

No. 70542-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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

Plaintiffs/Respondents,

vs.

CITY OF KIRKLAND, a Washington municipal corporation,

Defendant/Appellant.

APPELLANT CITY OF KIRKLAND'S OPENING BRIEF

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I. INTRODUCTION

The issue presented in this case is whether a shoreline permit application vests a developer in the local jurisdiction's entire zoning code, or if it only vests the developer in the shoreline regulations in existence at the time the application is filed. Specifically, in this case, did the developer, Potala Village Kirkland, LLC and Lobsang Dargey ("Dargey"), vest to all of the land use laws and regulations in effect on the date Dargey filed an application for a shoreline substantial development permit, or could he only obtain full vested rights by filing a building permit application?

All case law on this matter currently demonstrates that the filing of an application for a shoreline substantial development permit vests a developer only in existing shoreline regulations, not the local jurisdiction's entire zoning code. The trial court's Order, which holds that Dargey obtained fully vested rights via the filing of a shoreline permit application impermissibly expands the vested rights doctrine, which is a job for the legislature, not the trial court. Accordingly, the City respectfully requests that this Court reverse the trial court's Order Granting Plaintiff's Motion for Partial Summary Judgment and, in addition, grant the City's cross-motion and hold, consistent with existing legislative enactments and State Supreme Court case law, that shoreline permit applications do not confer

full vested rights upon an applicant.

Briefly, it is uncontested that Dargey's proposed development project requires multiple permits, and the first permit he applied for was a shoreline substantial development permit. Dargey asserts that this application for a shoreline permit vests him in not only the shoreline regulations in effect at that time, but in all of the City's zoning code provisions, including all land use laws, rules and regulations. The trial court agreed. As set forth herein, both Dargey and the trial court are mistaken.

This case is governed by the Supreme Court's decision in *Abbey Road Group v. Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180 (2009), and the state vesting statute, RCW 19.27.095(1). *Abbey Road* held that as long as the local jurisdiction allows a developer to file a building permit application at any time in the permitting process, only the building permit application—and no other application, including one filed earlier—freezes the land use laws for the rest of the project. *Abbey Road*, 167 Wn.2d at 252-54. In reaching this decision, *Abbey Road* first noted that Washington's vested rights doctrine, as it was originally judicially recognized, entitled developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application was filed, regardless of subsequent changes in zoning

or other land use regulations. *Id.* at 250. *Abbey Road* then noted that the judicially-created vested rights doctrine had been codified by the legislature in 1987, at RCW 19.27.095(1). This statute now explicitly confers vested rights upon the filing of a complete building permit application. Finally, *Abbey Road* reaffirmed its 1994 decision in *Erickson v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994), where it had declined to extend the vested rights doctrine to a Master Use Permit (MUP) application; holding, instead, that under the common law and statute, the vested rights doctrine applies only to building permit applications. *Abbey Road*, 167 Wn.2d at 253 (“For the same reasons we rejected the invitation to extend the vesting doctrine in *Erickson*, we refuse to expand it in this case.”).

It is undisputed that the City of Kirkland allows developers to file building permit applications at any time in the permitting process. Further, the record in this case shows that City Staff affirmatively told Dargey that the City Council was contemplating enacting a moratorium to consider changing the zoning of the properties subject to his project, and that he would need to file a building permit application to vest his development rights. But even with that information, Dargey did not file a building permit application. Because he chose not to file a building permit application before the City enacted an interim zoning moratorium (the

“Moratorium”) affecting his properties, Dargey failed to trigger vested rights for his project.

In support of his arguments below, Dargey relied solely on case law that is distinguishable and/or predates *Abbey Road* and the state legislature’s enactment of the state vesting statute, RCW 19.27.095(1). Because this case is governed by *Abbey Road* and RCW 19.27.095(1), and because Dargey did not file an application for a building permit before the effective date of the City’s Moratorium, the trial court order commanding the City to accept and review his building permit application under the provisions of the pre-Moratorium zoning code should be reversed. Further, the City’s motion to establish that the vested rights doctrine has not been expanded to apply to Dargey’s application for a shoreline substantial development permit should be granted.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it held that the vested rights doctrine applies to a shoreline substantial development permit application.

