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STATE OF WASHINGTON
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DEPUTY

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.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Abbey Road Group, LLC, Karl J. Thun and Virginia S. Thun, Thomas Pavolka, Virginia Leslie Revocable Trust, and William and Louise Leslie Family Revocable Trust (collectively “Abbey Road”) ask this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Abbey Road requests review of the opinion of the Court of Appeals Division II in case number 35383-1-II filed on October 9, 2007. A copy of the decision is in the Appendix at pages A-1 through A-16.

C. ISSUES PRESENTED FOR REVIEW

Does a complete 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 and costly site development permit process; and (3) no vesting ordinance, or ability to otherwise vest the entire project until complete building permits for all buildings are submitted.

D. STATEMENT OF THE CASE

Abbey Road owns three abutting parcels of property totaling 36.51 acres in the City of Bonney Lake (“Property”), and desires 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 5.¹

For commercial and multi-family development proposals, the City requires applicants to obtain a “Type 3” site development permit² 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 complete application. (“Type 3 Permit Application Form”) AR Ex. 27.

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 Type 3 Permit Application Form, including SEPA checklist, storm water report, traffic impact analysis, detailed site

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.

² The court of appeals in the present case refused to refer to the application as a “permit,” and instead referred to it as “site development plan review.” However, the Hearing Examiner correctly found that the Type 3 site development review process 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

plan prepared by a civil engineer, detailed landscaping plan prepared by a landscape architect, and an application fee of \$3674.00. AR Exs. 11-22; CP 29, FF 6(d). It cost Abbey Road more than \$228,000.00³ 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 and the application would not be processed because the Project was not allowed in the RC-5 zone. AR Ex. 5.

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).

³ 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 for the application and \$100,000 to secure its option on the property. AR Ex. 29; Transcript (02/06/2006) at 46. Contrary to the court of appeals' assertion in this case, 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 Hearing Examiner's math is wrong. $100,000 / 143,000,000 = .0007$, which corresponds to .07% not .007% as the Hearing Examiner stated.

Abbey Road appealed the Director's administrative determination to the Hearing Examiner, and on March 20, 2006, the Hearing Examiner issued his decision denying Abbey Road's appeal. CP 17-41. 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 September 15, 2005, the date Abbey Road's complete Type 3 permit application was submitted. CP 114. The City of Bonney Lake appealed this decision. On October 9, 2007, the court of appeals reversed the trial court's decision.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. *The decision of the court of appeals is in conflict with a decision of the Supreme Court.*

The decision of the court of appeals is in conflict with the decision of *Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994) in the sense that it concludes incorrectly that *Erickson* is controlling authority. *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 Seattle 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

(“MUP”) without a building permit application. *Id.* at 866. The *Erickson* 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, 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.

The absence of a vesting ordinance is a critical distinction. With a vesting ordinance, developers know the vesting ground rules with certainty before they incur the costs of preparing a land use application. If they know that a certain application does not vest, they can weigh the risk of an intervening change in regulations before deciding whether to submit an application. With the enactment of the Regulatory Reform Act, RCW Chapter 36.70B (“RRA”), developers have an expectation that land use applications that are considered complete are vested in the absence of a vesting ordinance that provides otherwise.

The RRA was adopted in 1995, a year after *Erickson*, to streamline, enhance predictability and reduce unnecessary duplication in the land use permitting process. *See* RCW 36.70B.010; Roger D. Wynne,

Reclaiming Vested Rights, 24 Seattle Law Rev. 851, 918 (2001). The RRA sets forth uniform procedures and standards for reviewing project permit applications⁴ for all local governments to follow. Under the RRA, local governments generally must: (1) issue a determination of completeness within 28 days of receiving an application;⁵ (2) provide notice of the application and an opportunity to comment;⁶ (3) make a determination of the proposed project's consistency with applicable development regulations;⁷ and (4) issue a decision within 120 days of a completed application.⁸

It is implicit in these procedures that the development regulations for a particular project permit application will be fixed at some point in time so that a timely and predictable determination of consistency can be made. The logical fixing point that will allow for the most efficient review is when a complete application is filed, which happens to be the vesting point for virtually every type of project permit application. *See* RCW 19.27.095 (building permits); RCW 58.17.033 (subdivision, short subdivision, binding site plan); *Weyerhaeuser v. Pierce County*, 95 Wn.

⁴ "Project permit" includes building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals, and other land use project approvals. RCW 36.70B.020(4).

⁵ RCW 36.70B.070.

⁶ RCW 36.70B.110.

⁷ RCW 36.70B.030 - .040.

⁸ RCW 36.70B.080(1).

