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SUPREME COURT
OF THE STATE OF WASHINGTON

POTALA VILLAGE KIRKLAND, LLC, a Washington limited liability company, and LOBSANG DARGEY and TAMARA AGASSI DARGEY, a married couple,

Petitioner,

vs.

CITY OF KIRKLAND, a Washington municipal corporation,

Respondent.

CITY'S **ANSWER** TO THE PACIFIC LEGAL FOUNDATION AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON'S AMICUS CURIAE MEMORANDUM

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I. INTRODUCTION

This Court should decline to review Division I's decision, *Potala Village Kirkland, LLC v. City of Kirkland*, 334 P.3d 1143 (2014 WL 4187807). The Pacific Legal Foundation and Building Industry Association of Washington (Amici curiae) fail to demonstrate how the decision conflicts with any decision of this Court or the Courts of Appeals. The case presents no constitutional issue and merits no review from this Court.

Amici curiae's primary argument is that Division I's decision ignores case law recognizing that the common law vested rights doctrine remains in force "despite the [Legislature's] codification" in 1987 of the vested rights doctrine. To the contrary, in *Abbey Road v. Bonney Lake* this Court held that pre-1987 cases extending the common law vested rights doctrine to permits other than building permits are no longer effective. *Accord Erickson v. McLeran*. *Abbey Road* stated that common law vested rights cases have been superseded by the Legislature's 1987 codification of the vested rights doctrine. Amici curiae may not will away this Court's earlier decisions. Because this Court has already decided the issue presented in this case, it merits no further review.

II. ARGUMENT

A. Amici do not raise any issue requiring review by the Supreme Court

1. In both *Erickson* and *Abbey Road*, this Court already announced that the vested rights doctrine is statutory.

Nothing about Division I's decision merits review. It is consistent with *Abbey Road v. Bonney Lake*, 167 Wn.2d 242, 252-254, 218 P.3d 180 (2009), where this Court held that as long as the City allows a developer to file a building permit application at any time in the permitting process (as the City of Kirkland allows), then only the building permit application – and no other permit – freezes the land use laws for the rest of the project. *Abbey Road* noted that the vested rights doctrine had been codified in 1987, and the Legislature had provided for vesting only upon the filing of a complete building permit application pursuant to RCW 19.27.095(1). *Abbey Road*, 167 Wn.2d at 252-254.

Abbey Road relied upon *Erickson v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994), which in turn relied on RCW 19.27.095(1), to decline to extend vested rights to any application other than a building permit. "For the same reasons we rejected the invitation to extend the vesting doctrine in *Erickson*, we refuse to expand it in this case." *Abbey Road*, 167 Wn.2d at 253.

2. **There is no Supreme Court or Court of Appeals decision contrary to *Erickson* and *Abbey Road*.**

Amici curiae argues that Division I's decision ignores case law recognizing that common law vesting remains in force "despite the codification" in 1987 of the vested rights doctrine. *Mem.*, p. 3. Amici curiae argue that case law decided pre-1987, which extended vested rights to applications other than building permits, was not superseded by statute and has not ever been overruled by this Court. To support this statement, they cite *Weyerhaeuser v. Pierce Cty*, 95 Wn. App. 883, 976 P.2d 1279 (1999); *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994) and *Mission Springs v. Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998).

Again, Amici curiae's argument ignores *Abbey Road*'s clear statement that pre-1987 common law vested rights cases have indeed been superseded by the Legislature's 1987 codification of the vested rights doctrine. *Abbey Road*, 167 Wn.2d at 252-254. *Abbey Road* held in particular that judicial expansion of vested rights to Master Use Permit (MUP) applications by Division I in *Victoria Tower v. Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987), was no longer valid after 1987:

> Even if *Victoria Tower* can be read to expand the common law vesting doctrine to MUP applications, it has been superseded by RCW 19.27.095(1) and our analysis in *Erickson.*

Abbey Road, 167 Wn.2d at 254 (emphasis added).

