

Countryman, Ryan

From: Tom McCormick <tommccormick@mac.com>
Sent: Friday, October 30, 2015 4:03 PM
To: Countryman, Ryan
Cc: Gretchen Brunner; Richard Schipanski; Tom Mailhot; Debbie Tarry; Eric Faison
Subject: No 2011 vesting to City's and Town's level of service standards
Attachments: 2008 FEIS & 2007 DEIS marked excerpts Emerald Pointe copy.pdf

Ryan,

Following up on my 10/15/2015 email that attached a spreadsheet of Shoreline's and Woodway's Traffic Limit Rules with Potential Vesting Dates, please consider the discussion below.

There are at least three reasons why the City's and Town's level of service standards and hard cap ADT limits in effect at the time of permitting apply to BSRE's applications, and not the level of service standards that were in effect when BSRE submitted its 2011 applications.

1. The vesting doctrine is generally limited to those laws which can loosely be considered as "zoning or other land use control ordinances." RCW 19.27.095 and RCW 58.17.033. A City's level of service standards for transportation are not generally considered to be zoning or other land use control ordinances.
2. Transportation rules (including level of service standards) serve a health and safety function and, as such, are not subject to the vesting doctrine. For an example of a jurisdiction that followed this conclusion, see the attached PDF of excerpts from the City of Burien's 2008 FEIS and 2007 DEIS for EMERALD POINTE ON THE SOUND. Here are a few of the excerpts: "Transportation regulations serve a health and safety function and, as such, are not vested. Therefore, the current Burien transportation policies and regulations ... apply to the Project." And Appendix A provides: "The project is vested to the 1990 Land Use regulations. However, regarding Health and Safety policies and regulations, current policies and regulations apply; this includes policies and regulations related to level of service for transportation." Perhaps Burien was aware of cases like *Hass v. Kirkland* and later cases that articulate either a "health and safety" or "police power" exception to the vested rights doctrine. *Hass v. Kirkland*, 78 Wn.2d 929, 931-32, 481 P.2d 9 (1971) ("There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community.") (quoting *City of Seattle v. Hinckley*, 40 Wn. 468, 471, 82 P. 747 (1905)).
3. The vesting doctrine applies only to the zoning or other land use control ordinances of the jurisdiction that is the permitting jurisdiction. Thus, the vesting doctrine does not apply to the City's or Town's level of service standards for transportation. It is implicit in the vesting statutes, RCW 19.27.095 and RCW 58.17.033, that an applicant can only vest to the rules of the permitting jurisdiction.

Please contact me if you have any questions about the above.

Thank you.

Tom McCormick

EMERALD POINTE ON THE SOUND

Final Environmental Impact Statement



See the embedded comments
regarding vesting.

Prepared for:

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June 2008

1.0 SUMMARY

Where this chapter of the Final Environmental Impact Statement (FEIS) includes clarifications or corrections to the Draft Environmental Impact Statement (DEIS) (whether in response to public comments on the DEIS, or based on clarifications or corrections by the City of Burien [City], its consultants, or the Applicant), the changes are identified in this FEIS using underlined text (underlined) for additions and strikethrough text (strikethrough) for deletions. However, minor non-substantive edits—such as punctuation, grammar, structure of citations, or use of abbreviations and capitalization—have been made without using underline/strikethrough in the text.

1.1 Introduction

The City of Burien prepared this ~~Draft~~ Environmental Impact Statement (DEIS) to identify and address the potential environmental impacts associated with a proposed Project to develop a multi-family development within the City. The Project, known as Emerald Pointe on the Sound (Emerald Pointe), was originally submitted to King County (County) on February 15, 1990, and it is vested under the County land use regulations in place at the time (see Section 1.3, Project History, for more information). February 15, 1990, is the date of Project vesting. In 1993, the City of Burien incorporated and the Emerald Pointe application was transferred to the City. In August 1996, the City of Burien issued a State Environmental Policy Act (SEPA) Determination of Significance (DS) for the Project, based on a review of the Project's SEPA checklist and the City's conclusion that the proposed Project could create a significant adverse impact to some elements of the environment. In addition, a Scoping Notice that established the alternatives and elements reviewed in this DEIS was issued on April 30, 1997. The City of Burien's DS followed the issuance of a DS by King County in June 1991, when the Project was still under the jurisdiction of the County. In response to the DS determination by the City, this EIS has been developed to evaluate two alternative development scenarios that would implement the Proposed Action on the Emerald Pointe site. In addition, a No Action Alternative, in compliance with SEPA and Revised Code of Washington (RCW) Chapter 43.21C, is also analyzed.