App. 883, 890, 976 P.2d 1279 (1999)(conditional use permits); *Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974)(shoreline substantial development permits); *Juanita Bay Valley Comm'ty Ass'n v. City of Kirkland*, 9 Wn. App. 59, 510 P.2d 1140 (1973) (grading permits). However, according to the court of appeals in the present case, a site development permit application has no vesting point whatsoever. If the court of appeals was correct, then development regulations governing a site development permit application could change after all notice, comment, and review for a permit has occurred but before a final decision has been issued and the entire review process would have to be redone under the new regulations. Such a result is contrary to the RRA's purpose of streamlining, speeding up, and standardizing the permitting process.

Thus, it is reasonable under the RRA to expect that all project permits will vest at the time a complete application for such permit is received. If a local government has a vesting ordinance that sets forth contrary vesting requirements, developers at least know the rules with certainty before they expend time and effort in submitting an application. In the absence of a vesting ordinance it is not reasonable to require applicants to decipher fifty years of haphazard vested rights case law which provides that conditional use permits and shoreline substantial development permit vest, but (according to the court of appeals) site

development review permits apparently do not. As a matter of fundamental fairness, all project permit applications should vest at the time of complete application unless a local ordinance not in conflict with state law provides otherwise.

2. *The Supreme Court should reconsider the Erickson decision because the Erickson court failed to properly consider the cost of preparing and submitting a MUP application.*

Even if *Erickson* was controlling authority in the absence of a vesting ordinance, the Supreme Court should reconsider the decision because the *Erickson* court failed 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 *Hull* 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 *Hull* 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 *Erickson* 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 *Erickson* 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. *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 deter 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). 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 *Hull* are satisfied.

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 *Erickson* 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 rationale 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 that the cost of Bonney Lake's Type 3 site development permit application justifies the 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 *Erickson* 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 *Hull*, there is no further inquiry regarding good faith or substantial commitment. *See also Allenbach v. City of Tukwila*, 101 Wn.2d 193, 676 P.2d 473 (1984).

In *Erickson*, the developer's costs to prepare the MUP are not

stated in the opinion. However, statements by the *Erickson* 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 E(3) of this Petition, is controlling. However, even if the Supreme 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 as discussed on Section E(5) of this Petition.

3. *The decision of the court of appeals is in conflict with another decision of the court of appeals.*

The decision of the court of appeals in this case is in conflict with *Victoria Tower Partnership*, 49 Wn. App. 755 (1987), which 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 *Victoria Tower* court 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 court of appeals in the present case assumed that because the court in *Victoria Tower* cited the vesting doctrine for building permits as authority for its decision, the applicant must have also filed a building permit application. Such an assumption is not warranted. In its opinion, the *Victoria Tower* 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.⁹ 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 *Victoria Tower* 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 lower court in *Erickson* sidestepped *Victoria Tower* by assuming that the distinction between a MUP and a building permit

⁹ In its decision in this case, the court of appeals asserts that *Victoria Tower II* repeatedly referred to the developer’s building permit application. On the contrary, *Victoria Tower II* only mentions “building permit” once, and was speaking to the City’s land use process in general, not the permit in that specific case. *Victoria Tower Partnership v. City of Seattle*, 59 Wn. App. 592, 604, 800 P.2d 280 (1990).

was not before the court¹⁰, 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.

4. *A significant question of law under the constitution of the State of Washington or the United States is involved.*

The issue of vested rights involves a significant question of due process under the Fourteenth Amendment. "The [vested rights] doctrine is based upon constitutional principles of fairness and due process, acknowledging that development rights are valuable and protected

¹⁰ *Erickson & Associates, Inc. v. McLerran*, 69 Wn. App. 564, 568, 849 P.2d 688 (1993).

property interests.” *Weyerhaeuser*, 95 Wn. App. at 892. In *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986), the Supreme Court held that a city ordinance violated the due process standards of the Fourteenth Amendment as being “unduly oppressive” because it denied a developer the ability to vest rights until after a series of permits is obtained. *Id.* at 52.

Abbey Road’s case is analogous to the *West Main* case 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. 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 application¹¹ and because it is not practical or feasible for such projects to submit complete building permit applications for all buildings prior to Type 3 site development approval.

¹¹ AR Ex. 28, requiring six copies of the “Approved Site Development Plans.” The court of appeals agreed with the Hearing Examiner’s finding that the commercial building permit application did not require approved site development plans because the applicant could have checked the “N/A” box and the application would have been complete for vesting purposes. This finding is not supported on the record and is based on flawed logic. Every item on the commercial building permit application checklist contains an “N/A” box. This does not mean an applicant can simply check “N/A” for any item it wants and the application will be deemed complete. The better reasoning, accepted by the trial court, is that the “N/A” boxes are reserved for special circumstances where a certain item may not be applicable to the particular project. For example, approved site development plans may not be applicable to a commercial building permit application for

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. By obtaining site development approval first, the developer knows the necessary parameters so that building permit applications can be processed efficiently.

