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STATE OF WASHINGTON
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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.

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

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Abbey Road asks this Court to ignore clear and well-reasoned Supreme Court precedent and to extend the vested rights doctrine to the initiation of optional site plan review. As correctly determined by the Hearing Examiner in this case, the Supreme Court has already determined that filing a site plan review application does not vest development rights. Furthermore, the Supreme Court has expressly held that it will not expand the vested rights doctrine beyond its well-established limits. Under these circumstances, this Court should affirm the Hearing Examiner's decision and reverse the superior court's decision.

II. ARGUMENT

A. *Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994), is controlling.

Abbey Road Group attempts to confuse the issues presented in this case and asks this Court to ignore the clear and reasoned decision of the Supreme Court in *Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994). Abbey Road is incorrect in arguing that *Erickson* is inapposite. *Erickson* squarely addresses the issue of whether due process requires vesting at the point a master use permit or site plan review application is filed—which is the precise issue in the present case. *Erickson* involved a vesting ordinance that permitted a developer to vest a project by

completing the master use permit process in the alternative to filing a completed building permit application. *Erickson*, 123 Wn.2d at 868-69. Here, the City has not enacted a vesting ordinance, so vesting occurs at the point a developer files a complete building permit application. The fact that Bonney Lake has not legislatively extended vesting to a point other than filing a building permit application does not make the *Erickson* court's decision inapplicable.

In *Erickson*, the Supreme Court held that cities are not required to set the vesting date at the filing of a complete site plan review application. *Erickson*, 123 Wn.2d at 876. In making this determination, the Supreme Court considered the developer's arguments that filing the site plan review application is sufficient to evidence a developer's commitment to a project and that not allowing vesting at that point would frustrate vesting—the same arguments Abbey Road makes here. The Supreme Court rejected these arguments, as should this Court. Abbey Road disagrees with the Supreme Court's decision and attempts to attack the Court's analysis. The Supreme Court, however, made a clear and reasoned decision and this Court is bound by that precedent. See, e.g., *Ramirez v. Dimond*, 70 Wn. App. 729, 733, 855 P.2d 338 (1993) ("This court [of appeals] may not overrule our Supreme Court."); *Schaeffer v. Woodhead*, 63 Wn. App. 627, 630, 821 P.2d

75 (1991) (“Any change in Washington law must come from our Supreme Court.”).

Abbey Road argues that it expended sufficient funds on its application to support vesting at the initiation of site plan review. Abbey Road, however, spent approximately \$100,000 to prepare its application, which amounts to only 0.07% of the projected project cost. CP 37, FF 20. Abbey Road argues that the cost of the permit application and not that cost relative to the total cost of the project is the relevant indicia of good faith that justifies vesting. The Supreme Court has clearly rejected this argument:

[C]ost-based arguments fail because substantial dollar figures alone do not demonstrate a significant burden on developers. The cost of obtaining a MUP varies greatly depending on the complexity of the proposal. 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.

Erickson, 123 Wn.2d at 874. Abbey Road points to other cases that do not discuss the projects’ cost to support its argument that the total project cost is not relevant to vesting issues. See, e.g., *Hull v. Hunt*, 53 Wn.2d 125, 331 P.2d 856 (1958); *Allenbach v. City of Tukwila*, 101 Wn.2d 193, 676 P.2d 473 (1984). Those cases, however, deal with building permit applications and there has been a general determination that the requirements of building

permit applications are sufficient to imply good faith on the part of the developers. *Hull*, 53 Wn.2d at 130 (“[H]owever, the cost of preparing plans and meeting the requirements of most building departments is such that there will generally be a good faith expectation of acquiring title or possession for the purposes of building. . . .”); *Allenbach*, 101 Wn.2d at 199 (“The cost of submitting an application and the time limitation on commencing construction after a permit is issued are sufficient commitments to eliminate any need for the courts to inquire into the ‘good faith’ of the applicant.”). There has been no such general determination for site plan review applications. In fact, the Supreme Court has expressly rejected extending the vesting doctrine to site plan review: “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).

