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NO. 35383-1-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF BONNEY LAKE, a Washington municipal corporation,

Appellant,

v.

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

Respondent.

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APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that *Erickson & Assoc. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994) is not controlling authority in this case.

2. The trial court erred in concluding that Abbey Road's site plan review application vested development rights.

3. The trial court erred in concluding that Abbey Road had a right to rely on land use forms prepared by City staff.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Abbey Road Group filed an application for site plan review. This application is similar to the Master Use Permit process reviewed by the Supreme Court in *Erickson & Assoc. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994). Did the trial court err in refusing to apply *Erickson* to Abbey Road's application? (Assignment of Error 1). This court reviews this issue *de novo*.

2. Under the vested rights doctrine development rights vest upon filing of a complete building permit application. Abbey Road did not file a building permit application. Did the trial court err in determining that Abbey Road's development rights vested upon filing for site plan review? (Assignment of Error 2). This court reviews this issue for clear error, with deference to the findings of the hearing examiner.

3. The trial court incorrectly determined that City forms required City approved site plans before a building permit application could be filed.

This is contrary to the provisions of the Bonney Lake Municipal Code. Did the trial court err in determining that City-approved site development plans were required before a building permit application could be filed, despite the fact that there is no such requirement in the Bonney Lake Municipal Code? This court reviews this issue for substantial evidence, while taking all evidence and inferences in the light most favorable to the City. (Assignment of Error 3).

4. The trial court determined that Abbey Road had a right to rely on forms prepared by City Staff. Did the trial court err in determining that any errors made by staff as to the interpretation of the Code could bind the City? This court reviews this issue *de novo*. (Assignment of Error 3).

III. STATEMENT OF THE CASE

On June 15, 2005, representatives from the City of Bonney Lake and from the Abbey Road Group, LLC, attended a pre-application meeting regarding Abbey Road's proposed Skyridge Condominiums project. Transcript (2/6/2006) at 14; Administrative Record (AR) Exhibit 15. During this meeting, City staff specifically told Abbey Road that a building permit application would be necessary to vest their development rights. Transcript (2/6/2006) at 15. At that time, the property was zoned C-2, which allowed for multi-family developments. Clerk's Papers (CP) at

13. Abbey Road was also given a letter, dated June 15, 2005, that summarized the issues discussed at the meeting. AR Ex. 15. This letter specifically states that a building permit is necessary for a "complete application" and that "completion of the pre-application process in the content of this letter does not vest any future project application." AR Ex. 15.

On September 6, 2005, City Planning Director Bob Leedy had a discussion with David Renaud from Abbey Road. During that conversation, Mr. Renaud acknowledged that the City had informed Abbey Road that a building permit application was required for vesting. Mr. Leedy confirmed this, but suggested that Abbey Road consider alternative means of vesting. Transcript (2/6/2006) at 91-92.

On September 13, 2005, Abbey Road submitted its "Commercial/ Multifamily Site Plan Review Application." Transcript (2/6/2006) at 38-40. Site plan review is an informal process which is initiated by a developer filing a relatively cursory application. AR Ex. 27, Transcript (2/6/2006) at 17. This occurs at the very early stages of development. After the application is filed, the developer and City look at the proposed project and the applicable regulations to determine if the proposal is feasible. Transcript (2/6/2006) at 17-18, 110-111. For example, the process involves looking at the applicable zoning regulations and going through the environmental review process. Transcript (2/6/2006) at 17. This allows developers to get as much information about the development requirements while

their financial investment in the project remains relatively low. Transcript (2/6/2006) at 110. At any time in this process, the developer may determine that the plans are sufficiently concrete to file a completed building permit application, which vests development rights. Transcript (2/6/2006) at 17-18. Abbey Road did not file a building permit application for its proposed project. Transcript (2/6/2006) at 18.