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 have a due process right to vest at an earlier stage of development. Otherwise, the City would have 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 at 53.

5. *Petition involves an issue of substantial public interest that should be determined by the Supreme Court.*

Site development permits are now a common and essential practice in most jurisdictions in Washington to efficiently process large projects. As such, the issue of vesting for use permits such as site development permits is an issue of substantial concern for developers, builders, and

the repair or remodel of an existing structure, but would always be required for a large

planners statewide that should be given a fresh look and determination by the Supreme Court. 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.

Even if the Supreme Court concludes that vesting of a Type 3 site development permit application is outside the current limits of the vested rights doctrine, numerous cases provide rationale for expansion of the doctrine. First, *West Main*, 106 Wn.2d 47 (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. Second, the doctrine has been applied to other use permit applications and Bonney Lake's Type 3 site development permit application is a use permit. See *Weyerhaeuser*, 95 Wn. App. 883 (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).

multi-family, multi-building project such as Skyridge.

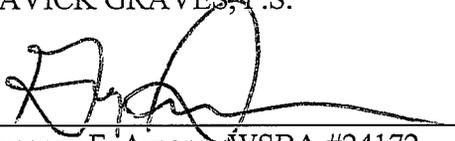
The doctrine has also been applied to “bare bones” short plat applications. *Westside Business Park v. Pierce County*, 100 Wn. App. 599, 5 P.3d 713 (2000). There is no rational reason for applying the vested rights doctrine to other use permit applications and to bare bones short plat applications but not to Abbey Road’s site development permit application.

F. CONCLUSION

The Supreme Court should accept review for the reasons indicated in Part E, reverse the decision of the court of appeals, 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 City of Bonney Lake Ordinance No. 1160.

RESPECTFULLY SUBMITTED this 7th day of November, 2007.

McGAVICK GRAVES, P.S.

By: 

Gregory F. Amann, WSBA #24172

Loren D. Combs, WSBA #7164

Attorneys for Petitioners

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY

DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ABBHEY 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.

No. 35383-1-II

PUBLISHED OPINION

Van Deren, A.C.J. -- The City of Bonney Lake asks us to reverse the superior court's decision reversing a hearing examiner's decision denying vested development rights to the Abbey Road Group, LLC¹ for a 575-unit condominium project within Bonney Lake. Bonney Lake contends that Abbey Road's site plan review application did not vest development rights under Washington's vested rights doctrine based on: (1) *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994) and (2) Abbey Road's failure to file an

¹ We refer to Abbey Road Group LLC, Karl J. and Virginia S. Thun, Thomas Pavolka, Virginia Leslie Revocable Trust, and William and Louise Leslie Family Revocable Trust collectively as "Abbey Road."

application for a building permit as required by RCW 19.27.095(1). We agree with Bonney Lake, reverse the superior court, and affirm the hearing examiner's decision that development rights did not vest because Abbey Road failed to file a building permit application before Bonney Lake adopted new zoning and permit standards applicable to Abbey Lake's property within its city limits.

FACTS

Abbey Road proposed to build a 575 unit condominium project on 36.51 acres within the City of Bonney Lake. In Bonney Lake, Title 14 of the Bonney Lake Municipal Code (BLMC)² governs development procedures. Title 14 does not articulate a vesting scheme nor specifically state that a building permit is required for development project rights to vest. Generally, review and approval of a proposed development plan is separate and apart from review and approval of a building permit application, although both parts of a project require city approval. *See* BLMC 14.50.060(C).

On June 15, 2005, Abbey Road representatives attended a pre-application meeting with Bonney Lake.³ At the meeting, Bonney Lake distributed a nine-page letter containing a paragraph entitled, "Land Use Review Process," that stated:

² Title 14 of the Bonney Lake Municipal Code (BLMC) is attached to the Administrative Record (AR).

³ Initially, Bonney Lake requires an applicant to provide a development proposal for the city to review. BLMC 14.50. The development code's purpose is to "to promote the health, safety and general welfare by guiding review of development in the city consistent with the city of Bonney Lake comprehensive plan[.]" BLMC 14.10.020. As part of the review process, the director of planning and community development "may require a potential applicant to participate in a pre-application conference." BLMC 14.50.005. After a Type 3 permit application is complete and a 15-day period for public comment has passed, the director has 120 days to issue a decision. BLMC 14.50.020, .030, .050.

The zoning of the subject site is Commercial (C-2). Pursuant to BLMC Section 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) [of 1971, RCW 43.21C], if applicable. All application material is included and all information requested on the application forms (Building Permit and Planning Department) shall be submitted in order for a complete application. A Type 3 permit is approved by the [Director of the Bonney Lake Planning and Community Development Department (Director)] and can be appealed to the Bonney Lake Hearing Examiner.