2. The trial court erred when it held that a shoreline permit application vests a developer in all of the land use laws, rules and regulations contained in a local jurisdiction’s entire zoning code, as Washington law holds that a shoreline permit application vests an applicant only in the existing shoreline regulations, and the vested rights

doctrine is only triggered by the filing of a complete building permit application.

3. The trial court erred by granting Dargey's motion under the Declaratory Judgments Act, which is not applicable given the legal posture of this case.

4. The trial court erred by granting Dargey's motion for summary judgment and holding that the vested rights doctrine applied to his application to the City of Kirkland for a shoreline substantial development permit.

5. The trial court erred by denying the City's cross motion for summary judgment requesting an order stating that the vested rights doctrine does not apply to Dargey's application to the City of Kirkland for a shoreline substantial development permit.

III. STATEMENT OF THE CASE

A. Factual Statement

The parties agree there are no genuine issues of material fact in this case. The only issue before the Court is a legal issue: Whether Dargey's application for a shoreline substantial development permit vested him in all of the land use laws, rules and regulations in effect at that time, or whether Dargey could only obtain vested rights by filing an application for a building permit. The following summary of undisputed facts is

presented as background to help put the issue before the Court in context.

Dargey sought to construct a fairly large mixed-use project (residential, retail and commercial) in the Neighborhood Business (BN) zone in Kirkland. *CP 92*. The City's BN zoning regulations are found in Chapter 40 of the Kirkland Zoning Code (KZC). When Dargey first contacted Kirkland about his proposed development, this particular BN zoned site (which is made up of three adjacent parcels) did not contain any cap or limit on residential density. The surrounding properties, however, were all zoned for a maximum of 12 dwelling units per acre. *CP 92*.

Dargey had two pre-application meetings with the City. *CP 85-86; 92-93*. As a result of these meetings, it was determined that he would need multiple permits, and that the first step was for the City to conduct environmental review under the State Environmental Policy Act (SEPA), RCW Ch. 43.21C. *CP 88-90*. Also, because a small portion of Dargey's site was located within the state mandated shorelines area (*i.e.*, within 200 feet of the ordinary high water line for Lake Washington), Dargey was required to apply for and obtain a shoreline substantial development permit under the State Shorelines Management Act, RCW Ch. 90.58, and Kirkland's Shoreline Master Program (SMP), KZC Chapters 83 and 141. *CP 86, 90, 94*.

Thus, on February 23, 2011, Dargey filed a checklist for

environmental review under SEPA for a mixed-use project that included a total of 143 residential units. He also filed an application for a shoreline substantial development permit. *CP 94, 109-111*. He did not, however, file an application for a building permit at that time. *CP 94, 109-111*.

Dargey does not dispute that staff informed him several times, both verbally and in writing, that he could apply for a building permit at any time. *CP 86-87, 90, 95*. It is also undisputed that the City's code does not prohibit a developer from applying for a building permit at the same time as a shoreline permit and/or while undergoing SEPA review. *CP 86-87, 95-99, 799, 802-803, 805* On May 11, 2011, Dargey's shoreline application was deemed complete and a Letter of Completeness was issued. *CP 95, 113*. Dargey claimed below, without citation to authority, that this letter constituted "notice" that the City "had determined Potala Village's shoreline permit application was vested to the BN zoning and land use regulations in effect" when he filed his shoreline permit application. *CP 350* (emphasis added). But this is neither a correct reading of the letter nor a correct interpretation of the City's code. *CP 968*. The Letter of Completeness did not state that Dargey's Project "vested" in any regulations. All it indicated was that his shoreline application was "complete" for processing, which started the City's 120-

day review clock.¹

An organized group of neighbors (the “Neighbors”) voiced objection to Dargey’s project, especially the proposed residential density. *CP 96-97*. Recall that the surrounding properties were all zoned with a maximum of 12 residential units per acre; yet Dargey’s site did not have a residential density cap and he was proposing a project with 143 residential units. Dargey was represented by legal counsel at the time and it is uncontested that both he and his former attorney were well aware of the Neighbors’ complaints. *CP 96-97*.

