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No. 70542-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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

Plaintiffs/Respondents,

vs.

CITY OF KIRKLAND, a Washington municipal corporation,

Defendant/Appellant.

REPLY BRIEF OF THE CITY OF KIRKLAND

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I. INTRODUCTION

The sole issue in this case is a pure question of law: Does a developer obtain vested rights to a local jurisdiction's land use laws based upon the filing of a shoreline permit application or, as the Supreme Court held in *Abbey Road v. Bonney Lake* and as the Legislature decreed at RCW 19.27.095(1), does an applicant only obtain full vested development rights upon the filing of a complete building permit application?

Potala Village and Mr. Dargey (hereafter referred to as "Dargey") have attempted to obfuscate and confuse the issue by intermingling the concepts of project vesting under Washington's vested rights doctrine, and permit vesting, which has evolved (whether rightly or wrongly) through case law. For instance, before *Abbey Road,* various courts had extended vesting principles to single permit applications, such as applications for grading permits[1] and septic tank permits.[2] This extension of vesting principles is best described as "permit vesting" (versus "project vesting"). Under the permit vesting cases, the issue was not whether an entire "project" vested to the zoning code in effect at the time a particular permit application was filed; but only whether the permit itself vested in existing regulations. *See, e.g., Juanita Bay v. Kirkland*, 9 Wn. App. 59, 82-85, 510 P.2d 1140 (1973) (grading permit was not subject to zoning changes

[1] *Juanita Bay v. Kirkland*, 9 Wn. App. 59, 84, 510 P.2d 1140 (1973).

[2] *Ford v. Bellingham-Whatcom Cty*, 16 Wn. App. 709, 715, 558 P.2d 821 (1977).

adopted after application for the grading permit had been filed).

Despite Dargey's comments to the contrary, his "permit vesting" issue is not before the Court. Instead, the City does not contest (and never has contested) that Dargey is vested in the shoreline regulations in effect when he filed a complete shoreline application. It is important, however, that the Court not confuse these cases regarding "permit vesting" with the crucial issue regarding the vested rights doctrine that is before it today. For example, in the old case of *Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974), the court of appeals held only that the applicant's shoreline permit was vested in the shoreline regulations in existence when he filed his permit. On its facts, *Talbot* did not extend the full vested rights doctrine to shoreline applications. No Washington case has done so. Given the Supreme Court's strong admonition in *Abbey Road* against courts' extending the State's already liberal vested rights doctrine, the City asks the Court to reverse the Order below holding that Dargey obtained full vested development rights at the time he filed a shoreline application.

II. STATEMENT OF UNDISPUTED FACTS

A. Introduction

Dargey appears to have misrepresented several facts in his briefing. The City urges the Court to review the actual record certified for review in this matter, and not rely upon assertions and speculation set

forth in Dargey's briefing. The City will assist the Court herein with cites to the certified record but, first, has a few notable comments to make.[3]

The City notes that Dargey stresses many facts in his brief that are irrelevant to the vested rights issue on appeal in this case. For instance, he complains that the Moratorium was allegedly enacted "without notice" to him. First, this is patently not true. Furthermore, the Moratorium's validity is not at issue here. Dargey could have filed an appeal of the original Moratorium Ordinance, but he did not do so.

Dargey also complains about the supposedly onerous environmental review his project underwent pursuant to the State Environmental Policy Act (SEPA), RCW Ch. 43.21C. Again, the validity of the City's requirement for an EIS is not at issue. Dargey could have filed an appeal of the City's requirement for an EIS, but he did not do so.

Dargey grumbles about the effect on his Project of the zoning code amendments adopted by the City during the Moratorium; but that issue is not before this Court either. Once again, Dargey could have appealed the City's zoning code amendments, but he did not do so.

Finally, Dargey harshly criticizes the City's decision approving, with conditions, his Shoreline permit. But the validity of the Shoreline Approval is not before this Court. Once again, Dargey could have

[3] Additionally, the City moves to strike Dargey's reference to mediation and settlement discussions, at pp. 14-15 of his opening brief, as inadmissible and irrelevant per ER 408.

appealed the decision approving his Shoreline permit, but he did not do so.