Administrative Record Exhibit (AR Ex.) 15 at 1-2.⁴ The letter generally reviewed the information required for the site development plan review and indicated that the land use application fees for the review were \$3,674, but it noted that “other fees for building permits” were also required.⁵ AR Ex. 15 at 2.

The letter also listed the following requirements for the site development plan review: SEPA checklist, public notification, preliminary storm water report, traffic impact analysis, various site plan versions, landscape and road/pedestrian plan, geotechnical report, and hydrogeologic impact study. The closing paragraph of the letter stated:

This letter reflects the information provided at the preapplication meeting and is intended to assist you in preparing plans and materials for formal application. We hope you found the comments useful to your project. We have made every effort to identify major issues to eliminate surprises during the City’s review of the formal application. *The completion of the preapplication process in the content of this letter does not vest any future project application.* Comments in this letter are only valid for one year.

The developer then has 15 days to appeal and the issuance of a building permit is prohibited until the applicable 15 day appeal period has passed. BLMC 14.50.060.

⁴ We refer to the Type 3 permit application review as the “site development plan review” for clarity.

⁵ BLMC 15.04.072 establishes how building permit fees are calculated. BLMC 15.04.080 establishes how building plan review fees are calculated.

As you know, this is a preliminary review only and does not take the place of the full review that will follow submission of a formal application. Comments provided in this letter are based on preapplication materials submitted.

AR Ex. 15 at 9. (emphasis added).

Abbey Road embarked on the development process, expending some \$96,500⁶ in the process and, on September 13, 2005, it submitted its application for the site development plan review. Later that day, the Bonney Lake City Council passed an ordinance rezoning the subject property to Residential/Conservation District (RC-5), a zoning category that precludes the multi-family development Abbey Road envisioned. Bonney Lake rezoned 65 acres, including Abbey Road's property, to bring the area into compliance with Bonney Lake's Future Land Use Map.

In a letter dated October 12, 2005, the Director notified Abbey Road that its project was not vested under the prior ordinance because Abbey Road had not filed a building permit application. Abbey Road appealed the Director's determination.

The parties disputed the testimony before the hearing examiner about whether the city officials who attended the pre-application meeting also orally advised the Abbey Road representatives that vesting occurred only with the building permit application. City officials all agreed that there was no ambiguity about the necessity of a building permit application to vest Abbey Road's development rights to this project, while the Abbey Road participants claimed that the City did not give them a direct answer to their questions. But the evidence included the June 15 letter informing Abbey Road that "[i]n addition to this preapplication letter, please examine the complete BLMC and other relevant codes carefully," and that completion of the preapplication process "does not vest any future project application." AR Ex. 15 at 9.

⁶ This expenditure amount is from the hearing examiner's findings. The record reflects other amounts up to \$228,000. Abbey Road did not dispute the hearing examiner's finding.

The hearing examiner found that the Director correctly determined that:

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 [& Associates] v. McLerran*, 123 Wn.2d 864[, 872 P.2d 1090] (1994); *Noble Manor Company v. Pierce County*, 133 Wn.2d 269[, 943 P.2d 1378] (1997).

Clerk's Papers (CP) at 37.

Abbey Road filed a petition under the Land Use Petition Act (LUPA), chapter 36.70C RCW, seeking to reverse the hearing examiner's decision. And the superior court reversed the hearing examiner's decision, concluding:

2. [Abbey Road] was required by [Bonney Lake] to submit a Type 3 site development permit application . . . which they did do in a complete and timely fashion on September 13, 2005.
3. [Abbey Road's] complete Type 3 site development permit application . . . is vested under the zoning and other land use control ordinances in effect at the time the complete application was filed. . . .
4. [Abbey Road has] a vested right to develop the [p]roperty in accordance with [its] site development permit application under the zoning and other land use control ordinances in effect at the time the complete application was filed on September 13, 2005;
5. [Abbey Road's] Type 3 site development permit application . . . and . . . development . . . are not subject to [the post-application ordinance that re-zoned the property].

CP at 115-16.

Bonney Lake appeals.

ANALYSIS

Bonney Lake contends that: (1) the hearing examiner properly determined that *Erickson* was controlling and, therefore, the hearing examiner did not erroneously interpret the law; (2) the hearing examiner properly applied the law to the facts in determining that Abbey Road's application for a site development plan review did not vest rights because Abbey Road never

filed a building permit application; and (3) the hearing examiner properly determined that Abbey Road's constitutional rights were not violated because Bonney Lake's procedures comport with public policy and were not unduly burdensome such that they improperly frustrated vesting.

