

X
FILED

DEC 10 2007

CLERK OF SUPREME COURT
STATE OF WASHINGTON

NO. 80878-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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.

ANSWER TO ABBEY ROAD'S PETITION FOR REVIEW

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
07 DEC 10 AM 7:57
BY RO. ALD. R. CARPENTER
CLERK

Jeffrey Ganson
WSBA #26469

Lisa M. Worthington-Brown
WSBA #34073

Attorneys for City of Bonney Lake

Dionne & Rorick
Attorneys at Law
900 Two Union Square
601 Union Street
Seattle, Washington 98101
Tel: (206) 622-0203
Fax: (206) 223-2003

TABLE OF CONTENTS

A. IDENTITY OF RESPONDENT 1

B. COURT OF APPEALS DECISION 1

C. ISSUE PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE..... 1

E. ARGUMENT WHY REVIEW SHOULD BE DENIED 5

 1. *This Court has already determined that site plan review applications do not vest development rights.* 5

 2. *The Erickson holding has stood for 13 years without any legislative intervention.*..... 11

F. CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Allenbach v. Tukwila, 101 Wn.2d 193, 676 P.2d 473 (1984).....9
Erickson & Assoc. v. McLerran, 123 Wn.2d 864, 872 P.2d 1090 (1994) ...5, 6,
7, 11
Erickson & Assocs. v. McLerran, 69 Wn. App. 564, 849 P.2d 688 (1993) 10
Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wn. App. 709, 558
P.2d 821 (1977) 6
Juanita Bay Valley Cmty. Ass'n v. Kirkland, 9 Wn. App. 59, 510 P.2d 1140
(1973) 6
Talbot v. Gray, 11 Wn. App. 807, 525 P.2d 801 (1974) 6
Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 733 P.2d 182
(1987) 7
Victoria Tower Partnership v. Seattle, 49 Wn. App. 755, 745 P.2d 1328 (1987)
.....6, 7, 9, 10

Other Authorities

SMC 23.76.0265

A. IDENTITY OF RESPONDENT

The City of Bonney Lake asks this Court to deny review of the Court of Appeals' decision terminating review designated in Part B of the Petition for Review.

B. COURT OF APPEALS DECISION

The City requests denial of Abbey Road's Petition for Review the opinion of the Court of Appeals Division II in case number 35383-1-II filed on October 9, 2007.

C. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals correctly determine that filing a site plan review application does not vest any development rights?

D. STATEMENT OF THE CASE

On June 15, 2005, representatives from the City of Bonney Lake and from the Abbey Road Group, LLC, attended a pre-application meeting regarding Abbey Road's proposed Skyridge Condominiums project. Transcript (2/6/2006) at 14; Administrative Record (AR) Exhibit 15. During this meeting, City staff specifically told Abbey Road that a building permit application would be necessary to vest their development rights. Transcript (2/6/2006) at 15. At that time, the property was zoned C-2, which allowed for multi-family developments. Clerk's Papers (CP) at 13.

Abbey Road was also given a letter, dated June 15, 2005, that summarized the issues discussed at the meeting. AR Ex. 15. This letter specifically stated that a building permit is necessary for a “complete application” and that “completion of the pre-application process in the content of this letter does not vest any future project application.” AR Ex. 15.

On September 6, 2005, City Planning Director Bob Leedy had a discussion with David Renaud from Abbey Road. During that conversation, Mr. Renaud acknowledged that the City had informed Abbey Road that a building permit application was required for vesting. Mr. Leedy confirmed this, but suggested that Abbey Road consider alternative means of vesting. Transcript (2/6/2006) at 91-92.

On September 13, 2005, Abbey Road submitted its “Commercial/Multifamily Site Plan Review Application.” Transcript (2/6/2006) at 38-40. Site plan review is an informal process which is initiated by a developer filing a relatively cursory application. AR Ex. 27, Transcript (2/6/2006) at 17. This occurs at the very early stages of development. After the application is filed, the developer and City look at the proposed project and the applicable regulations to determine if the proposal is feasible. Transcript (2/6/2006) at 17-18, 110-111. For example, the process involves looking at the applicable zoning regulations and going through the

environmental review process. Transcript (2/6/2006) at 17. This allows developers to get as much information about the development requirements while their financial investment in the project remains relatively low. Transcript (2/6/2006) at 110. At any time in this process, the developer may determine that the plans are sufficiently concrete and feasible to file a complete building permit application, which vests development rights. Transcript (2/6/2006) at 17-18. Abbey Road did not file a building permit application for its proposed project. Transcript (2/6/2006) at 18.

Also on September 13, 2005, the Bonney Lake City Council passed Ordinance 1160, re-zoning the Abbey Road property to RC-5, a zoning that does not allow multi-family development of the sort proposed by Abbey Road. AR Ex. 9. Because Abbey Road's submittal did not include a building permit application, Abbey Road's proposed development was not vested, and could not proceed under the new zoning ordinance. Therefore, it would be pointless for the City to process Abbey Road's site plan review application.

