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NO. 35383-1-II

SUPREME COURT
OF THE STATE OF WASHINGTON

ABBEY ROAD GROUP, LLC, a Washington limited liability company; Karl J. THUN and VIRGINIA S. THUN, husband and wife; THOMAS PAVOLKA; VIRGINIA LESLIE REVOCABLE TRUST; and WILLIAM AND LOUISE LESLIE FAMILY REVOCABLE TRUST,
Petitioners,

v.

CITY OF BONNEY LAKE, a Washington municipal corporation
Respondent.

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ANSWER OF PETITIONERS TO BRIEF OF AMICUS CURIAE
BY WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS

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ORIGINAL

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I. INTRODUCTION

Petitioners Abbey Road Group, LLC, Karl J. Thun and Virginia S. Thun, Thomas Pavolka, Virginia Leslie Revocable Trust, and William and Louise Leslie Family Revocable Trust (collectively “Abbey Road”) submit the following Answer to the Amicus Curiae Brief of Washington State Association of Municipal Attorneys (“WSAMA”).

II. RESPONSE TO WSAMA’S STATEMENT OF THE CASE

WSAMA’s Statement of the Case contains inaccuracies. First it refers to City of Bonney Lake’s “Type 3” site development permit application as a “voluntary process” and a “cursory” review. Amicus Brief at 1, 9. These descriptions are entirely inaccurate. The City’s own “Commercial or Multi-Family Site Plan Review Application Form Type 3 Permit” (Administrative Record “AR” Ex. 27) and Abbey Road’s completed Type 3 application (AR Exs. 10-22) clearly indicate that the application is anything but simple or cursory. Moreover, the Hearing Examiner correctly found that the Type 3 site development permit was indeed a valid and recognized mandatory land use permit application under Bonney Lake Municipal Code 14.50, separate and distinct from the building permit application, and that Abbey Road had submitted a complete application. Clerk’s Papers “CP” 28, FF 6(d); CP 34, FF 14; CP

36, FF 19; CP 38, CL 5¹. These findings were not challenged by the City and are verities on appeal. *United Development Corporation v. City of Mill Creek*, 106 Wn. App. 681, 688, 26 P.3d 943 (2001)(unchallenged administrative finding of fact are verities on appeal).

Also, although there was conflicting testimony regarding whether City officials told Abbey Road a building permit application was necessary in order to vest the project², there was no written warning, as WSAMA asserts. Amicus Brief at 1. The memorandum that City Staff prepared for the June 15, 2005 preapplication conference states only that “[t]he completion of the preapplication process in the content of this letter does not vest any future project application.” AR Ex. 15. This means only that information submitted during the preapplication process and before permit application does not vest a project. It does not say that a complete application will not vest. It is uncontested that Abbey Road submitted all of the information required in the Type 3 site development permit application. AR Ex. 27; AR Exs. 10-22.

¹ Reference to Findings of Fact (FF) and Conclusions of Law (CL) in this Brief at to the findings and conclusions of the Hearing Examiner’s Report and Decision. CP 17-41.

² Transcript (02/06/2006) at 52-53, 66-67.

III. ARGUMENT

A. "Default" Vesting Rule

WSAMA asserts incorrectly, that pursuant to "well settled" case law, Abbey Road's site development permit application does not vest, citing *Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994) and *Valley View Indus. Park v. Redmond*, 107 Wn.2d 621, 638, 733 P.2d 182 (1987). Amicus Brief at 2-4. Neither of these cases supports WSAMA's position. As explained in our Petition for Review, the *Erickson* case is inapposite because *Erickson* did not address the issue of vesting of a master use permit application in the absence of a vesting ordinance, and nevertheless was wrongly decided because it failed to properly consider in its vested rights analysis the cost of preparing and submitting a master use permit application. PFR at 4-14.

