NO. 35383-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CITY OF BONNEY LAKE, a Washington municipal corporation,
Appellant,

v.

ABBEY ROAD GROUP, LLC, a Washington limited liability company; Karl J. THUN and VIRGINIA S. THUN, husband and wife; THOMAS PAVOLKA; and VIRGINIA LESLIE REVOCABLE TRUST; and WILLIAM AND LOUISE LESLIE FAMILY REVOCABLE TRUST, Respondents.

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RESPONDENTS' BRIEF

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I. ASSIGNMENTS OF ERROR

A. The City's Assignments of Error

1. Did the trial court err in concluding that *Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994) is not controlling authority in this case?

2. Did the trial court err in concluding that Abbey Road's complete Type 3 site development permit application vests the Project?

3. Did the trial court err in concluding that Abbey Road had a right to rely on land use forms prepared by City staff?

B. Abbey Road's Assignments of Error

1. The Hearing Examiner erred in determining that Abbey Road's complete Type 3 site development permit application did not vest the Project for consideration under the land use regulations in effect on the date of application. FF 4, 8, 12, 19; CL 2, 6.[1]

2. The Hearing Examiner erred in determining that the City's Type 3 permit process does not frustrate or defeat vesting. FF 8, 16, 18, 20; CL 3-6.

3. The Hearing Examiner erred in determining that the City municipal code encourages concurrent processing of Type 3 site development applications and building permit applications, and that the City processes such applications concurrently. FF 11, 16, 17, 19; CL 3, 6.

4. The Hearing Examiner erred in finding that Abbey Road knew at the pre-application meeting that the city council was considering a rezone of the Property. FF 6(a).

5. The Hearing Examiner erred in finding that City staff consistently advised Abbey Road that it would need to file a building permit application to vest the Project. FF 6(b).

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[1] Reference to Findings of Fact (FF) and Conclusions of Law (CL) in this Brief are to the findings and conclusions of the Hearing Examiner's Report and Decision, CP 17-41.

6. The Hearing Examiners erred in finding that Abbey Road took no meaningful action until September 2005 and simply started the process too late to submit a building permit application. FF 20.

C. Issues Relating to Abbey Road's Assignments of Error.

1. Does a complete Type 3 site development permit application vest a project under the land use control ordinances in effect at the time of application in circumstances involving (1) a large multi-family multi-building development, (2) a mandatory, onerous and costly site development permit process that must be completed prior to the building permit, and (3) no vesting ordinance, or ability to vest the entire project until complete building permits for all buildings are submitted. (Assignments of Error 1-3).

2. Are the Hearing Examiner's findings that Abbey Road knew of the potential rezone of the Property, was told that a building permit application was required to vest the Project, and was not diligent in submitting its application prior to the rezone supported by substantial evidence or relevant to the vesting issue? (Assignments of Error 4-6).

II. STATEMENT OF THE CASE

Respondents Karl J. Thun and Virginia S. Thun, husband and wife, Thomas Pavolka, Virginia Leslie Revocable Trust, and William and Louise Leslie Family Revocable Trust are the owners, and Respondent Abbey Road Group, LLC ("Abbey Road") is the developer, of three

abutting parcels of property with a total area of 36.51 acres, located on the south side of SR-410 opposite the intersection with Meyer Road within the City of Bonney Lake ("Property"). Clerk's Papers (CP) 28, FF 5. Respondents desire to improve the Property with approximately 575 condominium units, consisting of a mix of studio, two and three-bedroom residential units in approximately 24 separate buildings ("Project"). The Project is known as Skyridge Condominiums. CP 28, FF 5.

For commercial and multi-family development proposals, the City requires applicants to obtain a "Type 3" site development permit under Chapter 14.50 of the Bonney Lake Municipal Code ("BLMC") prior to a building permit. CP 32, FF 10; CP 38, CL 5; Administrative Record (AR) Ex. 28. The Planning and Community Development Department has developed a form for the application titled "Commercial or Multi-Family Site Plan Review Application Form Type 3 Permit" that contains a detailed checklist of the information required for a completed application. AR Ex. 27.

Abbey Road participated in a required pre-application conference for the Project on June 15, 2005. AR Ex. 15. On September 13, 2005, Abbey Road submitted a complete Type 3 site development permit application. The application included all of the information required in the Commercial or Multi-Family Site Plan Review Application Form Type 3

Permit checklist as follows:

1. Master Land Use Application;
2. Filing Fee
3. Owner Authorizations;
4. Commercial or Multi-Family Site Plan Review Type 3 Permit Application;
5. SEPA Checklist (26 copies);
6. Mailing Labels, envelopes, vicinity map, and source information;
7. Preliminary Storm Water Report (5 copies);
8. Traffic Impact Analysis (5 copies);
9. Pre-Application comments;
10. Vicinity Map (30 copies);
11. Reduced Site Plan (30 copies);
12. Site Plan General Information (6 copies);
13. On-site Traffic Circulation/Pedestrian Circulation;
14. Existing and Proposed on–site conditions (6 copies);
15. Landscape Plan (6 copies);
16. Geotechnical Report;
17. Hydrogeologic Impact Evaluation; and
18. Wetlands Assessment.

AR Exs. 11-22; CR 29, FF 6(d).

It cost Abbey Road more than $228,000.00 to get the Project to this stage. AR Ex. 29; Transcript (02/06/2006) at 46. At the time the application was filed, the Property was zoned C-2, which allows multi-family development as a permitted use. AR Ex. 15. On Sept. 13, 2005, after Abbey Road had filed its complete application, the Bonney Lake City Council passed Ordinance No. 1160, effective October 3, 2005, which changed the zoning of the Property to Residential/Conservation (RC-5). Multi-family development is not allowed in the RC-5 zone. AR Ex. 9.

On October 12, 2005, the Director of Planning and Community

Development issued a decision to Abbey Road determining that Abbey Road's Project was not vested under the land use control regulations in effect on the date of submittal because the Commercial/Multi-family Type 3 application "is not a recognized development application under City code, and thus, the application would not be processed because the Project was not allowed in the RC-5 zone." AR Ex. 5.

On October 26, 2005, Abbey Road timely filed an appeal to the Hearing Examiner of the Director's administrative determination. AR Ex. 1. On March 20, 2006, the Hearing Examiner issued his decision, denying Abbey Road's appeal. On April 6, 2006, Abbey Road filed an appeal to the Pierce County Superior Court under the Land Use Petition Act, RCW 36.70C. CP 1-42. The trial court granted Abbey Road's petition, and a Judgment and Order on Land Use Petition was entered on September 1, 2006 ordering that the Project was vested under the land use control regulations in effect on the date of Abbey Road's Type 3 permit application. CP 114. The City of Bonney Lake appealed this decision.

III. ARGUMENT

Hearing Examiner Findings of Fact 4, 8, 19 and Conclusion 2 contain the legal conclusion that the Type 3 application does not vest the Project and that a complete building permit application is required to vest. CP 17-41. For the reasons set forth herein this conclusion is an erroneous

interpretation of the law, is a clearly erroneous application of the law to the facts, and violates the constitutional principals of fairness and due process. *See* RCW 36.70C.130.

A. Format of Argument

Since Abbey Road is the Respondent, it is required to answer the City's Opening Brief. RAP 10.3(b). However, as this is an appeal of an administrative decision under the Land Use Petition Act, Abbey Road must also address specific errors made by the Hearing Examiner. See RAP 10.3(h); RCW 36.70C.130. To avoid duplication of legal arguments, Abbey Road will address its assignments of error and the City's assignments of error concurrently. This Brief will first provide a description of the City's Type 3 site development permit process, then follow the basic outline of the City's Opening Brief, making appropriate reference to specific errors made by the Hearing Examiner, and then provide additional arguments for expanding the vested rights doctrine and addressing other findings of fact not previously addressed.

B. Bonney Lake's Type 3 Site Development Permit Process

In its Opening Brief, the City describes its Type 3 site development permit process as "an informal process," "relatively simple" and a "cursory filing," that "does not result in any formal approval of site development plans." Opening Brief (OB) at 5, 13, 18. These descriptions

are entirely inaccurate. The Court need look no further than the City's own "Commercial or Multi-Family Site Plan Review Application Form Type 3 Permit" (AR Ex. 27) and Abbey Road's completed Type 3 application (AR Exs. 10-22) to determine that the application is anything but simple or cursory. Moreover, the Hearing Examiner correctly found that the Type 3 site development permit was indeed a valid and recognized mandatory land use permit application under BLMC 14.50, separate and distinct from the building permit application, and that Abbey Road had submitted a complete application. CP 28, FF 6(d); CP 34, FF 14; CP 36, FF 19; CP 38, CL 5. These findings were not challenged and are verities on appeal. *United Development Corporation v. City of Mill Creek*, 106 Wn. App. 681, 688, 26 P.3d 943 (2001)(unchallenged administrative finding of fact are verities on appeal). A summary of this mandatory land use application process is as follows:

For commercial and multi-family development proposals, the City of Bonney Lake requires applicants to obtain a "Type 3" site development permit under Chapter 14.50 of the BLMC prior to a building permit. CP 32, FF 10; CP 38, CL 5; AR Ex. 28. The permit is a "project permit" under the Regulatory Reform Act and subject to the requirements of that Act. RCW 36.70B.020(4). The process requires the submittal of a completed permit application on a form created by the Planning

Department and titled "Commercial or Multi-Family Site Plan Review Application Form Type 3 Permit." AR Ex. 27. The form sets forth in detail all of the information that is required for a completed application, including a completed Master Land Use Application, SEPA environmental checklist, stormwater report, traffic impact analysis, detailed site plan including utilities, storm drainage plan, building footprints, roads, setbacks, parking, pedestrian circulation, and a landscape plan prepared by a licensed landscape architect. AR Ex. 27.

Once an application is complete, the Department issues a determination of completeness and commences SEPA review, site development review, and design review. BLMC 14.50.020-.045; CP 32, FF 11. Upon completion of the review, the Department will issue an MDNS and a Site Development Type 3 permit. *See e.g.* AR Exs. 38(f), 38(g). The permit establishes the configuration of the development and constitutes a determination that the proposed commercial or multi-family use is consistent with and meets the requirements of the Bonney Lake Municipal Code for zoning, health, and building standards. *See* Exs. 35i, 36e, 37h, 38g, and 39j. Approved site development plans are required for a complete building permit application. AR Ex. 28.

Bonney Lake's site development permit process allows for efficient processing of large projects and establishes approval for site

development, including use, infrastructure and environmental review, that gives the developer the parameters necessary to complete building design and submit building permit applications.

C. Vested Rights Doctrine Generally

In Section IV(B) of its Opening Brief the City provides a brief summary of the vested rights doctrine for building permits and subdivisions, but fails to acknowledge the broader scope and purpose of the doctrine. OB at 9.

Under Washington's vested rights doctrine "developers filing a timely and complete land use application obtain a vested right to develop land in accordance with the land use laws and regulations in effect at the time of application." *Weyerhaeuser v. Pierce County*, 95 Wn App. 883, 890, 976 P.2d 1279 (1999). 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*, 95 Wn. App. at 892. "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 has been codified for building permit applications, RCW 19.27.095, and subdivision and short subdivision applications, RCW 58.17.033, but has also been applied in a number of other land use applications, *see, e.g.*, *Weyerhaeuser,* 95 Wn. App. 883 (conditional use permit); *Beach v. Board of Adjustment*, 73 Wn.2d 343, 438 P.2d 617 (1968) (conditional use permit); *Victoria Tower Partnership v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987) (master use permit); *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 558 P.2d 821 (1977)(septic tank permit); *Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801(1974)(shoreline permit); *Juanita Bay Valley Comm'ty Ass'n v. City of Kirkland*, 9 Wn. App. 59, 510 P.2d 1140(1973)(grading permit).

D. The Trial Court correctly concluded that *Erickson & Associates v. McLerran* is not controlling authority in this case and that *Victoria Tower* is controlling authority.

1. Erickson *is not controlling authority.*

Contrary to the City's assertion in Section IV(C) of its Opening Brief, and the Hearing Examiner's conclusion, *Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994) is not controlling authority in this case. OB 10; CP 38, CL 6. *Erickson* and the present case are inapposite. The only issue before the court in *Erickson* was the validity of the City of Seattle's vesting ordinance. Under the ordinance, a

development project vests (1) when the developer submits a complete building permit application, or (2) when the City earlier issues a master use permit without a building permit application. *Id.* at 866. The court held that the ordinance was constitutionally valid and satisfied the requirements of case and statutory law. *Id.* at 877. *Erickson* stands for the proposition that a city may adopt vesting schemes best suited to the needs of a particular locality. *Noble Manor v. Pierce County*, 81 Wn. App. 141, 913 P.2d 417 (1996) *aff'd* 133 Wn.2d 269, 943 P.2d 1378 (1997). In the present case, the City of Bonney Lake has not adopted a vesting ordinance. *Erickson* did not address the issue of vesting of a MUP in the absence of a vesting ordinance. Moreover, the *Erickson* court misinterpreted vested rights case law and erred by failing to properly consider in its vested rights analysis the cost of preparing and submitting a MUP application.

The significance of permit application costs in vested rights analysis was considered in one of the first cases to develop Washington's vested rights doctrine, *Hull v. Hunt*, 53 Wn.2d 125, 331 P.2d 856 (1958). *Hull* involved a building permit application for a twelve story apartment in Seattle. The case was decided prior to SEPA, GMA and other development controls, at a time when a building permit was the only application necessary. The majority rule regarding vested rights was (and

still is) that a building permit is subject to later enacted zoning ordinances unless the applicant can show a substantial change in position in reliance on the permit prior to the zoning change. *Id.* at 129. The *Hull* court rejected the majority rule, preferring "to have a date certain upon which the right vests to construct in accordance with the building permit." *Id.* at 130. The court then determined that the "date certain" should be the date the applicant applies for the building permit. *Id.* The City of Seattle argued that such a rule would result in permit speculation. In dismissing this argument, the court stated:

> However, 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, particularly in view of the time limitations which require that the permit become null and void if the building or work authorized by such permit is not commenced within a specified period.

Id. at 130.

"Permit speculation" is the practice of applying for land uses without any real intention of constructing the project. Gregory Overstreet and Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 Seattle Law Rev. 1043, 1078 n.201 (2000). In theory, once a permit is obtained for the use, the value of the property increases and the permit speculator sells for a profit. *Id.*

In the *Erickson* case, the developer argued that the vesting ordinance was unconstitutional because the MUP application process imposed a significant burden on developers and was sufficiently expensive to prevent permit speculation and "to give the developer a stake in the process that should be protected." 128 Wn.2d at 874. The court rejected this argument for several reasons, all of which are erroneous or inapplicable to the present case.

First, without citation to any authority, the court stated: "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." *Id.* Contrary to the *Erickson* court's assertion, the relative cost of the application compared to the total project cost is irrelevant to the vested rights analysis. In *Hull*, the costs of constructing the twelve story apartment building were not mentioned or relevant in the court's analysis, which focused only on the "cost of preparing plans and meeting the requirements of most building departments" in submitting the application. *Hull*, 53 Wn.2d at 130. Costs of application were also considered in *Allenbach v. City of Tukwila*, 101 Wn.2d 193, 199, 676 P.2d 473 (1984), where the developer filed a building permit application for a multi-family development the day before the effective date of a rezone that prohibited multifamily

developments. The city argued that the developer lacked the requisite good faith because he knew of the pending rezone when he submitted the application. *Id.* at 195. Following *Hull* and other early cases, the court stated:

> 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.

Allenbach, 101 Wn.2d at 199. The court then found both factors satisfied because the developer had expended $17,000 on the application and a city ordinance required that construction be commenced within 180 days of permit issuance. *Id.* at 199. On that basis, the court rejected the "good faith" requirement as an exception to the vested rights doctrine. *Id.* at 200. The total cost of the project was not mentioned or in anyway part of the court's analysis.

It is clear from *Hull* and *Allenbach* that post application costs are not relevant in vested rights analysis, as neither case mentioned post application costs, which in both cases would have been exponentially higher than the application costs. However, regardless of prior case law, *Erickson*'s focus on the relative cost of the application to the total project cost is wrong because the costs of a project after permits are issued (i.e. construction costs) would have no deterrent effect on a permit speculator.

A speculator by definition has no real intention of constructing the project and is only concerned with obtaining a permit so the property can be sold at a higher value. Thus, the only costs that should be considered a deterrent to speculation are the costs of preparing and applying for the permit.

In the present case, Bonney Lake's Type 3 site development permit application is onerous and expensive, and requires a substantial commitment from the developer. AR Exs. 10-22 (Abbey Road's application submittals). It cost Abbey Road approximately $128,000[2] to prepare the Type 3 permit application for the Skyridge Condominium project and another $100,000 to secure its option on the Property. AR Ex. 29; Transcript (02/06/2006) at 46 (Hulsmann testimony). Also, pursuant to BLMC 14.90.090, 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). Thus, both of the factors set forth in *Allenbach* are satisfied.

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[2] Abbey Road's initial cost estimate as stated in the Notice of Appeal to the Hearing Examiner was $96,500.00. AR Ex. 1. Subsequent calculations revised the figure to $128,000. AR Ex. 29; Transcript (02/06/2006) at 46. The Hearing Examiner did not make a finding regarding application costs. He states only "While the appellant asserts that it spent approximately $100,000 to prepare the studies and the application and pay the submittal fees, said amount calculates to .007% of the estimated cost." CP 37, FF 20.