As stipulated in the RCW, the potential impacts of the Proposed Action alternatives have been evaluated in this document for circulation for public and agency review. Impacts identified herein are defined as either "adverse" or "significant." Significant, as used in the context of SEPA, means "reasonable likelihood of more than a moderate adverse impact on environmental quality" (SEPA Rules, Washington Administrative Code [WAC] Section 197-11-794(1)). Significance involves both context (physical setting) and intensity (magnitude and duration of an impact). The SEPA Rules also note that "an impact may be significant if its chance of occurrence is not great, but that resulting environmental impact would be severe if it occurred" (WAC Section 197-11-794(2)).

This section presents the purpose and need for the Project, reviews significant events in the Project's history, generally describes the Project site, and lists the individual elements of the environment that are analyzed in depth in Chapter 3 of the DEIS. With this information as

general background, an overview of the three alternatives and the associated impacts identified in subsequent sections is also provided.

1.2 Purpose and Need for the Project

The primary purpose of the Project is to develop a new multi-family condominium development, to be known as Emerald Pointe on the Sound, within the Burien city limits. Two action alternatives are proposed that would provide either 178 or 200 units of market-rate housing, plus an additional manager's unit, in accordance with applicable regulations. These alternatives aim to provide market-rate housing opportunities to existing and new Burien residents, while allowing the property owner to develop his property. The action alternatives discussed below, and their proposed residential densities, are consistent with the land use requirements of the vested 1990 King County Development Code. Under the vested code, the Project site is split between the RM-1800 and RM-2400 zoning designations. These zoning designations allow for high-density multi-family residential and medium-density multi-family residential uses, respectively. Additional objectives of the development include recognizing and accommodating the development constraints and opportunities of the site and mitigating potential environmental impacts, particularly to sensitive environmental features such as streams and wetlands.

Since the City of Burien incorporated in 1993, most of its population increase has come from annexation. In 1999, the City annexed the Manhattan area (south Burien), adding approximately 2,500 residents. Since that time, the population of the City of Burien has remained relatively stable. Between 2000 and 2005, the City's population fluctuated between approximately 31,000 and 32,000 residents. Washington's Office of Financial Management (OFM) estimated Burien's population in 2006 to be 31,080, down from a high of 31,881 in 2000 (OFM 2006). The provision of new housing serves to accommodate this expanding population with adequate housing opportunities, as established in *The Burien Plan* housing goals and policies (City of Burien 2006).

1.3 Project History

Since the submittal of the original Emerald Pointe building permit application and permit fees to King County in 1990, the Project has been subject to a number of important events and jurisdictional decisions that set the stage for the preparation of the EIS. Key events in the process leading up to the preparation of this EIS include:

- (1) *February 15, 1990* – The Applicant submitted the original Emerald Pointe building permit application and fees to King County. The original site plan for the Project proposed a total of 216 units. This submittal represents the “vesting” date of the Project (see below for more discussion of vesting).
- (2) *June 19, 1991* – King County issued a SEPA DS on the Project, based on the completion of a SEPA Checklist. The County's issuance of a DS for the Project required the preparation of an EIS.
- (3) *May 18, 1992* – The Applicant submitted an addendum to the original SEPA Checklist that reduced the size of the proposed Project to 178 units. After reviewing the addendum, King County maintained its requirement of an EIS for the Project.