On September 28, 2005, Abbey Road emailed the Planning Department to request a formal letter indicating that their application was complete. Transcript (2/6/2006) at 93. In response, on October 12, 2005,

Mr. Leedy sent a letter to Abbey Road, stating that site plan review does not result in any permit or approval under the City Code and therefore no determination of completeness for vesting purposes could be issued. AR Ex. 5, Transcript (2/6/2006) at 93.

On October 28, 2005, Abbey Road filed an administrative notice of appeal, challenging the Director's decision. AR Ex. 1. A public hearing was held on February 6, 2006 before Bonney Lake Hearing Examiner Stephen K. Causseaux, Jr. Transcript (2/6/2006) at 3. On March 20, 2006, the Hearing Examiner denied Abbey Road's appeal, determining that Abbey Road's submittal did not vest any development rights. CP 18-14.

Abbey Road filed a petition in Pierce County Superior Court under the Land Use Petition Act, chapter 36.70C RCW, challenging the Hearing Examiner's determination. CP 1-16. The trial court granted Abbey Road's petition. Transcript (8/18/2006) at 32-33. In doing so, the trial court relied primarily on the application form that was prepared by City staff and found that "Abbey Road had a right to rely on the completion and filing of their Type 3 site development permit application as vesting" Transcript (8/18/2006) at 33. The City filed a timely notice of appeal. On October 9, 2007, the Court of Appeals reversed the trial court's decision,

holding that a site plan review application does not vest any development rights.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. This Court has already determined that site plan review applications do not vest development rights.

In *Erickson & Assoc. v. McLerran*, the Washington State Supreme Court held that development rights did not vest upon filing of a master use permit application. 123 Wn.2d 864, 877, 872 P.2d 1090 (1994). The site plan review process in Bonney Lake is substantially similar to the master use permit process at issue in *Erickson*. Thus, as correctly determined by the Hearing Examiner and the Court of Appeals, the Supreme Court's analysis in *Erickson* is controlling.

In *Erickson*, this Court reviewed Seattle's Master Use Permit (MUP) process. Under the Seattle Municipal Code (SMC), MUPs are site plan approval permits required for development. "MUP's are 'umbrella' or 'master' permits, which actually represent a number of independent regulatory components, including environmental impact review, comprehensive plan review, and other use inquiries." *Erickson*, 123 Wn.2d at 866. SMC 23-76.026 provides that vesting occurs whenever a MUP is issued or whenever a building permit application is filed. In *Erickson*, a developer brought suit, arguing that this vesting scheme was

unconstitutional and that vesting should occur when the MUP application is filed. This Court rejected this argument and held that Seattle's vesting scheme was constitutional. *Erickson*, 123 Wn.2d at 876-77. Below, Abbey Road argued that *Erickson* does not apply because the City has not enacted a statutory vesting scheme like the one at issue in *Erickson*. Transcript (8/18/2006) at 32. The City, however, is not required to pass an ordinance to adopt the default vesting rule—that vesting occurs when a party files a completed building permit application, preliminary plat application, subdivision application, or one of the few other applications that were vesting events at common law. *Adams v. Thurston County*, 70 Wn. App. 471, 475, 855 P.2d 284 (1993).¹

Abbey Road argues that vesting when filing a site plan review application is the “default” rule for vesting, relying on *Victoria Tower Partnership v. Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987), a Division One case decided 13 years before *Erickson*. This ignores the clear reasoning of *Erickson* and also the express declaration by this Court that “as a general principle, we reject any attempt to extend the vested rights doctrine to site

¹ The vested rights doctrine has been applied to septic tank permits (*Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 558 P.2d 821 (1977)); shoreline permits (*Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974)); and grading permits (*Juanita Bay Valley Cmty. Ass'n v. Kirkland*, 9 Wn. App. 59, 510 P.2d 1140 (1973)).

plan review.” *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 639, 733 P.2d 182 (1987). Furthermore, *Victoria Tower* does not analyze the issue of whether a site plan review application is sufficient to vest development and therefore is not instructive here.

Erickson squarely addresses the constitutionality of denying vesting at the initiation of site plan review, unlike *Victoria Tower*, which does not address the issue at all. In fact, in *Erickson*, this court rejected the very arguments Abbey Road makes in this case. First, Abbey Road argued that in filing an application for site plan review, a developer has expended sufficient resources to prevent permit speculation and shows the required commitment to the project to require vesting. The court in *Erickson* specifically rejected this argument:

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. Second we reject a cost-based analysis that reintroduces the 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. Thus, it is clear that the court should not attempt to employ a cost-based analysis. But even if it did, Abbey Road spent around \$100,000 to file its site plan review application—that amounts

to only 0.007% of the projected project cost. CP 12.² Such a relatively small financial commitment is inadequate to protect the public against permit speculation. Abbey Road's proposed development is a very large project with 24 separate buildings and approximately 575 condominium units. CP 12. The information that is necessary to initiate site plan review is relatively simple and does not begin to address the complexities of a project of this magnitude. Allowing vesting at this very early stage of development and with such a cursory filing encourages permit speculation and runs counter to the purposes of the vesting doctrine.