Further, the record shows that in early November, 2011, the City’s Senior Planner (Ms. Teresa Swan) placed a telephone call to Mr. Dargey and informed him that the Neighbors had attended a City Council meeting and had urged the Council to implement a zoning change that would result in lowering the residential density limits applicable to his project. *CP 97-98*. Importantly, she also told him that his shoreline permit application only vested him in the City’s current shoreline regulations, not the entire zoning code. *CP 98*. She further told him that he might want to consider applying for a building permit to obtain vested rights for his project. *CP*

¹ The City has 120 days from the date it receives a complete application to issue a decision. There are exceptions, of course, and permits can be placed on hold for various reasons. Here, for instance, Dargey’s shoreline permit was put on hold while the City conducted environmental review and prepared an EIS. Once the EIS was issued, the hold was lifted and the City was required to begin processing the shoreline permit again. *CP 799*.

98. Shortly after this phone call, the City's Senior Planner received a call from Dargey's architect. CP 99. Again, she told the architect that Dargey's project was not vested simply because Dargey had filed an application for a shoreline permit, but that they could vest by filing an application for a building permit. CP 99. Despite these conversations, Dargey did not file an application for a building permit at that time. CP 73-74, 99-100.

On November 15, 2011, the City Council enacted an emergency development moratorium (the "Moratorium") that temporarily precluded the issuance of any development related permits or licenses in the BN zones, except for those that were already vested and/or those related to life/safety issues. CP 100, 139-140. Specifically, as applied to Dargey, the Moratorium prevented him from filing an application for a building permit for his proposed project. CP 100.

Shortly after the Moratorium was enacted, on November 29, 2011, Mr. Dargey and his former attorney met with several representatives of the City, including the Mayor and City Manager, to discuss his project. CP 73. At this meeting, Mr. Dargey admitted that he had intentionally chosen not to file an application for a building permit before the Moratorium was enacted because of how expensive it would be to prepare; in addition to the expenses he believed he would need to incur in the future based upon

changes required as a result of environmental review. *CP 73-74*. Thus, it is very clear in the record that Dargey knew he should have filed a building permit application to secure vested development rights, but chose not to do so because of how expensive he perceived it would be.

On May 1, 2012, the City Council extended the Moratorium for six months. *CP 102, 150-152*. Shortly afterwards, Dargey (who had retained new legal counsel) filed this lawsuit against the City. *CP 1-11, 102*.

Approximately six (6) months later, on October 16, 2012, several events occurred. First, Dargey attempted to file a building permit application with the City. *CP 78*. The City, however, refused to accept his building permit application materials due to the Moratorium. *CP 78-79, 82*. Second, later that same evening, the City Council extended the Moratorium one last time.² *CP 30, 162-166*.

Then, while the Moratorium was still in effect, the City Council passed amendments to the City's Zoning Code, Design Guidelines, and Comprehensive Plan; all of which had some impact on Dargey's proposed project. Specifically, on December 11, 2012, the City Council adopted legislative, area-wide amendments to (1) Kirkland's Zoning Code via

² This extension was for a short time, only two and one-half months, until December 31, 2012.

Ordinance O-4390;³ (2) Kirkland's Design Guidelines via Resolution R-4945;⁴ and (3) Kirkland's Comprehensive Plan (which, by law, can only be amended once a year) via Ordinance O-4389.⁵ *CP103-104*.

For purposes of this lawsuit, the amendments placed a limit, or cap, on the residential density in the City's BN zones. Specifically, pursuant to these amendments, the maximum number of residential units allowable on Dargey's BN zoned properties (absent circumstances not at issue here) is now 60 units; versus the 143 units in his original proposal. *CP 104*.

The City issued Dargey's shoreline permit approval on January 17, 2013. *CP 106, 246-265*. Although Dargey argued below that the City's shoreline approval encompasses his entire development, it does not. A shoreline permit only approves development within the shoreline areas, *i.e.*, here, areas located within 200 feet of the ordinary high water line of Lake Washington. *CP 794-795*. Only a small portion (53-feet) of Dargey's property lies within the state designated shoreline area. *CP 795*,

³ O-4390 amended the Zoning Code. Two of the amendments relevant to this lawsuit are (1) the Zoning Code now caps residential density at 48 units per acre in the BN zone applicable to Dargey's Property; and (2) the Zoning Code requires Design Review in the BN zone applicable to Dargey's Property.