In this case, Division I merely applied that same holding and logic to another pre-1987 extension of the vested rights doctrine, *Talbot v. Gray*, 11 Wn. App. 897, 525 P.2d 801 (1974) (shoreline substantial development permits). If the Court of Appeal's pre-1987 expansion of the vested rights doctrine to MUP applications has been superseded by statute, then so has the Court of Appeal's pre-1987 expansion of the doctrine to shoreline permit applications. Division I plainly followed *Abbey Road* and *Erickson* when making its decision in this case. Amici curiae are simply ignoring this Court's earlier decisions. Amici curiae cannot coerce review by ignoring precedent issued by this Court.

Furthermore, as set forth below, the cases cited by Amici curiae do not even support their claim:

***Weyerhaeuser v. Pierce County, supra,* (Div. II 1999)**. First, this Court specifically commented with disfavor on *Weyerhaeuser* in *Abbey Road,* noting that the case employed arguments the Court has already "considered and rejected." *Abbey Road,* 167 Wn.2d 253 n. 8. Amici curiae neither acknowledge this unfavorable citation to *Weyerhaeuser*, nor suggest why this Court should reconsider – and reject – *Weyerhaeuser* once again.

Second, *Weyerhaeuser* has never been cited with approval for the proposition that the vested rights doctrine applies to any permit other than

a building permit. In *Weyerhaeuser*, Division II had to decide whether the common law vested rights doctrine should be extended to an application for a conditional use permit (CUP). Relying principally on *Noble Manor v. Pierce Cty,* 133 Wn.2d 269, 943 P.2d 1378 (1999), which interpreted and applied statutory (not common law) vested rights pursuant to the subdivision statute, RCW 58.17.033, Division II inexplicably held that the common law vested rights doctrine should be extended to CUPs. Because *Noble Manor* did not address the common law vested rights doctrine, Division II's reliance upon it to determine a common law vesting issue is meaningless.

Moreover, *Weyerhaeuser* cited *dicta* from a 1968 case, *Beach v. Board of Adjustment*, 73 Wn.2d 343, 438 P.2d 617 (1968), for the proposition that the common law vested rights doctrine applies to CUP applications. *Beach* did nothing more than order a remand of the original CUP decision back to the City for a new hearing, based solely on the City's failure to record the first hearing and present a verbatim record on appeal. In *dicta*, *Beach* noted that a subsequent change in the City's applicable zoning ordinance would "not operate retroactively so as to affect vested rights" with regard to the new CUP hearing. *Beach*, 73 Wn.2d at 347. In fact, the "vested rights doctrine" was not at play at all in *Beach*, as the City was simply providing a do-over hearing. Finally, even

if *Beach* could be read to mean the common law vested rights doctrine applies to CUPs, this 1968 holding was superseded by the Legislature in 1987; as set forth in *Abbey Road* and *Erickson.*

Buechel v. State Dep't of Ecology. Amici curiae contend this Court recognized "common law" vesting for shoreline substantial development permits in *Buechel*, "despite the codification" of the vested rights doctrine in 1987. Not true. First, *Buechel* dealt with permits that had been applied for in 1984 (pre-1987), so the issue of whether the common law vested rights doctrine survived the 1987 codification was not before the Court (nor could it have been).

Second, vesting was not at issue in *Buechel*. The developer there contemporaneously filed applications with Mason County for a building permit, a shoreline permit, and a variance from the shoreline regulations. The sole issue in *Buechel* was whether the developer was entitled to a variance of the applicable shoreline regulations, which had nothing to do with vesting. The only reference to vesting occurred in a footnote in *Buechel,* as *dicta*, where this Court noted that Mason County had since amended its shoreline variance regulations, but that the developer was vested in the regulations applied for at the time of the "application." *Buechel*, 125 Wn.2d 206 n. 35. This Court did not specify to which of the three "applications" it was referring. But it is undisputed that the

developer was vested on the date he applied for a building permit (under either the common law or the 1987 legislation), so the filing of a shoreline permit in *Buechel* was irrelevant.