Abbey Road urges us to affirm the trial court, arguing that *Erickson* is not controlling authority and, therefore, the trial court correctly concluded that filing an application for site development plan review vested the project. In support, Abbey Road asserts that Washington's common law vested rights doctrine has been vicariously expanded or, in the alternative, we should expressly expand the vested rights doctrine to protect its due process rights.

I. STANDARD OF REVIEW

Under LUPA, we stand "in the shoes of the superior court" and limit our review to the record before the hearing examiner. *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 525, 94 P.3d 366 (2004); RCW 36.70C.120. As the party seeking relief from the hearing examiner's decision, Abbey Road bears the burden of proving one of the six bases for relief under chapter 36.70 RCW:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). Abbey Road challenges the hearing examiner's decision under (b),

(c), (d), and (f), asserting that the hearing examiner's decision was an erroneous

interpretation of the law, a clearly erroneous application of the law to the facts not supported by substantial evidence,⁷ and violated Abbey Road's constitutional rights.

Subsections (b) and (f) present questions of law that we review de novo. *Cingular Wireless, L.L.C. v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006) (citations omitted). Subsection (d) requires a showing of a clearly erroneous application of the law to the facts. Under the clearly erroneous standard, the reviewing court may find a decision clearly erroneous only when it is left with the definite and firm conviction that the hearing examiner made a mistake. *Cingular*, 131 Wn. App. at 768.

II. WASHINGTON'S VESTED RIGHTS DOCTRINE

Common law vesting rules protect individuals who have taken substantial steps to develop their property in reliance on prior zoning regulations when zoning is changed before development of their property is completed. 8 Eugene McQuillin, *The Law of Municipal Corporations* § 25.157 (3d ed. 2000). But the Washington Supreme Court long ago rejected any requirement for a change of position and substantial reliance to vest development rights and held:

Notwithstanding the weight of authority, we prefer to have a date certain upon which the right vests to construct in accordance with the building permit. . . . The more practical rule to administer, we feel, is that the right vests when the party, property owner or not, applies for his building permit, if that permit is thereafter issued. This rule, of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of application for the permit.

Hull v. Hunt, 53 Wn.2d 125, 130, 331 P.2d 856 (1958). Thus, Washington's date certain common law vested rights doctrine "entitles developers to have a land development

⁷ Abbey Road states that it "does not believe [the hearing examiner's disputed] findings are directly pertinent to the legal issue of vesting." Br. of Resp't at 47. We agree and do not further address whether there was substantial evidence to support the hearing examiner's decision.

proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations.” *Erickson*, 123 Wn.2d at 867-68 (citations omitted).

In 1987, the legislature codified Washington’s common law vested rights doctrine.⁸ Laws of 1987, ch. 104 (codified at RCW 19.27.095(1)). RCW 19.27.095(1) states:

A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.

III. BUILDING PERMIT APPLICATION

Bonney Lake contends that because Abbey Road did not submit a building permit application no development rights vested and, therefore, the hearing examiner properly applied the law to the facts under RCW 36.70C.130(d).

RCW 19.27.095(1) is unequivocal and requires a “valid and fully complete building permit application” be submitted for development rights to vest “on the date of the application.” Abbey Road points to no authority entitling the courts to ignore this legislative directive and the record is devoid of any claim that Abbey Road did, in fact, submit a building permit application. Therefore, because it is undisputed that Abbey Road did not submit a building permit application, it has not sustained its burden to show that the hearing examiner erroneously interpreted Washington’s vested rights doctrine or erroneously applied the law to the facts.

⁸ Washington’s vesting rules have been expanded to include applications for short plat approval and conditional use permits. See RCW 58.17.033; *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (1999).

RCW 36.70C.130(1)(b), (d), (f).

IV. VICARIOUS EXPANSION OF VESTED RIGHTS DOCTRINE

Abbey Road alternatively asserts that *Victoria Tower P'ship v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987) (*Victoria Tower I*) "is controlling." Br. of Appellant at 21. Abbey Road's argument suggests that, because Bonney Lake's site development plan review requirements are similar to those for the master use permit (MUP) at issue in *Victoria Tower I*, the vested rights doctrine has been vicariously expanded to include filing an application for site development plan review. This assertion is without merit.

In *Victoria Tower*, Seattle attempted to modify existing development rights after it adopted new ordinances in response to SEPA. 49 Wn. App. at 757. Division One initially remanded the case, holding that Seattle could not modify vested rights based on the new ordinances under the vested rights doctrine. *Victoria Tower I*, 49 Wn. App. at 762-63. On remand, Seattle's City Council reaffirmed its earlier decision by relying on policies that were adopted before the developers filed their building permit application. *Victoria Tower P'ship v. City of Seattle*, 59 Wn. App. 592, 595-96, 800 P.2d 380 (1990) (*Victoria Tower II*). Division One upheld the City Council's second decision, concluding that it was consistent with due process and clearly not erroneous. *Victoria Tower II*, 59 Wn. App. at 605.