Abbey Road also takes issue with the Supreme Court’s statement that it rejects “a cost-based analysis that reintroduces the case-by-case review of the developer’s reliance interest we rejected 40 years ago when we adopted the vest rights doctrine,” arguing that the Supreme Court misunderstood Erickson’s arguments. Respondents’ Brief (RB) at 16. The Supreme Court did not misunderstand Erickson’s argument; it rejected it.

Accepting Erickson's, and now Abbey Road's, argument would indeed result in a case-by-case review, based on whether the cost of filing a particular application would be sufficient to protect the interests of the public.

The Supreme Court has already addressed the issue of vesting for site review applications. This Court must apply the Supreme Court's holding in *Erickson* and affirm the decision of the Hearing Examiner.

B. *Victoria Tower Partnership v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987) is inapplicable.

Abbey Road incorrectly states that *Victoria Tower Partnership v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987) analyzed Seattle's MUP process. Nowhere in its opinion does the *Victoria Tower* court analyze the issue of whether a site plan review application should be treated like a building permit application. Instead, following one single reference to an MUP, the *Victoria Tower* court proceeded to analyze the vesting issue on the basis of a building permit application. See, e.g., *Victoria Tower*, 49 Wn. App. at 759 ("Appellate review of a city's denial of a building permit on SEPA grounds is governed by the 'clearly erroneous' test."), 49 Wn. App. at 760 ("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. The Washington doctrine protects developers who file a building permit application”), 49 Wn. App. at 762 (“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.”) Given the *Victoria Tower* court’s analysis and repeated mentions of a building permit application as the vesting event, the only reasonable conclusion is that the developers in that case also filed a building permit application. As such, *Victoria Tower* does not support Abbey Road’s position.

Abbey Road argues that the *Victoria Tower* court “had to first make the threshold determination that the MUP application was vested.” RB at 23. The cited portions of *Victoria Tower* do not analyze whether the developer’s permit application vested the project. Rather, the court addresses whether a project vests to the SEPA policies in place at the time of a building permit application. See, *Victoria Tower*, 49 Wn. App. at 761-62. Thus, there is no analysis in the *Victoria Tower* opinion regarding whether a MUP application is a vesting event.

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 Tower 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) polices 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. Therefore, *Victoria Tower Partnership* is neither controlling nor particularly instructive on this issue presented here.

Erickson & Associates v. McLerran, 69 Wn. App. 564, 568-69, 849 P.2d 688 (1993). Furthermore, the Supreme Court's statements in *Erickson* regarding *Victoria Tower* are *dicta* and not an attempt to characterize the meaning of that case. Rather, the Court was simply pointing out that *Victoria Tower* predated the vesting ordinance at issue. *Erickson*, 123 Wn.2d at 871 (“*Victoria Tower* is inapposite here because the vesting ordinance at issue in this case, SMC 23.76.060, was not adopted until 1985, approximately 5 years after the *Victoria Tower* appellant's application was filed.”).

Moreover, since *Victoria Tower* does not analyze the issue presented here, it is not helpful to the case at hand. This Court should not ignore a clearly reasoned opinion by the Supreme Court in favor of a 20-year-old Division One opinion that does not even attempt to analyze the issue before this Court.

C. Requiring developers to submit a complete building permit application is not unduly burdensome and does not frustrate vesting.

Abbey Road argues that requiring it to file building permit applications before vesting is unduly burdensome and frustrates vesting, relying on *West Main Associates 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). As argued in the City's Opening Brief, both of these cases are inapposite. Here, the City's site plan review application process does not defeat vesting. As in *Erickson*, "[t]his is not a case where the City has reserved for itself the sole discretion to determine the date of vesting." *Erickson*, 123 Wn.2d at 871. There is *nothing* in the BLMC to prohibit a developer from filing a building permit application during the site plan review process. As soon as an applicant is ready to do so, it may file a building permit application and thereby achieve vesting.