- (4) *February 28, 1993* – The City of Burien, previously part of unincorporated King County, officially incorporated, establishing a separate jurisdictional entity. As a result of an interlocal agreement between King County and the City of Burien, lead agency status on the Emerald Pointe Project (and a number of other projects) was transferred to the City of Burien. With this, the City assumed the responsibility for the Project’s compliance with SEPA.
- (5) *August 17, 1996* – The City of Burien issued its DS for the proposed Emerald Pointe Project based on its review of the Applicant’s original SEPA Checklist. In its DS, the City recognized King County’s previous identification of “a series of natural and built environment issues to be considered along with appropriate alternatives to the Project proposal...requiring additional environmental analysis.” The City determined that these environmental issues would still require environmental review in an EIS.
- (6) *September 3, 1996* – The Applicant filed an appeal of the City’s DS (an amended Notice of Appeal was submitted to the City on May 12, 1997 after the EIS scoping process).
- (7) *March 21, 1997* – The City of Burien issued a notice soliciting public comment on the scope of the Emerald Pointe EIS. The City issued the final scope of the EIS on April 30, 1997.
- (8) *January 14 and 20, 1998* – The City of Burien Hearing Examiner held hearings to make a decision on the Applicant’s appeal of the City’s DS determination. Due to ongoing litigation between the Applicant and the City and the potential for a settlement, the Hearing Examiner did not make a decision at the time (for more information on the legal aspects of the Project, see below).
- (9) *September 23, 2003* – The City withdrew the 1996 DS and issued a Mitigated Determination of Non-Significance (MDNS) based on the mitigation measures proposed by the Applicant in its submittal materials.
- (10) *October 14, 2003* – William Taylor appealed the City’s withdrawal of the DS and issuance of an MDNS to the City of Burien Hearing Examiner.
- (11) *February 18, 2004* – The City of Burien Hearing Examiner held a public hearing on the Taylor appeal.
- (12) *April 19, 2004* – The City of Burien Hearing Examiner issued a decision on the Taylor appeal, withdrawing the MDNS and reinstating the DS.
- (913) *October 18, 2005* – After an extended period due to litigation, the City of Burien Hearing Examiner denied the Applicant’s appeal. As a result of the Hearing Examiner’s denial of the appeal, completion of the current EIS was required for the Project application to proceed.

A major issue for the Project has been “vesting.” Based on State of Washington case law, vesting refers to the “notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the applicant’s submission” (*Friends of the Law v. King County* [1994]). The Applicant

originally filed a complete building permit application for the Emerald Pointe on the Sound Project in King County on February 15, 1990, because at the time of its original filing, Burien was not an incorporated city. As such, the Project is vested under 1990 King County land use regulations and must comply with the requirements contained in those regulations.

According to Washington case law, the “vested rights rule is generally limited to those laws which can loosely be considered ‘zoning’ laws” (*New Castle Investments v. City of Lacey* [1999]). Therefore, a project is only vested to those regulations specifically established to control land use-related activities. Resource areas guided by the 1990 King County land use regulations include Earth, Water, Plants and Animals, Wetlands, Land Use, and Aesthetics, Light, and Glare (except for illumination standards, as explained below). Comprehensive Plan priorities and policies are not considered to be land use regulations; they may be used as guidance, but may not act as a substitute for development regulations. To ensure appropriate public safety, vesting does not apply to regulations governing health and safety. Therefore, current Burien transportation, noise, public services and utilities, and parks and recreation standards are discussed in the applicable sections. Illumination standards are also considered health and safety regulations. A matrix showing the applicable plans and regulations for each section of this EIS can be found in Appendix A of the DEIS.

1.4 Project Site: Location and Description

Located at 13401 12th Avenue SW, in Burien, Washington, the proposed Project site is in the north-central portion of the City of Burien (see Figure 1.4-1). The site, roughly 1 mile from downtown Burien, abuts the eastern border of Seahurst (Ed Munro) Park and encompasses three parcels, all owned by the Applicant, totaling approximately 9.8 acres. Physically, the site sits on the upper part of the Puget Sound bluff, a moderately to steeply sloped hillside facing westward toward Puget Sound. The northeast corner of the Project site is framed by the intersection of 12th Avenue SW and SW 134th Street. Property owned by the Highline School District—and containing the former Burien Senior Center—is directly adjacent to the southeast boundary of the site. Directly south (across an undeveloped portion of the SW 136th Street right-of-way) is the Vintage Park apartment complex. Vintage Park contains over 500 multi-family rental dwelling units. Sound Vista, a 110-unit condominium development, is located directly north of the Project site. Residential densities of these two adjacent projects are approximately 15 dwelling units per acre and 22.5 dwelling units per acre, respectively.

