No. 90819-2

SUPREME COURT
OF THE STATE OF WASHINGTON

POTALA VILLAGE KIRKLAND, LLC, a Washington limited liability company, and LOBSANG DARGEY and TAMARA AGASSI DARGEY, a married couple,

Petitioner,

vs.

CITY OF KIRKLAND, a Washington municipal corporation,

Respondent.

CITY'S **ANSWER** AMICI CURIAE MEMORANDUM OF THE ASSOCIATION OF WASHINGTON BUSINESSES AND WASHINGTON REALTORS SUPPORTING THE PETITION FOR REVIEW

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I. INTRODUCTION

The Association of Washington Businesses and Washington Realtors (Amici curiae) argue that Division I's decision "ignores" case law recognizing that the common law vested rights doctrine remains in force even after the 1987 codification of the vested rights doctrine. But Amici curiae cite no case supporting their argument. They also assert that the City of Kirkland's permit processing procedures violate due process, again without any factual or legal support. Because Division I resolved this case consistent with applicable law the City respectfully requests that review be denied.

II. ARGUMENT

A. Amici curiae do not demonstrate that the decision on review ignores relevant case law.

The key issue before Division I was whether, in a development project that requires the issuance of multiple permits, the filing of a shoreline substantial development permit application alone triggers the vested rights doctrine; or whether full vested rights for a multi-permit project can only be triggered by filing a building permit application. Division I properly held that while the vested rights doctrine originated at common law, it is now statutory, and pursuant to RCW 19.27.095(1), vested rights in Washington are triggered only by the filing of a complete

building permit application.[1] Division I properly declined to *extend* the vested rights doctrine to shoreline applications, consistent with this Court's firm position that expanding the vested rights doctrine is a job for the legislature, not the courts.

Amici curiae argue that Division I's decision "ignores" case law recognizing that the common law vested rights doctrine remains in force even after the 1987 legislative enactments, citing *Phillips v. King Cty*, 136 Wn.2d 946, 968 P.2d 871 (1998); *Weyerhaeuser v. Pierce Cty*, 95 Wn. App. 883, 976 P.2d 1279 (1999); *Schneider Homes v. Kent*, 87 Wn. App. 774, 942 P.2d 1096 (1997).

First, Amici curiae's argument ignores this Court's clear statement, issued over five years ago, that the common law vested rights doctrine has been "superseded" by the Legislature's 1987 codification of the doctrine. *See Abbey Road v. Bonney Lake*, 167 Wn.2d 242, 252-254, 218 P.3d 180 (2009). In *Abbey Road*, this Court rejected the argument that the common law vested rights doctrine, which had been judicially expanded to master use permit (MUP) applications in *Victoria Tower v. Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987), was still valid:

> Even if *Victoria Tower* can be read to expand the common law vesting doctrine to MUP applications, **it has been superseded by**

[1] The Legislature also codified the vested rights doctrine as to subdivision applications, RCW 58.17.033, and development agreements, RCW 36.70B.180, but those statutes are not at issue in this matter.

> **RCW 19.27.095(1) and our analysis in *Erickson*** *[v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994)].

Abbey Road, 167 Wn.2d at 254 (emphasis added). An amicus brief based upon a premise that simply ignores this Court's clear holding in *Abbey Road* is not helpful to the Court.

Second, *even if* this Court had not already held that common law vested rights has been superseded by the 1987 legislative vesting enactments, the cases cited by Amici curiae on that issue are not persuasive.

Phillips v. King County. *Phillips* is inapplicable because it deals with the vesting of a preliminary plat under the subdivision statute, RCW 58.17.033. The common law vested rights doctrine is not at issue in *Phillips*.

> In 1988, Lozier applied to King County for approval of a preliminary plat to build a 78–home residential housing development, to be called "Autumn Wind." . . . Since the application for the Autumn Wind project was submitted in 1988, the engineering plans for the development were reviewed pursuant to the 1979 Surface Water Design Manual. Although a new surface water drainage code was adopted by King County in 1990, it did not apply to the Autumn Wind project because the project was vested to the prior code pursuant to **RCW 58.17.033**.

Phillips v. King County, 136 Wash. 2d at 950-951 (emphasis added).

Schneider Homes v. City of Kent. *Schneider Homes* is also inapplicable because it too addresses vesting of a preliminary plat filed

pursuant to the subdivision statute, RCW 58.17.033. Again, the common law vested rights doctrine is not at issue in *Schneider Homes*. For instance, in *Schneider Homes,* the Court of Appeals analyzed whether the developer was vested in planned unit development (PUD) regulations, because the PUD application had been filed at the same time as the preliminary plat application:

> The issue we perceive to be pivotal is whether the completed **application for a preliminary plat** in 1991, which is inextricably linked to the PUD permit application . . . also vested Schneider Homes with the right to have the PUD permit application considered under the 1991 King County Code.
>
> The doctrine reflected in **RCW 58.17.033** vests rights to develop, not merely divide the land. . . . [In *Noble Manor v. Pierce County*,][2] . . . this court held submission of a complete **subdivision application** vests the right to have not only the subdivision of the land, but also the development proposed for the subdivision, to be considered under the laws, ordinances and policies in effect at the time of the application. The court relied on **RCW 58.17.033** and prior case law.
>
> We find *Noble Manor,* and the authorities upon which it relies, dispositive. When Schneider Homes submitted its **preliminary plat application,** it became entitled to have not only that application, but also its companion PUD application, considered under the King County ordinances then in effect on the land.