The fact that Abbey Road's project is more complex than other projects, encompassing 575 residential units in 24 buildings over 36.51 acres of steeply sloping land, and therefore will be more costly and burdensome to meet the building permit application requirement for vesting does not mean that the City's process is unduly burdensome. CP 28; Transcript (2/6/2006) at 87. The vesting doctrine does not require the City to allow vesting at the earliest possible time. Rather, what is required is that there is a date certain vesting scheme that allows the developer to determine when to vest its project. *Erickson*, 123 Wn.2d at 868. That is the situation we have here. Abbey Road had the ability to fix the vesting date by filing a completed building permit application. The fact that it would be more difficult to submit building permit applications during the site plan review process—if that is even true—does not effect vesting.

Abbey Road argues that “vesting at building permit application provides little protection for large multi-family building projects.” RB at 36. As recognized by the Supreme Court, this is an issue to be addressed by the legislature and not the courts. *Erickson*, 123 Wn.2d at 876.

D. This Court should decline Abbey Road's invitation to extend the vested rights doctrine.

Knowing that its argument fails under the current law, Abbey Road urges this Court to judicially extend the vested rights doctrine. The

Washington State Supreme Court has expressly stated its unwillingness to do so on this precise issue. *Valley View*, 107 Wn.2d at 639 (“[W]e reject any attempt to extend the vested rights doctrine to site plan review.”); *Erickson*, 123 Wn.2d at 876 (“Given the substantial legislative activity in land use law, we are unwilling to modify or expand the vested rights doctrine . . .”). This Court must follow the Supreme Court precedent. See, e.g., *Ramirez v. Dimond*, 70 Wn. App. 729, 733, 855 P.2d 338 (1993) (“This court [of appeals] may not overrule our Supreme Court.”); *Schaeffer v. Woodhead*, 63 Wn. App. 627, 630, 821 P.2d 75 (1991) (“Any change in Washington law must come from our Supreme Court.”).

The developer in *Erickson* asked the Supreme Court to extend the vested rights doctrine to the filing of a MUP application. The Supreme Court expressly rejected this invitation:

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. . . . Our vested rights doctrine does not require the City to process MUP applications under the regulations in place at the infancy of the review process. Nor are we persuaded that changes in land use law warrant an expansion of the doctrine.

Erickson, 123 Wn.2d at 876. The Supreme Court recognized that the law regarding vesting is settled and that the legislature has made substantial

changes in the area of land use law, without changing the law regarding vesting. The Court concluded that any more changes to the vesting doctrine are left for the legislature. The Supreme Court made this decision in May 1994 and, to date, the legislature has not acted to change the vesting doctrine. Thus, this Court should also refuse to expand the doctrine of vested rights.

E. The application form prepared by City staff cannot change the Bonney Lake Municipal Code.

Abbey Road argues that the City's building permit application requires a developer to complete the site plan review application before it can file a building permit application. This argument is without merit as there is no requirement in the BLMC that a City-approved site development plan be submitted for a complete building permit application. The building permit application form lists "approved site development plans" as one optional submittal among a long list of items that may be included with a building permit application. On the application form there are two boxes for each item, one for "submitted" and the other for "n/a" or "not applicable." This shows that a developer could mark the box "n/a" if it were not including "approved site development plans." In its briefing, Abbey Road discusses other projects where the site plan review process was completed before a building permit application was filed. RB at 32. In all

of these cases, vesting was *not* an issue. See Transcript (2/6/06) at 25-28. Also, in at least one of these prior cases, a developer submitted a building permit application the day after it filed its site plan review application—when site plan review clearly had not yet been completed. See, CP 36 (FF 18), Ex. 37. Thus, the City’s practice as evidenced by Abbey Road’s own exhibit shows that a building permit can be filed during the site plan review process. Furthermore, the fact that some developers decide to go through the site plan review process before filing a building permit application does not mean that the BLMC requires it.

The optional site plan review process is a tool for applicants, allowing them to discuss their projects with the City and to lay down the framework for submitting a formal permit application. This process can be helpful to developers of large projects, particularly in cases where vesting is not an issue so that the developer can wait to file a building permit until later in the process. The process does not prevent a developer from filing a building permit application at any time during the process—it is simply a tool that can be used to facilitate the development process.