According to the vested 1990 King County zoning, the Project site is zoned for multi-family development. Although the entire site was zoned for multi-family use, the three parcels have different zoning designations. The zoning on the Project site is split between RM-1800 and RM-2400. The two northernmost parcels are designated RM-1800 and the southernmost parcel is designated RM-2400. These zoning designations allow high-density, multi-family residential development (one dwelling unit per 1,800 square feet) and medium-density, multi-family residential development (one dwelling unit per 2,400 square feet), respectively. On a per acre basis, these zoning designations allow a maximum of 24.2 dwelling units per acre (RM-1800) and 18.1 dwelling units per acre (RM-2400).

3.0 ELEMENTS OF THE ENVIRONMENT



The 2008 FEIS did not revise the marked section below from the DEIS. Thus, the marked DEIS text is considered to be part of the 2008 FEIS.

3.1 Transportation

This section presents information on the existing transportation network near and adjacent to the Project site and identifies potential impacts resulting from the proposed development alternatives. Potential long-term transportation impacts are estimated using the year 2010 as the relevant time frame. The No Action Alternative serves as the baseline for determining potential impacts of the two action alternatives. The section also addresses potential methods to mitigate significant adverse impacts and identifies potential adverse impacts that cannot be avoided.

3.1.1 Affected Environment

This section describes the existing transportation conditions within the vicinity of the site. This includes the study area, roadway network, traffic volumes, traffic operations, traffic safety, transit service, and non-motorized facilities in the study area.

3.1.1.1 Applicable Regulations

A number of regulations were used to identify the potential transportation impacts of the three alternatives under consideration in this EIS. Transportation regulations serve a health and safety function and, as such, are not vested. Therefore, the current Burien transportation policies and regulations (except for concurrency-related regulations) apply to the Project. Applicable policies, standards, and regulations include (for additional information on applicable regulations, see Appendix A):

- Current BMC 18.70 - Development Standards – Adequacy of Public Facilities and Services (except that concurrency requirements do not apply);
- Current Burien Comprehensive Plan Transportation Element (2003 as amended);
- Current Burien Transportation Improvement Program (2003); and
- Current Burien Pedestrian and Bicycle Facilities Plan (2004).

The City uses Level of Service (LOS) as the foundation of adequate transportation system functioning. LOS represents a tool to qualitatively measure the operational conditions of the system. LOS values range from A to F. LOS A represents free-flow traffic with little or no delay while LOS F indicates extreme congestion with lengthy delays. At signalized intersections, LOS is defined in terms of average delay per vehicle. At unsignalized intersections, LOS is measured in terms of the reserve (or unused) capacity available for critical turning movements.

In the Burien Comprehensive Plan and BMC 18.70, the City has adopted the following LOS standards:

- LOS E for First Avenue South;
- LOS D within the urban center boundary and for the intersection of SW 128th Street and Ambaum Boulevard SW; and
- LOS C for all other roadways and facilities (except state facilities).

Appendix A

Applicable Codes and Regulations under Vesting Rules for Emerald Pointe on the Sound



The 2008 FEIS did not revise Appendix from the DEIS. Thus, the marked DEIS text is considered to be part of the 2008 FEIS.

Emerald Pointe Project Applicable Plans and Regulations

This appendix identifies policies, standards and regulations that are applicable to the Emerald Pointe project based on vesting of the permit application for the project on February 15, 1990. This includes applicable SEPA regulations and policies, a summary explanation of the applicability of vested regulations and where current regulations may apply, and a chart showing the applicable regulations pertaining to each element of the environment that is analyzed in the EIS.

The following SEPA laws, regulations, and procedures apply to the project

- Revised Code of Washington (RCW) 43.21C currently in effect.
- Washington Administrative Code (WAC) 197-11 currently in effect.
- King County Code (KCC) 20.44 in effect on June 1, 1998 (as adopted by reference in Burien Municipal Code [BMC] 14.05.010) excluding KCC 20.44.080 (C) and (D).