⁴ R-4945 amended the City's Design Guidelines. Specifically, with relevance to this lawsuit, one of the amendments was to require Design Review for projects in the BN zone applicable to Dargey's Property. *CP 221-227*.

⁵ O-4389 amended the Comprehensive Plan. Specifically, with relevance to this lawsuit, the amendments included a change to the description of "Residential Market" and a change to the policy to the BN zone applicable to Dargey's Property, establishing a density cap of 48 units per acre. *CP 168-182*.

797. Thus, the City's shoreline approval is only applicable to this 53-foot section of property. *CP 797*. Furthermore, a shoreline approval is only based on the City's shoreline regulations as set forth in its Shorelines Master Program (SMP); here, Chapters 83 and 141 of the Kirkland Zoning Code, not the entire Zoning Code. *CP 796, 798*. The City performs only a narrow scope of review for a shoreline permit; a full and comprehensive review does not occur until the building permit stage. *CP 798*.

B. Procedural Status

As noted above, the Moratorium at issue in this lawsuit was enacted on November 15, 2011. *CP 100, 139-140*. Dargey did not file any lawsuit or administrative challenge of the Moratorium at that time.⁶

The Moratorium was extended for six (6) months by the City Council on May 1, 2013. *CP 102, 150-152*. Shortly thereafter, on May 24, 2013, Dargey filed a Complaint against the City, seeking a declaratory judgment and injunction. *CP 1-11, 102*.

But it was not until almost five (5) months after this lawsuit was filed (on October 16, 2012) that Dargey even attempted, for the first time, to file a building permit application with the City. *CP 78*. Because of the Moratorium, the City rejected that application at the counter. *CP 78-79, 82*. Several weeks later, on November 6, 2012, Dargey filed an Amended

⁶ The validity of the City's Moratorium is not at issue in this lawsuit or this appeal.

Complaint, adding, *inter alia*, a request for issuance of a Writ of Mandamus to order the City to accept his building permit application and process it under the pre-Moratorium zoning code. *CP 12-27*. Dargey claimed his development project was not subject to the Moratorium because his project had vested to all the land use laws, rules and regulations in effect at the time he had filed an application for a shoreline substantial development permit. The City did not agree.

One thing the parties did agree on, however, was that the pivotal issue in this case involved Washington's vested rights doctrine. Specifically, does the vested rights doctrine apply to shoreline substantial development permit applications, or can an applicant only obtain vested rights by filing a building permit application? Thus, the City and Dargey jointly sought a hearing date from the trial court to have that issue determined.

On April 2, 2013, the parties filed cross-motions for summary judgment. *CP 38-71, 347-370*. The hearing occurred on May 3, 2012, before the Honorable Monica J. Benton, who took the matter under advisement.

A week later, on May 10, 2012, Judge Benton entered an order denying the City's motion and granting Plaintiff Dargey's motion. *CP 992-995*. In particular, the order states that "Plaintiffs' shoreline

substantial development permit application is subject to the vested rights doctrine,” and further adds that “Plaintiffs’ shoreline substantial development permit application vested on February 23, 2011 to those zoning and land use regulations in force at the time of that application.”

CP 994. The order then went on to grant Dargey’s requests for both declaratory relief and mandamus:

9. This Court hereby enters declaratory judgment in favor of Plaintiffs that Plaintiffs are entitled to apply for, and the City of Kirkland is required to issue a decision on, building and other land development permit applications based on the zoning and land use regulation in effect on the date of the shoreline substantial development permit application, i.e., February 23, 2011.

10. In addition, the Court hereby enters a peremptory writ of mandamus commanding Defendant/Respondent City of Kirkland to accept and process an application for [a] building permit by Plaintiffs based on the on the [sic] zoning and land use regulations in effect on the date of the shoreline substantial development permit application, i.e., February 23, 2011, if said application is otherwise complete as required by state law and local regulation.

CP 994-995 (emphasis added). This order had been prepared by Dargey’s counsel as the prevailing party. But the trial judge did not just sign Dargey’s proposed order, instead she added a citation to the end of paragraph 10, where she wrote in “*Town of Woodway v. Snohomish County*, 172 Wash. App. 643 (2013).”⁷ CP 995. This citation was added without explanation. The parties do not know what it stands for.