The building permit application form clearly does not require the submittal of an approved site plan. But even if it did, such a requirement is not supported by the BLMC and therefore cannot bind the City. Abbey

Road recognizes that City staff cannot change or add to legislation, but instead argues that it can “fill in the gaps” in legislation if necessary. RB at 38. A requirement that a developer must go through an entire process and receive formally approved plans before submitting a building permit application is not the sort of “fill in the gap” operating procedures that City staff may promulgate. This rule would be adding a substantive requirement and therefore amending legislation—something that is not permissible. *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).¹

F. The City’s vesting scheme does not violate the Condominium Act, RCW 64.34.050.

Under RCW 64.34.050, “[a] zoning, subdivision, building code, or other real property law, ordinance, or regulation may not prohibit the

¹*Westside Business Park v. Pierce County*, 100 Wn. App. 599, 5 P.3d 713 (2000), cited by Abbey Road, is also inapplicable here. *Westside* deals with a short plat application and whether storm water drainage regulations vest at the time of application. *Westside* does not involve a situation where application forms prepared by staff add requirements that are not supported by the Code, but with an application form that required very little information. The applicant was found to have vested by completing that application. *Westside* does not stand for the proposition that an applicant can vest its project early by misreading the application form and disregarding the city code.

condominium form of ownership or impose any requirement upon a condominium which it would not impose upon a physically identical development under a different form of ownership.” Abbey Road argues that this prohibits the court from applying the doctrine of vested rights to its project. RCW 64.34.050 applies where the physical form of the buildings would be identical. Single family ownership would not be a physically identical form of building to that proposed by Abbey Road and therefore, RCW 64.34.050 is inapplicable.

Abbey Road’s reference to platting in order to construct apartment buildings—which it claims would be physically identical to the condominiums it proposes—is ridiculous. Land is not subdivided in order to build apartments. A “subdivision” is “the division or redivision of land . . . for the purpose of sale, lease or transfer of ownership.” RCW 58.17.020(1). Because the land upon which apartments are built is not sold, leased, or transferred, it would not qualify for subdivision. Thus, apartment developments are treated the same as Abbey Road’s condominium development: They vest upon submission of a complete building permit application.

The City has not adopted any law, ordinance, or regulation that treats condominiums any differently than other forms of property

ownership. All types of land development—condominium or otherwise—can vest development rights when a complete building permit application is filed. Because the vesting scheme does not place additional burdens on developers of condominiums, it does not violate RCW 64.34.050.² See, e.g., *Strauss v. City of Sedro-Woolley*, 88 Wn. App. 376, 944 P.2d 1088 (1997) (holding that the requirement that mobile home park owners file a binding site plan to convert the park into condominiums was not an additional requirement in violation of this section; rather, it was an alternative to the traditional subdivision process).

G. The Hearing Examiner’s findings are supported by the record.

Abbey Road challenges several of the Hearing Examiner’s findings that do not relate directly to the issue of vesting. Because these findings do not address vesting, this court need not consider them. However, because Abbey Road addressed them in its briefing the City will provide a brief response.

1. The Hearing Examiner’s finding that Abbey Road knew of the proposed rezone at the time of the pre-application meeting is supported by the record.

Abbey Road challenges the Hearing Examiner’s finding that at the time of the pre-application meeting Abbey Road “already knew of or Staff

² Furthermore, RCW 64.34.050 was in force at the time the Supreme Court decided

made the appellant aware of the Bonney Lake City Council's consideration of an area-wide zone reclassification which would include the appellant's parcel." CP 28, FF 6.A. At the hearing, City Planning Manager Steve Ladd testified that representatives from Abbey Road were present at meetings where the possibility of a rezone was discussed. Transcript (2/6/2006) at 78. This evidence is sufficient to support the Hearing Examiner's determination that Abbey Road knew about the possibility of a rezone. In challenging this finding, Abbey Road points to a telephone memorandum prepared by Abbey Road's Rachel Couch regarding conversations she had with City staff. This memorandum simply establishes that the rezone was not discussed at the meeting—not that Abbey Road was unaware of it at the time. Furthermore, even if this finding is not sustained, it is not necessary to support the Hearing Examiner's ultimate determination, as the date that Abbey Road found out about the rezone is not relevant to the issue of whether vesting occurred.

