

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 JAN 12 P 3:35

BY RONALD R. CANEENTE

CLERK

NO. 80878-3

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,

Petitioners,

v.

CITY OF BONNEY LAKE, a Washington municipal corporation,

Respondent.

BY RONALD R. CANEENTE

2009 JAN 21 A 10:4

FILED
SUPREME COURT
STATE OF WASHINGTON

BRIEF OF AMICUS CURIAE, WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS, IN SUPPORT OF RESPONDENT

Jeffrey S. Myers
Law, Lyman, Daniel,
Kamerrer & Bogdanovich

Mailing Address:
P.O. Box 11880
Olympia, WA 98508-1880

Street Address:
2674 R.W. Johnson Blvd.
Tumwater, WA 98501

Tel: (360) 754-3480
Fax: (360) 357-3511

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

A. LOCAL LAND USE REGULATIONS FLOW FROM THEIR CONSTITUTIONAL POLICE POWERS. 1

B. PETITIONERS PROPOSE A RADICAL EXPANSION OF THE VESTED RIGHTS DOCTRINE. 3

C. THE COST RATIONALE OFFERED BY PETITIONERS IS NOT A SUFFICIENT OR RELIABLE BASIS TO EXTEND THE VESTED RIGHTS DOCTRINE. 4

1. The Supreme Court has wisely rejected the “total cost” approach advocated by Petitioners in determining when rights should vest. 4

2. Petitioners’ proposal creates uncertainty & promotes permit speculation. 8

III. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

<i>Erickson v. McLerran</i> , 123 Wn.2d 864, 872 P.2d 1090 (1994)	passim
<i>Hass v. Kirkland</i> , 78 Wn.2d 929, 932, 481 P.2d 9 (1971)	1-2
<i>Isla Verde Intern. Holdings, Ltd. v. City of Camas</i> , ___ Wn.App. ___, 196 P.3d 719, 726, n. 14, (2008)	1
<i>Norco Constr., Inc. v. King Cy.</i> , 97 Wn.2d 680, 649 P.2d 103 (1982)	3
<i>Valley View v. City of Redmond</i> , 107 Wn. 2d 621, 733 P.2d 182 (1987)	5, 6, 7
<i>Village of Euclid v. Ambler Realty Co.</i> , 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)	2

Statutes

RCW 19.27.095	3, 7, 8, 11, 13
RCW 36.70A.010	2
RCW 36.70A.060	2
RCW 36.70B.010	6, 8
RCW 58.17.033	3, 7, 8, 11, 13

I. INTRODUCTION

Amicus Curiae Washington State Association of Municipal Attorneys (WSAMA) contends that the unprecedented extension of the vested rights advocated by Petitioners is an unwarranted and ill founded proposal. This proposal usurps state and local legislative authority and is not in the public interest.

II. ARGUMENT

A. LOCAL LAND USE REGULATIONS FLOW FROM THEIR CONSTITUTIONAL POLICE POWERS.

Local Governments are empowered by the State Constitution to regulate land use to protect public health, safety and the environment. Land use regulatory authority stems from the police powers granted to local governments by the State Constitution. Art. XI, Section 11 of the State Constitution provides:

Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

The Police Powers identified by Art. XI, Section 11 authorize local governments to adopt zoning, setbacks and other restrictions reasonably necessary to protect public health safety and the environment. *Isla Verde Intern. Holdings, Ltd. v. City of Camas*, ___ Wn.App. ___, 196 P.3d 719, 726, n. 14, (2008); *Hass v. Kirkland*, 78

Wn.2d 929, 932, 481 P.2d 9 (1971); see also, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

The vested rights doctrine contravenes the police powers of local governments to regulate for the protection of the public and the environment by freezing the laws in effect with respect to a particular development proposal. In so doing, the unanimous Supreme Court in *Erickson v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994) stated:

Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

123 Wn.2d at 873-874.

State laws such as the Growth Management Act require local governments to regulate the use of land to control the burdens and societal costs imposed by uncontrolled growth. See RCW 36.70A.010. Local governments are required to plan for growth and its transportation and other infrastructure impacts, as well as to enact ordinances protective of environmentally sensitive “critical areas” and to conserve agricultural, forest and mineral lands. RCW 36.70A.060.