B. The City Allows Applicant's to Obtain Vested Rights By Filing Building Permit Applications and Does Not Have in Place Any Scheme to Thwart Vested Rights

Abbey Road held that as long as a city allows a developer to file a building permit application at any time in the permitting process, then only a building permit application vests the law for the entire project. *Abbey Road*, 167 Wn.2d at 252-254. *Abbey Road* also held that the only constitutional prohibition to this process would occur if a city were to actively thwart an applicant's right to file a building permit. Here, the City's codes, processes and procedures all allowed Dargey to file a building permit application at any time during the development process. The City does not have in effect any impediments to filing a permit application, such as Bellevue did in *West Main Associates v. Bellevue,* 106 Wn.2d 47, 720 P.2d 782 (1986). Dargey does not dispute that he could have filed an application for a building permit to cement his vested rights at any time in the development process. So, in an attempt to prevail on this appeal, Dargey baldly asserts that the City had a scheme in place that would allow the City to unilaterally "divest" him of his vested rights. Dargey claims it is the City's position that even if he had filed an application for a building permit before the Moratorium, the City "unilaterally" reserved the right to change the Project's vesting date by

potentially requiring him to file a new or revised building permit application after SEPA and/or Shoreline review. The City has never taken this position. As set forth in the record on review, it is the City's unwavering position that if Dargey had filed a complete building permit application at any time prior to the Moratorium, then his project would have been vested as of that date.[4] Any modifications, changes or revisions to that application that would decrease the size or intensity of the Project as a result of environmental and/or shoreline review would not change the vesting date of the building permit application.[5] Dargey's assertions to the contrary are nothing more than straw man arguments that are not supported by the record.

C. The City's Requirements For a Complete Building Permit Application are Reasonable

Potala Village makes an off-hand comment that the City requires applicants to pass a "transportation concurrency" test before the developer can submit a complete development application. Again, this is not true. The City simply requires an applicant to pass a road concurrency test before it can submit a complete development application.[6] Road concurrency is only one small part of the City's review of multiple transportation impacts, a review which occurs later in a development

[4] CP 94, 96, 98-99; *Swan Dec.*, paras. 7, 14 and 17.
[5] *Second Suppl. Swan Dec.*, para.11; CP 968.
[6] *Suppl. Swan Decl.*, para. 5; CP 795.

project. The need to pass road concurrency is a reasonable requirement by the City for a development project application. There is no evidence in the record to suggest otherwise, nor any case law to the contrary.

D. The City Never Led Dargey to Believe His Project Had Full Vested Rights by Virtue of His Shoreline Permit Application

Dargey next tries to make the case that the City somehow led him to believe that his Project was fully vested to all of the land use regulations in effect when he filed his Shoreline permit application – including unlimited density in the BN zone. This is not true. The record shows that the City's Planner clearly testified that Dargey's Shoreline permit application vested Dargey, at the most, only to the City's then-existing Shoreline regulations, "Chapters 83 and 141 of the Kirkland Zoning Code (KZC), the Shoreline regulations and administration in effect at that time."[7] The Planner went on to testify that if Dargey had "wanted to vest his Project under the City's zoning code and other land use laws, rules, or regulations in effect at that time, then he would have had to file a building permit application."[8]

Dargey also claims, without citation to authority, that the Letter of Completeness the City issued with regard to his Shoreline application constituted "notice" that the City had determined his shoreline permit application was vested to the BN zoning and land use regulations in effect at that time. Again, this is not true, nor supported in any way by the

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[7] CP 95, *Swan Decl.*, para.8. This is the "permit vesting" argument that the City does not dispute and, therefore, it is not before the Court.