The *Erickson* court's second reason for rejecting the developer's argument was that the court rejected "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 vested rights doctrine." *Id.* at 874. The cost-based analysis to which the court was referring is the majority vesting rule rejected in *Hull* that requires a substantial change in position in reliance on the permit in order to vest. That is different than the cost-of-application analysis *Hull* used to support the Washington rule. Under the Washington vesting rule, the cost of a building permit application in general justifies the need to protect development rights at the time of application while also discouraging permit speculation. *See Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987). However the developer in *Erickson* was not arguing for a reintroduction of the majority rule, as the *Erickson* court apparently thought, but rather that the rational for the Washington vesting rule for building permits was equally applicable to Seattle's MUP. Likewise, Abbey Road is not asking the court to "employ a cost-based analysis," but to acknowledge as the courts in *Hull* and *Allenbach* did, that the cost of a Bonney Lake's Type 3 site development permit application justifies the

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Although irrelevant, the Hearing Examiner's math is wrong. 100,000 / 143,000,000 = .0007, which corresponds to .07% not .007% as the Hearing Examiner stated.

need to protect development rights at time of application while also discouraging permit speculation.

The *Erickson* court's third reason for rejecting the developer's cost of application argument was that it believed the "necessary indicia of good faith and substantial commitment" were lacking at the outset of the MUP process, because Seattle's MUP application allowed the developer to incur much of the cost associated with the MUP application after the application was filed. *Id.* at 874-75. Again, the court misconstrued the good faith and substantial commitment requirements. As explained above, the only relevant inquiry is the cost of submitting the application, not the relative costs before and after submittal. If the cost of the application is sufficient to discourage permit speculation and there is a time limitation on the permit, under *Allenbach*, there is no further inquiry regarding good faith or substantial commitment.

In *Erickson*, the developer's costs to prepare the MUP are not stated in the opinion. However, statements by the court indicate that the application requirements were much less onerous than Bonney Lake's Type 3 site development permit application. The court states: "MUP review is an iterative process. Developers may have general concepts in mind for development of property, and want to explore various scenarios with the municipality." *Id.* at 866. Later in the opinion, the court states:

"Much of the cost associated with MUP applications may be incurred *after* the application is filed." *Id.* at 875. Whereas Bonney Lake's Type 3 site development permit application requirements include traffic impact analysis, detailed site plan including utilities, storm drainage plan, building footprints, roads, setbacks, parking, pedestrian circulation, and a landscape plan prepared by a licensed landscape architect. AR Ex. 27. Much more than "general concepts" are required, and most of the costs associated with the Type 3 permit process are incurred prior to application. AR Exs. 10-22, 27, 29.

The *Erickson* court's final reason for rejecting the developer's argument was that, according to the court, the developer could point to no cases that support expanding the vesting doctrine beyond its current limits. *Id.* at 875. It is Abbey Road's position that the current limits of the Washington vested rights doctrine support vesting of Abbey Road's Type 3 permit application and that *Victoria Tower Partnership v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987), discussed in Section III(E)(3) of this Brief, is controlling. However, even if the Court concludes that vesting of a Type 3 site development permit application is outside the current limits of the doctrine, there is ample support for expanding the

doctrine.[3] Washington courts have never been presented with a situation like the present case, involving (1) a large multi-family multi-building development, (2) a mandatory, onerous and costly site development permit process that must be completed prior to building permit issuance, and (3) no vesting ordinance, or ability to vest the entire project until complete building permits for all buildings are submitted. As described more fully on Sections III(E) and (H) of this Brief, numerous cases support the rationale for expansion. First, *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), stand for the proposition that the vested rights doctrine is violated if the local government's development process delays or frustrates the ability to vest rights until late in the process after other permits have been obtained. Bonney Lake's development process necessarily delays and frustrates vesting for large projects such as Skyridge Condominium because approved site development plans are required for a complete building permit application and because it is not practical or feasible for such projects to submit complete building permit applications for all buildings prior to site development approval. Second, the doctrine has been applied to other use

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[3] The appellate court's decision may be based on any of the theories argued by a party at the trial court, regardless of the basis for the trial court's judgment. *Tropiano v. Seats*,

permit applications and Bonney Lake's Type 3 site development permit application is a use permit. *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (1999) (conditional use permit); *Beach v. Board of Adjustment*, 73 Wn.2d 343, 438 P.2d 617 (1968) (conditional use permit); *Victoria Tower*, 49 Wn. App. 755 (1987) (master use permit). Third, the doctrine has been applied to "bare bones" short plat applications, *Westside Business Park v. Pierce County*, 100 Wn. App. 599, 5 P.3d 713 (2000), and there is no rational reason for applying the vested rights doctrine to those applications and not to Abbey Road's application.

Finally, the rationale for vesting in Washington's first vested rights case, *Ogden v. City of Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954), also supports expansion. The court in *Ogden* held that a property owner has a vested right, accruing at building permit application, to put the property to permissible use as provided by the prevailing zoning ordinances. In so holding, the court reasoned:

> A property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto. A building or use permit must issue as a matter of right upon compliance with the ordinance. The discretion permissible in zoning matters is that which is exercised in *adopting* the zone classification with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts

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105 Wn.2d 873, 876, 718 P.2d 801 (1986).

> of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance.

Id. at 495 (citations omitted). According to *Ogden*, this vested right applies to building permits and use permits. *Id.* Bonney Lake's Type 3 site development permit is a use permit. Thus, under *Ogden*, because the City lacks discretion to deny a Type 3 site development permit application that satisfies all of the requirements of the zoning ordinance in effect at the time of application, discretionary (i.e. legislative) zoning decisions after the date of application cannot be a basis for denying the application. As such, Abbey Road has a vested right to put the property to uses permissible on the date of application. If the application satisfies all of the requirements in effect on that date, the City must issue the permit as a matter of right.

2. Victoria Tower *is controlling authority.*

Victoria Tower Partnership v City of Seattle, 49 Wn. App. 755, 745 P.2d 1328 (1987), analyzed Seattle's master use permit process prior to the enactment of the vesting ordinance analyzed in *Erickson.* In *Victoria Tower,* the plaintiff applied to the City of Seattle for a master use permit to construct a 76-unit addition to an apartment building, consisting of eleven two-story townhouses and a 65 unit 16-story apartment tower. *Id.* at 756. The tower's projected height was 174 feet. *Id.* After the master

use permit application was filed, Seattle adopted new multifamily use policies which would limit building height on the site to 60 feet. *Id.* Applying the new height restrictions, the City Council approved the project subject to the condition that the tower be limited to eight stories. The court of appeals held that applying the new multi-family use policies to the master use permit application violated the vested rights doctrine. *Id.* at 762-63.

The City argues that because the court in *Victoria Tower Partnership* cited the vesting doctrine for building permits as authority for its decision, it must be assumed that the applicant also filed a building permit application. OB at 14. Such an assumption is not warranted. In its opinion, the court described the permit as follows: "On July 8, 1980, Victoria Tower Partnership ("Victoria") applied to the City for a master use permit in order to construct a 76-unit addition to that building." *Victoria Tower,* 49 Wn. App. at 756. No other permit is mentioned and nowhere in the opinion does the court indicate that any other permit application was filed in conjunction with the MUP. The vesting doctrine for building permits was well settled at the time, and if the applicant had filed a building permit application with the MUP, the court would have so indicated. The court's citation to building permit cases in its recital of the vested rights doctrine means only that the court concluded that those cases

supported the court's holding. Although the opinion focused on whether subsequently enacted zoning policies qualify as zoning and building ordinances, the court had to first make the threshold determination that the MUP application was vested. *Id.* at 761-62.

Although the lower court in *Erickson* sidestepped *Victoria Tower* by assuming that the distinction between a MUP and a building permit was not before the court[4], the supreme court did not follow the same reasoning. Instead, the supreme court in *Erickson* merely found *Victoria Tower* inapplicable, stating:

> *Victoria Tower* is likewise inapplicable here. Like this case, *Victoria Tower* involved a Seattle MUP application. Appellants argued, and the Court of Appeals agreed, the City's application of newly adopted environmental policies to its MUP application violated Victoria Tower's vested rights. However, the analysis in Victoria Tower is inapposite here because the vesting ordinance at issue in this case, SMC 23.76.026, was not adopted until 1985, approximately 5 years after the *Victoria Tower* appellant's application was filed.

Erickson, 123 Wn.2d at 872. Just as *Victoria Tower* was inapplicable to *Erickson* because *Victoria Tower* did not involve a vesting ordinance, so to is Abbey Road's case which does not involve a vesting ordinance. *Erickson* did not overrule *Victoria Tower*, thus *Victoria Tower* remains the law for vesting of master use permit applications in the absence of a

vesting ordinance.

The City also quotes *Valley View Indus. Park v. Redmond*, 107 Wn.2d 621, 638, 733 P.2d 182 (1987), for the bare statement that the court rejected application of the vested rights doctrine to site plan review. OB at 12. 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. In *Valley View*, the developer proposed a 26 acre industrial park consisting of 12 buildings, to be constructed in phases. A City ordinance required site plan approval prior to building permit issuance. During the site plan review process the developer filed building permit applications for five of the buildings. The property was then downzoned to agricultural. The court held that the developer had a vested right to build the five buildings for which building permit applications had been filed. *Id.* at 639. As to the other seven, the court stated, without explanation or citation to authority: "as a general principal, we reject any attempt to extend the vested rights doctrine to site plan review." *Id.* at 640. This statement was not necessary for the court's decision because the court invalidated the rezone and allowed the developer to continue to develop the remaining seven buildings under the prior industrial zoning

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[4] *Erickson & Associates, Inc. v. McLerran*, 69 Wn. App. 564, 568, 849 P.2d 688 (1993).

classification. *Id.* at 641-42. Also, the case was decided prior to the adoption of RCW 58.17.033 extending the vested rights doctrine to preliminary plat and short plat applications. At the time, courts did not apply the vested rights doctrine to preliminary plat applications, *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 649 P.2d 103 (1982), and the court was reluctant to extend the doctrine when it had other avenues to obtain the correct result. Further, the site plan did not require the detail and financial commitment of Bonney Lake's Type 3 site development permit application. Finally, the site plan was filed in 1978. The development approval process has grown much more detailed and complex since then.

E. The Trial Court correctly concluded that Abbey Road's complete Type 3 site development permit application vests the Project.

1. The City's procedures are unduly burdensome and frustrate vesting.

The City argues in Section IV(D)(1) of its Opening Brief that its procedures are not unduly burdensome and do not frustrate vesting because Abbey Road was not prevented from submitting a building permit application prior to the zoning change. OB at 16. That is not the case.

The vested rights doctrine is violated if the local government's development process delays or frustrates the ability to vest rights until late

in the process after other permits have been obtained. In *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986), the developer of Bellevue's Meydenbauer Place challenged the validity of Bellevue's vesting ordinance which prohibited the filing of a building permit application until a series of other procedures were completed, including site plan review, design review, and landscaping approval. *Id.* at 48-49. The developer had spent over $500,000 on design phase costs, yet could not be vested under the ordinance. The supreme court held that the ordinance violated the due process standards of the Fourteenth Amendment and was unduly oppressive because it denied a developer the ability to vest rights until after a series of permits is obtained. *Id.* at 52.

> As the trial court noted, the pre-application procedures established by the ordinance are vague and discretionary. The City delays the vesting point until well after a developer first applies for City approval of a project, and reserves for itself the almost unfettered ability to change its ordinances in response to our vesting doctrine's protection of a citizen's constitutional right to develop property free of the 'fluctuating policy' of legislative bodies.

Id. at 53.

The court of appeals followed the same reasoning in *Adams v. Thurston County*, 70 Wn. App. 471, 855 P.2d 284 (1993). In *Adams*, developers filed preliminary plat applications. A county ordinance provided that if an EIS was required, the application was not considered as

submitted until the final EIS has been completed. *Id.* at 478. After the filing of the preliminary plat application but before the EIS had been submitted, the county down zoned the property. *Id.* at 474. The county argued that the project was not vested because the EIS had not been completed as required by the ordinance. The court, following *West Main*, rejected the county's interpretation and held that the EIS was not required in order for the application to vest:

> Here, the County's delayed vesting rule likewise exposes citizens to delay and fluctuating legislative policy and denies them the ability to determine the controlling ordinances.
>
> . . . .
>
> The only real purpose served by the County's interpretation of the ordinance is to allow it to change its zoning laws to defeat or modify a particular subdivision by delaying vesting until after environmental review. The County argues that later vesting is a preferable policy. The Washington Legislature and Supreme Court disagree.

Id. at 480, 482.

Abbey Road's case is analogous to the *West Main* and *Adams* cases because, according to the City of Bonney Lake, the only way Abbey Road could vest the Skyridge Condominium Project was to file 24 building permit applications, effectively denying Abbey Road the ability to vest the Project until after several other permits are obtained.

The Hearing Examiner erroneously concluded that *West Main* and

Adams were inapposite,[5] and that Bonney Lake's process did not defeat or frustrate vesting,[6] because he incorrectly found that Abbey Road had the ability to fix the vesting date by submitting a building permit application at any time during the Type 3 review process,[7] and that the City processes Type 3 site development permits and building permits concurrently.[8] The Hearing Examiner's position is in error because (a) it contradicts the testimony of the Building Official and the City's own Commercial Building Permit Application form, (b) concurrent processing of Type 3 and building permit applications is not supported on the record, and (c) the Hearing Examiner ignored the realities of large commercial or multi-family development.

(a) Commercial Building Permit Application

Building Official Jerry Hight testified that in order for a commercial building permit application to be complete the Commercial Building Permit Application form had to be filled out completely and all of the items on the form had to be submitted. Transcript (02/06/2006) at 86. The second page of the form requires "Six copies of the Approved Site Development Plans" for a complete application. AR Ex. 28. Thus,

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[5] CP 38, CL 4.
[6] CP 31, FF 8; CP 37, FF 20; CP 38, CL 4-5.
[7] CP 36, FF 18; CP 21-22, CL 3, 5-6.
[8] CP 35-36, FF 17, 19; CP 38, CL 5.

according to the form, vesting for commercial projects is delayed until after site development approval.

In Finding of Fact 16, the Hearing Examiner points to the N/A box on the application as evidence that approved site development plans are not always required for a complete application and he uses a prior development project in the City, the Bonney Lake Town Center project, (AR Ex. 34) as an example. CP 35, FF 16. However, the Bonney Lake Town Center project does not support the Hearing Examiner's conclusion. In that project the applicant[9] filed a commercial building permit application for a Target store on January 8, 2004. AR Ex. 34(g). The applicant marked the line item requiring approved site development plans as "N/A" with a notation reading: "site development under separate permit by American Eng. Co." *Id.* This notation does not mean that approved site development plans were not required; it only means they were provided under a separate permit. That separate permit was the Type 3 site development permit issued to American Engineering Corporation on December 9, 2003. AR Ex. 34(f). Thus, the site development plans had been approved at the time of building permit application, consistent with Abbey Road's position that such approval is required for a complete

application. Although there would be certain circumstances where prior site development approval would not be applicable for a complete commercial building permit application--such as a repair or remodel of an existing structure—such approval would always be necessary for large multi-family projects such as the Skyridge Condominium project.

The City also asserts that the requirement for "approved site development plans" in the commercial building permit application form does not refer to plans that must go through a formal approval process. OB at 18. In support of this statement, the City cites only the testimony of Building Official Jerry Hight describing a site development plan. Transcript (02/06/2006) at 85. Mr. Hight's testimony does not support the City's assertion. The description provided by Mr. Hight is consistent with the information required in the Type 3 site development permit application—including a site plan showing the location, size, and height of all structures, and the existing and proposed utilities. Transcript (02/06/2006) at 85; AR Ex. 27. The commercial building permit form requires "Six copies of the Approved Site Development Plans" for a complete application. AR Ex. 28. The City has a mandatory Type 3 site development plan approval process. CP 29, FF 6(d); CP 34, FF 14; CP 36,

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[9] The Hearing Examiner incorrectly stated in Finding of Fact 16 that the Bonney Lake Town Center project was an Abbey Road Project. The actual applicant was Skanska

FF 19; CP 38, CL 5. The only logical conclusion is that "approved site development plans" refers to the City's mandatory Type 3 site development approval process.

(b) Concurrent processing of Type 3 permits and building permits is not supported on the record.

In further support of his determination that Abbey Road had the ability to file a complete building permit application at any time, the Hearing Examiner states in Finding of Facts 17 and 19 and Conclusions 5 and 6 that the City processes building permit applications and Type 3 site development permit applications concurrently. CP 35-39. However, the record does not support concurrent processing for large multi-family or commercial projects. Building Official Jerry Hight testified that his department would not process a building permit application until all of the other departments had signed off their approval. Transcript (02/06/2006) at 89-90. He also stated that he would not want Abbey Road to submit building permit applications prior to site development approval:

> COMBS: Would you want them to bring in 24 buildings for a project that's a 150 million dollar project if you didn't even have in front of you the approved site plan that shows where the wetlands are, the unbuildable steep slopes are?
>
> HIGHT: Oh no we wouldn't allow that.

USA Building, not affiliated with Abbey Road Group. AR Ex. 34.

Transcript (02/06/2006) at 90.