As discussed below, the proposal advocated by Petitioners unduly expands and too easily grants “vested rights” potentially

undermining the ability of local governments to accomplish the goals of the Growth Management Act and to resolve issues of public concern by exercising their constitutionally granted police powers.

B. PETITIONERS PROPOSE A RADICAL EXPANSION OF THE VESTED RIGHTS DOCTRINE.

Petitioners' Supplemental Brief confirms that they seek to broadly expand the vested rights doctrine into a "global doctrine that includes all land use permits." Supp. Brief at 4. This extension undermines local regulatory authority to address real environmental and societal problems, and is not justified by the cost argument advanced by Petitioners.

As an initial matter, the more recent decisions from this Court have rejected attempts to expand the vested rights doctrine, leaving such policy determinations to the legislature, which is better suited to respond to and balance the relative burdens on the developer and society. See *Norco Constr., Inc. v. King Cy.*, 97 Wn.2d 680, 649 P.2d 103 (1982); *Erickson, supra*. This court should decline Petitioners' invitation to usurp the position of the Legislature by extending the vested rights doctrine to areas that the Legislature has chosen not to include. See RCW 19.27.095, RCW 58.17.033.

C. THE COST RATIONALE OFFERED BY PETITIONERS IS NOT A SUFFICIENT OR RELIABLE BASIS TO EXTEND THE VESTED RIGHTS DOCTRINE.

1. The Supreme Court has wisely rejected the “total cost” approach advocated by Petitioners in determining when rights should vest.

The principle reason advanced by Petitioners is virtually identical to the argument that the unanimous Supreme Court rejected in *Erickson v. McLerran*. In *Erickson*, the Court summarized the developer’s argument as follows:

Erickson lastly argues the practicalities of modern property development require us to extend the vested rights doctrine to Seattle’s MUP process to maintain the balance of private and public interests embodied in the doctrine. Both parties agree land development in Washington has become an increasingly complex, discretionary, and expensive process. Additionally, both parties agree the MUP review process is now a critical stage in Seattle property development. Land use, zoning, and environmental regulations all must be satisfied before a MUP will be issued. The parties disagree, however, on what impact these requirements should have on the vesting doctrine. Erickson asserts the increasingly onerous nature of land use review makes the use review (such as Seattle’s MUP process), rather than building permit review, the critical stage in land use regulation and requires the application of the vested rights doctrine to MUP’s.

123 Wn.2d at 873.

Erickson also rejected the approach followed by Petitioners in determining what costs are relevant in determining when to apply the vested rights doctrine. Petitioners claim that only the total cost of the

application is relevant, not the relative cost in comparison to the total project cost. Answer to Amicus Brief at 5. Again, this is at odds with the unanimous opinion in *Erickson*, where the Court stated:

The cost of obtaining a MUP varies greatly depending on the complexity of the proposal. It is the relative cost of the application compared to the total project cost that should be considered in evaluating the deterrent effect of the MUP application's cost to speculation in development permits.

123 Wn.2d at 874 (emphasis added).

Petitioner contends that differences in the permit process and increasing complexity have been created since 1987. Supplemental Brief at 3; Answer to Amicus Brief at 4. The adoption of the Growth Management Act and Regulatory Reform Act are provided as reasons to reverse *Erickson* and extend the vested rights doctrine to all land use permit applications. Supp. Brief at 4.

Petitioners' attempts to show that the permitting environment has so changed such that the vested rights doctrine should be modified are based on speculation and distinctions without a difference. Their briefing speculates that the site plan in *Valley View v. City of Redmond*, 107 Wn. 2d 621, 733 P.2d 182 (1987) "likely did not require the detail and financial commitment" required by Bonney Lake's process. Petitioners' conclusion that costs and complexity have increased are at odds with history.

The need for the Regulatory Reform Act in the mid 1990s arose because there was an increasing variety of complex permit requirements. See RCW 36.70B.010. The complex permit system that Petitioners claim to be of recent origin was at the heart of the Legislature's rationale in enacting Ch. 36.70B at the same time the Court was considering the same arguments for extending the vested rights doctrine. Other than speculation, Petitioners fail to support their contention that land development process has become more complex. Supp. Brief at 3.