Additionally, Abbey Road argued below that *Victoria Tower* establishes the "default" rules for vesting with regard to site plan applications. Abbey Road argues that the Court of Appeal's decision is in conflict with *Victoria Tower*. Petition at 14. Abbey Road's conclusion, however, is incorrect. While *Victoria Tower* does mention a MUP application, it certainly does not analyze the MUP process. Instead, its primary focus is on environmental review. The *Victoria Tower* court framed its reasoning in terms of building permit applications. For example, the court of appeals restated the vesting doctrine: "Under [the vested rights

² Abbey Road did not assign error to this portion of the hearing examiner's finding of fact. CP at 9.

doctrine], developers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application.” *Victoria Tower*, 49 Wn. App. at 760 (emphasis added) (quoting *Allenbach v. Tukwila*, 101 Wn.2d 193, 197, 676 P.2d 473 (1984) (holding that development rights vested upon filing of completed building permit application)). The court then proceeded as if it were dealing with a building permit application and not a MUP application. For example, the court stated:

Under the vested rights doctrine, an ordinance must be operative before it can be used to evaluate a building permit application, regardless of the extent to which the applicant did or did not rely on previous law. Because the multi-family policies were not yet adopted when Victoria applied for its permit, we conclude that the City Council violated the vested rights doctrine in using them to condition Victoria’s proposal.

Victoria Tower, 49 Wn. App. at 762 (emphasis added). Given the *Victoria Tower* court’s analysis and repeated mention of the filing of a building permit application as the vesting event, one must assume that *Victoria Tower Partnership* also filed a building permit application. Thus, *Victoria Tower* does not support *Abbey Road*’s position. Furthermore, even if a building permit application was not filed, the *Victoria Tower* court did not

explain its reasoning for treating a MUP application the same as a building permit application. As the Court of Appeals in *Erickson* noted:

Although *Victoria Partnership* applied the vesting doctrine in the context of a MUP application, the court did not address the question of whether the vesting rule for building permits should be extended to MUP's. The court apparently assumed that the two types of permits were equivalent. The focus of the opinion was on whether subsequently enacted SEPA (State Environmental Policy Act of 1971) policies qualified as zoning and building ordinances, and thus fell within the vested rights doctrine. *Victoria Tower Partnership*, 49 Wn. App. at 761. We can only conclude from the court's analysis that the distinction between a MUP and a building permit was not before the court.

Erickson & Assocs. v. McLerran, 69 Wn. App. 564, 568, 849 P.2d 688 (1993).

Moreover, *Victoria Tower* ignores the clear precedent in *Valley View*, which held that site plan review does not fall within the scope of the vesting doctrine.³ Given this and the fact that *Erickson* is a more recent decision from a higher court, it is clear that *Erickson* and not *Victoria Tower* controls in this case.

³ In *Valley View* the developer filed for site plan review for a development consisting of 12 buildings. The developer filed building permit applications for five of the 12 buildings before Redmond rezoned the property. The developer argued that all 12 proposed buildings were vested based on the site plan review. The court specifically rejected that argument and declined to extend the vested rights doctrine to include site plan review. *Valley View*, 107 Wn.2d at 639.

2. The *Erickson* holding has stood for 13 years without any legislative intervention.

This Court's *Erickson* decision was issued in 1994. This Court stated: "Given the substantial legislative activity in land use law, we are unwilling to modify or expand the vested rights doctrine unless it is required to protect the constitutional interests at stake." *Erickson*, 123 Wn.2d at 876. This Court then determined that constitutional interests did not warrant an expansion of the vested rights doctrine for site plan review, therefore leaving any change in the vesting scheme to the Legislature. This served as an invitation to the Legislature to make any changes that it deems necessary. *Erickson*, 123 Wn.2d at 876-77. To date, the Legislature has not acted to extend the vesting rules and thus, this Court should interpret this as the Legislature's agreement with the decision in *Erickson* and not alter that holding.

F. CONCLUSION

This Court has already issued a thorough and complete opinion addressing the issues raised by Abbey Road. As such, this Court should deny Abbey Road's Petition for Review.

RESPECTFULLY SUBMITTED this 6th day of December, 2007.

DIONNE & RORICK

A handwritten signature in cursive script, appearing to read "Jeffrey Ganson", written over a horizontal line.

By: Jeffrey Ganson, WSBA #26469
Lisa M. Worthington-Brown,
WSBA #34073
Attorneys for City of Bonney Lake

g:\bonlk\105aa\71205answer.pld.doc

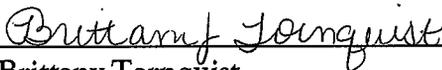
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent via U.S. first class mail, postage prepaid, Answer to Abbey Road's Petition for Review to the following:

Supreme Court of Washington
Temple of Justice
Post Office Box 40929
Olympia, Washington 98504

Loren D. Combs
McGavick Graves
1102 Broadway, Suite 500
Tacoma, Washington 98402-3534

Dated this 7th day of December 2007.


By: **Brittany Tornquist**