Mission Springs v. City of Spokane. Amici curiae contend *Mission Springs* recognized the common law vested rights doctrine as to grading permits. *Mission Springs* did not address vested rights, it only addressed whether a local jurisdiction could "delay" issuance of a ministerial permit. *Mission Springs* is not applicable to this case. At most, any comment by *Mission Springs* with regard to vested rights is *dicta* and not controlling.

B. Amici curiae's constitutional argument is without merit.

Amici curiae imply it is suspicious that "Kirkland does not process building permits until shoreline permits have been approved," implying that a developer cannot file a building permit application and vest until after other permits (such as shoreline permits) have been issued. *Mem., p. 9* (emphasis added). Kirkland's staging of permit "processing" is irrelevant, however, as it is uncontested that the City allows a developer to *file* a building permit application at any point in the permitting process, including immediately, and thereby secure vested rights for their project. *CP* 86-87, 90, 95-99, 799, 802-803, 805. This argument is nothing more than a red herring.

C. **Amici curiae's argument that the Legislature did not abrogate the common law vested rights doctrine is incorrect.**

Amici curiae argue that the Legislature did not abrogate the common law vested rights doctrine in 1987 and that review should be granted on this issue. This argument has no merit. In both *Erickson* and *Abbey Road*, this Court already held that the Legislature's codification of the vested rights doctrine did, indeed, abrogate the common law. Specifically, *Abbey Road* noted that the Court of Appeal's pre-1987 decision to judicially extend the vested rights doctrine to MUP's (in *Victoria Tower v. Seattle*) was "superseded" by the statute. *Abbey Road,* 167 Wn.2d at 254. If Amici curiae felt that the Legislature had not intended to abrogate the common law vested rights doctrine, then it should have made this argument many years earlier, in either the *Erickson v. McLerran* or *Abbey Road v. Bonney Lake* appeals.

Further, based upon the pain-staking analysis set forth by Division I in this case, it is clear that Amici curiae's argument has no merit:

> As previously noted, the plain words of this statute include "building permits" but do not include shoreline substantial development permits. We must presume that the legislature was aware of the then-existing common law regarding the vested rights doctrine when it passed this legislation. Yet the legislature only codified the vested rights doctrine to the extent of building permits in this section of the session laws. Thus, we further conclude from the exclusion of shoreline substantial development permits that the legislature intended that the vested rights doctrine would not extend to such permits.

Potala Village, Slip Opinion at 13 (citations omitted).

Division I went on to quote from the Final Bill Report, noting that the Legislature "was aware of the common law origins of this doctrine," yet chose to codify it "only to the extent of building permits, as the plain language of the statute specifies." *Id.,* Slip Op. at 14. Division I also noted that the Legislature chose to extend the vested rights doctrine to subdivision applications "at the same time it codified the doctrine to the extent of building permits." *Id.* In conjunction with the Legislature's acknowledgement of the common law vested rights doctrine (as stated in the Final Bill Report), and the Legislature's deliberate expansion of the doctrine only to subdivision permits, Division I concluded that the Legislature had considered "a wider scope of permit types to which the doctrine might apply beyond building permits," yet *chose* not to include shoreline permits in its 1987 codification. *Id.* at 14-15. Finally, Division I concluded that after this Court's decisions in *Erickson* and *Abbey Road*, if the Legislature had intended something different – i.e., if it had intended the vested rights doctrine to apply to MUP permits, or shoreline permits – it would have made changes to the statute after *Erickson* and *Abbey Road* were published. It did not. "Because these statutes are essentially the same now as when first enacted, we conclude the extent of codification of

the vested rights doctrine remains the same." *Id.* at 15. In sum, Division I's analysis establishes "clear evidence of the legislature's intent to deviate from the common law." *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008). Thus, there is no reason to accept review in this case.

III. CONCLUSION

The Memorandum filed by Amici curiae does not raise any issues worthy of review. Thus, the City respectfully requests that review in this case be denied.

Respectfully submitted this 14th day of January, 2015.

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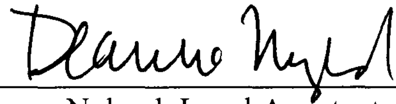

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