The case most on point in rejecting Petitioner's proposed revisions to the vested rights doctrine is *Erickson*, which was decided by a unanimous court in 1994, after enactment of the GMA and less than one year before the Legislature, in enacting the Regulatory Reform Act, made findings as to the complexity and increasing number of local permits. In fact, when *Erickson* was decided in 1994, the process was just as complex, if not more so than it is today in the wake of the Regulatory Reform Act. Moreover, the type of permit at issue in *Erickson* provides the same type of preliminary comprehensive review that is provided by Bonney Lake's site plan review process.

Careful examination of the permitting requirements in *Valley*

View v. City of Redmond, supra refutes Petitioners' contention that permitting has grown too complex for the current vested rights doctrine. The situation was also complex in 1987 when *Valley View* was decided. An examination of the facts in *Valley View* shows that it was a complex permitting task, involving multiple iterations of preliminary and final site plans, a shorelines substantial development permit, SEPA review, stormwater plans, sewer extension plans and approval of protective covenants. Such multiple permit reviews is comparable to the permit review for the Skybridge Condominium project described by Petitioners. Supp. Brief at 3, fn. 9.¹

Petitioners correctly suggest that the Regulatory Reform Act standardized the permit review process, although they fail to note that local governments still have wide discretion in adopting different permit requirements. Supp. Brief at 3-4 . Petitioners are incorrect, however, in stating that there is no uniform standard for vesting of project permit applications. The Legislature provided such uniformity in adopting RCW 19.27.095 and RCW 58.17.033. It is left to local legislative bodies to exercise the judgment constitutionally committed

¹ Petitioners inflate the statement of costs incurred in the permitting process, claiming more than \$228,000.00 was incurred. Answer to Amicus Brief, at 5. This statement is contrary to the unappealed finding of fact by the Hearing Examiner that the costs were actually \$96,500.00. See Court of Appeals decision, 184 Wn. App. at 189, fn. 6. Most of the extra costs are due to the \$100,000 cost to acquire an option for the property, which is not a cost imposed by the City's permit process.

to them by Art. XI, Section 11 of the State Constitution to adopt variations to the statutory vesting scheme.

In light of the societal costs incurred in preventing local legislative bodies from exercising police powers, the unanimous *Erickson* court correctly pointed to the Legislature to properly balance these costs. The permitting environment is not appreciably different from that existing in the early 1990s when, less than a year after *Erickson*, the Legislature found:

- 1) an increasing number of regulations and permits
- 2) increasing numbers of permit and environmental review processes; and
- 3) increased regulatory burdens adding to the cost and time needed to obtain permits.

See RCW 36.70B.010 [Laws of 1995, Ch. 347, Section 401].

The Court should preserve the existing vesting rules that allows fairness to developers but preserves rights of local government to exercise police powers to protect public health, safety and environment. This balance has been struck by our Legislature in adopting RCW 19.27.095 and RCW 58.17.033. Further extension is unwarranted.

2. Petitioners' proposal creates uncertainty & promotes permit speculation.

The Legislature's adoption of a bright line test for applying the

vested rights doctrine to “freeze” development regulations when a completed building permit application or plat application is filed provides the certainty that Petitioners claim is lacking. See Supplemental Brief at 4.

Petitioners’ solution is to have all permits vest development rights. Brief at 4. Petitioners then offer that “for permits intended to control subsequent development of a property and provide the parameters for subsequent permits, such as site plan and master use permits, vesting should include the right to develop the property in accordance with the site development permit or master use permit.” Id. At 5.

The Master Use Permit process at issue in *Erickson* and the site plan review process in Bonney Lake now before the Court both offer an opportunity for developers to test the feasibility of large development projects without incurring relatively large costs. Applying vested rights at this stage would encourage permit speculation. *Erickson* correctly rejected this approach for four reasons, all of which continue to apply today.

First, the *Erickson* Court noted that costs in one case do not justify demonstrate a significant burden in all cases, which can vary greatly depending on the nature of the proposed development.

Secondly, a rule based on costs would reintroduce a “case-by-case review of a developer's reliance interest we rejected 40 years ago when we adopted the vested rights doctrine”. *Erickson*, 123 Wn.2d at 874.

