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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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STATE OF WASHINGTON
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PETITIONERS' REPLY TO RESPONSE TO
SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Contrary to the City's assertion, Abbey Road is not urging the Court to issue a broad ruling on the vested rights doctrine. The Court may issue a ruling as narrow or broad as it deems appropriate. However, the Court does have before it the opportunity to clarify and harmonize the vested rights doctrine for all land use permit applications. If the Court decides to seize this opportunity, Abbey Road urges the Court to apply the doctrine to all land use permit applications.

II. ARGUMENT

A. The Principles of Stare Decisis and Judicial Restraint do not Prevent the Court from Determining that the Vested Rights Doctrine applies to all Land Use Permit Applications.

The City asserts incorrectly that the doctrine of *stare decisis* prevents the Court from revisiting the vested rights issue, because, according to the City, the issue of vested rights for master use permit applications was decided in the case of *Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994). As explained in our prior briefing, 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.¹

Even if *Erickson* was directly on point, *stare decisis* does not prevent the Court from re-examining the vested rights doctrine in the present case. As the Court has stated:

Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change. Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office. But we also recognize that stability should not be confused with perpetuity. If the law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires. The true doctrine of *stare decisis* is compatible with this function of the courts.

In re Stranger Creek and Tributaries in Stevens County, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). As stated in our previous briefing, there are several reasons for re-examining the vested rights doctrine. First, the Court has an obligation to settle the conflict between the court of appeals decision in this case and the decision in *Victoria Tower Partnership v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987).² Second, in order to achieve a uniform and consistent vested rights doctrine, the Court should apply the doctrine to site development permits the same way it is applied to similar permits such as conditional use permits, preliminary

¹ See Court of Appeals Respondents' Brief at 10-23; Petition for Review at 4-14.

² See Court of Appeals Respondents' Brief at 21-23; Petition for Review at 14-16.

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.³

Third, the Court should reconsider the *Erickson* decision because the *Erickson* court failed to properly consider the cost of preparing and submitting a MUP application.⁴ Finally, even if the Court remains reluctant as the *Erickson* court was, to 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.⁵

The City also argues that the principle of judicial restraint prevents the Court from rendering a broad decision on vested rights and requires that the decision be narrowly tailored to the specific facts of this case.⁶ Although it is true that the principle of judicial restraint discourages the Court from resolving issues that are not necessary to dispose of a case, judicial restraint does not prevent the Court from resolving those issues that are necessary to resolve the case in a broad fashion so that the

³Respondents' Brief at 42-45; Petition for Review at 16-20.

⁴Respondents' Brief at 10-23; Petition for Review at 4-14.

⁵Petition for Review at 16-18.

⁶Response to Petitioners' Supplemental Brief at 2.

decision has precedential value beyond the specific facts before it. In *Hayden v. Mutual of Enumclaw Insurance Corp.*, 141 Wn.2d 55, 1 P.3d 1167 (2000), quoted by the City in its response brief, the assignee of an insured sought a declaration that a commercial general liability policy imposed a duty to defend a claim for the insured's deficient performance of certain fruit tree grafting work. Two issues raised were whether the "loss of use" exclusion in the policy barred coverage and whether it was proper for the insurer to rely on extrinsic facts to avoid its duty to defend. *Id.* at 61. The Court held that since it was clear that the duty to defend did not exist even without considering extrinsic evidence, the principle of judicial restraint dictated that it not decide the extrinsic evidence issue. *Id.* at 67-68.

Unlike in *Hayden*, the present case does not involve multiple issues such that if one is decided, resolution of the others becomes unnecessary. The one issue is whether Abbey Road's site development permit application vested at the time of application. The Court can decide this issue narrowly so that it applies only to the specific facts of this case, or more broadly so that it clarifies and harmonizes the vested rights doctrine more generally. "The Washington Supreme Court . . . plainly has an obligation to clarify and harmonize the law of the state, as well as to correct errors of the lower courts." Philip A. Talmadge, *Understanding the*

Limits of Power: Judicial Restraint in General Jurisdiction Court Systems,
22 Seattle U. Law Rev. 695, 710 (1999).

The vested rights doctrine is in dire need of clarifying and harmonizing. It should not allow conditional use permits and preliminary plat applications to vest, but not site development permits. The principles of fairness and certainty that are the foundation of the vested rights doctrine apply to all land use permit applications. 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.

B. The Court should Decide the Issue of Vested Rights for Site Development Permits and not Defer to the Legislature.

As explained in Section A above, there is no "well established precedent" for non-vesting of permits such as the City of Bonney Lake's Type 3 site development permit, but if there were, the Court would be justified in departing from it. In support of its argument, the City again quotes *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987), for the bare statement that the court rejected

application of the vested rights doctrine to site plan review.⁷ As explained in our previous briefing, 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.⁸

The City also asserts that nothing has changed in land use law since *Erickson*, to warrant a review of the vested rights doctrine.⁹ That statement is incorrect. One major change in land use law since *Erickson* has been the adoption of the Regulatory Reform Act ("RRA"), RCW Chapter 36.70B, in 1995. The RRA's purpose was to streamline, enhance predictability and reduce unnecessary duplication in the land use permitting process. *See* RCW 36.70B.010; Roger D. Wynne, *Reclaiming Vested Rights*, 24 Seattle U. Law Rev. 851, 918 (2001). The RRA sets forth uniform procedures and standards for reviewing project permit applications for local governments to follow. Since local governments now have uniform procedures and standards for reviewing project permit applications, they should also have uniform standards for vesting of such applications.

⁷Response to Petitioners' Supplemental Brief at 3. The City continues to refer to Abbey Road's Type 3 application as "site plan review." However, in their Type 3 approval letters, the City's planning department consistently refers to the Type 3 application as a "site development permit." *See e.g.*, Administrative Record Exs. 34(f), 35(i), 36(e), and 37(h).

⁸Court of Appeals Respondents' Brief at 24-25; Answer to Brief of Amicus Curiae at 3-4.

⁹Response to Petitioners' Supplemental Brief at 5.

Contrary to the City'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). It is the Court's duty to clarify and harmonize the laws of the state and it should do so in this case with regard to the vested rights doctrine.

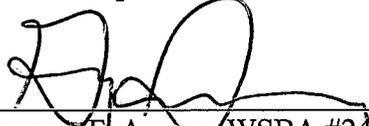
III. CONCLUSION

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 clarify and harmonize the doctrine and reestablish fairness and certainty in the development process.

RESPECTFULLY SUBMITTED this 10th day of November, 2008.

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