Although Abbey Road admits that the "vesting doctrine for building permits was well settled at the time" of the *Victoria Tower I* decision, it asserts that the developer's application in *Victoria Tower* was for a MUP and not for a building permit. Br. of Resp't at 22. Apparently Abbey Road reasons that Division One must have determined that filing a MUP application vested development rights. But a fair reading of both *Victoria Tower* decisions does not support Abbey Road's conclusion. In fact, both *Victoria Tower* decisions repeatedly refer to the

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developer's building permit application. 49 Wn. App. at 758-62; *see also* 59 Wn. App. at 604.

Therefore, either the *Victoria Tower* court assumed that the two types of permits were equivalent or the distinction between a MUP and a building permit was not before the court. *See Erickson & Assocs., Inc. v. McLerran*, 69 Wn. App. 564, 568, 849 P.2d 688 (1993).

Contrary to Abbey Road's argument, *Victoria Tower* is entirely consistent with Washington's common law vested rights doctrine that has long required a building permit application to preserve development rights under the building codes in effect when it was filed. Moreover, the legislature codified the common law vesting rules in 1987, the year that Division One decided *Victoria Tower I*. Thus, Abbey Road's reliance on *Victoria Tower I* is misplaced and neither the vested rights statute nor the common law vested rights doctrine has been expanded to include an application for the review of the site development plan at issue here.

V. EXPANSION OF VESTED RIGHTS DOCTRINE TO PROTECT DUE PROCESS RIGHTS

Abbey Road also urges expansion of the vested rights doctrine to allow vesting when an applicant files an application for review of a site development plan. Abbey Road argues that Bonney Lake's procedures frustrate vesting and are unduly burdensome and, therefore, expanding Washington's vested rights doctrine is appropriate. Br. of Resp't at 44-45.

The hearing examiner found that:

[Bonney Lake's] procedure most closely approximates that of the City of Seattle in [*Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994)]. Although [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.

CP at 38. Abbey Road disagrees with the hearing examiner's conclusion, asserting that the issue in *Erickson* was the validity of a vesting ordinance and, therefore, it is inapposite.⁹ But in *Erickson*, the Washington Supreme Court specifically addressed and refused to expand the vested rights doctrine.

The Seattle ordinance at issue in *Erickson* allowed vesting when a building permit application was *submitted* or when a MUP was *issued*. *Erickson*, 123 Wn.2d at 866 (emphasis added). In *Erickson*, the developers first contended that, contrary to Seattle's vesting ordinance, the vested rights doctrine allowed development rights to vest when a MUP was submitted but also argued that, if the Court found that the rights did not vest, the Court should expand the doctrine to allow vesting upon submission of a MUP. *Erickson*, 123 Wn.2d at 869, 873. The Court disagreed with both of the developers' arguments and declined to extend the vested rights doctrine to a MUP. It held that Seattle's vesting ordinance "is constitutional and satisfies the requirements of case and statutory law." *Erickson*, 123 Wn.2d at 877. The Court also stated that "[g]iven 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. The Court explained that:

[O]ur vesting doctrine is rooted in constitutional principles of fundamental fairness. The doctrine reflects a recognition that development rights represent a valuable and protectable property right. By promoting a date certain vesting point, our doctrine insures that "new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law." Our vested rights cases thus establish the constitutional minimum: a "date certain" standard that satisfies due process requirements.

⁹ Abbey Road also asserts that "the *Erickson* court misinterpreted vested rights case law." Br. of Resp't at 11. But *Erickson* is binding precedent and we do not reconsider our Supreme Court's decisions. We, therefore, do not further address this claim.

Erickson, 123 Wn.2d at 870 (citations omitted). Therefore, we examine whether Bonney Lake's development process provides a date certain standard for vesting development rights.

Here, because Bonney Lake has not adopted a vesting ordinance, RCW 19.27.095(1) requires that vesting occur only when a building permit application is filed. And Abbey Road argues that, under the Seattle vesting ordinance at issue in *Erickson*, a developer could file a building permit application at any time in the process and thereby control the vesting date, 123 Wn.2d at 871, while under Bonney Lake's scheme, a building permit application may be submitted only after the City has reviewed and approved a site development plan. The hearing examiner disagreed, concluding that:

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 [BLMC] is to streamline and combine reviews for various permits and guide development in the City. The [BLMC] encourages concurrent review of building permit applications and Type 3 applications. [Abbey Road] could have filed a building permit application . . . and vested the project.