[8] CP 95, *Swan Decl.*, para.8 (emphasis in original).

record. It is undisputed that the Letter does not address "vesting" at all.[9] All the Letter indicated was that Dargey's application was "complete" for processing, which started the City's 120-day review clock.[10]

E. Dargey Had Actual Notice of the Upcoming Moratorium and Could Have Filed a Building Permit to Obtain Vested Rights, But Intentionally Chose Not To Do So

The City finds it hard to believe that Dargey continues to attempt to argue that the Moratorium was adopted without any notice to him. Cities are not required by law to provide "public notice" of their intent to enact development moratoria, so this complaint is completely irrelevant to any aspect of the vested rights doctrine. *See,* RCWs 35.63.200; 35A.63.220; & 36.70A.390. Further, it is undisputed that Dargey did, in fact, have notice that the City was considering enacting a moratorium.[11] Dargey loses credibility by arguing that he did not have notice. He knew about the upcoming moratorium and, for reasons of his own, intentionally chose not to file a building permit application.[12]

F. The City's Adopted Shoreline Regulations are Separate from the City's General Zoning Code

Dargey urges the Court to believe that (1) the City's Shoreline regulations applied to its entire project, and (2) the City reviewed his

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[9] CP 799; 942.
[10] This was also explained fully in the City's Opening Brief, p. 8, n. 1.
[11] CP 97-99; CP 802-804.
[12] CP 101; *Swan Decl.*, para. 21; *see also*, CP 72-75.

entire Project under both the Shoreline code and the general zoning code during its Shoreline review. There is no support for these contentions.

1. Shoreline regulations apply only within the designated Shoreline Jurisdiction

The City's shoreline code states that shoreline regulations are not part of the City's general zoning code. KZC 83.40.1. Instead, they are regulations that can only be applied to that portion of a project that is located within the shoreline jurisdiction. Thus, contrary to Dargey's assertions, they could not apply to his entire project.

Shoreline regulations may only be adopted by following the strict procedures set forth in the State Shoreline Management Act (SMA), RCW Ch. 90.58 and WAC 173-26. Shoreline regulations are set forth in the City's Shoreline Master Program (SMP). Before a city can adopt a SMP the Program must first be approved by the Department of Ecology.[13] It is uncontested that the City's SMP applicable to Dargey's Project was approved by Ecology in July 2010 and adopted by the City Council in August 2010.[14] These regulations are located at Chapters 83 and 141 of the Kirkland Zoning Code. Only these regulations have been approved by Ecology and, thus, these are the only regulations that are – as a matter of law – part of the City's Shoreline regulations.

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[13] CP 105; *Decl. Swan*, para. 36.
[14] CP 105; *Decl. Swan*, para. 37.

Then, on the flip side, Dargey also argues that the City's SMP "inherently" incorporated the City's entire zoning code and land use regulations "by requiring the City to impose the most environmentally protective regulations within the zoning code, whether or not those are found in the shoreline regulations or elsewhere."[15] This argument has no basis in fact or in law. Again, only those regulations approved by Ecology can, as a matter of law, be part of the City's SMP. As the entirety of Kirkland's zoning code was not approved by Ecology, it has not been incorporated into the Shoreline regulations in any way, shape, or form.

2. The City's Shoreline Approval only approved that portion of Dargy's Project located within the Shoreline jurisdiction

Dargey contends that the City's shoreline approval encompassed his entire development. It did not. A shoreline permit only approves development within the shoreline areas, *i.e.,* areas located within 200 feet of the ordinary high water line of Lake Washington.[16] Only a small portion (53-feet) of Petitioner's property lies within the state designated shoreline area. Thus, the City's shoreline approval is only applicable to this 53-foot section of property,[17] which happens to encompass only five

[15] Potala Village Brief, p. 17.
[16] CP 797-795; *Suppl. Swan Decl.,* paras. 3-4.
[17] CP 797.

(5) of the project's proposed 143 residential units.[18] The Shoreline permit has a narrow scope and does not address all of the other regulations in the City's zoning code. Again, only those regulations approved by Ecology can be adopted in the City's SMP and applied to shoreline review.

