn. App. 1018 (2010)

Snohomish Cnty., 180 Wn.2d 165, 173 (2014), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682 (2019). The only land use applications for which the Legislature has authorized vesting are those for plats and building permits. *Id. See also, Potala Village Kirkland, LLC v. City of Kirkland,* 183 Wn. App. 191, 197 - 208 (2014).

Here, there is no application for a building permit or a plat. Therefore, there is no vesting. The current CUP application is to be judged by the laws in effect when the Town makes its decision on the application.

That the applicant may have learned of the applicable regulation only recently is of no consequence. The result would be the same if the applicant had learned of the applicable regulation only recently because it was newly adopted. Whether regulations are newly adopted or newly "discovered," an application for a CUP must be evaluated by reference to the regulations in effect at the time the Town takes action on the application.

In this regard, I saw an email from the Scott Thomas where he states, "we are obligated to observe the rules that are already in place, and we are prohibited from adopting new rules mid-course." But as the foregoing analysis demonstrates, that is incorrect. Mr. Thomas's statement is true only if a complete building permit or subdivision application has been submitted. Because that is not the case here, the applicant is not protected from "mid-course" changes in the applicable regulations.

Mr. Thomas also has, on occasion, referred to a 1989 rezone and suggested that had the effect of nullifying the 1986 contract rezone. But the promise in the 1986 contract to comply with historic district requirements was in exchange for the landowner having the right to develop the property consistent with the Commercial zoning then effect. The town might change that zoning later (as it did), but contract did not expire at that time. The contract provides the owner with the right to develop pursuant the commercial zoning then in effect, as long as the development is also consistent with the commercial zoning rules. That quid pro quo contractual agreement survives any unilateral action on the Town's part thereafter.

Mr. Thomas also has suggested that the Town waived all of its rights under the contract when it issued two CUPs for minor work on the property in the 1990s without requiring adherence to the Historical District regulations. (One CUP was for temporarily placing a trailer on the property; the other was to place a mobile home on the property.) But a failure to require compliance with contract terms on one or two occasions does not typically preclude a contracting party from requiring compliance in the future. The rules for waiving covenant restrictions through failure to enforce them in the past requires that the past failures to enforce be both "habitual and substantial." *Reading v. Keller*, 67 Wn.2d 86, 89, 406 P.2d 634, 636 (1965). Two, minor projects are not sufficient to trigger this rule.

B. Must development on the subject site comply with regulations of the Historical Preservation District?

The Contract Rezone clearly requires development on the subject property to comply with the regulations of the Historical Preservation District. Indeed, that appears to have been the primary purpose of the Town's agreement to rezone the property.

The Contract Rezone provides:

> Prior to any development or improvement of the above-described real property which would, under the applicable ordinances of the Town of La Conner require the application for an issuance of a building permit, application shall be made to the appropriate person, commission, committee or body for approval of the plan to develop or improve said **property as would be required if said property were located within this Historical Preservation District** of the Town of La Conner. The parties agree that Owners' property, which is the subject of his Contract Rezone, is not presently located within the Historical Preservation District, but **the Owner agrees to be bound by the same application and review process which applies to property located within the Historical Preservation District as if the above-described property were located within the Historical Preservation District.** Owner understands that any breach, violation or failure to comply with this condition shall cause the property in question to revert back to the underlying zone in effect prior to this rezone, namely residential. Owner agrees and understands that the City Attorney of the Town shall be authorized to take any action deemed necessary to enforce this agreement. (Emphasis supplied.)

The requirement for development on the subject property to meet the requirements of the Historical Preservation District are stated twice in this paragraph. In the first sentence, the contract provides that prior to any development that would require a building permit (which is the case here), the application must be submitted to the appropriate person or entity "for the approval . . . as would be required if said property were located within the Historical Preservation District of the Town of La Conner."

This requirement is then restated in the next sentence which makes clear that the requirement applies even though the property is *not* in the Historical Preservation District:

> The parties agree that Owners' property, which is the subject of his Contract Rezone, is not presently located within the Historical Preservation District, but the Owner agrees to be bound by the same application and review process which applies to property located within the Historical Preservation District as if the above-described property were located within the Historical Preservation District.

Clearly, then, the current development proposal is subject to the Historical Preservation District regulations.

C. If the Town finds development of the subject site must comply with the regulations of this Historical Preservation District, which regulations apply?

1. Do the regulations of the Historical Preservation District in effect when the Contract Rezone was executed apply; or do the regulations of the Historical Preservation District in effect when the current Conditional Use Permit was deemed technically [complete] apply?

2. Which specific regulations from the Historical Preservation District apply to the current development of the site?

C.1 (Which set of Historical Preservation Regulations are applicable—the former or current set?): As to whether a former set or the current set of Historical Preservation District regulations apply, the answer is dictated by the same vesting law discussed above. Because vesting applies only to applications for building permits and subdivisions (not CUPs or Historical Preservation District approvals), the current Historical Preservation District regulations are the ones to be applied in this instance.[2]

C.2 (Which specific regulations from the Historical Preservation District are most relevant to this particular application):

Numerous regulations appear to preclude the current design:

LMC 15.50.010 – Purposes of the historic preservation code is to "[e]nsure that new construction and additions respect the scale, forms and proportions of the Historic Preservation District."

LMC 15.50.020 – Chapter 15.50 applies, among other things, to "any new development" within the historic district.

LMC 15.50.060 – A historic design review permit is required for any new development.

LMC 15.50.080 – General requirements, including "design shall respect and preserve the important features and qualities of the La Conner Historic Preservation District as outlined in the Design Evaluation Checklist in LCMC 15.50.170. The proposal shall relate to, and not diminish any physical or visual aspect of the site, neighborhood, and community."

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[2] We note that the framing of Question C.1. appears to be based on a misunderstanding of Washington's vesting law. Question C.1. references the date when the CUP application was "deemed technically [complete]." As noted above, the date the application is complete is relevant if the application is for a building permit or subdivision, but it is irrelevant to this situation involving a CUP and Historical Preservation District approval.

LMC 15.50.090 – Building exterior requirements, including, but not limited to, LMC 15.50.090 (10) (Ornamentation) –

> (a) Ornamentation shall be in keeping with the historic period of the building.
> (b) Large wall areas of structures with street frontage devoid of ornamentation should be avoided.

LMC 15.50.110 – Building site requirements, including, but not limited to, subsection (3) ("historic relationship between buildings, landscape features, and open space should be retained") and subsection (4) (relating to ornamentation, lighting and other features which are to "respect the historic period" and meet other standards).

LMC 15.50.120 (2) – Morris Street Commercial District standards requiring, among other things, "residential scale and proportions historically found on this street shall be maintained;" and the setback, lot size, and lot coverage requirements in subsection (2) (a) – (e).

LMC 15.50.180 – Multiple requirements to "ensure that commercial buildings are based on a human scale, and to ensure that large buildings reduce their apparent mass and achieve an architectural scale consistent with historic scale, forms, and proportions of buildings in the Historic Preservation District."

Thank you for your consideration of this information. The community looks forward to working with the Town so that development of the property is consistent with the intent of the rezone contract and the intent of the historic preservation code: "Ensure that new construction and additions respect the scale, forms and proportions of the Historic Preservation District."

Very truly yours,

BRICKLIN & NEWMAN, LLP

David A. Bricklin

DAB:psc

CC: Scott Thomas
Clients