CP at 37-38. The hearing examiner's conclusion is consistent with BLMC 14.50.060 ("No building permit shall be issued for work requiring a Type 3 permit until the 15-day appeal period has lapsed") and BLMC 14.90.020(D) ("If one permit cannot be reasonably processed until another is issued, such as a building permit[,]. . . the 120 days within which a notice of decision must be issued for the contingent permit . . . shall not begin until the other permit has been issued.").

Abbey Road asserts that the hearing examiner's conclusion was in error because "it contradicts the testimony of the Building Official and [Bonney Lake's] own Commercial Building Permit Application form." Br. of Resp't at 28. Before the hearing examiner, Abbey Road elicited testimony that, in the past, Bonney Lake had required a particular developer to first

obtain a “letter of completeness” on a site development plan review before submitting a building permit application. Administrative Record (AR) at 48. But, as was pointed out on cross-examination, the prior development project did not involve a dispute over vested rights. Here, the summary of the pre-application meeting reflected specific, albeit disputed, mention of a building permit. Furthermore, contrary to Abbey Road’s assertions, our review of the BLMC shows no requirement for a developer to obtain site development plan review approval before submitting a building permit application. Thus, consistent with *Erickson*, vesting occurs no later than the building permit application stage. 123 Wn.2d at 870. We hold that this establishes a sufficient date certain for rights to vest.

Abbey Road also asserts that it “had a right to rely on [Bonney Lake’s] application form.” Br. of Resp’t at 39. The second page of the building permit application form has a check box to indicate that six copies of the “Approved Site Development Plans” are attached. AR Ex. 28. The hearing examiner found that, by checking the “not applicable” box on the form, the building permit application would have been deemed complete for vesting purposes. CP at 35; *see* RCW 19.27.095(1) (requiring a “fully complete building permit application” for vesting). And it is undisputed that no BLMC ordinance specifically requires site development plan review approval before an applicant can submit the building permit application.

Abbey Road’s argument is thus reduced to an assertion that it was reasonable for it to rely on its own erroneous interpretation of the building permit application form. Because Washington abandoned a detrimental reliance analysis for vesting development rights long ago, the hearing examiner’s conclusion that Abbey Road’s rights could not vest based on its misunderstanding of the form was not an erroneous application of the law.

Thus, we decline Abbey Road's invitation to expand the vested rights doctrine to a site development plan review application, absent a building permit application, because Bonney Lake's ordinances and processes satisfy statutory and constitutional concerns.

V. BURDEN OF SITE DEVELOPMENT PLAN REVIEW DOES NOT CREATE VESTED RIGHTS

Finally, Abbey Road asserts that applying for site development plan review should vest its development rights because "Bonney Lake's Type 3 site development permit application is onerous and expensive, and requires a substantial commitment from the developer." Br. of Resp't at 15. The developers made the same argument in *Erickson*. 123 Wn.2d at 873-74. Our Supreme Court rejected it, stating that "a cost-based analysis [would reintroduce] the case-by-case review of a developer's reliance interest we rejected [forty] years ago when we adopted the vested rights doctrine." *Erickson*, 123 Wn.2d at 874.

Abbey Road also asserts that the hearing examiner "ignored the realities of large commercial or multi-family development" in finding that Bonney Lake's process does not impermissibly frustrate vesting. Br. of Resp't at 28. Abbey Road states:

[I]t 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.

Br. of Resp't at 33. This argument was also directly addressed and rejected in *Erickson*:

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. . . .

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.

This court recognized the tension between public and private interests when it adopted Washington's vested rights doctrine. The court balanced the private property and due process rights against the public interest by selecting a vesting point which prevents "permit speculation", and which demonstrates substantial commitment by the developer, such that the good faith of the applicant is generally assured. The application for a building permit demonstrates the requisite level of commitment.

Erickson, 123 Wash.2d at 873-74. Thus, Abbey Road's argument does not persuade us to abandon Washington's bright-line rule for vesting development rights.¹⁰

We hold that no development rights vested when Abbey Road filed an application for site development plan review. Furthermore, we hold that Bonney Lake's development scheme is not so burdensome that it unconstitutionally frustrates vesting rights under ordinances and building codes in effect when a building permit is filed, nor does it conflict with statutory or case law controlling vesting of development rights. Accordingly, we are not persuaded that the hearing examiner erroneously interpreted or applied the law or that the hearing examiner's decision is clearly erroneous or constitutionally flawed.

¹⁰ Abbey Road, also, without citation to authority, argues that Bonney Lake's vesting process violates RCW 64.34.050. RCW 64.34.050 states in relevant part that a "zoning, subdivision, building code, or other real property law, ordinance, or regulation may not . . . impose any requirement upon a condominium which it would not impose upon a physically identical development under a different form of ownership." Abbey Road reasons that a site development plan review application for condominiums should vest because a preliminary plat application for apartments would vest and disparate treatment violates the statute. But, since it is state law and not a Bonney Lake "zoning, subdivision, building code, or other real property law, ordinance, or regulation" that controls vesting here, this argument is without merit.