3. The City's Shoreline review of Dargey's Project was a very limited review

Dargey contends that the City's Shoreline review was an extensive and "detailed review of the proposed land development, leaving nothing to speculation,"[19] and that the shoreline permit allowed the City to review the project with respect to "design, aesthetics, environmental impacts, parking and the like."[20] In reality, the shoreline permit is a very limited scope permit, both generally and specifically as applied to Dargey's Project.[21]

Dargey contends that the City required "soil, groundwater,

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[18] CP 794-795; 797; *Suppl. Swan Decl.*, paras. 3, 9.
[19] Potala Village Brief, p. 24 (emphasis added); and pp. 6-7.
[20] Potala Village Brief, p. 6.
[21] CP 795; *Suppl. Swan Decl.*, para. 3 ("[B]ecause Dargey's property does not abut Lake Washington, and because only a small portion [53 ft] is subject to the jurisdiction of the state SMA and the City's SMP, his shoreline permit was far from complex. For instance, policies and regulations relating to view corridors and public access design stands do not apply. Looking at pages 12-13 of the SDP decision, there are only nine (9) regulations that apply to Dargey's property, out of 168 pages of shoreline regulations. Much more complex will be the building permit review which involves extensive Zoning, Building, Fire, and Public Works codes and regulations."); **see, also, CP 797**; *Suppl. Swan Decl.*, para. 9 ("The only 'aesthetic' regulations that apply to the 53-foot area are: prohibition on reflective or mirrored materials; screen outdoor storage areas and roof top units; and downcast lights. No 'design standards' apply to the property by virtue of the shorelines regulations. Since the site is not close to Lake Washington, review of environmental impacts under the SDP was limited to site contamination. The EIS, which would have been required with or without an SDP, addressed all of the environmental impacts, parking and other issues.").

drainage, water quality and stormwater plans"[22] to be submitted and reviewed as part of his Shoreline review, and that "Kirkland reviewed the Potala Village mixed-use land development project in its entirety."[23] Finally, Dargey states that the City "reviewed the entire proposed mixed-use project in all respects"[24] under Shoreline review. These contentions are not true. [25] Again, the City performs a narrow scope of review for a Shoreline permit (limited to only the SMP regulations and to that portion of the property located within the Shoreline jurisdiction). The Court can confirm the City's limited review by perusing the record in this case.

III. ARGUMENT

A. Introduction

The sole legal issue on appeal to this Court is whether Dargey vested to the land use laws and regulations in effect on the date he filed a complete Shoreline permit application with the City. Washington's leading vested rights decision is *Abbey Road v. Bonney Lake*, 167 Wn.2d

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[22] Potala Village Brief, p. 7.
[23] Potala Village Brief, p. 26.
[24] Potala Village Brief, p. 24.
[25] CP 798; *Suppl. Swan Decl.*, para. 10 ("The SDP only required a general stormwater plan. Dargey, however, apparently already had completed soil groundwater drainage and water quality reports and a stormwater prevention and pollution plan, which he submitted with his SDP application materials. Submission of these documents was not required with his SDP application materials. . . **With regard to Dargey's SDP application, I did not review the project for 'every aspect of review,' but only under Chapters 83 and 141 of the Zoning Code (the City's shoreline regulations**). Although SEPA broadened the scope of the review, it still did not look at compliance with zoning, building and fire codes, and other aspects of the project.") (Emphasis added.)

242, 252-54 (2009), which held that as long as a city allows a developer to file a building permit application at any time in the permitting process, then only a building permit application vests the land use laws and regulations for the entire project. *Abbey Road* further noted that this rule was codified in 1987 by the state legislature at RCW 19.27.095(1). Based upon *Abbey Road* and RCW 19.27.095(1), it is the City's position that a shoreline permit application alone does not grant vested rights such as would occur if a developer were to file a building permit application.