Schneider Homes, 87 Wn. App. at 778-79 (emphasis added).

Weyerhaeuser v. Pierce County. The City distinguished *Weyerhaeuser* in its response to the amicus brief filed by PLF and BIAW,

[2] *Noble Manor v. Pierce County*, 181 Wn. App. 141, 913 P.2d 417, *aff'd on review*, 133 Wn.2d 269, 943 P.2d 1378 (1997).

and incorporates those arguments herein.[3] The City finds it worth mentioning that this Court has already commented with disfavor on *Weyerhaeuser* in *Abbey Road,* noting that *Weyerhaeuser* employed arguments the Court has previously "considered and rejected." *Abbey Road,* 167 Wn.2d 253 n. 8. Amici curiae have not set forth any legal or factual argument sufficient to persuade this Court to consider – and reject – the poorly decided *Weyerhaeuser* once again.

B. The City's permit processing procedure does not violate due process and Amici curiae do not present any factual or legal argument to the contrary.

Amici curiae attempt to lure the Court into believing the City of Kirkland's permit processing procedures violated due process because they somehow prevented Potala Village from securing vested rights. This argument is contrary to the facts in the record and does not merit review by this Court.

It is undisputed that the City of Kirkland's codes, processes and procedures all allowed Potala Village to *file* a building permit application at any time during the development process. Once a complete building permit application is filed with the City, the applicant obtains vested rights to the project. If, however, a building permit application is filed before environmental review of the project is completed, such as review under

[3] *See, City's Answer to Amicus Brief,* filed January 14, 2015, in response to brief filed by PLF and BIAW , pp. 4-6.

the State Environmental Policy Act (SEPA), RCW Ch. 43.21C, it is possible that changes will need to be incorporated into the project based upon environmental review (such as a reduction in the square footage of structural coverage, or an increase in set-backs from sensitive areas, *etc.*) Based on these changes, it is possible that the originally filed building permit application will need to be amended or, if there are significant changes required, a new application may need to be filed. It is at this point where Amici curiae wrongly assert that, in this case, even if Potala Village had filed a building permit application before the City enacted the Moratorium, the City could have unilaterally forced him to *lose his vested rights* by making him file a new building permit application after completion of shoreline and SEPA review. *Mem., pp. 6-7.* This is simply not true.

There is no evidence in the record to support Amici curiae's assertion that a developer would lose vested rights by filing a new or amended building permit after environmental review. In fact, a review of the record demonstrates that this assertion is not true. Once a developer files a complete building permit application in Kirkland, development rights vest – *and that vesting will not be lost* even if the developer is later required to file a new (or amended) permit as a result of conditions imposed during shoreline and/or SEPA review. As stated by the City's

Senior Planner:

> If Petitioner [Appellant Potala Village] had filed a pre-Moratorium building permit, and if he were required to file a new and/or modified building permit, then- and only then- would the Planning Department have to determine whether he was still vested to the zoning code by virtue of his original building permit application. . . [I]f the changes reduce the size of the project, and reduce its impact on the environment, **then I believe it would be appropriate to find that there has been *no change in the vesting date* simply because a new, reduced building permit needs to be filed**.

CP 968-969 (emphasis added). The evidence set forth in this declaration was not contradicted by Appellant Potala Village. No one testified that the new and/or modified building permit, under these circumstances (which reduces environmental impacts), would require Potala Village (or any other similarly situated developer) to lose their original vesting date.

In sum, Amici curiae's due process argument is without merit and does not support review in this case. Had Potala Village filed a building permit application before enactment of the Moratorium, it would have obtained vested rights for its Project, and those vested rights would not have been lost as a result of SEPA and shoreline review.

III. CONCLUSION

Amici curiae claim review should be granted because no Washington court, including this Court, has ever held that the Legislature's codification of the vested rights doctrine as to building

permits, RCW 19.27.095(1), superseded the common law vested rights doctrine. This is not true. This Court has indeed held that the common law vested rights doctrine has been superseded by RCW 19.27.095(1). *See, Abbey Road*, 167 Wn.2d at 254. Furthermore, Amici curiae have not raised any legal or factual arguments to support their unfounded assertion of a due process violation.

In sum, Amici curiae have nothing of value to add to this case. Here, Division I simply followed the law as previously set forth by this Court. Accordingly, the City respectfully requests that review be denied.

Respectfully submitted this 14th day of January, 2015.

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DECLARATION OF SERVICE

I declare that on January 14, 2015, a true and correct copy of the foregoing document was sent to the following parties of record via method indicated:

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