2. **The Hearing Examiner's finding that the City consistently advised Abbey Road that a building permit was necessary for vesting is supported by substantial evidence in the record.**

Abbey Road also challenges the Hearing Examiner's finding that City staff consistently advised Abbey Road that a completed building permit

Erickson.

application was necessary for vesting. This finding is fully supported by the record. Associate City Planner Elizabeth Chamberlain testified that Abbey Road was advised at the pre-application meeting that a building permit was necessary to vest the project. Transcript (2/6/2006) at 15. Abbey Road points out that Ms. Chamberlain indicated that Mr. Renaud sent her emails “continually asking what is needed for a complete application” and argues that this suggests that the City did not consistently advise Abbey Road about the building permit requirement. This testimony does not support that conclusion. Ms. Chamberlain’s testimony is clear—the City consistently told Abbey Road that a building permit was necessary to vest the project. That Abbey Road did not want to accept the City’s position does not change the fact that this was the City’s consistent position.

City Planning Manager Steve Ladd also testified that the City informed Abbey Road that a building permit was necessary to vest the project. Mr. Ladd testified that there was no disagreement among staff on the issue of vesting. Transcript (2/6/2006) at 72: 11-13.

Abbey Road points to Mr. Renaud’s conversation with City Planning Community Development Director Bob Leedy as evidence that the City did not consistently inform Abbey Road that a building permit was needed. To the contrary, Mr. Leedy’s testimony specifically states that

Abbey Road had been informed about the building permit requirement and that Mr. Renaud was expressing concern about that requirement: "I don't recall the—how the conversation may have evolved into that, but Mr. Renaud expressed concern, that he had been told in order to vest the Skyridge project, that they would have to have a complete building permit application." Transcript (2/6/2006) at 92. Thus, the City consistently told Abbey Road that a building permit was required to vest, but Abbey Road did not want to accept this answer. Abbey Road's refusal to accept the City's answer does not make the City's position inconsistent.

Furthermore, Abbey Road argues that the Hearing Examiner's finding of fact was not supported by substantial evidence because Mr. Renaud testified that Jerry Hight, Bonney Lake Building Official, stated that a building permit was not required for vesting. Mr. Hight testified that he did not remember disagreeing with planning staff regarding vesting at the pre-application meeting. Transcript (2/6/2006) at 85. Ms. Chamberlain also testified that she did not remember what Mr. Hight said at the meeting. Transcript (2/6/2006) at 35. Mr. Ladd specifically testified that Mr. Hight did not state that a building permit was not necessary in order to vest the project. Transcript (2/6/2006) at 72. This evidence is substantial and supports the Hearing Examiner's finding of fact.

3. **The Hearing Examiner's finding that Abbey Road did not take meaningful action on the project until September 2005 is supported by the record.**

Abbey Road challenges the Hearing Examiner's finding that Abbey Road "had considered developing the property as early as 1996 but took no meaningful action until September 2005, immediately prior to the area-wide rezone." It is clear that Abbey Road did not file its site plan review application until September 2005 and most of the documents submitted were dated September 2005. This supports the Hearing Examiner's finding.

Furthermore, this finding has nothing to do with the vesting issue, which is the critical consideration in this case. Therefore, any error by the Hearing Examiner with respect to this finding is harmless.

III. CONCLUSION

Abbey Road attempts to divert this Court's attention to various fringe issues and arguments to take the focus off the fact that the Supreme Court has already addressed the issue here—whether an application for site plan review vests development rights. This Court should reject Abbey Road's invitation to ignore Supreme Court precedent and to expand the vested rights doctrine beyond the currently established limits.

RESPECTFULLY SUBMITTED this 11th day of April, 2007.

DIONNE & RORICK

A handwritten signature in black ink, appearing to be 'Jeffrey Ganson', written over a horizontal line.

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CERTIFICATE OF SERVICE

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

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Dated this 11th day of April, 2007.

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