Also on September 13, 2005, the Bonney Lake City Council passed Ordinance 1160, re-zoning the Abbey Road property to RC-5, a zoning that does not allow multi-family development of the sort proposed by Abbey Road. AR Ex. 9. Because Abbey Road's submittal did not include a building permit application, Abbey Road's proposed development was not vested, and could not proceed under the new zoning ordinance. Therefore, it would be pointless for the City to process Abbey Road's site plan review application.

On September 28, 2005, Abbey Road emailed the Planning Department to request a formal letter indicating that their application was complete. Transcript (2/6/2006) at 93. In response, on October 12, 2005, Mr. Leedy sent a letter to Abbey Road, stating that site plan review does not result in any permit or approval under the City Code and therefore no determination of completeness for vesting purposes could issue. AR Ex. 5, Transcript (2/6/2006) at 93.

On October 28, 2005, Abbey Road filed an administrative notice of appeal, challenging the Director's decision. AR Ex. 1. A public hearing was held on February 6, 2006 before Bonney Lake Hearing Examiner Stephen K. Causseaux, Jr. Transcript (2/6/2006) at 3. On March 20, 2006, the Hearing Examiner denied Abbey Road's appeal, determining that Abbey Road's submittal did not vest any development rights. CP 18-14.

Abbey Road filed a petition in Pierce County Superior Court under the Land Use Petition Act, chapter 36.70C RCW, challenging the Hearing Examiner's determination. CP 1-16. The trial court granted Abbey Road's petition. Transcript (8/18/2006) at 32-33. In doing so, the trial court relied primarily on the application form that was prepared by City staff and found that "Abbey Road had a right to rely on the completion and filing of their Type 3 site development permit application as vesting . . ." Transcript (8/18/2006) at 33.

The City filed a timely notice of appeal.

IV. ARGUMENT

A. Standard of Review

The Land Use Petition Act, Chapter 36.70C RCW, governs judicial review of land use decisions. Under LUPA, this Court "stands in the shoes of the superior court and reviews the hearing examiner's action on the basis of the administrative record." *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 525, 94

P.3d 366 (2004). A court may grant relief under LUPA, only if the party seeking relief—here Abbey Road—has established one of the following standards is met:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). Standards (a), (b), (e), and (f) involve questions of law that this Court reviews de novo. *Cingular Wireless v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Standard (c) is reviewed for substantial evidence. "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." *Cingular*, 131 Wn. App. at 768. In making this determination, this Court must "consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority." *Cingular*, 131 Wn. App. at 768. Here,

the highest fact-finding authority was the hearing examiner, and therefore this Court must consider all evidence in the light most favorable to the City.

Standard (d) requires the court to employ the clearly erroneous standard of review. Under that standard, the court must determine whether it "is left with a definite and firm conviction that a mistake has been committed." *Cingular*, 131 Wn. App. at 768. The court again defers to factual findings made by the highest forum below with fact-finding authority–here, the hearing examiner. *Cingular*, 131 Wn. App. at 768.

B. Vested Rights Doctrine

Under Washington's doctrine of vested rights, developers are entitled to "have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use restrictions." *Erickson & Associates v. McLerran*, 123 Wn.2d 864, 867, 872 P.2d 1090 (1994). Additionally, under RCW 58.17.033, development rights vest when a short plat or subdivision application is filed. This rule "runs counter to the overwhelming majority rule that 'development is not immune from subsequently adopted regulations until a building permit has been obtained and substantial development has occurred in reliance on the permit.'" *Erickson*, 123 Wn.2d at 868. Washington's vesting doctrine is rooted in principles of fundamental fairness and recognizes that development rights constitute a

valuable property interest. The vesting doctrine allows developers to "fix" the rules that will govern the development of their land. *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986). The public, however, also has an interest in having development conform to current land use regulations. The vesting doctrine seeks to balance these interests. *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 891-92, 976 P.2d 1279 (1999). This balance is reached by providing for a "date certain" vesting scheme which allows a developer to control when vesting will occur. The public's interest is protected by setting the vesting point at a time to prevent permit speculation and to show a substantial commitment by the developer so that good faith can be inferred. *Erickson*, 123 Wn.2d at 870. The legislature and courts have determined that filing a building permit application evidences the requisite commitment by the developer and is therefore an appropriate "date certain" for vesting. *Erickson*, 123 Wn.2d at 870.