Six other recent commercial or multi-family development projects were included in the record as evidence of the City's Type 3 site development permit process. AR Exs. 34-39. None of these provide evidence of concurrent review for large commercial or multi-family projects. For example, in the Bonney Lake Town Center (AR Ex. 34) and the Cedar Ridge (AR Ex. 39) projects, the building permit applications were filed after issuance of the Type 3 site development permit. In the Bonney Ridge project (AR Ex. 38), the Type 3 site development permit was issued but the applicant never applied for a building permit. In the Windermere project (AR Ex. 35), the Type 3 permit application was deemed complete and the MDNS was issued prior to submittal of a building permit application form. The Type 3 site development permit was issued on April 28, 2004, three months prior to the issuance of the building permit. AR Exs. 35i, 35j. There is no evidence on the record that the building permit application was deemed complete prior to issuance of the Type 3 permit or that any review of the building permit application occurred prior to issuance of the Type 3 permit.

(c) Concurrent applications would be unduly burdensome for large projects

Regardless of whether it is technically possible to submit building

permit applications concurrently with Type 3 permit applications, it is not practical or feasible to submit complete building permit applications for large commercial or multi-family developments prior to Type 3 site development approval. Architectural design and engineering of building plans is expensive and time consuming. A relatively minor change in a site development plan such as setbacks, ingress-egress, or resizing of a storm water pond could have a domino effect on building plans, requiring buildings to be moved, resized or even eliminated. Contrary to the Hearing Examiner's statement in Finding of Fact 11 (CP 32) and Conclusion 3 (CP 37), processing Type 3 site development permits and building permits concurrently for large commercial or multi-family projects like Abbey Road's Skyridge Condominium project is not consistent with the purpose of Title 14 of the BLMC[10] because doing so does not streamline and simplify the development review process. It actually has the opposite affect, because it would require the building department to review "a moving target," as site development review may require changes to the building plans, or the elimination of buildings. As a result, the building permit review process will take longer and be less efficient for building department staff, and developers will have to incur

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[10] BLMC 14.10.020 provides in part: "...the administration of the development code is to provide procedures which simplify the permit process, combine and consolidate the

the additional cost and expense of revising their building permit applications during the site development review process. Gil Hulsmann, the Land Development Manager for Abbey Road, described the problem as follows:

> Most jurisdictions will not even let you submit a building permit until the SEPA is done because they believe it's a waste of time should the SEPA not allow you to build 50% due to open space, you find wetlands, you find Heron rookeries, you find any of those, and you can't develop. Why submit a building permit for something that basically you can't build on and you don't know until the SEPA is done?

Transcript (02/06/2006) at 60.

Title 14 of the BLMC surely does not encourage concurrent review of permits if doing so would frustrate the development code's purpose. In order to comply with the purpose and intent of Title 14 and process large projects efficiently, the site development permit process for projects such as Skyridge Condominiums must be completed prior to building permit application. By obtaining site development approval first, the developer knows the necessary parameters so that building permit applications can be submitted and approved efficiently. In the words of the court in *Friends of the Law v. King County*, 63 Wn. App. 650, 656, 821 P.2d 539 (1991),

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various review and approval processes . . . ."

requiring a complete building permit application at the site plan review stage would be "impractical and useless."

Because the only viable option for large commercial or multi-family projects such as Skyridge is to submit building permit applications after site development permit approval is obtained, developers of such projects must have the ability to vest at an earlier stage of development. If not, vesting would necessarily be delayed until well after the developer first applies for land use approval and would reserve in the City the unfettered ability to change its ordinances and subject developers to the "fluctuating policy" of the City's legislative body. *West Main*, 106 Wn.2d 47 (1986); *Adams*, 70 Wn. App. 471 (1993).

In response to Abbey Road's argument that it is not practical or feasible for large projects to submit a building permit application before completing site plan review, the City merely cites the *Erickson* court's four reasons for rejecting the cost-of-application argument made by the developer in that case. OB at 18-19. Each of these reasons was previously addressed in Section III(D)(1) of this Brief.

2. Public Policy does not support Hearing Examiner's decision.

The City argues in Section IV(D)(2) of its Opening Brief that its obligations under the Growth Management Act provide a public policy basis in support of the Hearing Examiner's decision and that Abbey

Road's constitutional interests are protected because there is a date certain vesting point at the time of building permit application. OB at 20-21. Although Abbey Road agrees that the vested rights doctrine seeks to balance the interests of the developer and the public, it is also true that "society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin." *West Main*, 106 Wn.2d at 51.

The purpose of the GMA is for citizens, communities, local governments, and the private sector to cooperate and coordinate with one another in comprehensive land use planning. RCW 36.70A.010. However, this purpose was never intended to override development rights. This is evident in the legislature's findings to the 1995 GMA amendments, which provide, in part: "The legislature further finds that, while plans and regulations should be improved and refined over time, it is unfair to penalize applicants that have submitted permit applications that meet current standards." 1995 Wash. Laws Ch. 347, Sec.101.

Finally, as stated previously, vesting at building permit application provides little protection for large multi-building projects. Abbey Road would have to file 24 building permit applications in order to vest the project. It is impractical and unreasonable to require submittal 24

completed building applications for a multi-building development prior to site development approval.

F. Trial Court's focus on the City's building permit application form was correct.

The City argues in Section IV(E) of its Opening Brief that neither Abbey Road nor the trial court had a right to place any significance on the City's commercial building permit form checklist that required "Six copies of the Approved Site Development Plans" for a complete application, (AR Ex. 28), because such a requirement is not specifically spelled out anywhere in the Bonney Lake Municipal Code. OB at 22.

The City made these exact arguments to the Hearing Examiner regarding the Type 3 site development permit application prepared by city staff. AR Ex. 48. The Hearing Examiner correctly rejected the City's arguments and determined that the Type 3 site development permit was indeed a valid and recognized mandatory land use permit application under BLMC 14.50, separate and distinct from the building permit application. CP 29, FF 6(d); CP 34, FF 14; CP 36, FF 19; CP 38, CL 5.

Requiring approved site development plans for a complete commercial building permit application, as the commercial building permit application form provides, is not *ultra vires* because such a requirement does not have to be expressly provided for in the Bonney

Lake Municipal Code in order for it to be valid. The Director of Planning and Community Development, the Director of Public Works, and the Building Official are charged with the responsibility for the administration and enforcement of the City of Bonney Lake Development Code, BLMC Titles 14 through 19. BLMC 14.10.070. Although administrative agencies do not generally have the power to promulgate rules that would amend or change legislation, they do have the power to "fill in the gaps" in legislation if such rules are necessary to the effectuation of a general statutory scheme. *Washington Public Ports Ass'n v. Dept. of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003) (quoting *Hama Hama Co. v. Shoreline Hearings Bd*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975)). The Departments created a process for efficiently administering commercial and multi-family developments. The process requires approved site development plans for a complete commercial building permit application. AR Ex. 28. The Departments created an application form consistent with this process that complies with BLMC 14.50.010, which provides:

> The applicant shall complete the appropriate application form and submit application, environmental checklist, and applicable fees to the director(s). The application form shall specify the submittal requirements.

BLMC 14.50.010; AR Ex. 28. The application form does not place any substantive requirements on development. It is simply a procedural

mechanism for the orderly and efficient review and processing of commercial and multi-family development proposals, as mandated by the Regulatory Reform Act, RCW 36.70B. Abbey Road had a right to rely on the City's application form. *See Westside Business Park v. Pierce County*, 100 Wn. App. 599, 605, 5 P.3d 713 (2000)(noting that parties should be able to rely on County's application form to contain all that is necessary for complete application).

The City also argues that any "confusion" regarding the building permit application form was remedied because "City staff repeatedly and consistently told Abbey Road that a building permit was necessary to vest the project." OB at 23; CP 28, FF 6(b)[11]. This statement supports Abbey Road's position that the City frustrated vesting because City staff is saying the project can't vest until a complete building permit application is submitted, but according to the City's own form, a building permit application cannot vest until site development plans are approved. However, there is conflicting evidence regarding what City staff actually told Abbey Road. Gil Hulsmann of Abbey Road testified that there was a disagreement among staff regarding the vesting issue and that clarification was not provided. Transcript (02/06/2006) at 52-53. David Renaud of

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[11] Abbey Road assigned error to this statement in paragraph 7.3 of the Land Use Petition but incorrectly identified it as Finding 6(c) rather than 6(b). CP 7.

Abbey Road testified that the Building Official questioned whether a building permit was necessary at that stage. Transcript (02/06/2006) at 66-67. Renaud's testimony was not refuted by the Building Official himself Jerry Hight who testified that he had no recollection of what he said at the meeting. Transcript (02/06/2006) at 84.

The Hearing Examiner accepted the City's testimony because, according to the Hearing Examiner, there was no evidence that Abbey Road "ever contacted the City about the vesting uncertainty." CP 28, FF 6(b). This is incorrect. City planner Elizabeth Chamberlain testified that between June 15 and September 13 she received emails from David Renaud "continually asking what is needed for a complete application." Transcript (02/06/2006) at 16. David Renaud also asked Planning Director Robert Leedy about the vesting issue at the September 6, 2005 City Council meeting. AB Ex. 5; Transcript (02/06/2006) at 91-92.

Ultimately, what Abbey Road was or was not told prior to submittal of its complete Type 3 site development permit application has no bearing on the legal issue of whether the application is vested. The Planning and Building Departments are charged with creating application forms that specify the submittal requirements. Abbey Road and other developers should be able to rely on the accuracy of the forms.

G. Trial Court had the entire record before it.

Although not included in its assignments of error, the City argues in Section IV(F) of its Opening Brief, that the trial court's decision cannot stand because the trial court allegedly did not receive a copy of the transcript of the administrative hearing.[12] OB at 24. This allegation is based solely on the declaration of Emma Gaddis, a staff person in the superior clerk's office, who concluded that since she could not locate the transcript it was not filed. However Abbey Road did file the transcript with the court on June 27, 2006 along with a Declaration of Filing and Service of Transcript. *See* Declaration of Dawn Ketter filed with the Court of Appeals on 01/26/2007. Both parties quoted extensively from the transcript in their briefs and at the trial court hearing. CP 54-109; Transcript (08/18/2006). If the trial court did not have a copy of the transcript, it would have so stated at the hearing. The only reasonable explanation is that the court misplaced the transcript after the hearing.

In both cases cited by the City, *Loveless v. Yantis*, 82 Wn.2d 754, 513 P.2d 1023 (1973) and *Byers v. Bd. of Clallam County Commissioners*, 84 Wn.2d 796, 529 P.2d 823 (1974), the administrative hearing could not be transcribed at all because the recording was faulty. Thus, neither the

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[12] Failure to assign error means that the issue need not be considered by the Court. *State v. Copeland*, 130 Wn.2d 244, 280, 922 P.2d 1304 (1996).

parties nor the courts had the transcript available. In the present case, the City had the transcript at the trial court and has not shown or alleged any prejudice if the trial court did not have it. Moreover, since the Court of Appeals unquestionably has the full administrative record before it and is reviewing the matter *de novo*, the issue is moot.

H. Case law supports expansion of the Vested Rights Doctrine.

As stated previously, it is Abbey Road's position that the current limits of the Washington vested rights doctrine support vesting of Abbey Road's Type 3 permit application and that *Victoria Tower Partnership v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987), is controlling. However, even if the Court concludes that vesting of a Type 3 site development permit application is outside the current limits of the doctrine, there is ample support for expanding the doctrine.

1. The Vested Rights Doctrine applies to use permit Applications.

Bonney Lake's Type 3 site development permit approval is a determination that the proposed commercial or multi-family <u>use</u> is consistent with and meets the requirements of the Bonney Lake Municipal Code for zoning, health, and building standards. *See* AR Exs. 35i, 36e, 37h, 38g, 39j. Washington courts on several occasions have applied the vested rights doctrine to similar "use permits." In *Victoria Tower*, discussed above, the court of appeals held that applying the new multi-

family use policies to the master use permit application violated the vested rights doctrine. 49 Wn. App. at 762-63.

In *Beach v. Board of Adjustment*, 73 Wn.2d 343, 438 P.2d 617 (1968), plaintiff applied for a conditional use permit to operate a wrecking yard in a rural use zone. The issue was whether a verbatim record of proceedings was required to establish an adequate record for review. However, in remanding the case the court held that the application was to be reviewed under the land use regulations in effect at the time the application was filed. *Id.* at 347. The court stated that "the subsequent change in the zoning ordinance does not operate retroactively so as to affect vested rights." *Id.*

In *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (1999) a landfill operator submitted a complete conditional use permit application to construct a landfill. The applicant sought review of the hearing examiner's decision to require the applicant to obtain a wetlands permit under county regulations adopted after the conditional use application had been submitted. *Id.* at 885-86. The court held that under Washington's vested rights doctrine the complete conditional use application vested the project as to the laws governing applications for conditional use permits as well as regulations governing wetland activities applicable at the time of application. The court reasoned:

> Declining to recognize vesting as to the wetland regulations would not only increase the procedural and financial burdens borne by LRI in resubmitting its application to comply with the subsequently enacted laws, but also it would fundamentally and necessarily defeat the project.
>
> Moreover, disregarding LRI's rights to develop the wetlands under the laws applicable in 1989, would inject a level of uncertainty into the project that would frustrate the developer's ability to streamline and plan the project. LRI has a due process right to expect that its project would be subject to fixed rules, as opposed to fluctuating legislative policy, so it could plan its project with reasonable certainty.

Id. at 895. *Victoria Tower*, *Beach*, and *Weyerhaeuser* all applied the vested rights doctrine to use permit applications. Abbey Road's completed "Commercial or Multi-Family Site Plan Review Application Form Type 3 Permit," which included Master Land Use and SEPA applications, is essentially a use permit application. The policy reasons for applying the vested rights doctrine in the *Weyerhaeuser* case are just as applicable to Abbey Road's situation. Declining to recognize vesting would necessarily defeat the project and would inject a level of uncertainty that would frustrate the ability of developers of commercial or multi-family projects to streamline and plan their projects. Abbey Road has a due process right to expect that its project would be subject to fixed rules so it could plan its project with reasonable certainty.

2. *There is no rational reason to allow vesting for "bare bones" short plats and not for Abbey Road's application.*

In *Westside Business Park v. Pierce County*, 100 Wn. App. 599, 5 P.3d 713 (2000) the applicant filed a bare bones short plat application, showing only two vacant lots with no structural improvements, no storm drainage facilities, no roads or utilities. However, the application contained all of the information required by the County for a short plat. *Id.* at 601-02. The court held that the completed application vested in the developer the right to develop the property under the land use and zoning laws in effect at the time of the application, including storm water drainage ordinances. *Id.* at 607.

The application requirements for Bonney Lake's Type 3 site development permit are much more onerous and detailed than the short plat application that vested in *Westside Business Park.* AR Ex. 27. There is no rational reason for allowing vesting for a bare bones short plat, and not for Abbey Road's site development permit.[13]

3. *Treating condominiums and subdivisions differently for vesting purposes violates RCW 64.34.050.*

If Abbey Road had proposed the exact same development with the

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[13] This same reasoning was used by the court in *Juanita Bay Valley Com. v. Kirkland*, 9 Wn. App. 59, 510 P.2d 1140 (1973). In extending the vested rights doctrine to grading permits, the court reasoned "in the context of [the vested rights] doctrine we see no

same number of buildings and the same site plan, but had decided to place the buildings in individual ownership by subdividing the property rather than using the condominium form of ownership, it could have vested the project at the beginning of development by filing a preliminary plat application. RCW 58.17.033. RCW 64.34.050 of the Condominium Act prohibits any real property law that imposes any requirement upon a condominium which it would not impose upon a physically identical development under a different form of ownership. By treating vesting for Skyridge Condominium different from a physically identical development under a different form of ownership, the City of Bonney Lake is violating the spirit and intent of RCW 64.34.050. If a building permit application is the only mechanism for developers of large condominium projects such as Skyridge to fix the vesting date then it will have a chilling effect on condominium projects as developers will be unwilling to absorb the risk of fluctuating land use policy that could stop a condominium project at a late stage of development after significant time and expenses have been incurred.

The City argued at the trial court level that RCW 64.34.050 is inapplicable because, according to the City, single family ownership

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rational distinction between building or conditional use permits and a grading permit." Id. at 84.

would not be a physically identical form of building to that proposed by Abbey Road. CP 90. This argument is without merit. Abbey Road's application was for 24 separate multi-family buildings. CP 28, FF 5. If Abbey Road instead wanted the buildings to be apartments and had filed a preliminary plat application subdividing the property so that each apartment building was on a separate parcel, the entire development would be vested under the land use control ordinances in effect at time of preliminary plat application. RCW 58.17.033. Each building would be physically identical to the buildings actually proposed by Abbey Road.

Also, contrary to the City's assertion, the City does impose additional burdens on projects like Skyridge Condominium because, unlike preliminary plat applications, such projects do not have the opportunity to vest prior to building permit application.

I. Additional Findings are not supported by substantial evidence.

The Hearing Examiner made two findings of fact, not previously discussed, regarding events occurring prior to submittal of the Type 3 permit application that are not supported by substantial evidence. Abbey Road does not believe these findings are directly pertinent to the legal issue of vesting but is addressing them because the Hearing Examiner apparently deemed them relevant.

In Finding of Fact 6(a), the Hearing Examiner states that at the

June 15 pre-application meeting Abbey Road "already knew of or City staff made [Abbey Road] 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). The only evidence on the record that supports this statement is City Planning Manager Steve Ladd's testimony that he knew they were aware of it because "they were at the same meetings where I was where the rezones were being discussed." Transcript (02/06/2006) at 78. However, there is ample evidence that Abbey Road was not aware of the potential rezone at the June 15 meeting. According to Steve Ladd, the rezone was not discussed at the June 15 meeting. Transcript (02/06/2006) at 79. Nor was the potential rezone mentioned in the June 15 pre-application memorandum which identified the zoning as C-2. AR Ex. 15. And most persuasively, a telephone memorandum prepared by Rachel Couch, one of Abbey Road's representatives, summarized conversations she had with City Staff on July 6, 2005, an excerpt of which is as follows:

> 07-06-05 Coordinated with Elizabeth Chamberlain 253.447.4355 Associate Planner at the city of Bonney Lake reference our pre app meeting and why nothing about the rezoning was discussed at the meeting. She indicated that until the Planning Commission makes a formal recommendation to the city council, she would not know about their plans as she does not attend these meetings. – RC

AR Ex. 41.