⁷ A copy of the Court’s Order is attached as **Appendix 1**.

The City filed a timely Motion for Reconsideration, which was denied. *CP 996-1024, 1055-1056*. This appeal followed.

IV. ARGUMENT

A. **Washington's Vested Rights Doctrine Confers Vested Rights Only When a Complete Building Permit Application is Filed**

The Washington Supreme Court's most recent vested rights decision is *Abbey Road Group v. Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180 (2009). In *Abbey Road*, the Court wrestled with two questions: (1) whether the vested rights doctrine extends to permits other than building permits, and (2) the role due process plays in the doctrine. See Roger Wynne, "*Abbey Road: Not a Road Out of Our Vested Rights Thicket*," *Environmental and Land Use Law*, p. 9 (Dec. 2009).⁸

Washington's vested rights history is summarized by the Court in *Abbey Road* (and confirmed by Division I in *Town of Woodway v. Snohomish County*, 291 P.3d 278 (2013)).⁹ Washington's vested rights

⁸ Washington Attorney Roger Wynne, who is currently with the Seattle City Attorney's Office, is this State's recognized expert on Washington's vested rights doctrine. In drafting their decision in *Abbey Road*, the Supreme Court relied heavily upon Mr. Wynne's 2001 vested rights law review article, "Washington's Vested Rights Doctrine: How We Have Muddled A Simple Concept And How We Can Reclaim It," *Seattle University Law Review*, Vol. 24, No. 3, pp. 851-903, Roger Wynne (2001). *CP 858-935*. A copy of this article is attached as **Appendix 2**; and a copy of Mr. Wynne's article "*Abbey Road: Not a Road Out of Our Vested Rights Thicket*," (2009) (*CP 64-68*), is attached as **Appendix 3**.

⁹ While this Court's decision in *Town of Woodway* summarizes the vested rights doctrine, it does not stand for the proposition that the doctrine should be extended to shoreline permits. Thus, the City does not know why Judge Benton made a reference to *Town of Woodway* in her order on summary judgment in this matter. *CP 995*. This anomaly is discussed more fully, *infra*, pp. 45-48.

doctrine, as it was originally judicially recognized, entitles developers to have a land development 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. *Abbey Road*, 167 Wn.2d at 250, citing *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958); *Woodway*, 291 P.3d at 281. “Vesting ‘fixes’ the rules that will govern the land development regardless of later changes in zoning or other land use regulations.” *Woodway*, 291 P.3d at 281.

Our state’s vesting doctrine grew out of case law recognizing that vested rights are rooted in notions of fundamental fairness. *Abbey Road*, 167 Wn.2d at 250. Washington’s vested rights rule is the minority rule, and it offers more protection of development rights than the rule applied in most other jurisdictions. In other jurisdictions, the majority rule provides that development is not immune from subsequently adopted regulations until a building permit has been obtained and substantial development has occurred in “reliance” on the permit. Washington rejected this reliance-based rule, instead embracing a vesting principle which places greater emphasis on certainty and predictability in land use regulations. *Abbey Road*, 167 Wn.2d at 251. By promoting a date certain vesting point, our doctrine ensures that “new land-use ordinances do not unduly oppress development rights, thereby denying a property owner’s right to due

process under the law.” *Id.*, quoting *Valley View Industrial Park v. Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987). That date certain is the date a developer files an application for a building permit.

In 1987, the legislature codified the above-noted judicially recognized principles in RCW 19.27.095(1). *Laws of 1987*, ch. 104, § 1. The state vesting statute now explicitly confers vested rights upon the submission of a complete building permit application. RCW 19.27.095(1) (emphasis added) reads:

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.

“Naturally, our ‘liberal’ vesting rule comes at a price.” *Woodway*, 291 P.3d at 281; *Graham Neighborhood Ass’n v. F.G. Assocs.*, 162 Wn. App. 98, 115, 252 P.3d 898 (2011). Our Supreme Court has acknowledged that vesting implicates a delicate balancing of interests. *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994). The goal of the statute is to strike a balance between the public’s interest in controlling development and the developer’s interest in being able to plan their conduct with reasonable certainty.