C. The trial court erred in concluding that *Erickson & Assoc. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994), is not controlling authority in this case.

Unlike the superior court, the hearing examiner properly concluded that *Erickson & Assoc. v. McLerran* is controlling. As an interpretation of law, this Court reviews these determinations *de novo*. RCW 36.70C.130(1)(b). In *Erickson & Assoc. v. McLerran*, the Washington State Supreme Court held that development rights did not vest upon filing of a master use permit application. 123 Wn.2d at 877.

The site plan review process in Bonney Lake is substantially similar to the master use permit process at issue in *Erickson*. Thus, the Supreme Court's analysis in *Erickson* is controlling and the trial court erred in refusing to apply the Supreme Court's holding to this case.

In *Erickson*, the Court reviewed Seattle's Master Use Permit (MUP) process. Under the Seattle Municipal Code (SMC), MUPs are site plan approval permits required for development. "MUP's are 'umbrella' or 'master' permits, which actually represent a number of independent regulatory components, including environmental impact review, comprehensive plan review, and other use inquiries." *Erickson*, 123 Wn.2d at 866. SMC 23.76.026 provides that vesting occurs whenever a MUP is issued or whenever a building permit application is filed. In *Erickson*, a developer brought suit, arguing that this vesting scheme was unconstitutional and that vesting should occur when the MUP application is filed. The Supreme Court rejected this argument and held that Seattle's vesting scheme was constitutional. *Erickson*, 123 Wn.2d at 876-77. Below, Abbey Road argued, and the trial court agreed, that *Erickson* does not apply here because the City has not enacted a statutory vesting scheme like the one at issue in *Erickson*. Transcript (8/18/2006) at 32. The City, however, should not be required to pass an ordinance to adopt the default vesting rules—that vesting occurs when a party files a completed building

permit application, preliminary plat application, subdivision application, or one of the few other applications that were vesting events at common law.[1]

Abbey Road argued below that vesting when filing a site plan review application is the "default" rule for vesting, relying on *Victoria Tower Partnership v. Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987), a Division One case decided 13 years before *Erickson*. This ignores the clear reasoning of *Erickson* and also the express declaration by the Supreme Court that "as a general principle, we reject any attempt to extend the vested rights doctrine to site plan review." *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 639, 733 P.2d 182 (1987). Furthermore, *Victoria Tower* does not analyze the issue of whether a site plan review application is sufficient to vest development and therefore is not instructive here.

Erickson squarely addresses the constitutionality of denying vesting at the initiation of site plan review, unlike *Victoria Tower*, which does not address the issue at all. Abbey Road made all of the same arguments below that the developer in *Erickson* made before the Supreme Court. First, Abbey Road argued that in filing an application for site plan review, a developer has expended sufficient resources to

[1] The vested rights doctrine has been applied to septic tank permits (*Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 558 P.2d 821 (1977)); shoreline permits (*Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974)); and grading permits (*Juanita Bay Valley Cmty. Ass'n v. Kirkland*, 9 Wn. App. 59, 510 P.2d 1140 (1973)).

prevent permit speculation and shows the required commitment to the project to require vesting. The court in *Erickson* specifically rejected this argument:

> It is the relative cost of the application compared to the total project cost that should be considered in evaluating the deterrent effect of the MUP application's cost to speculation in development permits. Second we reject a cost-based analysis that reintroduces the case-by-case review of a developer's reliance interest we rejected 40 years ago when we adopted the vested rights doctrine.