Here, it is uncontested that the City allows developers to file a building permit application at any time in the development process. Dargey admits this in his briefing to the Court.[26] It is also uncontested that the City went out of its way to tell Dargey he would need to file a building permit application to vest his Project before the City Council enacted the Moratorium. Thus, had Dargey wanted to obtain vested development rights to his Project, he could have filed a building permit application at any time in the permitting process prior to the City's adoption of the Moratorium. Unfortunately, he chose not to do so.

Washington's vested rights rule is the minority rule, and it offers more protection of development rights than the rule applied in most other jurisdictions. In other jurisdictions, the majority rule provides that

[26] Potala Village Brief, p. 9.

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. Washington rejected this reliance-based rule, instead embracing a vesting principle which places greater emphasis on certainty and predictability for developers. By promoting a date certain vesting point, Washington's doctrine ensures that new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law. That date certain is the date a developer files a complete application for a building permit. Washington's vested rights rule is very generous to developers, more so than in any other state. All Dargey had to do was file a building permit application, but he did not. The Court should not expand Washington's already generous vesting rules here, especially given the facts of this case. As the Supreme Court stated in *Abbey Road*, expanding the vested rights doctrine is a job best left to the legislature, not the courts. *Abbey Road*, 167 Wn.2d at 261.

B. The Vested Rights Doctrine Does Not Apply To Shoreline Permit Applications

Dargey attempts to support his argument that the vested rights doctrine applies to shoreline permit applications in several ways. First, as noted in the facts section above, Dargey tries to convince the Court that his entire

project received intense, microscopic review under both the City's Shoreline code and general zoning code during the shoreline permit approval process. But there is no evidence in the record to sustain his allegations, and simply repeating them over and over throughout his 50 page brief does not make them true. Here, shoreline review was limited to only that 53-foot portion of the Project that is located within 200 feet of the ordinary high water line of Lake Washington. The first page of the Shoreline Approval Decision clearly describes what improvements were proposed by Dargey within the shoreline jurisdiction: some landscaping; a sidewalk; and a small portion of a building (encompassing only 5 of his proposed 143 residential units).[27] These are the only improvements actually subject to the shoreline permit and approved via the Shoreline approval.

Dargey tries to convince the Court that because the entire project had to be "described" for purposes of the shoreline application, then the entire project must, of course, be vested. But if that was the law, then the Supreme Court would have extended vesting to the Master Use Permits at issue in both *Erickson* and *Abbey Road*, because those permits required "descriptions" of the developers' entire projects also.

Dargey argues the State SMA prohibited Kirkland from "isolating

[27] CP 246-265; *Swan Decl.*, **Ex. V**; CP 801; *Suppl. Swan Decl.*, ¶ 15.

its review" to only that portion of Potala Village's development in the shoreline area. Certainly, the City considered Dargey's entire Project when conducting its Shoreline review, so that its review could be placed in context. But simply because the City considered his Project for the purpose of "context" does not translate into the conclusion that the City's Shoreline approval actually approved anything other than as allowed by law, *i.e.,* the 53-feet of Dargey's Project located within 200 feet of the ordinary high water line of Lake Washington.

In support of his proposition, Dargey cites to *Merkel v. Port*, 8 Wn. App. 844, 509 P.2d 390 (1973), a case issued shortly after the State SMA was adopted in 1971. In *Merkel,* the court made it clear that where a project is located partially within and partially outside of the shoreline jurisdiction, an applicant cannot obtain construction permits and begin work on the uplands portion of the property until after the shoreline permit has been issued; even if the entire project, including the uplands portion, has already undergone SEPA review. *Merkel*, 8 Wn. App. at 850-851. The City's procedures in this case were consistent with the holding in *Merkel*. For instance, the City advised Dargey that no construction permit for any portion of his Project (either on the uplands portion or on the 53 feet within the shoreline jurisdiction) could be issued until after a shoreline permit had been approved. The bottom line, however, is that

Dargey could have applied for a building permit (and obtained vested rights) at any time before or during Shoreline review (and/or SEPA review), right up until the date the Moratorium was enacted. There is nothing about *Merkel* that supports Dargey's argument that vested rights should apply to shoreline permit applications.