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We reverse the trial court's decision that Abbey Road has a right to develop the 575-unit condominium project within Bonney Lake city limits based on its filing for site development plan review and we remand for further proceedings consistent with this opinion.

Van Deren, A.C.J.
Van Deren, A.C.J.

We concur:

Armstrong, J.
Armstrong, J.

Penoyar, J.
Penoyar, J.



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

FOR CITY USE ONLY
Submitted

PROJECT NAME:

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.



"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 <i>bcnmf</i>	Repair/Remodel <i>bcrrr</i>	Temporary Occupancy <i>bceto</i>	Tenant Improvement <i>bctip</i>
Project Name / Description:		Value of Construction:		
Site Address:		Tax Parcel Number:		
General Location:		Lot Number:		
Site Information:		Lot Sq. Ft.:		
Section:	Township:	Range:	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 <input type="checkbox"/> or Issuer of Payment Bond <input type="checkbox"/> : 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. 1 st Floor: _____		2 nd Floor: _____		3 rd Floor: _____
				4 th Floor: _____
				5 th 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: <input type="checkbox"/> Retail <input type="checkbox"/> Restaurant <input type="checkbox"/> Multi-Family <input type="checkbox"/> Warehouse <input type="checkbox"/> Hospital <input type="checkbox"/> Church				
<input type="checkbox"/> Manufacturing <input type="checkbox"/> Motel/Hotel <input type="checkbox"/> Office <input type="checkbox"/> School/College/University <input type="checkbox"/> Other _____				
Proposed use: <input type="checkbox"/> Retail <input type="checkbox"/> Restaurant <input type="checkbox"/> Multi-Family <input type="checkbox"/> Warehouse <input type="checkbox"/> Hospital <input type="checkbox"/> Church				
<input type="checkbox"/> Manufacturing <input type="checkbox"/> Motel/Hotel <input type="checkbox"/> Office <input type="checkbox"/> School/College/University <input type="checkbox"/> 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 intend 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:

City of Bonney Lake, P.O. Box 7380, Bonney Lake, WA 98390
Permit Center (253) 362-3602
Rev 06/30/2004

EXHIBIT " 28 "

A-19

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

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 Assessor's 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:

- | | |
|---|--|
| <input type="checkbox"/> Occupancy classification | <input type="checkbox"/> Exiting requirements (i.e. exit plan with occupant loads) |
| <input type="checkbox"/> Type of construction | <input type="checkbox"/> Fire rated assemblies |
| <input type="checkbox"/> Allowable floor area vs. actual floor area | <input type="checkbox"/> Accessibility requirements |
| <input type="checkbox"/> Allowable building height vs. actual building height | <input type="checkbox"/> Code editions and design parameters |

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

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

FLOOR PLAN Include the following information:

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

FOUNDATION/FLOOR FRAMING Include the following information:

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

ELEVATIONS Include the following information:

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

ROOF FRAMING PLAN Include the following information:

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

CROSS SECTIONS Include the following information:

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

- | | |
|---|---|
| <input type="checkbox"/> All Engineering details and schedules shown or referenced in structural calculations | <input type="checkbox"/> Retaining walls, etc. |
| <input type="checkbox"/> Footings, piers | <input type="checkbox"/> Pony walls, drag strap connections |
| <input type="checkbox"/> Pier/beam | <input type="checkbox"/> Beam to joist connection |
| <input type="checkbox"/> Post to girder | <input type="checkbox"/> Girder truss to truss connection |
| <input type="checkbox"/> Header connections | <input type="checkbox"/> Roof eaves |
| <input type="checkbox"/> Interior footings | <input type="checkbox"/> Top plate splice |

Signature

Date

Phone

07 NOV -8 PM 2:25

SUPREME COURT STATE OF WASHINGTON
OF THE STATE OF WASHINGTON YM
DEPUTY

ABBHEY 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.

Pierce County Superior Court
Case No. 06-2-06745-8

Court of Appeals
Case No. 35383-1-II

Certificate of Service

I certify under penalty of perjury under the laws of the State of

Washington that I sent a copy of the Petition for Review to the following:

David Ponzoah, Clerk
Washington State Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Via Hand Delivery

Jeffrey Ganson
Lisa M. Worthington-Brown
Dionne & Rorick
900 Two Union Square
601 Union Street
Seattle, WA 98101

Via Legal Messengers

DATED at Tacoma, Washington, this 8th day of November, 2007.


Dawn Ketter