Erickson, 123 Wn.2d at 874. Thus, it is clear that the court should not attempt to employ a cost-based analysis. But even if it did, Abbey Road spent around $100,000 to file its site plan review application—that amounts to only 0.007% of the projected project cost. CP 12.[2] Such a relatively small financial commitment is inadequate to protect the public against permit speculation. Abbey Road's proposed development is a very large project with 24 separate buildings and approximately 575 condominium units. CP 12. The information that is necessary to initiate site plan review is relatively simple and does not begin to address the complexities of a project of this magnitude. Allowing vesting at this very early stage of development and with such a cursory filing encourages permit speculation and runs counter to the purposes of the vesting doctrine.

Additionally, Abbey Road argued below that *Victoria Tower* establishes the "default" rules for vesting with regard to site plan applications. Abbey Road's

[2] Abbey Road did not assign error to this portion of the hearing examiner's finding of fact. CP at 9.

conclusion, however, is incorrect. While *Victoria Tower* does mention a MUP application, its primary focus is on environmental review. The *Victoria Tower* court also framed its reasoning in terms of building permit applications. For example, the court of appeals restated the vesting doctrine: "Under [the vested rights doctrine], developers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application." *Victoria Tower*, 49 Wn. App. at 760 (emphasis added) (*quoting Allenbach v. Tukwila*, 101 Wn.2d 193, 197, 676 P.2d 473 (1984) (holding that development rights vested upon filing of completed building permit application)). The court then proceeded as if it were dealing with a building permit application and not a MUP application. For example, the court stated:

> Under the vested rights doctrine, an ordinance must be operative before it can be used to evaluate a building permit application, regardless of the extent to which the applicant did or did not rely on previous law. Because the multi-family policies were not yet adopted when Victoria applied for its permit, we conclude that the City Council violated the vested rights doctrine in using them to condition Victoria's proposal.

Victoria Tower, 49 Wn. App. at 762 (emphasis added). Given the *Victoria Tower* court's analysis and repeated mention of the filing of a building permit application as the vesting event, one must assume that Victoria Tower Partnership also filed a building permit application. Thus, *Victoria Tower* does not support Abbey Road's

position. Furthermore, even if a building permit application was not filed, the *Victoria Tower* court did not explain its reasoning for treating a MUP application the same as a building permit application. As the Court of Appeals in *Erickson* noted:

> Although *Victoria Partnership* applied the vesting doctrine in the context of a MUP application, the court did not address the question of whether the vesting rule for building permits should be extended to MUP's. The court apparently assumed that the two types of permits were equivalent. The focus of the opinion was on whether subsequently enacted SEPA (State Environmental Policy Act of 1971) policies qualified as zoning and building ordinances, and thus fell within the vested rights doctrine. *Victoria Tower Partnership*, 49 Wn. App. at 761. We can only conclude from the court's analysis that the distinction between a MUP and a building permit was not before the court.

Erickson & Assocs. v. McLerran, 69 Wn. App. 564, 568, 849 P.2d 688 (1993). Moreover, *Victoria Tower* ignores the clear precedent in *Valley View*, which held that site plan review does not fall within the scope of the vesting doctrine.[3] Given this and the fact that *Erickson* is a more recent decision from a higher court, it is clear that *Erickson* and not *Victoria Tower* controls in this case.

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[3] In *Valley View* the developer filed for site plan review for a development consisting of 12 buildings. The developer filed building permits for five of the 12 buildings before Redmond rezoned the property. The developer argued that all 12 of its buildings were vested based on the site plan review. The court specifically rejected that argument and declined to extend the vested rights doctrine to include site plan review. *Valley View*, 107 Wn.2d at 639.

D. The trial court erred in concluding that Abbey Road's site plan review application vested development rights.

As an application of the law to the facts, this Court reviews the hearing examiner's conclusion that Abbey Road's development rights were not vested for clear error. RCW 36.70C.130(1)(d). This Court must defer to the findings of the hearing examiner. *Cingular*, 131 Wn. App. at 768. The hearing examiner's decision was not erroneous and this Court should affirm his decision and reverse the decision of the superior court.

