CARMICHAEL CLARK, P.S.
ATTORNEYS AT LAW

1700 D Street
Bellingham, WA, 98225

P. 360 647 1500
F. 360 647 1501
carmichaelclark.com

ROBERT A. CARMICHAEL | Attorney
bob@carmichaelclark.com

MEMORANDUM

TO: **Heidi Gudde**

FROM: Robert Carmichael and Catherine Moore

DATE: March 12, 2020

SUBJECT: **RB Development PRD**

INTRODUCTION

You asked us to determine whether the City of Lynden (City)'s current code provision prohibiting moving densities between areas within a planned residential development ("PRD") applies to the RB Development PRD ("RB PRD"). It is our conclusion that the RB PRD is not vested to the old code allowing such transfers. However, because such density transfers are expressly allowed under both the Development Contract and the City Code in place at the time the Development Contract was entered, we conclude that RB Development retains a contract right to move densities to different areas within the PRD.

FACTS

The RB PRD was approved in two stages: the development contract for the entire RB PRD in 1994, recorded at Whatcom County Auditor's File No. 941227078 ("Development Contract"), and the plat subdividing the property in 1995, recorded at Whatcom County Auditor's File No. 950412119 ("Plat"). RB Development is now proposing a 41-unit age-restricted housing development which was not contemplated in the Development Contract. The age-restricted housing would be placed on an open portion of a lot in Area B of the RB PRD. Area B was originally allocated 152 units of residential density. The particular lot the age-restricted development would go on is already improved with a 45-unit apartment building. The rest of Area B contains the Christian Health Care Center, a 142-bed facility allocated 85 units. The PRD as a whole has more than 41 remaining units, but Area B of the PRD has only 22 remaining units.[1]

Ch. 19.29 LMC governs PRDs. The version in effect at the time the RB PRD was approved permitted transferring densities between areas outright. The Development Contract modified this code provision to allow RB Development to move units from one area of the PRD to another area only after public hearing. However, the current version of LMC 19.29.120, adopted in 2006, explicitly prohibits such modifications.

[1] Area B is Lots 3, 4, 5, and 6 as designated on the Plat. At various points in the documents related to the PRD, there has been discussion of how 38 units were allocated to each "quadrant," but units have been moved between quadrants freely. We found no authority for asserting that the distribution of the densities had to be uniform across the entirety of Area B.

ANALYSIS

I. The RB Development PRD is NOT vested to being able to move densities between areas.

The vested rights doctrine originated at common law, and was eventually incorporated into state statute for certain types of land use applications.[2] vested rights extend to complete applications for "building permits…; subdivisions…; and development agreements…."[3]

There is no state statute governing planned residential developments (or more generally, planned unit developments or "PUDs") because PUDs are not defined by statute in Washington. There is also no statute extending vesting to a PUD on its own, in the absence of one of the above-mentioned applications to which vesting applies. Therefore, because applications for PUDs are "are not vested by statute, the vested rights doctrine does not apply."[4] However, when a PUD application and a plat application are inextricably linked, the vesting that applies to the plat application is extended to the companion PUD application.[5]

Here, the RB PRD was accompanied by the Plat recorded at Whatcom County Auditor's File No. 950412119. The RB PRD has the same "vested" rights as the Plat.

A. The possibility of permitting an amendment to the PRD to move units from one area to another is a "land use control ordinance" within the meaning of RCW 58.17.033.

RCW 58.17.033 is the statute codifying the vested rights doctrine for subdivisions:

> (1) A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.

The statute does not define "land use control ordinance," nor is it defined in the other sections on vesting. Courts have defined "land use control ordinance as "an ordinance that exerts a restraining or directing influence over land use."[6] Further, the land use control ordinance must be related to an issue left to the municipality's discretion, not one mandated by state or federal law.[7]

It is our interpretation that the ordinance prohibiting moving densities from one area of the PRD to another would be a "land use control ordinance" for vesting purposes. The ability to move densities impacts

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[2] *Town of Woodway v. Snohomish Cty.*, 180 Wn.2d 165, 173, 322 P.3d 1219, 1223 (2014), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019).

[3] *RMG Worldwide LLC v. Pierce Cty.*, 2 Wash.App.2d 257, 279-80, 409 P.3d 1126, 1138 (2017).

[4] Id. at 280.

[5] *Schneider Homes v. City of Kent,* 87 Wash.App. 774, 779, 942 P.2d 1096, 1099 (1997), *review denied,* 134 Wn.2d 1021, 958 P.2d 316 (1998).

[6] *Snohomish Cty. v. Pollution Control Hearings Bd.,* 187 Wn.2d 346, 366, 386 P.3d 1064, 1074 (2016), *as amended* (May 2, 2017), *citing New Castle Investments v. City of LaCenter,* 98 Wash.App. 224, 232, 989 P.2d 569 (1999).

[7] Id. at 374.

physical site development, and the prohibition on moving densities was an exercise in the City's discretion. Therefore, we conclude that the ability to move densities vested with the PRD.