If Abbey Road had been aware of the potential rezone at the June 15 meeting, Rachel Couch would not have asked Elizabeth Chamberlain why it wasn't discussed. Even if Abbey Road had been aware of the potential zoning change Washington courts have consistently rejected any "pending zoning change" exception to the vested rights doctrine. *Allenbach v. City of Tukwila*, 101 Wn.2d 193, 200, 676 P.2d 473 (1984).

In Finding of Fact 20, the Hearing Examiner states 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," and that Abbey Road simply started the process too late to submit a building permit application. CP 37, FF 20. The basis for this finding is that most of the studies, plans and documents submitted in the permit application were dated September 2005. CP 37, FF 20.

An examination of the submittal documents leads to the obvious conclusion that work on them must have begun well before September 2005. The detailed wetlands assessments, traffic studies, drainage plans and engineering drawings submitted by Abbey Road clearly took significant time and effort. AR Exs. 10-22. Just because they may have been completed in September 2005, does not mean meaningful work on them didn't begin prior to September 2005. Gil Hulsmann testified that

Abbey Road had proceeded diligently after June 15 with the goal of submitting the application in September or October. Transcript (02/06/2006) at 57. According to Hulsmann, they were 70% complete in August, but accelerated the process once they became aware that the rezone was likely going to happen. Transcript (02/06/2006) at 59.

Although the above facts have little relevance to the vesting issue, they show that from the beginning Abbey Road was making a good faith effort to proceed with the development process.

IV. Conclusion

For the reasons set forth above, Abbey Road requests that the Court affirm the decision of the trial court and determine that Abbey Road's application and development are vested under the land use control ordinances in effect at the time of submittal and not subject to Ordinance No. 1160.

RESPECTFULLY SUBMITTED this 12th day of March, 2007.

McGAVICK GRAVES, P.S.

By: _____ 24172

Loren D. Combs, WSBA #7164
Gregory F. Amann, WSBA #24172
Attorneys for Respondents

V. APPENDIX

A-1

Excerpts from Hearing Transcript of February 6, 2006

1 A. Yes, I had e-mails back and forth with David Renaud. There
2 were some questions about, you know, continually asking
3 what is needed for a complete application. I then
4 forwarded those to both the Planning Manager and the -- and
5 the Director for -- for answering that, those questions.
6 Q. To your knowledge was Abbey Road Group ever -- ever
7 informed that submitting an application without a building
8 permit application included would vest their project?
9 A. No.
10 Q. Were they told the opposite?
11 A. Yes. They were told that a building permit is -- was
12 required.
13 Q. And Mr. Combs asked you a number of questions about
14 something called a Type-3 permit?
15 A. Um hum.
16 Q. In fact, there are a number of Type-3 applications under
17 Title 14 in the -- in the Bonney Lake Code, correct?
18 A. Yes.
19 Q. And so what is it specifically that -- that you understood
20 Mr. Combs to be asking about in terms of a Type-3 permit?
21 A. Did it -- is a Type-3 permit kind of just a site plan
22 review, not -- not a building permit application.
23 Q. Okay. So if we look at -- if we look Attachment 13 in the
24 Staff Report --
25 A. Okay.

1 basically work with us or the owners to develop preliminary
2 plans as far as building floor plan sizes, and then helped
3 us with the design of the overall architectural plan.
4 Reproduction Northwest is our -- copying items for
5 reproduction for submittals.
6 City of Bonney Lake fees of $9,900 -- $9,090.52.
7 And then, of course, the other costs to bring it to this
8 point was a nonrefundable Earnest Money by the property
9 owner.
10 Q. Okay. So other than the nonrefundable Earnest Money, if I
11 total up those fees, is it your representation that it
12 costed to prepare the application approximately $128,000?
13 A. That would also include the $9,000 for the submittal and
14 other City fees.
15 Q. All right. Associated with the Type-3 permit?
16 A. That's correct.
17 Q. All right. And have you been billed for hourly processing
18 of that Type-3 permit since the permit was submitted?
19 A. That's correct. We were receiving monthly bills for the
20 City for some of their reviews, being planning and traffic
21 I believe is what they were.
22 Q. All right. And those bills continue to come in?
23 A. Correct. We just got another bill last week. I believe
24 that was for some traffic review.
25 Q. Now, you haven't submitted any other applications other

1 streetlighting, roads, and those other parameters of the
2 project.
3 Q. Which would mean your -- the design of the building might
4 change before you submitted the building permit application
5 based upon what went on in the Type-3 permit process?
6 A. Correct. The design of the building is based on what the
7 final allowable footprint is that's approved under the SEPA
8 environmental review and the site development. We may be
9 limited on traffic, transportation, water or sewer, and
10 these availabilities will determine how many units we can
11 really build on a given site.
12 MR. COMBS: Okay. Thank you. No further
13 questions.
14 THE COURT: Do you have any questions, Mr. Danson?
15 MR. DANSON: I do. Thank you.
16 CROSS EXAMINATION
17 BY MR. DANSON:
18 Q. Mr. Hulsmann, were you present at the June 15th, 2005
19 pre-application meeting (inaudible)?
20 A. Yes, I was.
21 Q. And did you ask for clarification at that time regarding
22 what would be necessary to vest your proposed project?
23 A. We asked at that time for clarification of what would be
24 vested.
25 Q. And that clarification was provided, wasn't it?

1 A. It was not provided.
2 Q. It was not provided?
3 A. It was not provided. There -- as a matter of fact, during
4 the meeting there were certain parties that got up and left
5 the room and then came back in and I -- it was either the
6 Development Director or the Building Director said that
7 they would have to discuss further. There was kind of a
8 disagreement about do you drop 24 permits on their desk and
9 they start the review for a building permit, or should it
10 go through the site development Phase 3 like the other
11 projects that have gone through the City.
12 Q. Okay. And you -- and you just described, sir, a series of
13 applications that was contemplated, correct?
14 A. That's correct.
15 Q. Now, that -- that plan would have been workable but for the
16 change in the zoning, correct, that -- that scuttled your
17 plan?
18 A. No, it -- uh, the -- the plan of land use is covered
19 underneath -- my opinion is underneath the code, a plan of
20 land use is covered under the environmental review and the
21 Type-3 site development. Land use is not covered
22 underneath the building permit portion of it. Based on my
23 previous experience of many jurisdictions and also in this
24 City, my determination on Windermere for land use items
25 being landscape, storm drainage, parking areas and all of

1 building permit. We can't do that until such time that we
2 know what the site approval is going to be.
3 Q. The fact of the matter, sir, is that on September 12th the
4 Bonney Lake City Council adopted an ordinance rezoning this
5 property, correct? And your application was filed either
6 that day or the next day?
7 MR. COMBS: Excuse me, Your Honor, the record
8 speaks for itself. The Council met on September 13th, not
9 the 12th.
10 BY MR. DANSON:
11 Q. Oh, I'm sorry. So on the same day that the Council adopted
12 the rezone ordinance, that was the day that your
13 application was submitted, correct?
14 A. We submitted the application that day and the Council had a
15 meeting that night.
16 Q. Because you felt that there was a need to get in under the
17 gun, correct, in order to try to vest your project? You
18 needed to get something filed?
19 A. We basically had started in July to move forward for
20 submittal documents in the month of September, October.
21 MR. DANSON: Nothing further.
22 THE COURT: Mr. Combs?
23 MR. COMBS: Nothing further, Your Honor.
24 THE COURT: I just had one question I wanted to
25 ask. What was the -- what was the status -- in other

1 words, you had gone -- you had gone to the pre-hearing
2 conference or pre-submittal conference on June 15th.
3 THE WITNESS: Yes, sir.
4 THE COURT: It's now September. What -- what had
5 happened in the meantime? What was the status of the
6 project at that time when you filed the application?
7 THE WITNESS: At the public hearing, I mean --
8 correction, uh, sir, at the pre-application meeting one of
9 the questions we asked was is there any zoning require --
10 any zoning changes or anything coming up within this
11 individual process. We started as typically. We went out
12 and surveyed and we did the additional underground water
13 seepage tests that the City had asked us for during the
14 pre-application meeting.
15 THE COURT: Those things that you listed on --
16 THE WITNESS: All of those things.
17 THE COURT: Okay. All right.
18 THE WITNESS: We moved forward of those individual
19 items. And that mid-June, July is when we got the word
20 that the City was looking at rezoning the individual
21 property.
22 THE COURT: And so then you got all of these
23 studies together and you presented them to the City in
24 September; is that it?
25 THE WITNESS: Correct. Probably about the 20th of

1 August we were probably 70% done with it and we basically
2 were being told that the Code may be changing. I was not
3 at the hearings, but we had gentlemen here that were at
4 those hearings and everybody else was submitting their
5 documents basically to keep the Code, and so we moved up
6 our timeline a couple of weeks and submitted our documents.
7 THE COURT: And so in this -- then the City would
8 have -- for you -- your position then is the City would
9 have had to review all of these documents that you
10 submitted and then issue you a Declaration of Completeness
11 or a completeness letter, and then at that point you would
12 -- you would have filed your building permits; is that --
13 is that what I understand?
14 THE WITNESS: Basically -- well, we had submitted
15 the documents -- upon submitting the documentation we would
16 have waited the 28 days, 30 days for the City to issue
17 their determination. Once their determination was done, it
18 would have gone through the SEPA process. Once it went
19 through the SEPA process, simultaneously the City of Bonney
20 Lake takes it through the Type-3 design, site design
21 process. At the completion of those, when we call it in
22 our business a site plan stops moving because the design of
23 the City and everybody else wants more dumpsters, more
24 trees, more open space, this -- once the site plan stops
25 moving, then at that time we will go ahead and submit the

1 building permits. Most jurisdictions will not even let you
2 submit a building permit until the SEPA is done because
3 they believe it's a waste of time should the SEPA not allow
4 you to build 50% due to open space, you find wetlands, you
5 find Heron rookeries, you find any of those, and you can't
6 develop. Why submit a building permit for something that
7 basically you can't build on and you don't know until the
8 SEPA is done?
9 THE COURT: Okay. So -- so all of the code review
10 has to occur, all of the SEPA review has to occur, and then
11 you get a finally-approved site plan, I'm assuming. And
12 then you submit the building permits for each, you know,
13 for each lot or each -- lot or each space?
14 THE WITNESS: And that's basically the reason why
15 on the other projects, my Windermere specifically, why the
16 building permits were not submitted. And in that specific
17 case because of neighbors during the SEPA review they asked
18 us to lower the building, to move it farther away from the
19 property line, to add more trees. All of that came out in
20 their design review and SEPA as conditions that affected
21 the way the building height and everything else was
22 designed for submittal.
23 THE COURT: Okay. Okay. Thank you.
24 THE WITNESS: Thank you.
25 MR. DANSON: I do have one follow-up question to

1 permit application was also required as a condition of the
2 Type-3 permit?
3 A. Yes, there was.
4 Q. And would you please describe for the Examiner what you
5 recall of that discussion?
6 A. Yes. As Associate Planner Elizabeth Chamberlain was
7 running down the list of items on -- on -- basically
8 addressing the letter that was handed out, she got to the
9 portion that described requiring a building permit and the
10 -- and a discussion ensued. I, in fact, brought up the
11 point that it didn't seem reasonable -- reasonable or
12 rational that a building permit be required at that point
13 in time. And so there was some discussion, in fact lengthy
14 discussion, in -- in the meeting between the
15 representatives -- us, the representatives of the Abbey
16 Road Group, and the City staff on that point.
17 Q. Did the building official address this at all, this issue?
18 A. The building official made -- made comments to the point as
19 staff was discussing it that he did not see that a building
20 permit was necessarily required. The staff discussed it
21 back and forth. The Planning Manager, Steve Ladd, was the
22 one that Elizabeth Chamberlain deferred to with the
23 question. He basically said yes, a building permit would
24 be required.
25 What the Abbey Road Group asked, what I asked

1 specifically was that City staff, you know, look at that
2 and reconsider that requirement based on the proposal that
3 we put on the table. And that's the way the meeting ended.
4 It was open-ended that the staff was going to go back and
5 look at that. The building official did not necessarily
6 concur that a building permit was appropriate.
7 Q. Were you ever involved in processing the Type-3 permit
8 while you were working for the City of Bonney Lake?
9 A. Yes, I was.
10 Q. And do you recall when that was?
11 A. Actually, many permits, both commercial and -- and a number
12 of multifamily permits throughout my tenure as Assistant
13 Planner and Associate Planner.
14 Q. In order -- during your tour of duty with the City of
15 Bonney Lake, did they ever require a building permit as a
16 condition of receiving a Type-3 permit approval?
17 A. Yes, they did, for certain projects, but it was not a
18 standardized practice necessarily. Not -- not in all cases
19 was a building permit required.
20 Q. Did you ever come cross any commercial or multifamily
21 projects where a building permit was required for multiple
22 buildings?
23 A. Not that I recall.
24 MR. COMBS: Okay. Thank you. No further
25 questions.

1 the application form?
2 Q. I'm just saying that the City processed those six
3 applications since the code was changed and gave a Letter
4 of Completeness without a building permit application being
5 filed. Was the City in error in all of those cases?
6 A. My understanding is that none of those were actual Type-3,
7 if they did not include the building permit. So literally
8 to answer your question, those were not Type-3 permit
9 applications.
10 Q. Oh, so what was the Letter of Completeness for?
11 A. Evidently Letters of Completeness were issued on the site
12 plan approval which still would remain under the B section
13 of the code as a sort of unofficial optional extra process.
14 Q. Well, you as a skilled planner that served in several
15 jurisdictions, and you're very familiar with the regulatory
16 format, are you not?
17 A. Yes, I am.
18 Q. What does a Letter of Completeness mean to you as a
19 professional?
20 A. That the application is complete.
21 MR. COMBS: Thank you. Nothing further.
22 THE COURT: Mr. Danson, anything further?
23 MR. DANSON: Yes.
24 ///
25 ///

1 REDIRECT EXAMINATION

2 BY MR. DANSON:

3 Q. Mr. Combs was asking you about the requirement on the
4 building permit application form for an approved site plan.
5 Did anyone from Abbey Road ever contact you or anyone else
6 at the City asking what that meant --

7 A. No.

8 Q. -- asking for clarification?

9 A. No.

10 MR. DANSON: That's all.

11 THE COURT: This is -- you're talking about
12 subsequent to the June 15th meeting or what were you
13 talking about?

14 THE WITNESS: I don't recall it being brought up
15 at the meeting or subsequent to the meeting.

16 THE COURT: Anything further, Mr. Combs?

17 MR. COMBS: Uh, I -- I do, Your Honor. If I may.

18 RECROSS EXAMINATION

19 BY MR. COMBS:

20 Q. Do you ever recall discussions with regards to the rezone
21 that subsequently resulted from this property? Do you ever
22 remember discussing that with my client?

23 A. Hum, no. Hum um. I don't remember. I just knew that they
24 were aware of it because they were at the same meeting
25 where I was where the rezones were being discussed.

1 Probably we talked about it too, but not much.
2 Q. Okay. Do you remember talking about it at the pre-app
3 meeting?
4 A. My recollection of the pre-app meeting was that everybody
5 was fully aware of what was going on.
6 Q. But do you remember it being discussed?
7 A. No, I do not.
8 Q. Okay. Do you remember on -- on or about July 6th talking
9 with my client about the Planning Commission's progress in
10 the rezone process; remember that discussion?
11 A. With Mr. Renaud or --
12 Q. Do you remember -- I mean, do you remember that discussion
13 at all?
14 A. If you tell me the names of the individuals, that would
15 help, but no, there's a blank.
16 Q. Gail Hulsmann?
17 A. No, I do not recall that conversation.
18 Q. Okay. Did -- has -- do you recall on July 6th whether the
19 Planning Department made a formal recommendation with
20 regards to the rezone issue?
21 A. That sounds about the right date.
22 Q. Well, if I were to tell you based upon a business record
23 note made by my client of the telephone conversation were
24 on July 6th there's a business record entry that says he,
25 referring to Steve Ladd, says they have been discussing the

1 the designer, items that would be needed on the plans.
2 Q. Okay. And this letter was reviewed at that June 15th
3 meeting?
4 A. Yes, I believe so.
5 Q. Was the -- at some point in that discussion did the issue
6 of, well, what was necessary in order to vest this project,
7 was that discussed?
8 A. Yes, I remember something to this effect.
9 Q. And were you active in that particular discussion?
10 A. I don't remember.
11 Q. Okay. Is that a --
12 MR. COMBS: I'm sorry, I didn't hear the answer.
13 THE WITNESS: I don't remember.
14 BY MR. DANSON:
15 Q. Do you believe -- well, what was the -- who did speak to
16 that issue?
17 A. I believe planning did.
18 Q. Planning being?
19 A. Elizabeth Chamberlain.
20 Q. Okay. Would that also include Steve Ladd?
21 A. Yes, I believe he was there.
22 Q. Okay. Now, do you remember what the -- what the outcome
23 was, what -- what Abbey Road Group was told regarding
24 vesting?
25 A. No, I don't remember.