As stated above, the Supreme Court has expressly rejected extending the vested rights doctrine to site plan review: "As a general principle, we reject any attempt to extend the vested rights doctrine to site plan review. Only where a city's conduct frustrates the permit application process will we consider looking to the entire development proposal contained in a site plan." *Valley View*, 107 Wn.2d at 639. Here, there is no evidence that the City frustrated the permit application process and therefore the hearing examiner correctly concluded that Abbey Road's submittal did not vest its development rights.

1. The City's procedures are not unduly burdensome and do not frustrate vesting.

Abbey Road argued below that the City's vesting scheme is unduly burdensome for developers. In making this argument, Abbey Road relied on *West Main Assocs v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986) and *Adams v.*

Thurston County, 70 Wn. App. 471, 855 P.2d 284 (1993). Abbey Road's reliance on these cases is misplaced. In both *West Main* and *Adams*, the local government required certain permits and applications to be filed and approved before a building permit application or short plat application could be filed. The courts in *West Main* and *Adams* held that these requirements caused developers to lose the ability to choose a "date certain" vesting point. *West Main*, 106 Wn.2d at 52-53; *Adams*, 70 Wn. App. at 479-80. Here, the City has not erected additional requirements that a developer must satisfy before filing a building permit application. Nothing in the BLMC would have prevented Abbey Road from submitting a building permit application prior to the zoning change, and Abbey Road never inquired of City staff about any alleged confusion as to that point. Abbey Road had available to it a date-certain vesting point—the date that a completed building permit application was filed. It simply did not avail itself of that opportunity.

Much of Abbey Road's argument below rested on a checklist included in the City's "Commercial Building Permit Application Form." AR Ex. 28. This checklist includes a list of items that may be included as part of the building permit application. Next to each item, there are two boxes, one indicating that the item has been submitted and the other indicating that the item is "not applicable" or "N/A." One of the items that may be included with a building permit application

is "approved site development plans." AR Ex. 28. Abbey Road argued below that the inclusion of this term on the checklist means that a developer must go through a formal site plan review process and receive formally "approved" site plans before a building permit application may be submitted. There is nothing in the BLMC that supports this argument. Under the BLMC, the site plan review process does not result in any formal approval of site development plans. Rather, as explained by Building Official Jerry Hight, "a site development plan is a plan using an eighth inch scale showing the location, size, height of all of the structures and how it's going to be placed on the . . . property itself, showing the utilities, address, things of that nature." Transcript (2/6/2006) at 85. Furthermore, as the hearing examiner correctly found, the building permit application form also allows a developer to check a box indicating that the site development plans are "not applicable." Therefore, unlike the situations in *West Main* and *Adams*, the City has not erected a scheme to delay vesting or to deprive developers of a date-certain vesting scheme. Additionally, even if the application form is incorrect as to the law, as discussed below, a misinterpretation of the law by City staff cannot alter the requirements of the BLMC and cannot bind the City.

Abbey Road also argued below that it is not practical or feasible for large projects to submit a building permit application before completing the site plan

review process. The developer in *Erickson* also made this argument, which was rejected by the Supreme Court:

> Erickson lastly argues the practicalities of modern property development require us to extend the vested rights doctrine to Seattle's MUP process to maintain the balance of private and public interests embodied in the doctrine. Both parties agree land development in Washington has become an increasingly complex, discretionary, and expensive process. Additionally, both parties agree the MUP process is now a critical stage in Seattle property development. Land use, zoning, and environmental regulations all must be satisfied before a MUP will be issued. The parties disagree, however, on what impact these requirements should have on the vesting doctrine. Erickson asserts that the increasingly onerous nature of land use review makes the use review (such as Seattle's MUP process), rather than building permit review, the critical state in land use regulation and requires the application of the vested rights doctrine to MUPs. . . . We reject Erickson's argument for several reasons.