C. Dargey's Arguments Regarding Potential Overlap Between the City's General Zoning Code and Its Shoreline Regulations are Meritless

The City's shoreline code, the Shoreline Master Plan (SMP), is separate and apart from the City's regular zoning code. It contains regulations specifically aimed only at protecting the shorelines, as required by the Legislature. It is simply incorrect to say that a shoreline permit fully addresses all of the land use decisions in a project. The shoreline code is an overlay code; it is in addition to the regular zoning code and addresses only shoreline concerns on properties that are located within the jurisdiction of the shorelines.[28] The shoreline code does not adopt or administer other zoning code regulations, nor do its regulations apply to any area outside the shorelines areas. It makes no sense to argue that filing a shoreline permit application vests one in zoning code provisions that are not part of the shoreline code. Instead, the general zoning code

[28] Potala Village's argument that the City's SMP -- which by law must be reviewed and approved by the Department of Ecology before it can even be adopted by the City -- is the same as an "Equestrian Overlay Zone," is completely without merit. *See* Potala Village Brief, p.46.

regulations are applied through review of the building permit.

By analogy, this Court can, if it so chooses, refer to a line of decisions from the Shorelines Hearings Board where the Board has repeatedly held that it does not have jurisdiction over local zoning code provisions that have not been adopted into the City's Shorelines Code:

> Since 1999, it has been well settled that the Board does not have jurisdiction over local zoning codes unless: (1) the local government's SMP has specifically incorporated the zoning provisions in question; and (2) the zoning provisions have been reviewed and approved by Ecology in its approval of the SMP as required by RCW 90.58.090(1).

Breakwater Condominium Assoc. v. City of Kirkland, SHB No. 06-034, Order on Motions at 3 (April 5, 2007). The Shoreline Hearings Board understands that it does not have jurisdiction over provisions of the local zoning code that have not been adopted into a city's SMP. It follows, therefore, that a shoreline permit cannot vest an applicant in the general provisions of a city's local zoning code.

D. No Washington Case Has Ever Applied the Full Vested Rights Doctrine to Shoreline Permit Applications

Dargey next argues that the Washington courts have "consistently applied the vested rights doctrine to shoreline permits."[29] But here is where Dargey fails to distinguish between cases applying the vested rights doctrine (or "project vesting") to cases that only approve "permit vesting."

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[29] Potala Village Brief, p. 26.

Dargey's entire case hinges on the old case of *Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974). But *Talbot* does not address the vested rights doctrine; it does not address whether or not a shoreline application vests a developer in the land use laws and other zoning regulations in effect on the day a shoreline permit application is filed. In *Talbot*, the court merely held that the applicant's shoreline permit was vested in the shoreline regulations in existence when he filed his permit.

Without discussion, at page 27 of his brief, Dargey provides the Court with a string cite to cases that have cited *Talbot* for the proposition that the vested rights doctrine supposedly applies to shoreline permits. But none of these cases actually apply the vested rights doctrine to a Shoreline permit application. In addition, *Abbey Road* questioned the continued validity of the limited "permit vesting" holding in *Talbot v. Gray*:

> Abbey Road also argues that we should expand the vested rights doctrine based on case law, contending that there is no "rational reason" for refusing to expand the doctrine to site plan applications when the courts have done so in other contexts. . . . ***See Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974) (shoreline permit applications)**; . . . *Weyerhaeuser v. Pierce County,* 95 Wn. App. 883, 976 P.2d 1279 (1999) (conditional use permit applications). Again, in *Erickson,* we considered and rejected similar arguments, and we are not persuaded to overrule our analysis or holding in *Erickson.*

Abbey Road, 167 Wn.2d at 253, n. 8 (emphasis added)