B. However, the vested status of the PRD expired when the vested status of the Plat did.

RCW 58.17.170(2)(a) states: "…any lots in a final plat filed for record shall be a valid land use notwithstanding any change in zoning laws for a period of seven years from the date of filing if the date of filing is on or before December 31, 2014…" In 1994 when the RB PRD was approved, the RCW stated: "a subdivision shall be governed by the terms of approval of the final plat, and the statutes, ordinances, and regulations in effect at the time of approval under RCW 58.17.150(1) and (3) for a period of five years after final plat approval…"

Regardless of whether the five or seven-year limit applies, any right to develop under the land use ordinances in effect at the time of plat approval has expired. Even if the RB PRD was vested to the ability to move densities between areas, it is not any longer. The vested rights doctrine will provide RB Development no relief.

II. RB Development does, however, appear to have a contract right to transfer densities.

In 2006, the City adopted an ordinance which prohibits the transfer of densities from one area of a PRD to another. LMC 19.29.120(C)(1). But, Paragraph 19(e) of the Development Contract states, "Unused densities or units cannot be transferred to other parcels without approval through the PRD hearing process as established in Lynden Municipal Code 19.29.050." In other words, the Development Contract allows density transfers between areas if approved by the City through the process provided in LMC 19.29.050 as it existed in 1994.

LMC 19.29.050 described the hearing process for approval of a PRD, which is the same as the hearing process for approval of a PRD today. The planning commission made a recommendation to the city council, who had the ultimate authority to approve or deny the PRD application.

The clause in Paragraph 19(e) must have been specifically bargained for between the parties, as opposed to being a standard clause included in PRDs routinely at the time, because Ch. 19.29 in 1994 actually permitted transferring densities between areas. LMC 19.29.10(F) stated:

> Densities are for an entire Planned Residential Development. As a result, if there are less units in the first phase of the development than otherwise allowed, a transfer of the number of units may be allowed to subsequent development phases.

A. As a contract, the PRD would likely be interpreted to permit moving densities, despite the change in the municipal code.

It is a basic tenet of contract interpretation that "[t]he law in force at the time the contract was made became part of contracts executed thereunder, and continues in force for the benefit of persons entitled thereto, until the engagements of the contract are fully performed."[8] Additionally, "[i]f the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that

[8] *State ex rel. Washington Mut. Sav. Bank v. City of Bellingham*, 8 Wn.2d 233, 248, 111 P.2d 781, 788 (1941).

document becomes part of their contract."[9] Finally, Washington courts have embraced "the rule that if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract…."[10]

The law at the time the Development Contract was approved explicitly permitted moving units between PRD areas. The Development Contract modified this slightly to permit moving densities between areas subject to a public hearing, as provided by the then-current LMC 19.29.050, which it incorporated by reference. The City then adopted a new ordinance, which, if applied to the RB PRD, would result in the City breaching this provision of the Development Contract.

If it applied the 2006 ordinance to the RB PRD, a court would almost certainly find that the City "voluntarily put[] it out of [its] power" to honor clause 19(e) of the Development Contract, and that such action constituted a breach of the Development Contract. A court would likely require the City to honor clause 19(e) and hold a public hearing on transferring densities within the RB PRD to remedy that breach. Alternatively, a court could award RB Development damages for the breach, which would amount to the difference in profit between a 41-unit development and the development RB Development could actually build without transferring densities into Area B.

Since the City is a public entity, it is additionally subject to the requirements of the Washington State Constitution. Those obligations are described more fully in the next section.

B. Imposition of the prohibition on moving densities between areas of the PRD, which was codified in 2006, would likely be a violation of the Contracts Clause of the Washington State Constitution.

Article 1, Section 23 of the Washington State Constitution, like Article 1, Section 10, Clause 1 of the United States Constitution, prohibits impairment of obligations of contracts,[11] including obligations of contracts made by the jurisdiction implementing the new law. It is likely that for Lynden to now prohibit transferring densities within the RB PRD, where the Development Contract specifically allows transferring densities, would be unconstitutional.

Courts have different tests for when a private contract is infringed upon versus when a public contract is infringed upon. A governmental entity is held to a higher standard when its own ordinance could impair a contract to which it is a party.[12] "The test for analyzing impairment of public contracts has three parts. First, the court must determine whether a contractual relationship exists; second, the court must determine whether the legislation substantially impairs the contractual relationship; third, when a state impairs its own contracts, the court must determine if the impairment was reasonable and necessary to serve a legitimate public purpose."[13]

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[9] *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.,* 176 Wn.2d 502, 517, 296 P.3d 821, 829 (2013).

[10] *Vance v. Mut. Gold Corp*., 6 Wn.2d 466, 475, 108 P.2d 799, 804 (1940).

[11] "Obligations of contracts" refers to contract parties' legal obligation to perform the duties specified in the contract. This is as opposed to the agreement the parties reach itself. Governments may and routinely do limit what parties may actually agree to in a contract.

[12] *Caritas Servs., Inc. v. Dep't of Soc. & Health Servs.,* 123 Wn.2d 391, 403, 869 P.2d 28, 35 (1994).

[13] Id., citing *Carlstrom v. State,* 103 Wash.2d 391, 694 P.2d 1 (1985); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505 (1977).