123 Wn.2d at 873-74. The Court rejected Erickson's argument because (1) substantial dollar amounts alone do not demonstrate a significant burden on developers; (2) cost-based analysis is not appropriate because it would revert the scheme back to case-by-case review; (3) site plan review applications can be submitted at the early stages of development; and (4) there are no cases from Washington or other jurisdictions that extend the vested rights doctrine beyond its current limits. *Erickson*, 123 Wn.2d at 874-75. Likewise, this Court should reject Abbey Road's argument made below that filing a building permit application to vest a project is too burdensome. Cities are only required to provide a date-certain vesting point, not a date at the earliest possible time. The filing of a site plan

review application requires minimal investment by a developer and can happen at the very early stages of development. Allowing vesting at this point would essentially allow a developer to put its foot in the door and gain all of the development rights without showing the requisite commitment to the project to protect the public. This would encourage permit speculation and defeat the purposes of the vesting doctrine. Requiring developers to go through the process of completing a building permit application protects the public's interest in having developments conform to existing land use regulations and also protects the developer's constitutional rights.

2. The hearing examiner's decision is in line with public policy.

Public policy also supports the hearing examiner's decision. As noted above, the doctrine of vested rights seeks to balance a developer's interest in certainty and the public's interest in having development conform to current land use regulations. The Growth Management Act (GMA) requires cities subject to the Act to make their development regulations consistent with their comprehensive plans. RCW 36.70A.040; RCW 36.70A.130. In 2003, the City identified various zoning areas that were inconsistent with its comprehensive plan. Transcript (2/6/2006) at 7-8. To remedy this, as required by the GMA, the City adopted Ordinance No. 1160—the ordinance at issue in this case. *See* AR Ex. 9. The Court in *Erickson* recognized the requirements that the GMA places on local governments

and stated, "Given the substantial legislative activity in land use law, we are unwilling to modify or expand the vested rights doctrine unless it is required to protect the constitutional interests at stake." *Erickson*, 123 Wn.2d at 876. This argument applies equally here. Abbey Road's constitutional interests were protected as there was a date-certain vesting point—the date a building permit application was filed. Thus, this Court should follow *Erickson* and decline to modify or expand the vested rights doctrine to include the initial phases of site plan review.

E. The trial court's focus on the City's building permit application form was misplaced.

The trial court misinterpreted the BLMC and the forms prepared by City staff and determined that a formal "approved" site plan was required before a building permit application could be filed. The hearing examiner correctly found that the building permit application form did not require submittal of a City-approved site plan. This court reviews the hearing examiner's decision for substantial evidence, taking all evidence and inferences in the light most favorable to the City. *Cingular*, 131 Wn. App. at 768. As discussed above, the building permit application form does not require submittal of a formal City-approved site plan before a building permit application may be filed. The trial court's oral

decision focused primarily on one line on a form prepared by staff in the City's Planning Department.[4] *See* Transcript (8/18/2006) at 32-33.

Even if the building permit application form did purport to require an approved site development plan before a building permit application could be submitted, such a purported requirement contrary to the BLMC would be of no effect. Forms prepared by City staff may not alter the BLMC and may not bind the municipality. "An administrative agency created by statute has only those powers expressly granted or necessarily implied by statute." *Brougham v. Seattle*, 194 Wn. 1, 6, 76 P.2d 1013 (1938); *Town of Othello v. Harder*, 46 Wn. 747, 752, 284 P.2d 1099 (1955); *Properties Four, Inc. v. State*, 125 Wn. App. 108, 117, 105 P.3d 416 (2005). The City Department of Community Development, which includes the Planning Department and the Building Division and is headed by the Community Development Director, is created by BLMC 2.08.070. The BLMC also outlines the duties and responsibilities of the Department. As an administrative agency created by the Bonney Lake Municipal Code, the Department has only those powers granted by the BLMC. Those powers do not include the power to make or alter legislation. *See* BLMC 2.08.070(B). Thus, a form prepared by City staff may not add requirements to or modify the Code. Therefore, the building permit

[4] The form in question is the building permit application check list that lists "Approved Site Development Plans" and then has boxes for "N/A" and "Submitted." AR Ex. 28.

