

NO. 35383-1-II

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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.

PETITIONERS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The reasons for reversing the court of appeals decision and determining that Abbey Road's Type 3 site development permit application in particular is vested, are set forth in detail in Abbey Road's previous briefing and Petition for Review. If the Supreme Court decides to issue a broad opinion on the vested rights doctrine, the doctrine should be applied to all land use permit¹ applications, in order to reestablish fairness and certainty in the development process.

II. ARGUMENT

A. *The Vested Rights Doctrine should apply to all Land Use Applications.*

The vested rights doctrine originated in the 1950s when the only permit a developer needed in order to develop real property was a building permit. The Supreme Court at that time rejected the majority rule regarding vested rights that required the applicant to show a substantial change in position in reliance on the permit prior to the zoning change, and instead determined that the right to construct in accordance with a

¹ For purposes of this brief, "land use permit" is intended to have a similar meaning as "project permit" defined in RCW 36.70B.020(4) as:

... any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations

....

building permit vests when the applicant applies for the building permit. *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958)(building permit only permit required for twelve-story apartment building).

As stated in Abbey Road's previous briefing,² the purpose of the vested rights doctrine is to provide a measure of certainty to developers and to protect their expectations against fluctuating land use policy. *Friends of the Law v. King County*, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994). "The doctrine is based upon constitutional principles of fairness and due process, acknowledging that development rights are valuable and protected property interests." *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 892, 976 P.2d 1279 (1999). "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).

The vested rights doctrine fulfilled its mission of fairness and certainty when building permits were the only permit necessary. However, as government agencies put more regulations on development, the issue of vesting for other land use permits arose, and in the 1960s and 1970s the courts expanded the doctrine to include conditional use

² See Court of Appeals Respondents' Brief at 9.

permits,³ grading permits,⁴ shoreline permits,⁵ and septic permits.⁶ In 1987 the legislature expanded the doctrine to subdivisions and short subdivisions,⁷ and codified the existing doctrine for building permits.⁸

Since 1987, the land development process has continued to expand and become more complex. Today large development projects such as Abbey Road's Skyridge Condominium project require many permits and approvals and must comply with a wide array of laws and regulations.⁹ For these projects, the building permit is now the last permit issued. Yet neither the courts nor the legislature has expanded the vested rights doctrine to keep up with current state of land use development.

With the adoption of the Regulatory Reform Act¹⁰ in 1995, local governments now have uniform procedures and standards to follow for

³ *Beach v. Board of Adjustment*, 73 Wn.2d 343, 438 P.2d 617 (1968).

⁴ *Juanita Bay Valley Comm'ty Ass'n v. City of Kirkland*, 9 Wn. App. 59, 510 P.2d 1140(1973).

⁵ *Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801(1974).

⁶ *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 558 P.2d 821 (1977). It is Abbey Road's position, as stated in its previous briefing, that the doctrine was also extended to master use permits in *Victoria Tower Partnership v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987).

⁷ RCW 58.17.033.

⁸ RCW 19.27.095.

⁹ The Skyridge Condominium project requires a Type 3 site development permit, SEPA review, design review, clearing and grading permit, sign permit, fire sprinkler permit, fire alarm permit, and building permits from the City of Bonney Lake, permits from the State Department of Natural Resources, Health Department, and Department of Transportation, and an NPDES permit from the Department of Ecology. Administrative Record (AR) Ex. 15; AR Ex. 21 at 3.

¹⁰ Chapter 36.70B RCW.

reviewing project permit applications,¹¹ but no uniform standard for vesting of project permit applications. For permits other than building permits and subdivisions, applicants and local government staff are required to decipher fifty years of case-by-case vested rights law to try to determine whether the particular permit application vests.

The Supreme Court now has before it the opportunity to bring the vested rights doctrine up-to-date and reestablish fairness and certainty in the doctrine so that local governments and developers know the vesting rules for every land use permit application regardless of the permit's name or what it does or does not do. As a matter of fundamental fairness, if a local government establishes a land use permit and sets forth the requirements for a complete application, and the applicant complies with all of the requirements, the local government should not then be able to change the land use laws that govern the application and defeat the permit. In order to reestablish the principles of fairness and certainty that were the foundation of the original Washington vested rights doctrine, all land use permit applications should be considered under the zoning and other land use control ordinances in effect on the date the complete application is submitted to the government agency.

By establishing a global doctrine that includes all land use permits,

¹¹ *See supra* Note 1.

the doctrine will not have to be revised or clarified every time new layers of regulations and new permits are added to the land development process.

B. Vesting for Multiple Permits.

For separate, standalone permits on the same project, the vesting of one permit should not vest the subsequent permit. However, for permits that are intended to control the subsequent development of a property and provide the parameters for subsequent permits, such as site development permits and master use permits, vesting should include the right to develop the property in accordance with the site development permit or master use permit. The Supreme Court in *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 285, 943 P.2d 1378 (1997), has already expressed this rule in the case of subdivisions, holding that a complete preliminary plat application vests the right to develop and not just divide land under the land use control laws in effect on the date of application. The court reasoned that if all that was vested was the right to divide land with no assurance that the land could be developed, the vested rights doctrine would provide no protection to the landowner. *Id.* at 278. The court of appeals in *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883 (1999), followed the reasoning of *Noble Manor* and determined that a vested right for a conditional use permit, but not for land use and development, would be an empty right. *Id.* at 895. Likewise, if site development permit

applications such as Abbey Road's Type 3 site development permit are vested, but such vesting does not also extend to building permits and other subsequent permit applications necessary for development, vesting provides no protection, and is an "empty right."

C. Reasonable Time Limits will Prevent Permit Speculation and the Proliferation of Nonconforming Uses.

The argument against extending vesting is that it encourages permit speculation and results in a proliferation of nonconforming uses. *Erickson v. City of Seattle*, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994). However local governments can easily prevent permit speculation and the proliferation of nonconforming uses by placing reasonable time limits on permits.¹² The City of Bonney Lake already does this. BLMC 14.90.090 provides that 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). This time limit strikes the appropriate balance between developer interest and public interest, by protecting developers who pursue their projects with reasonable diligence, while insuring that projects that are not pursued with diligence lose their vested

¹² Richard Settle, *Washington Land Use and Environmental Law and Practice* §2.7(c)(iv) (1983)(exploitation of vested rights rule by permit speculation may be deterred by short permit expiration).

status.

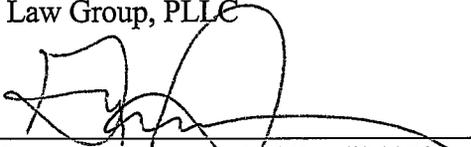
III. CONCLUSION

For the reasons set forth herein, in Abbey Road's previous briefing, and in the Petition for Review, the Supreme Court should reverse the decision of the court of appeals, affirm the decision of the trial court and determine that Abbey Road's application and development are vested under the zoning and other land use control ordinances in effect at the time of submittal and not subject to City of Bonney Lake Ordinance No. 1160.

If the Supreme Court decides to issue a broad opinion on the vested rights doctrine, the doctrine should be applied to all land use permit applications, in order to reestablish fairness and certainty in the development process.

RESPECTFULLY SUBMITTED this 7th day of August, 2008.

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