The City has provided the following general comments regarding applicability of policies and regulations:

1. The project is vested to the 1990 Land Use regulations. However, regarding Health and Safety policies and regulations, current policies and regulations apply; this includes policies and regulations related to level of service for transportation.
2. SEPA mitigating measures necessary to mitigate environmental impacts remaining after applying any applicable regulations can still be required but are based on the vested 1990 regulations.
3. The proponent and City may agree in writing to use current regulations instead of vested regulations.
4. The current Burien Comprehensive Plan may be used as guidance but may not act as a substitute for development regulations. In cases where the current Comprehensive Plan and vested regulations are in conflict, the vested regulations supersede.
5. Procedural rules in effect at the time of vesting will be applied unless the applicant otherwise agrees to follow later enacted procedural rules.
6. The project is vested to the SEPA policies in place at the time of complete application. Therefore, the City may consider environmental impacts only in the context of the environmental regulations in place by King County in 1990 as well as SEPA as it existed at the time of vesting. Thus, approval or denial and mitigation standards must be based upon those 1990 policies to which the applicant has vested.



Policies, Standards, and Regulations pertaining to Elements of the Environment

EIS Section	<u>Applicable Policies, Standards, and Regulations</u>	Explanation
Transportation	<ul style="list-style-type: none"> • Current BMC 18.70 - Development Standards – Adequacy of Public Facilities and Services (except that concurrency requirements do not apply) • Current Burien Comprehensive Plan Transportation Element (2003 as amended) • Current Burien Transportation Improvement Program (2003) • Current Burien Pedestrian and Bicycle Facilities Plan (2004) 	<p><u>Transportation regulations relate to health and safety; and are therefore not vested. However, concurrency regulations do not vest.</u></p> <p>While impact mitigation fees do not vest, the City does not have an adopted impact fee ordinance and so no impact fees apply.</p> <p>Following are current City of Burien policies, standards, and regulations which are <u>not applicable</u>:</p> <ul style="list-style-type: none"> • Concurrency standards contained in BMC 18.70 Adequacy of Public Facilities and Services
Drainage and Water Quality	<ul style="list-style-type: none"> • 2005 King County Surface Water Manual (2005 Manual), as agreed to in writing by the proponent. • Wetlands regulations contained in KCC 21.54 Special Control Areas in effect February 15, 1990 • Current Burien Comprehensive Plan Stormwater Element (2003 as amended) are used as guidance 	<p>Land use regulations are vested; however, the proponent and City may agree in writing to use current regulations instead of vested regulations.</p>
Earth and Geotechnical	<ul style="list-style-type: none"> • KCC 21.54 Special Control Areas in effect Feb. 15, 1990 • KCC 16.82 Grading in effect Feb. 15, 1990 • Current International Building Code (IBC) adopted in the BMC by reference (as adopted by reference in Chapter 19.27 RCW). 	<p>Land use regulations are vested. However, building codes pertain to health and safety; and are therefore not vested.</p> <p>Following are current City of Burien policies, standards, and regulations which are <u>not applicable</u>:</p> <ul style="list-style-type: none"> • Current Burien Zoning Code 19.40 Critical Areas • Current City of Burien Critical Areas Maps
Plants and Animals	<ul style="list-style-type: none"> • Wetlands regulations in KCC 21.54 Special Control Areas in effect Feb. 15, 1990 • KCC 21.51 Landscaping and Screening in effect Feb. 15, 1990 	<p>Land use regulations are vested.</p> <p>Following are current City of Burien policies, standards, and regulations which are <u>not applicable</u>:</p> <ul style="list-style-type: none"> • Current Burien Zoning Code 19.40 Critical Areas • Current Burien Zoning Code 19.25 Tree Retention and Landscaping • Current City of Burien Critical Areas Maps
Wetlands	<ul style="list-style-type: none"> • Wetlands regulations in KCC 21.54 Special Control Areas in effect Feb. 15, 1990 	<p>Land Use regulations are vested.</p> <p>Following are current City of Burien policies, standards, and regulations which are <u>not applicable</u>:</p>