application form, even if read to require some sort of City-approved site development plans, cannot add that requirement to the BLMC. Persons dealing with municipal corporations are presumed to know the limits of the staff's authority and unauthorized acts of staff will not bind the municipality. *State v. Clallam County Bd. of County Comm'rs*, 77 Wn.2d 542, 549, 463 P.2d 617 (1970) (citing *Paul v. Seattle*, 40 Wn. 294, 82 P. 601 (1905), *Stoddard v. King County*, 22 Wn.2d 868, 158 P.2d 78 (1945)); *Barengregt v. Walla Walla Sch. Dist.*, 26 Wn. App. 246, 250, 611 P.2d 1385 (1980). Here, the City staff had no authority to change the requirements found in the BLMC and therefore any errors or ambiguities in forms used by the staff or mistakes as to the law cannot bind the City. The only relevant consideration is the contents of the BLMC, not the forms that are prepared by staff.

At any rate, it must be stressed that any alleged confusion was remedied because City staff repeatedly and consistently told Abbey Road that a building permit was necessary to vest the project and that the project would not vest through filing a site plan review application. *See e.g.* AR Ex. 15; Transcript (2/6/2006) at 14-15, 71-74, 91-92. Because, as discussed above, the BLMC does not prohibit the filing of a building permit application during site plan review, the City's vesting scheme does not violate due process and Abbey Road's development rights are not vested under the prior zoning code.

F. The trial court did not have the entire record before it and therefore its decision cannot stand.

Under LUPA, the superior court reviews the record before the administrative tribunal. RCW 36.70C.120. A transcript of any hearings before the administrative body is included as part of the record and the petitioner—in this case Abbey Road—must submit a verbatim transcript of the hearing to the court. RCW 36.70C.120(1). As stated in the declaration filed with this Court, the Pierce County Superior Court never received a copy of the transcript of the administrative proceedings. *See* Declaration of Emma Gaddis attached to the 1/22/07 letter to this Court. Because the record before the court was incomplete, the court's decision cannot be affirmed. *See e.g.*, *Loveless v. Yants*, 82 Wn.2d 754, 763, 513 P.2d 1023 (1973) (when transcript of proceedings before planning commission could not be produced the record is incomplete and appellate review by the superior court is impossible); *Byers v. Bd. of Clallam County Comm'rs*, 84 Wn.2d 796, 799, 529 P.2d 823 (1974). Because the Superior Court had an incomplete record of the administrative proceedings, that court's review is a nullity. This Court, however, may review the full record of the administrative proceedings and can make a determination on the merits of the appeal.

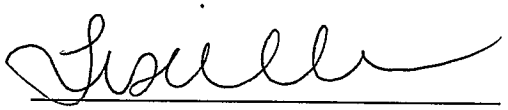
V. CONCLUSION

In this context, vesting does not occur until a developer files a completed building permit application. Abbey Road seeks an extension of the vested rights

doctrine to include the initial phases of site plan review. The Supreme Court has expressly rejected this invitation and therefore this Court should also reject it. Additionally, the superior court made several errors in considering Abbey Road's petition and therefore this Court should reverse the trial court's decision and affirm the thorough and careful decision of the hearing examiner.

RESPECTFULLY SUBMITTED this 9th day of February, 2007.

DIONNE & RORICK



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

ABBEY ROAD GROUP, LLC, a Washington limited liability company; Karl J. THUN and VIRGINIA S. THUN, husband and wife; THOMAS PAVOLKA; and VIRGINIA LESLIE REVOCABLE TRUST; and WILLIAM AND LOUISE LESLIE FAMILY REVOCABLE TRUST, Respondents, v. CITY OF BONNEY LAKE, a Washington municipal corporation, Appellant.	Pierce Co. Superior Court Case No. 06-2-06745-8 Court of Appeals Case No. 35383-1-II Certificate of Service

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I certify under penalty of perjury under the laws of the State of Washington that I sent, via legal messenger, the **Appellant's Opening Brief** to the following:

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Dated this 9th day of February, 2007.

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