1 Q. Do you remember any disagreement between yourself and Mr.
2 Ladd or yourself and Ms. Chamberlain on the issue of
3 vesting?
4 A. No.
5 Q. Now I'll show you Exhibit 28. Are you familiar with that
6 form?
7 A. Yes, it's our commercial building permit application.
8 Q. Okay. And if you turn the page and look at the second
9 page, I'll point out some language to you, I believe it's
10 the second checked box after the traffic and park impact
11 fee heading?
12 A. Right.
13 Q. And it refers to an approved site development plan as being
14 required. Do you know what that means or refers to?
15 A. Well, a site development plan is a plan using an eighth
16 inch scale showing the location, size, height of all of the
17 structures and how it's going to be placed on the, um, the
18 property itself, showing the utilities, address, things of
19 that nature.
20 Q. And do you -- do you know what's meant by the word
21 *approved*?
22 A. No, I don't. I believe this form was an existing form that
23 was there before -- before I came to work for the City.
24 Starting down here with general requirements, those I
25 revised and added onto shortly after I -- I came here.

1 Q. And that was when?
2 A. Well, I came here on August 4th, 2003.
3 Q. Okay. And the language prior to that general requirement
4 section you haven't closely reviewed?
5 A. No. I figured that was existing and for whatever reason
6 that was supposed to stay on there. So --
7 Q. Okay. Has anyone -- did anyone from the Abbey Road Group
8 approach you and ask you what was meant by an approved site
9 development plan?
10 A. No, not to my knowledge.
11 Q. No one sought any clarification of that issue?
12 A. No.
13 Q. If they -- if the Abbey Road Group had -- well, let me ask
14 you this. What would have -- what would have been
15 necessary in order for the Abbey Road Group to submit a
16 complete building permit application for their project?
17 A. This form, our application filled out, and all of the items
18 that are on this be a complete application.
19 Q. Okay.
20 A. The floor plan, site plan, cross-section, foundation plans,
21 construction blueprints in order to build the structures.
22 Q. You would have been focused on -- on structural documents,
23 documents relating to the structure?
24 A. Correct, buildable blueprints.
25 Q. Can you think of any reason why the Abbey Road Group could

1 THE COURT: Yes.
2 MR. DANSON: But if it doesn't, I'll throw it out
3 there.
4 THE COURT: Okay. Your -- your standard objection
5 covered it.
6 BY MR. COMBS:
7 Q. Does that make sense to you as a building official?
8 A. I'm not clear on what you're asking, what the question is.
9 We would -- when somebody applies for a permit on anything,
10 we need complete plans before we plan check it. Then we
11 plan check it and then we approve or deny the plan, okay.
12 Q. So would you approve --
13 A. And then once -- once that's approved, we're ready to issue
14 a building permit, but we don't issue a permit until all of
15 the other departments have signed off on it, planning,
16 Public Works, fire department would have to approve it. As
17 far as the process of when the applicant can submit it or
18 the SEPA process, that is all up to the planning
19 department.
20 Q. So you would take the time to review a building permit for
21 a building in a location that you were not even sure could
22 be built upon? I'm trying to get to the point of what you
23 think this --
24 A. Well, GeoTech in the engineering for the structure should
25 be pointed out as part of the -- of the project itself, the

1 construction documents.
2 Q. As part of the approved site development plan perhaps so
3 that you know it's buildable where the building is?
4 A. Okay, I'm -- I'm not following what you're saying about the
5 site development. You're saying without an approved site
6 plan by --
7 Q. Would you want them to bring in 24 buildings for a project
8 that's a $150 million dollar project if you didn't even
9 have in front of you the approved site plan that shows what
10 the -- where the wetlands are, where the unbuildable steep
11 slopes are?
12 A. Oh, no, we wouldn't -- we wouldn't allow that.
13 Q. You wouldn't allow that?
14 A. We'd want to know all of the facts. We wouldn't want to --
15 Q. Before you'd start to process a building permit?
16 A. Correct, the topography, the soils conditions.
17 Q. That's fine. Do you have the staff to process 24 -- if I
18 came in with $150 million dollars of 24 buildings of this
19 multifamily project all at once, do you have the staffing
20 to handle that size of a --
21 A. We would, yes.
22 Q. Do you now?
23 A. Yeah, we -- we'd farm out the structural and Scott and I
24 would probably do the non-structural work.
25 Q. Okay. But you'd want to make sure they were buildable

1 first?
2 A. Of course.
3 MR. COMBS: Okay. No further questions.
4 THE COURT: Anything further?
5 MR. DANSON: No.
6 THE COURT: Okay. Thank you, Mr. Haight.
7 MR. DANSON: The City will call Bob Leedy.
8 THE COURT: Were you sworn in, Mr. Leedy?
9 THE WITNESS: Yes.
10 DIRECT EXAMINATION
11 BY MR. DANSON:
12 Q. Mr. Leedy, please state your name and your business address
13 for the record.
14 A. I'm Bob Leedy, L-E-E-D-Y, Planning Community Development
15 Director for the City of Bonney Lake.
16 Q. What are your -- generally what are your responsibilities
17 in that position?
18 A. To manage the general day-to-day operations of the
19 department, including the planning division, code
20 enforcement and the building division.
21 Q. Okay. And you -- you attend Council meetings from time to
22 time?
23 A. Every one.
24 Q. Okay. And do you recall attending a Council meeting on
25 September 6th of 2005 and a conversation you had with Mr.

1 Renaud?
2 A. Yes, I do.
3 Q. And what was -- first of all, who started that
4 conversation?
5 A. I don't recall. I think it was just, "How are you doing,
6 David?" "How are you doing, Bob?"
7 Q. And did he bring up any issues regarding the Skyridge
8 Condominium project?
9 A. He did.
10 Q. What did he -- what did he say or ask?
11 A. I don't recall the -- how the conversation may have evolved
12 into that, but Mr. Renaud expressed concern, that he had
13 been told in order to vest the Skyridge project, that they
14 would have to have a complete building permit application.
15 Q. And did you say anything in response to that or how did you
16 respond to that concern?
17 A. I indicated that there probably were -- I thought there
18 were other ways of becoming vested with the project than --
19 than applying for a building permit, especially on a -- on
20 a project of this magnitude. And I suggested that --
21 knowing that we have a lot of Pierce County plats that have
22 been vested for a long, long time, I suggested that they
23 explore the planning option.
24 Q. Did you -- did you feel you resolved Mr. Renaud's concern
25 regarding a building permit being required in order to

A-2

Report and Decision of the City of Bonney Lake
Hearing Examiner, March 20, 2006

BONNEY Lake
Planning & Community Development Department

March 20, 2006

Abbey Road Group LLC
P.O. Box 207
Puyallup, WA 98371

RE: ADMINISTRATIVE APPEAL - SKYRIDGE CONDOMINIUM

Dear Appellant:

Transmitted herewith is the Report and Decision of the City of Bonney Lake Hearing Examiner relating to the above-entitled matter.

Very truly yours,

STEPHEN K. CAUSSEAUX, JR.
Hearing Examiner

SKC/cka
cc: Parties of Record
City of Bonney Lake

City of Bonney Lake
(253) 862-8602 • Fax (253) 862-8538
P.O. Box 7380 • 19306 Bonney Lake Blvd.
Bonney Lake, WA 98390-0944

OFFICE OF THE HEARING EXAMINER

CITY OF BONNEY LAKE

REPORT AND DECISION

CASE NO.: ADMINISTRATIVE APPEAL
SKYRIDGE CONDOMINIUM

APPELLANT: Abbey Road Group LLC
P.O. Box 207
Puyallup, WA 98371

PROPERTY OWNERS: Karl J. Thun, Virginia S. Thun, and Thomas Pavolka
P.O. Box 10
Graham, WA 98338-0010

SUMMARY OF APPEAL:

Abbey Road Group applied to the City of Bonney Lake for a multi-family development on September 13, 2005, on a 36.51 acre site. Concurrently City Council was discussing zone change for the subject property (along with several other properties) to Residential/Conservation District (RC-5) to bring the zoning in compliance with the Future Land Use Map. On October 12, 2005, the Director of Planning and Community Development issued a letter to the applicant stating that the information submitted is not recognized development application and therefore cannot be processed as the property is now zoned RC-5.

SUMMARY OF DECISION:

Appeal denied.

PUBLIC HEARING:

After reviewing Planning and Community Development Staff Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on February 6, 2006, at 9:00 a.m.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

EXHIBIT "1"	-	Appellants Notice to Appeal to Hearing Examiner dated October 26, 2005
EXHIBIT "2"	-	Type I appeal permit, dated October 26, 2005
EXHIBIT "3"	-	Appeal Hearing Notice, dated November 23, 2005
EXHIBIT "4"	-	Notification list of hearing notice
EXHIBIT "5"	-	Letter to David Renaud with Abbey Road Group dated October 12, 2005
EXHIBIT "6"	-	Memo to Skyridge Condo file from Bob Leedy dated November 28, 2005
EXHIBIT "7"	-	Letter to Examiner from appellant's attorney requesting a deposition dated November 29, 2005
EXHIBIT "8"	-	Letter to Hearing Examiner from City Attorney in response to appellant's attorney's request dated November 30, 2005
EXHIBIT "9"	-	Ordinance 1160 changing the zoning of the subject property dated September 13, 2005
EXHIBIT "10"	-	Cover letter from Abbey Road Group for multi-family application, dated September 12, 2005
EXHIBIT "11"	-	Site development review commercial/multi-family Eden permit, dated September 13, 2005
EXHIBIT "12"	-	Master Land Use Application with property owner authorization forms, dated September 13, 2005
EXHIBIT "13"	-	Commercial or multi-family site plan review application form Type 3 Permit, dated September 13, 2005
EXHIBIT "14"	-	SEPA Eden permit, dated September 13, 2005
EXHIBIT "15"	-	Pre-application notes, dated June 15, 2005
EXHIBIT "16"	-	Traffic Impact Analysis – Level 1 dated September, 2005
EXHIBIT "17"	-	Geotechnical Report prepared by Allen L. Hart Engineering Geologist, dated May 8, 2002
EXHIBIT "18"	-	Hydrogeologic Assessment prepared by Krazan & Associates, Inc., dated July 22, 2005
EXHIBIT "19"	-	Preliminary Storm drainage, erosion and sedimentation control report prepared by C.E.S., N.W., Inc., dated September, 2005
EXHIBIT "20"	-	Wetland Assessment prepared by J.S. Jones & Associates, Inc., dated September 12, 2005
EXHIBIT "21"	-	Environmental Checklist dated September 13, 2005
EXHIBIT "22"	-	Submitted plans, dated September 13, 2005
EXHIBIT "23"	-	Letter from Hearing Examiner dated December 1, 2005
EXHIBIT "24"	-	Letter from Gregory F. Amann to Jeff Ganson dated December 21, 2005

EXHIBIT "25"	-	Letter from Jeff Ganson to Gregory Amann dated December 21, 2005
EXHIBIT "26"	-	Copy of City of Bonney Lake web page dated January 22, 2006
EXHIBIT "27"	-	Commercial or Multi-Family Site Plan Review Application Form Type 3 Permit
EXHIBIT "28"	-	Commercial Building Permit Application Form
EXHIBIT "29"	-	Skyridge Condominiums Site Development Cost Estimate dated August 28, 2005
EXHIBIT "30"	-	Mailing Labels, Vicinity Map and source of mailing info. dated September 13, 2005
EXHIBIT "31"	-	Invoice from City of Bonney Lake to Abbey Road Group dated October 15, 2005
EXHIBIT "32"	-	Invoice from City of Bonney Lake to Abbey Road Group dated November 1, 2005
EXHIBIT "33"	-	Invoice from City of Bonney Lake to Abbey Road Group dated December 15, 2005
EXHIBIT "34"	-	Bonney Lake Town Center Project documents
EXHIBIT "34a"	-	Project Checklist
EXHIBIT "34b"	-	Amended Master Application dated September 12, 2003
EXHIBIT "34c"	-	Project Narrative dated October 24, 2003
EXHIBIT "34d"	-	Email from Elizabeth Chamberlain to Raymond Frey dated October 16, 2003
EXHIBIT "34e"	-	MDNS for Site Development Permit dated November 15, 2003
EXHIBIT "34f"	-	Notice of Site Development Permit Approval dated December 9, 2003
EXHIBIT "34g"	-	Commercial Building Permit Application dated January 8, 2004
EXHIBIT "35"	-	Windermere Office Building Project
EXHIBIT "35a"	-	Pre-application Meeting Comments dated June 23, 2003
EXHIBIT "35b"	-	Commercial Site Development Application TOC dated December 2, 2003
EXHIBIT "35c"	-	Commercial or Multi-Family Site Plan Review Application dated December 2, 2003
EXHIBIT "35d"	-	Master Application for Land Use Actions dated December 2, 2003
EXHIBIT "35e"	-	Determination of Incompleteness dated December 23, 2003
EXHIBIT "35f"	-	Determination of Completeness dated January 8, 2004
EXHIBIT "35g"	-	MDNS for Site Development Permit dated March 9, 2004
EXHIBIT "35h"	-	Commercial Building Permit Application dated March 12, 2004
EXHIBIT "35i"	-	Site Development Permit Approval dated April 28, 2004

EXHIBIT "35j"	-	Building Permit application receipts dated July 23, 2004
EXHIBIT "36"	-	Harborstone Bank Project
EXHIBIT "36a"	-	Pre-application Meeting Comments dated October 8, 2003
EXHIBIT "36b"	-	Master Land Use Application dated July 2, 2004
EXHIBIT "36c"	-	Commercial or Multi-Family Site Plan Review Application Form and receipts dated July 2, 2004
EXHIBIT "36d"	-	MDNS for Site Development Permit dated September 8, 2004
EXHIBIT "36e"	-	Site Development Permit Type III Approval dated October 12, 2004
EXHIBIT "36f"	-	Commercial Building Permit Application dated October 6, 2004
EXHIBIT "36g"	-	Request for more information for Building Permit review dated November 5, 2004
EXHIBIT "37"	-	Kitsap Bank Project
EXHIBIT "37a"	-	Pre-Application Meeting Comments dated December 3, 2003
EXHIBIT "37b"	-	Commercial or Multi-Family Site Plan Review Application Form dated January 19, 2004
EXHIBIT "37c"	-	Master Land Use Application dated January 19, 2004
EXHIBIT "37d"	-	Site Development Review receipts dated January 20, 2004
EXHIBIT "37e"	-	Commercial Building Permit Application dated January 20, 2004
EXHIBIT "37f"	-	Request for Additional Information dated March 19, 2004
EXHIBIT "37g"	-	MDNS for Site Development Permit dated July 15, 2004
EXHIBIT "37h"	-	Site Development Permit Type III Approval dated August 18, 2004
EXHIBIT "37i"	-	Email from Nancy Packard from Helix Architects dated August 19, 2004
EXHIBIT "38"	-	Bonney Ridge Project
EXHIBIT "38a"	-	Pre-Application Meeting comments dated April 30, 2003
EXHIBIT "38b"	-	Commercial or Multi-Family Site Plan Review Application Form dated January 9, 2004
EXHIBIT "38c"	-	Master Land Use Application dated January 9, 2004
EXHIBIT "38d"	-	Application Receipts dated January 9, 2004
EXHIBIT "38e"	-	Determination of Completeness dated January 23, 2004
EXHIBIT "38f"	-	Revised MDNS dated April 28, 2004
EXHIBIT "38g"	-	Site Development Permit Type III Approval dated June 11, 2004
EXHIBIT "38h"	-	Email from Christy McQuillen to Greg Amann dated December 8, 2005
EXHIBIT "39"	-	Cedar Ridge Retirement Community Project
EXHIBIT "39a"	-	Pre-application Meeting Comments dated July 16, 2003
EXHIBIT "39b"	-	Master Application for Land Use Actions dated September

		16, 2003
EXHIBIT "39c"	-	Application Receipts dated September 16, 2003
EXHIBIT "39d"	-	Determination of Completeness Checklist dated September 29, 2003
EXHIBIT "39e"	-	Determination of Incompleteness dated October 2, 2003
EXHIBIT "39f"	-	Determination of Incompleteness dated October 10, 2003
EXHIBIT "39g"	-	Determination of Completeness Checklist dated October 21, 2003
EXHIBIT "39h"	-	Determination of Completeness dated October 21, 2003
EXHIBIT "39i"	-	MDNS for Site Development Permit dated November 20, 2003
EXHIBIT "39j"	-	Site Development Permit Type III Approval dated January 8, 2004
EXHIBIT "39k"	-	Commercial Building Permit Application dated January 20, 2004
EXHIBIT "40"	-	Invoice from City of Bonney Lake to Abbey Road Group dated January 31, 2006
EXHIBIT "41"	-	Email from Gil Hulsmann re: Bonney Lake Development Rezone 05-0129
EXHIBIT "42"	-	Planning and Community Development Department Staff Report
EXHIBIT "43"	-	Letter to Examiner from Elizabeth Chamberlain dated December 6, 2005
EXHIBIT "44"	-	Letter to Examiner from Jeff Ganson dated January 31, 2006
EXHIBIT "45"	-	Letter to Examiner from Gregory Amann dated February 1, 2006
EXHIBIT "46"	-	Letter to Examiner from Gregory Amann dated February 23, 2006
EXHIBIT "47"	-	Hearing Brief of Appellant/Applicant dated February 3, 2006
EXHIBIT "48"	-	City's Hearing Brief dated February 15, 2006
EXHIBIT "49"	-	Reply Brief from Appellant/Applicant dated February 23, 2006

ELIZABETH CHAMBERLAIN appeared, presented the Planning and Community Development Department Staff Report, and testified that the appellant submitted an application on September 13, 2005, for a multi-family project on a 36.51 acre parcel. Subsequent thereto, the City Council rezoned 65 acres including the appellant's parcels from Commercial to RC5 as the said area was not in compliance with the City's future land use map. The zone change became effective October 3, 2005, and the appellant's application was not recognized by the City as vesting the project. Staff recommends that the appeal be denied.