Third, general development review at early stages in the process, like the MUP at issue in *Erickson* or Bonney Lake's site plan process here, allow developers to test the feasibility of projects in a relatively inexpensive manner. Developers can therefore defer many of the necessary costs until later in the development. Vesting at this early stage of the process, would be premature and comes before the developer has manifested a substantial commitment to completion of the project. *Erickson*, 123 Wn.2d at 874-875. This result encourages permit speculation, and further prevents changes in regulations that may be necessary to respond to environmental or growth related problems.

Finally, no state in our union has opted for such a radical proposal. This was true in 1994 when the Court considered *Erickson*, 123 Wn.2d at 875, and it remains true today. In such circumstances, the Court should leave to the Legislature the policy determinations that Petitioners ask the Court to determine.²

² Petitioners argues that the courts have recently extended vested rights to conditional use permits in *Weyerhaeuser v. Pierce County*, 95 Wn.App. 883, 976 P.2d 1279 ((1999). Supp. Brief at 5; Answer to Amicus Brief at 9. Petitioners are incorrect. Vested rights were extended to conditional use permits by the

Petitioners' proposal would establish a new test, which ironically creates as much uncertainty as they claim now exists. First, they seek to apply vesting to all development permits. Then, Petitioners propose an unworkable test for determining if vesting applies to all subsequent permits or only the permit at issue. Supp. Brief at 5. Petitioners would vest all future permits if the permit applied for is "intended to control the subsequent development of a property and provide the parameters for subsequent permits."

This approach is exactly what the Court unanimously rejected in *Erickson* where the Court refused to extend vesting to a Master Use Permit. In so doing, the Court wisely recognized that local governments should be free to adopt local permitting schemes which allowed early determination of project feasibility and identification of specific future requirements. Those local governments are also in the best position to determine the fairness of extending vesting to such permits. The approach advocated by Petitioners would force local governments to accept premature vesting, or abandon such innovative and cost effective techniques.

When examined more carefully, such a rule would create

Supreme Court in 1968 in *Beach v. Board of Adjustment*, 73 Wn.2d 343, 438 P.2d 617 (1968). WSAMA is not aware of any extension of the vested rights doctrine since the Legislature adopted RCW 19.27.095 and RCW 58.17.033 in 1987.

confusion as to when vesting occurs. For example, it would make it uncertain if a relatively simple permit application, such as a grading permit application, would vest for all future development permits because of the expense involved. Expense will vary greatly given the different types of development proposals.

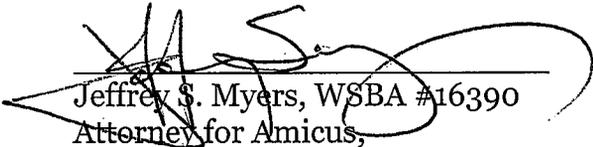
Moreover, developers frequently use a relatively simple application, like a grading permit or site plan application, to trigger local SEPA processes and test whether a project is feasible. Such SEPA review necessarily implicates the scope of the entire subsequent development of the property and provides parameters for incorporating mitigation requirements into subsequent permits. In such circumstances, the test proposed by Petitioners could arguably extend vesting at the earliest stage of the permit process where relatively small investments have been made.

This encourages permit speculation, even if there are deadlines in the permit process, especially since many codes allow repeated extensions of these deadlines. The lengthy permit deadlines cited by Petitioners, Supp. Brief at 6, do not begin to run with the filing of the application, but on granting of the permit. Such deadlines do not provide a meaningful deterrent to permit speculation.

III. CONCLUSION

The Legislature is the best place to balance the burdens placed on developers in a fair manner that provides sufficient certainty and maintains legislative authority to respond to public concerns. The Legislature has properly struck this balance by adopting two statutes, RCW 19.27.095 and RCW 58.17.033, which define when the vested rights doctrine applies. The Court should reject Petitioners' invitation to judicially extend vesting to new uncharted territory.

RESPECTFULLY SUBMITTED this 12th day of January, 2009.



Jeffrey S. Myers, WSBA #16390
Attorney for Amicus,
Washington State Association of
Municipal Attorneys