E. Dargey's Reliance on Subdivision Vesting Case Law is Inapposite

Decisions interpreting Washington's subdivision vesting statute, such as *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997), do not apply here, where no subdivision application is involved. Subdivision vesting provisions present a different set of issues than building permit vesting provisions. For instance, at common law, the vested rights doctrine had long been applied to building permit applications, but had never been extended to applications for preliminary or short plat approval. *See Noble Manor*, 133 Wn.2d at 175. Then, in 1987, the Legislature stepped in and not only codified the vested rights doctrine as to building permits; but also expanded the vesting doctrine to apply – for the first time – to subdivision applications (RCW 58.17.033). *Noble Manor* was the Supreme Court's first opportunity to interpret the subdivision vesting statute. The issue in *Noble Manor* was:

> Does the filing of a complete application for a short subdivision vest only the right to divide the property, or does it also vest the right to develop the property under the land use and zoning laws in effect on the date of the application?

Noble Manor, 133 Wn.2d at 274.

Right away this Court can tell that the subdivision vesting statute is clearly different than the building permit vesting statute. Under the vested rights doctrine as applied to building permits, there was never any

question as to "what" an applicant vested in; an applicant was, of course, vested in the land use and zoning laws in effect on the date of filing a complete application. But under the subdivision statute, "what" an applicant vested in was a mystery until *Noble Manor* was decided.[30] Ultimately, *Noble Manor* held a subdivision developer obtains a vested right to not only subdivide its property, but also – if certain conditions had been met – develop its land in accord with the zoning and land use laws existing at the time it filed its subdivision application. *Id.* at 285. The "condition" *Noble Manor* held must be met was that the subdivision developer had to disclose its intended "use" of the property at the time of filing its subdivision application (a condition required by the local jurisdiction, Pierce County, in that case). Obviously, with regard to building permits, disclosure of a "use" requirement does not apply. *Noble Manor* and the subdivision vesting statute do not apply to the case at bar, nor to any case regarding the building permit vested rights doctrine. They are different creatures. Dargey's cavalier assertion that the vesting rules between the two are applied exactly the same is without merit.

It is obvious, however, *why* Dargey is trying to make this argument, because he failed to file a building permit application when he had the chance to do so, and threw away the opportunity to vest before the

[30] To some extent it's still a mystery, but that's an issue for another day.

City's new zoning amendments took effect. Now, he tries to convince the Court that his shoreline permit application is similar to the subdivision application in *Noble Manor*, because he fully disclosed his "use" of the property to the City in his shoreline application. Dargey argues that if the Court were to "limit Potala Village's vested right only to shoreline regulations and the shoreline permit, but not to the actual use and development of the property based on what was set forth in the application, the Court would render the vested rights doctrine meaningless."[31] There are many problems with this analysis. But first and foremost is the fact that, unlike the subdivision developer in *Noble Manor*, Dargey could have fully vested simply by filing a building permit application. The City provided Dargey with the opportunity to vest at any time in the development process. As the Supreme Court noted in *Abbey Road*, if a local jurisdiction provides a developer with that opportunity, then the vested rights doctrine is not "meaningless."

F. The City's Vested Rights Doctrine Does Not Violate Due Process

Dargey claims that the City's failure to give him vested rights based upon his shoreline permit application "violates fundamental fairness and Potala Village's rights [to] due process."[32] But Dargey needs to look

[31] Potala Village Brief, p. 33 (emphasis added).
[32] Potala Village Brief, p. 34.

back at the Supreme Court's decision in *Abbey Road*, because the Supreme Court clearly recognized only one due process concern, and that concern was whether a local jurisdiction has adopted any provisions that unduly frustrate or prohibit a developer from filing a building permit application and obtaining vested rights. Here, the City's codes, processes and procedures all allowed Dargey to file a building permit application at any time during the development process. Kirkland does not have in effect any impediments to filing a permit application, such as Bellevue did in *West Main Associates v. Bellevue,* 106 Wn.2d 47, 720 P.2d 782 (1986) (holding that it violated due process to require an applicant to first obtain administrative design review approval, site plan review approval, administrative condition use approval, and modification of landscape approval before being allowed to file a building permit application).