Upon cross-examination by LOREN COMBS, attorney at law representing the

appellant, MS. CHAMBERLAIN testified that she became employed by the City in July, 2003, as an assistant planner and is now an associate planner. Type 3 applications are not approvals, but are procedural applications. She proceeded as directed as previous planners have done. A letter of completed application is submitted to an applicant by the City. The Planning Department has not required building permits in the past prior to issuing letters of completion.

Upon questioning by JEFF GANSON, City Attorney, MS. CHAMBERLAIN testified that the City Council rewrote Title 14 at the end of 2003. Exhibit "15" is a record of the pre-application conference and Mr. David Renaud, the appellant's representative, was present. Section 1 sets forth the Planning Department requirements and Subsection A provides notice that they would need to submit a full building permit application to vest the project. Abbey Road submitted Exhibit "13", the Site Plan Review Application, but there is no site plan approval or application in the Bonney Lake Code. A cursory review is that the City would provide the appellant with information as to whether the project would work and the environmental review. They could do all of this work without obtaining a building permit. An applicant can choose to go through this process to see if the project will work.

MR. COMBS then cross-examined MS. CHAMBERLAIN on documents within the appellant's exhibit for Target and other applications where Type 3 approvals were issued and determinations of completeness were issued.

MR. GANSON then questioned MS. CHAMBERLAIN and ascertained that in the project covered by Exhibit "34F", the date of vesting was not an issue nor was it at the Berry Ridge project.

Upon further questioning by MR. COMBS, MS. CHAMBERLAIN stated that in accordance with Section 14.50.010 of the code, she advised the appellant that they needed to submit a completed Type 3 application form does not require submittal of a building permit application.

MR. GANSON ascertained that a multi-family building permit is a separate form.

MR. COMBS ascertained that Exhibit "28" is the building permit application. On page 2 it shows the need for approval of a site development plan.

Upon questioning by MR. GANSON, MS. CHAMBERLAIN said that she was never asked what this meant or any questions about the form, and that site development could mean several things.

RACHEAL COUCH appeared and testified that she worked for the appellant as an associate planner and submitted the application to the City. She took it to the counter

and the person went through the checklist and made sure all of the components were present. The City has a form checklist for a Type 3 permit and the counter person went through the checklist which took about 30 minutes. She paid the application fee. The checklist was the City's, and it did not require a building permit.

GIL HULSMANN appeared and testified that he is the principal for the Abbey Road Group and a senior level development manager. He represents the client and performed a feasibility study. They put together a design team to perform a feasibility study. Exhibit "29" represents the fees spent in preparing the application. They have received monthly bills from the City regarding traffic and other types of review. He has processed other permits within Bonney Lake. He was the land development manager for the Windermere building which required a Type 3 permit and SEPA review. He received a letter of completeness (35F) and didn't submit a building permit application prior to approval. He did receive a notice of incompleteness (35E), but again, the City did not require a building permit to obtain completeness. In the Windermere project he submitted a building permit two months after the Type 3 development completeness which is consistent with other jurisdictions. The difference is that SEPA review and the Design Commission review are part of the process before applying for a building permit. They must submit one individualized building permit per building and they have 24 buildings. They discussed doing one permit and then the balance. They could submit one at a time and would know of the requirements. The building permit submittal would cost $600,000 on a $170,000,000 project. They underwent Type 3 permit review and SEPA review. The site development Type 3 receives design review comments regarding streetlights, roads, etc. The building design is based on the final footprint allowed following review of SEPA, water, sewer, etc.

Upon questioning by MR. GANSON, MR. HULSMANN testified that he was present at the June 15th pre-application meeting and asked for clarification as to vesting because he was unsure. City staff was also unsure and said they would have to check on whether they had to have 24 building permits or one Type 3 permit. Land use is not covered under a building permit, but is covered by the Type 3 site development and SEPA review. He bases his testimony on comments by the Planning Division and Building Division. He couldn't meet the requirements of a building permit submittal because the City required the site development plan approval before application. Then did he submit one building permit or 24 building permits? When does the code change? He made the appellant's decision. He raised the issues at the pre-application meeting and received three or four answers. His questions addressed the submittal requirements? It was not clarified that the City would require a building permit in order to vest. He asked about the building permit language, but received no firm answer from Ms. Chamberlain. As part of the process he needed a building permit, but couldn't acquire one without the site plan approval. He submitted the application the same day as the City Council meeting. SEPA review tells them all codes that they must design to. He had no issues in the Windermere building regarding vesting.

DAVID RENAUD appeared and testified that he is a land development planner and was an assistant planner and associate planner for Bonney Lake from 2001 to 2003 and attended the pre-application conference. Exhibit "15" represents the minutes which were handed out at the beginning of the meeting. He never received the actual minutes. Concerning the discussion of vesting, Ms. Chamberlain ran down the list, and he said that it is not reasonable or rational to submit a building permit at this time. The building official said it was not necessarily required. Ms. Chamberlain deferred to Steve Ladd the Department director. Staff agreed to look at the issue since the building official did not believe it necessarily appropriate. They processed the Type 3 permit required for multi-family and commercial. Building permits are not required in all cases, but he does not recall which.

ELIZABETH CHAMBERLAIN reappeared and testified that she processed the Windermere building and that no issues arose regarding vesting, the code, or zoning. She made it clear that a building permit was required to vest and that issue was not left as an open question.

Upon questioning by MR. COMBS, she testified that she does not remember Mr. Ladd's statement.

STEVEN LADD appeared and testified that he is the Planning Manager for the City and supervises long range and current planning. He attended the June 15th meeting but cannot remember who brought up the issue of vesting. The issue discussed is what was necessary to vest. All were aware at the meeting of the possible rezone. He spoke to the vesting issue. Subsequent to David working for the City, Title 14 had changed and the SEPA process was not longer a separate permit. The building permit itself is necessary to vest. The changes to Title 14 were to a site development permit. There was no dispute among any staff. Jerry Hite had no issue. Mr. Hulsmann and the appellant respectfully disagreed. They didn't agree, but the City was unanimous in its opinion. They never agree that staff would review vesting and get back to them. Mr. Hulsmann said that he would need an answer, but he gave Mr. Holsman an answer. The top paragraph on page 2 of Exhibit "28" is in error. The permit application has not changed. No confusion existed at the meeting regarding vesting.

Upon questioning by MR. COMBS, MR. LADD testified that the City has no vesting ordinance. The City may have changed the form on the web site. In the multi-family Type 3 process no application requires a building permit, but it is the building permit application itself that vests the project. Stating that an applicant must have an approved site plan prior to building permit application is an error. He is aware of five projects approved through the Type 3 process. It is not a Type 3 permit application. They issue a site plan approval as an optional extra process. The letter of completeness means the application is complete.

Upon questioning by MR. GANSON, MR. LADD testified that the appellant requested no clarifications at or subsequent to the meeting.

Upon questioning by MR. COMBS, MR. LADD stated that he knew everyone was aware of the rezone process but he doesn't remember the rezone being discussed. He doesn't recall the conversation of July 6th, but it is about the date of the staff recommendation. He is unsure if he made a recommendation at the Planning Commission meeting. Exhibit "41" is a recollection of a telephone conference.

JERRY HIGHT, building official, appeared and testified that he enforces the building code and was present at the June 15th meeting. His role is to provide a letter setting forth all of the requirements of his office (Exhibit "15"). He has a standard letter which outlines all information needed on the building plans. He remembers the vesting discussion and remembers that Planning spoke to the issues through Ms. Chamberlain and Mr. Ladd. He doesn't remember the outcome, but doesn't remember any disagreement. Exhibit "28" is the site development plan which shows the location, size, and type of structure. It also shows utilities, and has an approval for site plan. He knows a few were used previously by the City, but does not know why the language is there. No one from the appellant sought clarification of the site development plan approval. The building permit application would have required the City's form completed, plus all items on the form. The applicant proposed a very large project and may not have had time to put it together. He never told anyone that they could not file a building permit application.

Upon questioning by MR. COMBS, MR. HIGHT acknowledged that the site consists of 20 to 30 acres on a steep slope. He would have had to review 24 large, multi-family structures prior to site plan review. He needs complete plans before he can check the plan. He doesn't issue the building permit until all other departments have signed off. SEPA is the responsibility of the Planning Division. He wouldn't allow a building permit application without knowing the topography, the existence of wetlands, and other critical areas such as slopes. He could timely review 24 permits by farming them out.

ROBERT LEEDY, Director of Planning and Community Development, testified that he attended a September 6th Council meeting and conversed with Mr. Renaud who brought up a project. He expressed concerns regarding vesting as he knew a building permit application was needed. Mr. Leedy indicated other ways of become vesting especially with the project of this magnitude such as the short platting process. He recommended that Mr. Renaud explore short platting or some other option of vesting. He received an email from Mr. Renaud asking for a letter of completeness. He responded after conferring with the City Attorney. Ultimately the letter stated that he could not provide a determination of completeness. The site plan approval did not vest the project. He never advised that he would not provide a determination of completeness without the

building permit. He felt the opposite was quite clear.

Upon questioning by MR. COMBS, MR. LEEDY reviewed exhibits which referred to Type 3 applications and indicated site plan approval as consistent with the City Code. Exhibits refer to site plan approval and the fact that they are subject to appeal.

Upon questioning by MR. GANSON, MR. LEEDY testified that in none of the projects referred to by Mr. Combs did issues of vesting, code, or zoning arise. The ordinance became effective a couple of weeks after passage by the City Council. Upon the effective date the project could not proceed. He signed and drafted the October 2nd letter.

STEVE LADD reappeared and testified that the City must deem a submitted application complete or incomplete within 21 days and then SEPA review occurs. The pre-application conference is extra for site plan approval. It is not a three part application. It is not part of the Type 3 application and the code does not address it. A lag occurred between the Municipal Code change and the City's form.

ORLEAN YEAW appeared and testified that the appellant should not be estopped from development. The project will add a needed tax base for the City and the Examiner should consider growth presently occurring in Sumner and Puyallup.

No one spoke further in this matter and so the Examiner took the request under advisement and the hearing was concluded at 11:32 a.m.

NOTE: A complete record of this hearing is available in the City of Bonney Lake Planning and Community Development.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, viewed the property, heard testimony, and taken this matter under advisement.

2. This request is exempt from review under the State Environmental Policy Act (SEPA).

3. Appropriate notice was provided pursuant to the Bonney Lake Municipal Code.

4. The appellant, Abbey Road Group, LLC, appeals an administrative determination made by the City of Bonney Lake Director of Planning and Community Development (Director). The Director determined that the submission of a

completed application for the Type 3 permit procedure set forth in Chapter 14.50 of the Bonney Lake Municipal Code (BLMC) does not vest development rights for a multi-family project allowed outright by the effective zone classification. The Director determined that the appellant needed to file a completed application for a building permit in order to vest the project. For the reasons set forth hereinafter, the Director correctly determined that the appellant needed to submit a completed building permit application to vest the project.

5. The appellant has a possessory ownership interest in three abutting parcels of property with a total area of 36.51 acres, located on the south side of SR-410 opposite its intersection with Meyer Road within the City of Bonney Lake. The appellant desires to improve the parcels with 575 condominium units consisting of a mix of studio, two, and three bedroom residential units in approximately 24 separate buildings. The project would access onto Elhi Hill Road to the east and SR-410 to the north opposite the Meyer Road intersection. The project is known as Skyridge Condominiums.

6. Few disputes exist in the relevant facts necessary to resolve the appeal which are as follows:

   A. The appellant initially contacted the City regarding development of the site at a pre-application meeting on June 15, 2005. At said meeting, attended by various City staff and appellant's representatives, staff advised the appellant of City code requirements, expert studies, and other items necessary to process the project. At said meeting the appellant already knew of or City staff 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. The rezone would change the existing Commercial (C-2) zone classification which allowed the project outright to Residential/Conservation District (RC-5) which allows only single family dwellings and accessory dwelling units at a maximum density of one dwelling unit per five acres. Thus, a zone reclassification to RC-5 would prohibit the appellant's development.

   B. At said June 15 meeting, City staff advised the appellant's representatives that they would need to process the project through the "Type 3 permit" procedure set forth in Chapter 14.50 BLMC may require participation in a pre-application conference (Section 14.50.005) and does require the submittal of "the appropriate application form" (Section 14.50.010). The appellant's representatives testified that they questioned City staff as to whether the filing of such an application under Chapter 14.50 would vest the project under the C-2 zone classification, and that City staff disagreed among themselves regarding whether said application would vest the

project or whether the appellant would also need to submit a completed application for a building permit. The appellant's representatives testified that City staff told them they would discuss the matter and advise them later regarding vesting. City staff testified that staff members speaking to the vesting issue consistently advised the appellant's representatives that they would need to file a completed application for a building permit to vest the project, and that no uncertainty among staff members existed. The Examiner accepts the testimony of City staff because staff did not communicate further with the appellant regarding vesting, and the appellant produced no evidence that its representatives ever contacted the City regarding the vesting uncertainty. Exhibit "41", a telephone memorandum dated July 6, 2005, prepared by Rachael Couch, one of the appellant's representatives, refers to the contemplated City Council action to rezone the site, but raises no questions about whether the City had resolved the vesting uncertainty. Staff advised the appellant's representatives in the June 15, 2006, meeting that they would need to file a completed application for a building permit to vest the project.

C. Following the July 6, 2005, telephone conference, the next contact between the appellant and staff occurred on September 6, 2005. Planning Director Robert Leedy discussed the project with David Renaud, the appellant's planner, who expressed concern regarding the City's position that vesting the project would require submittal of a completed building permit application. Mr. Leedy reaffirmed the City's position, but also recommended that Mr. Renaud consider other methods of vesting such as submittal of a short plat or long plat application which vests upon submittal.

D. On September 13, 2005, the appellant submitted a completed application for the Type 3 permit process pursuant to Chapter 14.50 BLMC. The application included the following:

(1) Master Land Use Application.
(2) Owner authorizations.
(3) Commercial or multi-family site plan review Type 3 permit application.
(4) SEPA checklist.
(5) Site Plan set including
    (a) Cover sheet.
    (b) Site Plan.
    (c) Engineering Plans.
    (d) Landscaping Plan.
(6) Reduced Site Plan.

(7) Geotechnical Report.
(8) Hydrogeologic Impact Evaluation.
(9) Wetlands Assessment.
(10) Traffic Impact Analysis.
(11) Storm drainage Report.

The appellant spent more than $96,500 to obtain the information and to prepare the documents required for the application and submitted a $3,674 filing fee to the City.

E. On the evening of September 13, 2005, at its regularly scheduled meeting, the Bonney Lake City Council adopted Ordinance No. 1160 which changed the zoning of the appellant's property from C-2 to RC-5. The ordinance became effective on October 3, 2005. The appellant did not submit a building permit application prior to the effective date of the ordinance.

F. David Renaud in an email dated September 28, 2005, and sent to Robert D. Leedy requested a City letter confirming the completeness/vesting of the Skyridge Condominium project.

G. In a letter dated October 12, 2005, Mr. Leedy, following consultation with the Bonney Lake City Attorney, advised Mr. Renaud that:

> As I previously indicated, staff had been waiting for an opinion from the City Attorney advising whether submittal and processing of a Commercial/Multi-Family Type III Application could result in vesting of a project. The City has now determined that such application cannot vest a project. While this application is an aid to efficient processing of a large project – for both the City and the proponent – it is not a recognized development application under City Code and therefore, in the absence of a building permit, cannot vest the proposed project. (Attachment "5" to Staff Report)

H. The appellant timely filed an appeal of Mr. Leedy's October 12, 2005, letter on October 26, 2005.

7. Chapter 18.26 BLMC sets forth the bulk regulations and allowed uses in the C-2 zone classification. Section 18.26.020 BLMC sets forth uses permitted outright and includes apartments and attached residential dwellings. Thus, prior to

October 3, 2005, the appellant's Skyridge Condominium project was an outright permitted use and required no special use or zoning type permits to proceed. However, the appellant would need to obtain a Type 3 permit and building permit.

8. The issues raised by this appeal are as follows:

   A. Does the submittal of a completed Type 3 permit application pursuant to Chapter 14.50 BLMC vest a project for consideration under the zoning and land use ordinances in effect on the date of submittal?

   B. If not, do the requirements of the Type 3 permit serve to frustrate vesting by allowing the Bonney Lake City Council the opportunity to enact new zoning regulations thereby causing proponents to lose the ability to fix the rules that govern their land development?

   The answer to both questions is "no".