EIS Section	Applicable Policies, Standards, and Regulations	Explanation
		<ul style="list-style-type: none"> • Current City of Burien Critical Areas Maps • Current Ecology 1997 Manual Wetland Definition/USACE 1987 Manual • Current City of Burien Critical Areas Ordinance definitions (including buffer definitions) • Washington Department of Ecology Wetland Rating System (2004)
Land Use (including Relationship to Plans and Policies)	<ul style="list-style-type: none"> • KCC 21.12 RM-2400 in effect Feb. 15, 1990 • KCC 21.14 RM-1800 in effect Feb. 15, 1990 • KCC 21.48 General Provisions – Height Yards, Area and Open Space in effect Feb. 15, 1990 • KCC 21.50 General Provisions - Loading Areas and Off Street Parking in effect Feb. 15, 1990 • KCC 21.51 Landscaping and Screening in effect Feb. 15, 1990 • Current Burien Comprehensive Plan (2003 as amended) is used as guidance except where vested regulations apply 	<p>Land use regulations are vested.</p> <p>Following are current City of Burien policies, standards, and regulations which are <u>not applicable</u>:</p> <ul style="list-style-type: none"> • Burien Zoning Code 19.15.005 Single Family Residential Zones (The site’s current zoning is RS-12,000; however, the vested King County regulations apply instead.)
Aesthetics, Light & Glare	<ul style="list-style-type: none"> • KCC 21.12.080 Height (RM-2400) in effect Feb. 15, 1990 • KCC 21.14.080 Height (RM-1800) in effect Feb. 15, 1990 • Current Burien Comprehensive Plan (2003 as amended) is used as guidance except where vested regulations apply 	<p>Building height is related to land use, and land use regulations are vested.</p> <p>Illumination standards are considered health and safety and are not vested; however, Burien does not have illumination standards for private development.</p> <p>Following are current City of Burien policies, standards, and regulations which are <u>not applicable</u>:</p> <ul style="list-style-type: none"> • City of Burien Comprehensive Plan (as amended in 2003) – Community Character Element • Burien Zoning Code 19.15.005 Single Family Residential Zones (The site’s current zoning is RS-12,000; however, the vested King County regulations apply instead.)
Noise	<ul style="list-style-type: none"> • Current BMC 9.105.400 Noise • Current BMC 12.30.1100 Exterior Noise Levels at Parks of Local or Regional Significance • Current WAC 173-60 Maximum Environmental Noise Levels 	<p>Noise relates to health and safety regulations; therefore, current noise regulations apply.</p>
Parks and Recreation	<ul style="list-style-type: none"> • Current Burien Comprehensive Plan – Parks, Recreation and Open Space Element (2003 as amended) is used as guidance • Parks Recreation and Open Space Plan (2006) is used as guidance 	<p>No parks and open space regulations relating to the development of multi-family housing were in effect in King County on Feb. 15, 1990. Current plans and policies are used as guidance.</p>

EIS Section	Applicable Policies, Standards, and Regulations	Explanation
	<ul style="list-style-type: none"> • Seahurst Park Master Plan (2002) is used as guidance • Pedestrian and Bicycle Facilities Plan (2004) is used as guidance 	
Public Services <ul style="list-style-type: none"> • Police • Fire • School 	<ul style="list-style-type: none"> • Current Highline School District Capital Facilities Plan • Current fire service certificate of availability is required. 	<p>Ability to provide services does not vest to old plans.</p> <p>Following are current City of Burien policies, standards, and regulations which are <u>not applicable</u>:</p> <ul style="list-style-type: none"> • City of Burien Comprehensive Plan (2003) – Capital Facilities Element
Public Utilities <ul style="list-style-type: none"> • Sewer • Water • Solid Waste 	<ul style="list-style-type: none"> • Current sewer and water certificates of availability are required. 	<p>Ability to provide services does not vest to old plans.</p> <p>Following are current City of Burien policies, standards, and regulations which are <u>not applicable</u>:</p> <ul style="list-style-type: none"> • City of Burien Comprehensive Plan (2003) – Capital Facilities Element