WSAMA quotes *Valley View* for the bare statement that the court rejected application of the vested rights doctrine to site plan review. Amicus Brief at 4. A reading of the *Valley View* case reveals that the statement is dicta and is not a proper basis for denying vesting for Abbey Road's application. In *Valley View*, the developer proposed a 26 acre industrial park consisting of 12 buildings, to be constructed in phases. 107 Wn.2d at 625-26. A City ordinance required site plan approval prior to building permit issuance. During the site plan review process the

developer filed building permit applications for five of the buildings. *Id.* at 628-29. The property was then downzoned to agricultural. The court held that the developer had a vested right to build the five buildings for which building permit applications had been filed. *Id.* at 639. As to the other seven, the court stated, without explanation or citation to authority: “as a general principal, we reject any attempt to extend the vested rights doctrine to site plan review.” *Id.* at 640. This statement was not necessary for the court’s decision because the court invalidated the rezone and allowed the developer to continue to develop the remaining seven buildings under the prior industrial zoning classification. *Id.* at 641-42. Also, the case was decided prior to the adoption of RCW 58.17.033 extending the vested rights doctrine to preliminary plat and short plat applications. At the time, courts did not apply the vested rights doctrine to preliminary plat applications, *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 649 P.2d 103 (1982), and the court was reluctant to extend the doctrine when it had other avenues to obtain the correct result. Finally, the site plan was filed in 1978. With the enactment of the Growth Management Act, Regulatory Reform Act, and other land use regulations, the development approval process has grown much more detailed and complex since then. The site plan likely did not require the detail and financial commitment of Bonney Lake’s Type 3 site development permit

application.

WSAMA also argues that Abbey Road's site development permit application should not vest because Abbey Road's investment when compared to the total cost of constructing the project is relatively minor, and because vesting projects at the site development stage "would wreak major havoc on local land use controls." Amicus Brief at 5.

As explained in our Petitioner for Review, the relative cost of the application compared to the total project cost is irrelevant to the vested rights analysis; the only relevant inquiry is the cost of submitting the application, not the relative costs before and after submittal. PFR at 8-13. If the cost of the application is sufficient to discourage permit speculation and there is a time limitation on the permit, under the reasoning of *Hull v. Hunt*, 53 Wn.2d 125, 331 P.2d 856 (1958), the application should vest. In the present case, Bonney Lake's Type 3 site development permit application is onerous and expensive, and requires a substantial commitment from the developer. AR Exs. 10-22 (Abbey Road's application submittals). It cost Abbey Road more than \$228,000.00³ to get the Project to this stage. AR Ex. 29; Transcript (02/06/2006) at 46. Also,

³ Abbey Road's initial cost estimate as stated in the Notice of Appeal to the Hearing Examiner was \$96,500.00. AR Ex. 1. Subsequent calculations revised the figure to \$128,000 for the application and \$100,000 to secure its option on the property. AR Ex. 29; Transcript (02/06/2006) at 46.

pursuant to BLMC 14.90.090, a Type 3 permit expires “two years after the date of issuance if substantial progress has not been made toward realizing the permitted use or project, or within five years if construction has not been completed.” BLMC 14.90.090(B). Thus, both of the factors set forth in *Hull* are satisfied.

Abbey Road is not arguing for a “detrimental reliance test,” as WSAMA suggests, but rather that the rationale for the Washington vesting rule for building permits as set forth in *Hull* is equally applicable to Bonney Lake’s Type 3 site development permit application because the cost of the application in general justifies the need to protect development rights at time of application while also discouraging permit speculation.

WSAMA’s argument that vesting of Bonney Lake’s site development permit application would “wreak major havoc on local land use controls” is also without merit. Amicus Brief at 5. Although it is true that the practical effect of recognizing a vested right is to sanction a nonconforming use, it must be balanced with the competing policy concern that “society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.” *West Main v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986). Vesting at the site development permit stage is no earlier and would wreck no more “havoc” than vesting at the preliminary plat or

binding site plan stages. Moreover, the short expiration period for Bonney Lake's site development permit inhibits "permit speculation" and limits the proliferation of nonconforming uses because vesting will expire if the project does not progress expeditiously. BLMC 14.90.090(B). The City can further protect itself by adopting a vesting ordinance. With a vesting ordinance, developers know the vesting ground rules with certainty before they incur the costs of preparing land use applications.

Washington courts have never been presented with a fact pattern like the present case, involving: (1) a large multi-family multi-building development; (2) a mandatory, onerous and costly site development permit process that must be completed prior to building permit application⁴; and (3) no vesting ordinance. In such a situation, the case law is not "well settled," and the Court should accept this opportunity to make it so.