9. Title 14 BLMC, entitled "Development Code Administration", sets forth its purpose and intent in Section 14.10.020 as follows:

> It is the purpose of the development code administration to promote the health, safety, and general welfare by <u>guiding review of development</u> in the city consistent with the City of Bonney Lake comprehensive plan, the Washington State Growth Management Act and the Regulatory Reform Act (ESHB 1724). It is further intended that the administration of the development code is to <u>provide procedures which simplify the permit process, combine and consolidate the various review and approval processes</u> including environmental review, provide clearer appeal procedures, provide clear enforcement procedures to assure compliance with the development code, enhance public notice, and encourage more opportunities to comment during development review. (emphasis supplied)

   Thus, Title 14 <u>guides</u> review of development within the City consistent with The Growth Management Act and the Regulatory Reform Act, and simplifies the permit process by combining and consolidating various review and approval processes to include environmental review. Section 14.10.060(B) BLMC requires a permit applicant to read and understand the development code. Section 14.10.070 BLMC places responsibility for administration and enforcement of the development code upon the Director of Planning and Community Development. Section 14.20.010 BLMC sets forth six development review types (1-6) for all

required land use permits and specifies the "type" of review each such permit will undergo. Permit types 4-6 require public hearings and include conditional use permits, shoreline permits, preliminary plats, and site specific rezones. Since the appellant's project requires neither a special use permit nor a public hearing, it falls under the category of "Building Permits – Non-SEPA Exempt", a Type 3 permit review. Chapter 14.50 BLMC sets forth the procedures and criteria for Type 3 review.

10. Chapter 14.50 BLMC is entitled "Type 3 Permits (Non-SEPA-Exempt Building Permits, Short Plats, Sensitive Area Permits, and Shoreline Letters of Exemption". Chapter 14.50 requires participation by a project applicant in a pre-application conference if deemed necessary by the Director. Following said conference, an applicant must then complete the appropriate application form and submit said form along with an environmental checklist and applicable fees to the Director. The application form specifies the submittal requirements. Following submittal of an application, the City must within 28 days send the applicant a determination of completeness or notice setting forth the information required to complete the application. Section 14.50.030 BLMC requires the Director to commence SEPA review of the project within 14 days of determination of completeness and issue a threshold determination. Section 14.50.045 BLMC authorizes submittal at any time of the completed Type 3 application to the City's Design Commission for review and the issuance of a finding of conformance or nonconformance with the Community Character Element of the Comprehensive Plan. Section 14.50.050 BLMC requires the Director, within 120 days of the issuance of the determination of completeness, to decide "whether the application is consistent with this development code, act on the application accordingly, and issue a notice of decision." The notice of decision must set forth the SEPA threshold determination and is published in accordance with BLMC requirements. Section 14.50.060 BLMC prohibits the <u>issuance</u> of building permits requiring a Type 3 permit until the Type 3 appeal period has lapsed.

11. The Type 3 permit procedure contemplates concurrent review of items required in the application form together with SEPA review and review by the City Design Commission. Nothing in Title 14 prohibits a project proponent from submitting a building permit application for review concurrent with the Type 3 permit review. In fact, submittal of a building permit during the Type 3 process is consistent with the purpose of Title 14 to "simplify the permit process, combine and consolidate the various review and approval processes including environmental review". Concurrent review of the Type 3 permit application materials together with SEPA, the design review, and the building permit application would combine and consolidate the review and approval process. However, the appellant did not elect to submit the building permit application. According to the testimony of Gil

Hulsmann, the principal for Abbey Road Group, LLC, he did not file a building permit application because the City would not accept said application until it completed its Type 3 review and issued a Type 3 "site plan approval". However, the BLMC does not prohibit filing of a building permit application; to the contrary, the BLMC encourages concurrent review and the filing of a building permit application concurrent with the Type 3 permit.

12. The appellant asserts that the City's application forms, web site, and prior practices show that the City has consistently interpreted the Type 3 permit procedure as vesting a commercial/multi-family project without the necessity of filing a building permit. However, such assertion is contrary to the City's position at the pre-application conference and inconsistent with the City's documents and forms.

13. The City's letter summarizing the issues and comments at the June 15, 2005, pre-application meeting (which the appellant asserts was handed out at the beginning of the meeting) provides in part under the Planning Department section:

> A. Land Use Review Process – the zoning of the subject site is Commercial (C-2). Pursuant to BLMC 18.26.020, the C-2 zoning district permits multi-family development, subject to a Type 3 permit under BLMC Chapter 14.50, and environmental review under the State Environmental Policy Act (SEPA), if applicable. All application material is included and <u>all information requested on the application forms (Building Permit and Planning Department) shall be submitted in order for a complete application</u>. A Type 3 permit is approved by the director and can be appealed to the Bonney Lake Hearing Examiner (emphasis supplied).

The above language requires that the information requested for a building permit must be submitted in order for a <u>complete application</u>. The Building Division's comments found on pages 6-8 of the letter sets forth standard building permit requirements which are incorporated into all commercial projects, and requires the appellant to incorporate applicable items. Required items include such things as the number of and complete plumbing fixture calculations; occupancy classifications; type of building construction, schematics for water piping, gas piping, HVAC, and septic; and numerous other items. The appellant submitted none of the items required by the Building Division in its Type 3 permit application. As found hereinafter, a completed Type 3 permit application does not require submittal of building permit information.

14. To implement Title 14 BLMC, the City Planning and Community Development Department developed a form entitled "Commercial or Multi-Family Site Plan Review Application Form Type 3 Permit" (Attachment 13 to the Staff Report). Said form sets forth the documents required for a Type 3 permit which the appellant provided as set forth above. However, said form contains no requirements for submittal of items needed for a completed building permit application as set forth by the Building Division in the June 15, 2005, pre-application conference letter. Thus, while the appellant submitted necessary documents for a Type 3 permit, it submitted no documents required by the Building Division for a building permit.

15. Following submittal of the documents on September 13, 2005, the City did not issue either a determination of completeness or notice setting forth additional information necessary to complete the application as required by Section 14.50.020 BLMC due to the effective date of the rezone three weeks later. However, the appellant submitted examples of letters of completeness issued by the City for Type 3 permits in previous projects. Said letters provide in part:

> The City of Bonney Lake Planning and Community Development received the information requested on December 29, 2003. At this time the application...is determined complete.
>
> The 120-day time clock has started for the technical review...(Exhibit "35f").

Section 14.50.050(A) BLMC requires the City to complete its review to include environmental review within 120 days of the determination of completeness for the Type 3 permit. Again, while the City is reviewing the Type 3 permit information, nothing prohibits an applicant from submitting a completed application for a building permit and having the City review said application concurrently in accordance with the purpose and intent of Title 14.

16. Following completion of the 120 day review, the City issues a Type 3 approval which in the cover letter reads:

> ...The proposed project is consistent with and meets the minimum requirements of the Bonney Lake Municipal Code for zoning, health, and building standards. A Mitigated Determination of Nonsignificance was issued on March 10, 2004.
>
> The approval of a site development permit is required pursuant to BLMC Title 14, including adherence to all applicable

> regulatory requirements...The project is approved subject to the following conditions of approval and the conditions within the staff report...
>
> Pursuant to Chapter 14.40, Development Code and Registration, a site development permit is a Type 3 permit and can be appealed to the Hearing Examiner....(Exhibit "35i").

Attached to the letter are findings/conclusions and conditions of approval prepared by the Planning and Community Development Department. Conditions address erosion, stormwater, noise, landscaping, parking, transportation, water, sewer, and fire. However, conditions do not address building permit requirements which are reviewed separately (and concurrently if an application is submitted).

16. The appellant asserts that the commercial building permit application requires six copies of an approved Type 3 site development plan, and thus an applicant may not submit an application for a commercial building permit until it has gone through and successfully completed the Type 3 permit process. Page 2 of the Commercial Building Permit Application form (Exhibit "28") sets forth numerous application requirements with blocks for "N/A" and "Submitted" for each. Said form includes the following requirement:

N/A	Submitted	
☐	☐	Six copies of the Approved Site Development Plans (3 for Tenant Improvement)

Gil Hulsmann, principal of the appellant, testified on two occasions that the appellant could not meet the requirements of the commercial building application form because the City required an approved site development plan as part of the application. However, the form contains a block for "N/A" which means "not applicable". Thus, not all documents listed on page 2 need be submitted for a completed application. For example, the permit documents submitted by the appellant for another of its projects, the Bonney Lake Town Center, include the commercial building permit. Said permit marks the line item requiring approved site development plans as "N/A". The notes on the form read: "site development under separate permit by "American VNG. Co." (Exhibit "34g") Thus, the City Building Official noted a separate permit process for the Type 3 permit. In the Town Center project, the appellant waited until completion of the Type 3 permit process before filing a building permit application. However, no vesting issues were present.

17. Mr. Hulsmann also served as agent for the Abbey Road Group, LLC, in the Windermere Real Estate office building project and submitted a building

construction permit application packet on March 12, 2004, prior to receiving Type 3 permit approval (Exhibit "35g"). The City did not issue the Type 3 approval until April 28, 2004, 1.5 months subsequent to submittal of the building permit application (Exhibit "35i"). Thus, contrary to his testimony, in one of Mr. Hulsmann's own projects, he submitted a building permit application well in advance of receiving Type 3 approval. The City evidentially reviewed the building permit applications concurrently with the Type 3 permit as contemplated by Chapter 14.50 BLMC and issued the building permit on July 23, 2004, (Exhibit "35j").

18. In the Kitsap Bank commercial development documents (Exhibit "37"), the City advised under the "Planning and Community Development Department Comments" that:

> ...[T]he C-2 zoning district permits the proposed use and is a Type 3 (Site Plan Review) permit under BLMC 14.50...A Type 3 permit requires the approval of the Planning and Community Development Director with any appeals heard by the Bonney Lake Hearing Examiner. Building permits, with approval, can be issued after land use approval is granted. (Exhibit "37a")

While the City will not issue a building permit until the Director has granted Type 3 land use approval, nothing prohibits an applicant from submitting a building permit concurrent with the Type 3 application or at any time during the process. In the Kitsap Bank project the applicant submitted a "Commercial or Multi-Family Site Plan Review Application Form" on January 19, 2004 (Exhibit "37b"). The applicant also submitted a Commercial Building Permit Application on January 20, 2004, one day after submitting the Type 3 permit application (Exhibit "37e"). The City issued the Type 3 approval on August 28, 2004, (Exhibit "37h") and apparently was prepared to issue the building permit on August 19, 2004 (Exhibit "37i"). Thus, the past practices of the City confirms staff's testimony that applicants may file a building permit application at any time to include concurrently with the Type 3 permit application and vest their project. In the present case, the appellant did not file a building permit application and thus did not vest the project.

19. Chapter 14.80 BLMC entitled "Type 6 Permits (Preliminary Plats and Site-Specific Rezones)" requires a Type 6 permit application and a subsequent determination of completeness and SEPA threshold determination. However, just as the Type 3 permit, submitting a completed Type 6 permit application does not vest a preliminary plat. Any applicant may vest a preliminary plat by submitting a completed application for preliminary plat approval pursuant to Chapter 17.12 BLMC. The Type 6 permit process is in addition to and processed concurrently with the preliminary plat application, as the Type 3 permit process is in addition to and processed concurrently with a building permit application. An application for a Type

6 permit does not vest a preliminary plat which requires a separate preliminary plat application, and a Type 3 permit application does not vest a commercial or multi-family project which requires a separate building permit application.

20. Neither the City Development Code (Title 14 BLMC) nor the City's actions in processing the appellant's application frustrated the vesting of the project as in the case of Valley View Industrial Park v. Redmond, 107 Wn. 2d 621 (1987). In the present case, the appellant's first contact with the City for its $143,650,000 project was the pre-application conference on June 15, 2005. Prior to said date the only evidence in the file showing activity on the site consists of two geotechnical reports prepared by Allen L. Hart, engineering geologist. Mr. Hart's initial report is dated July 29, 1996, and his review of said report is dated May 8, 2002. Activities subsequent to the June 15, 2005, meeting include a Wetland Assessment prepared by J.S. Jones and Associates' dated September 12, 2005 (retained August 15, 2005 – Exhibit "17"); a Preliminary Storm Drainage, Erosion and Sediment Control Report prepared by C.E.S. NW, Inc., dated September, 2005; a 10 page, Level 1 Traffic Impact Analysis prepared by Heath and Associates, Inc., dated September, 2005; and a standard form, 12 page, environmental checklist signed by David Renaud on September 13, 2005. The appellant's next contact with the City was also on September 13, 2005, when it submitted its application for Type 3 permit review. The City Council adopted the ordinance changing the zoning of the site the evening of September 13, 2005. Thus, the appellant had considered developing the property as early as 1996 but took no meaningful action until September, 2005, immediately prior to the area-wide rezone. The appellant simply started the Type 3/building permit process too late to submit a completed building permit application. While the appellant asserts that it spent approximately $100,000 to prepare the studies and the application and pay the submittal fees, said amount calculates to .007% of the estimated development cost.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.

2. The submittal of a completed application for a Type 3 permit pursuant to Chapter 14.50 BLMC does not vest a multi-family or commercial project allowed outright by the applicable C-2 zone classification. An applicant must submit a completed application for a building permit to vest the project. Erickson v. McLerran, 123 Wn. 2d 864 (1994); Noble Manor Company v. Pierce County, 133 Wn. 2d 269 (1997).

3. The Type 3 process does not prohibit an applicant from filing a building permit application prior to completion of the process. To the contrary, the intent of the City Development Code is to streamline and combine reviews for various permits and

guide development in the City. The Development Code encourages concurrent review of building permit applications and Type 3 applications. The appellant could have filed a building permit application prior to October 3, 2005, and vested the project. As shown by previous City actions and the appellant's previous actions, the appellant did not need to wait until it had secured a Type 3 permit before filing a building permit application.

4. The Type 3 permit process does not defeat vesting by requiring SEPA review, expert studies, or the filing of other permits prior to filing a completed application for a building permit as in Adams v. Thurston County, 70 Wn. App 471 (1993), and West Main Associates v. City of Bellevue et al, 106 Wn. 2d 47 (1986). The City did not inhibit the appellant's submitted if either the Type 3 permit application or a building permit application.

5. The permit processes set forth in Title 14 BLMC, the Development Code, are not voluntary. A project applicant must apply for and secure an appropriate permit type review, the intent of which is to simplify the permit process and combine and consolidate various review and approval processes. While the procedure is mandatory, it does not delay the filing of a building permit application and thereby defeat vesting. An applicant may file a building permit application at any time during the process. By contrast, the City of Bellevue in West Main, supra., attempted to preempt the vesting doctrine by enacting ordinances which required the acquisition of a series of permits prior to the filing of a building permit application. Bonney Lake's Development Code does not do so, but allows and in fact encourages applying for and securing building permit review concurrent with other required permits.

6. The City's procedure most closely approximates that of the City of Seattle in Erickson and Associates v. McLerran, supra. Although the City of Bonney Lake does not have a vesting ordinance as did Seattle, the Washington Supreme Court would refuse to extend the vested rights doctrine to a Type 3 permit application the same as it did in Seattle's MUP. The MUP is similar to the City's Type 3 permit and does not defeat vesting as an MUP applicant may vest rights at any time.

> ...Under SMC 23.76.026 the vesting point for an MUP application is controllable by a developer, and, in all instances, vesting occurs no later than the building permit application stage. At any point in the MUP review process a developer can file a complete building permit application. The developer's rights then vest and the City must process the proposed project under the than existing land use and construction ordinances...
>
> Both parties agree MUP's are now a critical part of the

development process. Therefore, Erickson argues, under Seattle's land use permitting scheme, the need for certainty is greatest at the use review stage and the vested rights doctrine should protect development rights when a developer applies for a MUP. Erickson's arguments ignore that the City's ordinance does afford developers certainty and predictability required by due process. A developer controls the date of vesting by selecting the time in which he/she chooses to submit a completed building application...Under Seattle's ordinance, Erickson could have protected its rights by filing a building permit at the beginning or at any point in the process. Erickson failed to do so....123 Wn. 2d 864 at 870.

Bonney Lake's ordinance likewise allows a developer to determine the vesting date by submittal of a building permit application at any time during the Type 3 review process. Developers have submitted building permit applications both concurrent with the Type 3 permit application and prior to the issuance of Type 3 permit approval.

7. The appellant argues that the City's requirement of a fee for commercial and multi-family site plan reviews as set forth in Section 3.68.010(O) BLMC somehow vests the project. However, many items within the fee schedule have nothing to do with vesting such as a sign permit review, right-of-way vacation, review of special environmental studies, final building permit review fee, environmental checklist review, and hearing examiner services.

DECISION:

The appellant's appeal of the City's determination that the proposed Skyridge Condominium project did not vest prior to the effective date of the zone change from Commercial (C-2) to Residential/Conservative District (RC-5) is hereby denied.

ORDERED this 20th day of March, 2006.

STEPHEN K. CAUSSEAUX, JR.
Hearing Examiner

TRANSMITTED this 20th day of March, 2006, to the following:

APPELLANT: Abbey Road Group LLC
P.O. Box 207
Puyallup, WA 98371

PROPERTY OWNERS: Karl J. Thun, Virginia S. Thun, and Thomas Pavolka
P.O. Box 10
Graham, WA 98338-0010

Lisa Worthington-Brown
900 Two Union Square
601 Union Street
Seattle, WA 98101

Jeffrey Ganson
900 Two Union Square
601 Union Street
Seattle, WA 98101

Gregory F. Amann
1102 Broadway, Ste. 500
P.O. Box 1317
Tacoma, WA 98401

David Renaud
P.O. Box 207
Puyallup, WA 98371

Gil Hulsmann
P.O. Box 207
Puyallup, WA 98371

Orlean Yeaw
12709 82nd Avenue E.
Bonney Lake, WA 98321

Frank Stratton
46907 – 260th Avenue SE
Enumclaw, WA 98022

CITY OF BONNEY LAKE
Planning and Community Development Department
Elizabeth Chamberlain
P.O. BOX 7380
19306 BONNEY LAKE BLVD.
BONNEY LAKE, WA 98390-0944

NOTICE

CASE NO. ADMINISTRATIVE APPEAL
SKYRIDGE CONDOMINIUM

NOTICE

Pursuant to the City of Bonney Lake Municipal Code Section 14.120.020(F) entitled "Appeal of actions of the director(s) to the hearing examiner", the hearing examiner's decision on the appeals shall be final.