Regarding the first prong of the test, Washington courts define "contract" as "an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts."[14] There can be little doubt that the Development Contract is a contract. The contract reduces to writing the agreement by which, in consideration of the development specifications contained therein, the City would allow the development of the RB PRD.

Second, "[a] contract is impaired by a statute which alters its terms, imposes new conditions or lessens its value."[15] "Impairment may be substantial if the complaining party relied on the supplanted portions of the contract."[16] Statutes and ordinances have been found to substantially impair contracts where the change in law resulted in: a reduction in expected compensation by $175,000;[17] a requirement to annex into a city, where that requirement was not present when a ULID was imposed and property owners paid their ULID assessments;[18] or a prohibition on granting franchises to all utility providers except one, where the city previously granted a franchise to a different utility provider.[19]

Here, it is likely that a court would agree the City's subsequent prohibition on moving densities within the PRD substantially impairs RB Development's right under the Development Contract to have an amendment to relocate densities considered. It is true that RB Development has not specifically exercised this right in the past. RB Development has, however, made significant amendments to the PRD in other ways that have impacted the distribution of its densities. It appears that some of the areas themselves may have had their boundaries adjusted. And, when considering the amendment to allow the Christian Health Care Center, the Planning Commission noted that the two parcels within Area B the development was to be on had been allocated 76 units, but still permitted the 142-bed project. The ability to move units between areas of the PRD is flexibility that, as evidenced by the present action, has real monetary value to RB Development.

Third, "[e]ven if a substantial impairment of contract occurs, however, it may nonetheless be constitutional if it was reasonable and necessary to achieve a legitimate public purpose."[20] This inquiry, in turn, is analyzed using five factors: "(1) the emergency nature of the legislation; (2) whether the state had previously regulated the subject activity; (3) whether the impact is generalized or specifically directed toward a narrow class; (4) whether the reliance on pre-existing rights was both actual and reasonable; and (5) whether the challenged law worked a severe, permanent, and immediate change in those relationships reasonably relied upon."[21]

Here, the third prong leans toward the City's new ordinance being unconstitutional as applied to the RB PRD, but not as certainly as the previous two. First, the ordinance was not passed in response to a true public emergency. This weighs against the ordinance being constitutional. Second, PRDs are and were fairly

[14] Id.

[15] *Ketcham v. King Cty. Med. Serv. Corp.,* 81 Wn.2d 565, 576, 502 P.2d 1197, 1203 (1972), *citing Tremper v. Northwestern Mut. Life Ins. Co.,* 11 Wash.2d 461, 119 P.2d 707 (1941).

[16] *Caritas Servs., Inc.,*123 Wn.2d at 405.

[17] *Caritas Servs., Inc.*, supra

[18] *Vine St. Commercial P'ship v. City of Marysville*, 98 Wn. App. 541, 553, 989 P.2d 1238, 1244 (1999)

[19] *City of Tuckwila,* supra

[20] *Caritas Servs., Inc.,* 123 Wn.2d at 411.

[21] *Cycle Barn, Inc. v. Arctic Cat Sales Inc.,* 701 F. Supp. 2d 1197, 1203 (W.D. Wash. 2010).

significantly regulated by the Lynden Municipal Code, but are not subject the same level of regulation as subdivisions. We find this factor to be neutral. Third, the prohibition on moving densities presumably has a fairly narrow impact, as there are few PRDs in Lynden. This weighs against the ordinance's constitutionality as applied. Fourth, there is some evidence that RB Development has been acting in reasonable reliance on the ability to move densities, but it is also undisputed that this is the first instance of RB Development moving densities. This factor is neutral. Fifth, the ordinance does not really impose severe, permanent, and immediate change. RB Development is limited to placing an additional 22 units on the property, instead of the desired 41. This weighs in favor of constitutionality.

III. The Developer and City Council might be able to agree to abandon the Development Contract for further development.

In general, parties to a contract may, upon mutual agreement, rescind that contract.[22] However, Washington courts favor maintaining the integrity of PUDs. For example, in one case, a tract that had been designated as green space in a PUD was foreclosed upon due to failure to pay taxes; the court held that the tract would retain its green space designation even after the foreclosure sale.[23] If the City and RB Development mutually decided to abandon the PRD, there is a question as to whether a court would find that action valid. Unfortunately, the courts have not yet had an opportunity to rule on this issue.

CONCLUSION

At the time RB Development entered into its Development Contract with the City in 1994, the City Code expressly provided that densities were established for the entire PRD, and that increased density may be transferred from early phases of the development to later phases. LMC 19.29.100.F (*circa 1994*). Furthermore, and perhaps most importantly, such density transfers are expressly allowed under the Development Contract. Therefore, we conclude that RB Development retains a contract right to transfer densities to later developments within the PRD. This contract right is not only enforceable at law by RB Development, but a breach thereof by the City would likely violate the "Contracts Clause" of the Washington state constitution.

[22] See e.g. *Pavey v. Collins,* 31 Wn.2d 864, 870, 199 P.2d 571, 574 (1948).

[23] *City of Olympia v. Palzer,* 107 Wn.2d 225, 728 P.2d 135 (1986).