B. The Victoria Tower Case

WSAMA assumes that because the court in *Victoria Tower Partnership v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987), cited the vesting doctrine for building permits as authority for its decision, the applicant must have also filed a building permit application. Amicus

⁴ It is Abbey Road's position that the City requires approved site development permits for a complete building permit application in accordance with the City's building permit application form. See PFR at 17. In the alternative, it is not practical or feasible for projects such as Abbey Road's to submit complete building permit applications for all buildings prior to site development approval. PFR at 17-18.

Brief at 6. Such an assumption is not warranted. In its opinion, the *Victoria Tower* court described the permit as follows: “On July 8, 1980, Victoria Tower Partnership (“Victoria”) applied to the City for a master use permit in order to construct a 76-unit addition to that building.” *Victoria Tower*, 49 Wn. App. at 756. No other permit is mentioned and nowhere in the opinion does the court indicate that any other permit application was filed in conjunction with the MUP. The *Victoria Tower* court held that applying new multi-family use policies to the master use permit application violated the vested rights doctrine. *Id.* at 762-63.

The *Victoria Tower* court’s citation to building permit cases in its recital of the vested rights doctrine means only that the court concluded that those cases supported the court’s holding.⁵

C. Supreme Court should not Defer to the Legislature.

Contrary to WSAMA’s urging, the Court need not, and should not, defer to the legislature the decision of vesting of site development permits. Washington’s vested rights doctrine originated at common law. *See Ogden v. City of Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954). Although the doctrine has been codified for building permit applications, RCW 19.27.095, and subdivision and short subdivision applications, RCW

58.17.033, there is no indication that the legislature intended that these two statutes be the exclusive embodiment of the vested rights doctrine. Since the adoption of these statutes in 1987 the courts have expanded the doctrine and followed pre-1987 case law for vesting of other types of land use permit applications. *See, e.g. Weyerhauser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (1999) (conditional use permit).

There are several reasons for accepting review in this case. First, the Court has an obligation to settle the conflict between the court of appeals decision in this case, and the *Victoria Tower* case. Second if, as WSAMA asserts, the goal of the vesting doctrine is to achieve uniform rules, then the Court should apply the vested rights doctrine to site development permits the same way they are applied to similar permits such as conditional use permits, preliminary plats, and binding site plans. There is no rational reason for applying the vested rights doctrine to those applications but not to site development permit applications.

Third, as set forth in our Petition for Review, the Court should reconsider the *Erickson* decision because the *Erickson* court failed to properly consider the cost of preparing and submitting a MUP application. Finally, even if the Court remains reluctant as the *Erickson* court was, to

⁵ The *Victoria Tower* case is discussed more fully in Section E(3) of the Petition for Review.

modify or expand the vested rights doctrine, it is required in this case in order to protect Abbey Road's constitutional interests. As set forth in Section E(4) of the Petition for Review, vesting is necessary to protect Abbey Road's due process rights under the Fourteenth Amendment.

IV. CONCLUSION

For the reasons set forth herein and in the Petition for Review, the Supreme Court should accept this matter for review.

RESPECTFULLY SUBMITTED this 19th day of February, 2008.

VSI Law Group, PLLC

By: 

Gregory F. Amann, WSBA #24172

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Attorneys for Petitioners

SUPREME COURT OF THE STATE OF WASHINGTON

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CERTIFICATE OF SERVICE OF
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OF AMICUS CURIAE BY
WASHINGTON STATE ASSOCIATION
OF MUNICIPAL ATTORNEYS

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The undersigned makes the following declaration under penalty of
perjury as permitted by RCW 9A.72.085:

I am a legal assistant for VSI Law Group, PLLC, attorneys for the
Respondents. On the 19th day of February, 2008, I deposited with LMI Legal
Messengers, Inc. at Tacoma, Washington, for filing with the Supreme Court
of the State of Washington and service on the following:

1. Answer of Petitioners to Brief of Amicus Curiae by
Washington State Association of Municipal Attorneys,

ORIGINAL

concerning the above-entitled matter; and

2. This Certificate of Service.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington, this 19th day of February, 2008.


Dawn Ketter