A-3

Administrative Record Exhibit 27

BONNEYLAKE Planning & Community Development Department

Commercial or Multi-Family Site Plan Review Application Form Type 3 Permit

FOR CITY USE ONLY	PROJECT NAME:
Submitted	

DOCUMENTS:

	1. A completed master land use application.
	2. The filing fee required pursuant to Bonney Lake Municipal Code (BLMC) Chapter 3.68.
	3. Twenty-six (26) copies of a completed SEPA environmental checklist to be obtained from the Planning Department or on line.
	4. Mailing labels that include the names and addresses of adjoining property owners within 600 feet of all sides of the subject property along with stamped No. 10 envelopes that include a return label for the city: City of Bonney Lake, P.O. Box 7380, Bonney Lake, Washington, 98390. Include a vicinity map that shows the 600 foot radius and numbered to correspond with list of mailing labels. Please provide source of mailing information and date generated.
	5. Five (5) copies of a preliminary stormwater report prepared by a registered Civil Engineer.
	6. Five (5) copies of a Traffic Impact Analysis.
	7. One set of the pre-application comments provided at the pre-application meeting.

MAPS/DRAWINGS

	1. Vicinity Map 8 ½ x 11 **30 copies**
	2. Reduced Site Plan 11 x 17 or 8 ½ x 11 **30 copies**
	3. Site Plan General Information (provided on cover sheet) **6 copies**
	a. North Arrow, scale of drawing, and date of drawing.
	b. Legal Description and parcel number(s) of the subject property.
	c. Site size
	d. Dwelling units allowed and proposed (residential only)
	e. Gross floor area allowed and proposed (non-residential)
	f. Open space/landscaping required and provided.
	g. Parking required and provided
	h. Building height allowed and proposed.
	4. On-site Traffic Circulation/Pedestrian Circulation

	a. Fire Department access
	b. Stacking/queuing of vehicles
	c. Parking areas
	d. Parking layout
	e. Delivery areas and location of all loading spaces
	f. Sidewalk locations
	g. Pedestrian circulation within parking lot
	h. Circulation between adjacent uses if applicable
	5. Existing and Proposed on-site conditions (shall be prepared by a registered Civil Engineer) **6 copies**
	a. Show property lines and lots.
	b. All existing and proposed driveways, intersections, and lane channelization.
	c. Existing and/or proposed public or common use areas.
	d. Existing and/or proposed easements.
	e. Existing and proposed utilities (water, sewer, power, gas, etc.)
	f. Existing and proposed roadway improvements, including sidewalk curb and gutter, tapers, and street lights.
	g. Existing driveways within 200 feet of the subject site.
	h. Show all property lines adjacent to the subject site.
	i. Proposed topography including heights of proposed retaining structures and rockeries.
	j. Grading, storm drainage, and erosion control plans prepared in accordance with City's Site Development Regulations.
	k. Location of proposed signs (approval under separate permit)
	6. Landscape Plan (BLMC 16.12): Must be prepared by a licensed landscape architect. **6 copies**
	a. Existing vegetation to be retained.
	b. General location of proposed trees, shrubs, and ground cover.
	c. A plant schedule providing the scientific name, common name, size, and spacing of each plant.
	d. Location, square footage, percentage, and dimensions of applicable landscape areas (parking lot, perimeter landscaping, buffer landscaping)
	e. Include method of irrigation.
	Additional Studies (site specific, may not be applicable)

Additional information may be required by the City. The applicant will be notified in writing if additional information is necessary.

PLEASE NOTE: In order to help work out potential problems before the formal submittal, The City of Bonney Lake shall require that the applicant attend a pre-application meeting. Please call the Planning and Community Development Department for information regarding the pre-application meetings.

I certify that I have provided all the necessary information as requested above.

Applicant Signature _____ Date _____

If you have any questions, please contact the Planning and Community Development Department at 253-862-8602 ext. 356.

A-4

Administrative Record Exhibit 28

BONNEY Lake

"The City of Bonney Lake's mission is to protect the community's livable identity and scenic beauty through responsible growth planning and by providing accountable, accessible and efficient local government services"

FOR STAFF USE ONLY
Date:
Project Description:
Permit Number:

COMMERCIAL BUILDING PERMIT APPLICATION

Application and Plan must be complete in order to be accepted, and all applications must be made "in person" at the Permit Center.

Traffic and Park Impact Fees are due at time of Permit Issuance.

Permit Type: (Please Circle)	New Commercial/Multifamily *bcmmf*	Repair/Remodel *bcrrr*	Temporary Occupancy *bctco*	Tenant Improvement *bctip*

Project Name / Description:	Value of Construction:
Site Address:	Tax Parcel Number:
General Location:	Lot Number:
Site Information: Section: Township: Range: ¼:	Lot Sq. Ft.: Impervious Surface:
Applicant:	Phone:
Street Address: City State/Zip	Fax #:
Property Owner:	Phone:
Street Address: City State/Zip	Fax #:
Contact Person:	Phone:
General Contractor:	Phone:
Street Address: City State/Zip	Fax #:
State Contractor's License #: Expiration Date:	City of Bonney Lake Business Registration:
Plumbing Contractor: (if different than General)	Phone:
Street Address: City State/Zip	Fax #:
State Contractor's License #: Expiration Date:	City of Bonney Lake Business Registration:
Mechanical Contractor: (if different than General)	Phone:
Street Address: City State/Zip	Fax #:
State Contractor's License #: Expiration Date:	City of Bonney Lake Business Registration:
Architect:	Phone:
Street Address: City State/Zip	Fax #:
Firm or Company Name:	E-Mail Address:
Engineer:	Phone:
Street Address: City State/Zip	Fax #:
Firm or Company Name:	E-Mail Address:
Lender ☐ **or Issuer of Payment Bond** ☐**:** Firm or Company Name	Phone:
Street Address: City State/Zip	*Reference RCW 19.27.095*

Description of work (Specific description):

Structure Information:

Existing Square Footage: _____ Additional Square Footage: _____ Total Square Footage: _____

Sq. Ft.: 1st Floor: _____ 2nd Floor: _____ 3rd Floor: _____ 4th Floor: _____ 5th Floor: _____

Building Height: _____ Number of Restrooms: _____ Number of Units: _____ Type of Construction: _____

*** Note: Maximum Building height is 35 feet, unless specifically, or otherwise, approved, as defined by Bonney Lake Municipal Code chapter 18.*

Existing use: ☐ Retail ☐ Restaurant ☐ Multi-Family ☐ Warehouse ☐ Hospital ☐ Church ☐ Manufacturing ☐ Motel/Hotel ☐ Office ☐ School/College/University ☐ Other _____

Proposed use: ☐ Retail ☐ Restaurant ☐ Multi-Family ☐ Warehouse ☐ Hospital ☐ Church ☐ Manufacturing ☐ Motel/Hotel ☐ Office ☐ School/College/University ☐ Other _____

By leaving the contractor section blank, I hereby certify that I am the owner, or agent of the owner, of the subject property and contractors will not be hired to perform any work in association with this permit. I acknowledge that in leaving the contractor section blank, I do not intent to perform work for selling purposes without being a registered contractor by the State of Washington (RCW 18.27.090). I also verify that if I do choose to hire a contractor, general or subcontractor, I will only hire those which are licensed by the State of Washington (RCW 18.27.110).

Applicant: (Signature and Print) **Date:**

COMMERCIAL BUILDING PERMIT

Must be submitted with the following:

The following is a brief outline of the requirements for a **New Commercial Building** submittal. This list is for reference purposes only and may not include all items needed to complete the plan check process. Note: All projects over 4,000 square feet or over four dwelling units must be designed by a licensed architect or engineer per RCW 18.08.410.

N/A	Submitted	
☐	☐	Pre-Application meeting with city staff to discuss the proposed scope of work, permit requirements, design standards, and the approval process per BLMC 14.20.030. This pre-application meeting is required unless waived by staff.
☐	☐	**TRAFFIC and PARK IMPACT FEES to be paid at time of Permit Issuance.**
☐	☐	Six copies of the site plan. Site plans must be to scale with given dimensions from structures to property lines (setbacks). Locations of existing and proposed structures, septic tank, drain field, and any other major physical features. Scale and North arrow, topography, and high water mark shall also be included on the site plan. (Three Copies for Tenant Improvement)
☐	☐	Six copies of the Approved Site Development Plans. (3 for Tenant Improvement)
☐	☐	Six copies of the floor plan and details. (3 for Tenant Improvement)
☐	☐	Six copies of the elevations view (all views). (3 for Tenant Improvement)
☐	☐	Six copies of the cross-sections view throughout the structure. (3 for Tenant Improvement)
☐	☐	Six copies of the foundation plans and details.
☐	☐	Six copies of the structural framing plans and details necessary to completely describe construction. (3 for Tenant Improvement)
☐	☐	Two copies of the manufacture's data and specifications sheet for pre-manufactured aspects of the structure (i.e. trusses).
☐	☐	Complete land clearing application including a site plan of the clearing area.
☐	☐	Washington State Energy Code Data (Gas/Electric/Oil/Propane/Heat Pump)
☐	☐	Sewer permit application - septic approval. If not in the sewer service area, approval for septic from the Pierce County Health Department (591-6470) is needed for all construction, including additions and building footprint changes, carports, garages, etc.
☐	☐	Certificate of sewer availability
☐	☐	Water connection application.
☐	☐	Certificate of water/fire flow availability.
☐	☐	Copy of recorded Legal Description from Pierce County
☐	☐	Copy of short plat if applicable.
☐	☐	Copy of a valid contractor's business license or current City license number, with tax ID number and L&I Contract number.
☐	☐	Road approach permit or Right of Way permit. A paved road approach is required for new construction.
☐	☐	Erosion control – indicate erosion control measures on plot plan submittals.
☐	☐	Storm retention – property will be subject to an engineered on site drainage retention system.
☐	☐	Attach plans, reports, or other documentation required with SEPA decisions.

GENERAL REQUIREMENTS:

☐ Six (6) complete sets of plans (Double line drawings).

☐ Six (6) sets of site plans. Minimum Scale 1" = 30'

☐ Plans shall be firmly bound on one edge.

☐ All plans and details are to be drawn to scale and fully dimensioned.

☐ All pages of the plans shall be on the same size paper. The minimum size of plans allowable is 24" X 36". Minimum scale 1/4" = 1' (1/8" = 1' may be permitted on exceptionally large projects with prior approval from the building official.)

☐ Plans shall be black or blue ink. All comments must be original and incorporated into the original tracings.

☐ The following information needs to be present on either a title sheet or on the plot plan:

- ☐ Owners Name
- ☐ Assessors Parcel Number
- ☐ Lot, Block, and Subdivision
- ☐ Project Address
- ☐ Mailing Address
- ☐ Square footage breakdown (office area, storage, sales area, etc.)

ENERGY CALCULATION FORMS

☐ Two (2) copies of State Energy Code Data (Gas/Electric/Oil/Propane/Heat Pump) must be included with plans.

ENGINEERING REQUIREMENTS

☐ Provide two (2) wet sealed (original stamp and signature) engineering calculations for the project.

☐ All engineering requirements are to be shown on plans. All plan sheets which show any engineering shall be wet stamped by the project engineer.

TRUSS CALCULATIONS

☐ Two (2) sets of Truss calculations are to be submitted at time of application. Calculations must be site specific, either with address or Assessors Parcel Number, and be wet sealed (original stamp and signature).

☐ All Truss locations are to be identified on the roof framing layout.

PLAN INFORMATION plans are to clearly depict all of the following information:

- ☐ Occupancy classification
- ☐ Type of construction
- ☐ Allowable floor area vs. actual floor area
- ☐ Allowable building height vs. actual building height
- ☐ Exiting requirements (i.e. exit plan with occupant loads)
- ☐ Fire rated assemblies
- ☐ Accessibility requirements
- ☐ Code editions and design parameters

SITE PLAN (min. 1" = 30') Include the following information:

- ☐ Scale
- ☐ North arrow
- ☐ Topography (Contour lines in 2'elevation increments)
- ☐ Lot drainage
- ☐ Easements
- ☐ Driveways and roads
- ☐ Sewer lateral
- ☐ Water main
- ☐ Electrical service meter
- ☐ Distance from property lines on all sides (North, South, East, and West)
- ☐ Show type and location of all retaining walls and slope stabilization
- ☐ Indicate exterior grade (Slope away from structure minimum of 2% for the first 10 feet)
- ☐ All cantilevers, with given dimensions from structures to property lines (setbacks)
- ☐ Distance between buildings
- ☐ All existing and proposed structures

FLOOR PLAN Include the following information:

- ☐ Identify all rooms and spaces (Include dimensions)
- ☐ Plumbing fixtures
- ☐ Water heater & furnace sizes
- ☐ Walls & partitions
- ☐ Appliances/ Washer & Dryer
- ☐ All windows and doors (Include all sizes and types)
- ☐ Size and location of underfloor and attic access
- ☐ Shear walls and shear wall schedule
- ☐ Guardrail type, height, and rail spacing
- ☐ Show size and location of skylight openings (If glass include manufactures information)
- ☐ Show location of a minimum of two (2) frost free hose bibs
- ☐ Stairs; show width, rise and run
- ☐ Location of A/C-D/C interconnected smoke detectors
- ☐ Landings at all exterior doors
- ☐ Fireplace & hearth including wood or pellet stoves. (Show size & type)

FOUNDATION/FLOOR FRAMING Include the following information:

- ☐ Size and location of all foundations and piers
- ☐ Size, span, and spacing of all floor framing members
- ☐ Size and spacing of all anchor bolts
- ☐ Post/beam size (Include connectors used)
- ☐ Type of floor sheathing and nailing to be used
- ☐ Hold downs and attachment
- ☐ Stepped footings, basement walls, and stemwall footings
- ☐ Size and location of under floor access and cross ventilation
- ☐ Deck and porch footings/piers
- ☐ Show separate floor framing layout for upper floors

ELEVATIONS Include the following information:

- ☐ All sides of proposed project
- ☐ All exterior grades, floor, and roof heights
- ☐ Roof pitch
- ☐ All posts, decks, overhangs, and details
- ☐ Foundation & attic vents
- ☐ Windows and doors shall match location on floor plan
- ☐ Types of material to be used such as, roofing material, siding, etc.

ROOF FRAMING PLAN Include the following information:

- ☐ Size, span, and spacing of all framing members
- ☐ Size and location of all beams, headers, and posts
- ☐ Type, size and nailing of roof sheathing
- ☐ Size and location of skylights
- ☐ Size and location of all ridges, hips, and valleys
- ☐ Each individual truss shall bear the same designation as the truss calculations
- ☐ Size and type of all framing hardware such as hangers, clips, straps, etc.

CROSS SECTIONS Include the following information:

- ☐ A minimum of one (1) complete **detailed** building construction cross sections.
- ☐ Indicate all material to be used including, but not limited to the following:
  - ☐ Insulation, (floor/roof/wall)
  - ☐ Sheathing & nailing (floor roof/ /wall)
  - ☐ Sheetrock, (type & thickness)
  - ☐ Footing size & depth (Include rebar size & spacing)
  - ☐ Piers, girders, posts, and hangers
  - ☐ Floor blocking
  - ☐ Shear transfer from roof through foundation
  - ☐ Anchor bolts
  - ☐ Decks, and deck framing
  - ☐ Rafters/trusses, roof framing. (Sizes & details)
  - ☐ Top plates, studs, and sole plates (Show sizes & details)
  - ☐ Rim joists (Show sizes & details)
  - ☐ Complete construction cross sections of fireplace and chimney framing
  - ☐ Size, span, and spacing of all framing members.
  - ☐ Type of material to be used under cantilevered floor joists
  - ☐ Roof overhangs, ceiling joists (Show sizes & details)

DETAILS (min. 1/2" = 1' scale)

Provide all necessary construction cross sectional details for all work shown. Details shall include, but not be limited to, the following;

- ☐ All Engineering details and schedules shown or referenced in structural calculations
- ☐ Footings, piers
- ☐ Pier/beam
- ☐ Post to girder
- ☐ Header connections
- ☐ Interior footings
- ☐ Retaining walls, etc.
- ☐ Pony walls, drag strap connections☐ Beam to joist connection
- ☐ Girder truss to truss connection
- ☐ Roof eves
- ☐ Top plate splice

Signature Date Phone

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ABBEY ROAD GROUP, LLC, a Washington limited liability company; Karl J. THUN and VIRGINIA S. THUN, husband and wife; THOMAS PAVOLKA; and VIRGINIA LESLIE REVOCABLE TRUST; and WILLIAM AND LOUISE LESLIE FAMILY REVOCABLE TRUST, Respondents, v. CITY OF BONNEY LAKE, a Washington municipal corporation, Appellant.	Pierce County Superior Court Case. NO. 06-2-06745-8 Court of Appeals Case No. 35383-1-II Certificate of Service

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DIVISION II
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I certify under penalty of perjury under the laws of the State of Washington that I sent the Respondents' Brief to the following:

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Via Legal Messengers

DATED at Tacoma, Washington, this 12th day of March, 2007.

Dawn Ketter

ORIGINAL