In an attempt to state a claim, Dargey fabricates an "impediment" to vesting. Dargey asserts that even if he 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 application after completion of shoreline and SEPA review. **The City has never made this argument and it is not accurate**. Instead, once a developer files a complete building permit application his development rights vest, and that vesting would not be lost if he is later required to file

a new (or amended) permit that reduces the size and/or adverse environmental effects of the proposed project, as a result of conditions imposed during shoreline and/or SEPA review.[33] The City does not have any code provision that forces an applicant to lose their vested rights.[34]

G. Pre-*Abbey Road* Case Law From the Courts of Appeals Must Yield to *Abbey Road's* Clear Holding

Another inapplicable case cited by Dargey is *Weyerhaeuser v. Pierce County,* 95 Wn. App. 883, 976 P.2d 1279 (1999), where Division II had to decide whether the common law vested rights doctrine should be extended to an application for a conditional use permit (CUP). Relying principally on *Noble Manor* (a subdivision case), Division II held that it did. *Weyerhaeuser* is, at best, a poorly decided decision that should not be relied upon. First, *Weyerhaeuser* mistakenly relied upon *Noble Manor*, which interpreted the subdivision vesting statute. Second, *Weyerhaeuser* is in direct conflict with Supreme Court authority interpreting the vested rights doctrine as it applies to building permits in both *Erickson* and *Abbey Road.* In *Abbey Road*, the Supreme Court made it very clear that the vested rights doctrine applied to building permit applications *only*, even going so far as to hold that a prior case decided by this Court (Division I) that extended vested rights to a Master Use Permit (MUP) was no longer

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[33] CP 968-969.
[34] CP 968; *Second Suppl. Decl. of Swan*, para. 10.

good law. *See Abbey Road*, 167 Wn.2d at 254 (criticizing the applicant's claim that the vested rights doctrine had been judicially extended to MUP applications by Div. I in *Victoria Tower P'ship v. Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987), saying "Even if *Victoria Tower* can be read to expand the common law vesting doctrine to MUP applications, it has been superseded by RCW 19.27.095(1) and our analysis in *Erickson*.").

Finally, *Weyerhaeuser* relied upon dicta from another pre-*Abbey Road* case for the proposition that the vested rights doctrine applies to CUPs, *Beach v. Bd of Adjustment*, 73 Wn.2d 343, 347, 438 P.2d 617 (1968), where the Court (upon remand for a new CUP hearing due to the City's failure to record the first hearing and present a verbatim record on appeal), noted that a "subsequent change in the zoning ordinance does not operate retroactively so as to affect vested rights." In fact, the true vested rights doctrine was not at play at all in *Beach*. But even if *Beach* stated that the vested rights doctrine applies to CUPs, this statement was only set forth in dicta, and courts cannot rely upon dicta. Also, *Beach*'s decision on vested rights (if any) has been superseded by RCW 19.27.095(1) and the Court's analysis in both *Erickson* and *Abbey Road*.

H. Dargey's Declaratory Judgment Action Should Be Dismissed

Dargey has a completely adequate remedy at law with his action for a Writ of Mandamus, and is not entitled to relief via a declaratory

judgment action. Furthermore, Dargey failed to present facts or arguments to support a declaratory judgment action and the City respectfully requests that his declaratory judgment action be dismissed.

CONCLUSION

The vested rights doctrine, as applied to building permits, has undeniably been addressed by our state Supreme Court in *Abbey Road Group v. Bonney Lake,* where the Court held that the only permit application that gives a developer vested rights is a building permit application. As long as a city allows a developer to file a building permit application at any time in the permitting process (as the City of Kirkland does here), then only a building permit application vests the law for the entire project. *Abbey Road*, 167 Wn.2d at 252-254. Accordingly, the City respectfully requests that the trial court Order expanding vested rights to a shoreline permit application be reversed.

Respectfully submitted this 10th day of January, 2014.

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DECLARATION OF SERVICE

I declare that on January 10, 2014, a true and correct copy of the foregoing document was sent to the following parties of record via method indicated:

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