Development interests can often come at a cost to public

interest. The practical effect of recognizing a vested right is to potentially sanction 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 could be subverted.

Abbey Road, 167 Wn.2d at 251 (emphasis added; citations omitted).

In *Abbey Road*, as in this case, the developers could have filed building permit applications to cement their vested rights; but did not do so. In June of 2005, the developers in *Abbey Road* attended a pre-application meeting with the City to discuss construction of a large, multi-family residential development. Thereafter, the developers started their project, expending more than \$96,500 on pre-application costs. Then, on September 13, 2005, they submitted an application for site plan approval for 575 condominium units on 36.51 acres. This project would ultimately require numerous building permits as well, but the developers did not apply for any building permits at that time, only for site plan approval.

Later that same day, after the developer had applied for site plan approval, the city council passed an ordinance rezoning a large portion of the subject property to a zoning category that precluded the multi-family residential condos the developers were seeking. The City then issued a written decision notifying the developers that their project had not vested under the prior ordinance because they had not filed a building permit

application and, therefore, their site plan application was denied. *Abbey Road*, 167 Wn.2d at 247-48. The developers filed a judicial appeal of the City's decision under the Land Use Petition Act (LUPA), RCW Ch. 36.70C.¹⁰ The Supreme Court affirmed the City's decision, holding that development rights do not vest absent the filing of a building permit application, and that the developers had not obtained vested rights merely upon the filing of an application for site plan review. *Abbey Road*, 167 Wn.2d at 247.

As Roger Wynne noted, "*Abbey Road* articulates Washington's statutory vesting rule in simple terms: no matter the number of permits required for a project, and unless a local ordinance allows an earlier opportunity,¹¹ the developer may lock in the law applicable to that project only by filing a complete building permit application." Roger Wynne, *Environmental & Land Use Law*, at 9 (emphasis added).

One of the issues raised by the developers in *Abbey Road* to support their argument that the vested rights doctrine should be extended to cover site plan applications, was the high cost to a developer of

¹⁰ The different facts in our case have led to different causes of action being prosecuted by the developer. Here, the City Council passed a moratorium before ultimately adopting area-wide amendments that affected the developer's property. During the Moratorium, the City refused to accept Dargey's building permit application, leading to Dargey's mandamus action.

¹¹ Here, it is uncontested that the City does not have an ordinance that allows for an earlier vesting date than the date provided by state statute in RCW 19.27.095(1) (which states that vested rights accrue upon the filing of a complete building permit application).

submitting a site plan application. But the Supreme Court rejected this argument, noting that it had previously rejected the same cost-based arguments for the extension of the doctrine to Master Use Permit (MUP) applications in *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 874-75, 872 P.2d 1090 (1994):

In summary, in *Erickson*, we declined to extend the vesting doctrine to MUP applications on the basis of cost for three reasons: (1) the cost of obtaining MUP applications varies greatly depending on the proposed project; (2) we refused to reintroduce a form of case-by-case analysis of costs and reliance interests, which we had rejected 40 years before in favor of a date certain vesting standard; and (3) unlike building permit applications, MUP applications may be submitted at the infancy of a project before the developer has made a substantial commitment to it. Similarly, the costs involved in preparing and submitting a building permit application are often substantial. For the same reasons we rejected the invitation to extend the vesting doctrine in *Erickson*, we refuse to expand it in this case.

Abbey Road, 167 Wn.2d at 252-53 (emphasis added; citations omitted).

Here, Dargey advised the City that he believed it would have been too expensive to file a building permit application before environmental review was completed. CP 73-74. Dargey may also try to contend that the expenses he paid for shoreline review and SEPA review alone were so substantial (especially given the fact that he had to pay for an EIS) that they should be sufficient to cement vested rights. But this same argument has been rejected by the Supreme Court at least twice already, in *Erickson*

and *Abbey Road*.

B. The Vested Rights Doctrine Has Not Already Been Extended to Shoreline Permits by The Court Of Appeals in *Talbot v. Gray*

Dargey argued below that the vested rights doctrine has already been extended to shoreline substantial development permit applications by the court in *Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974). But *Talbot* was decided before the state vesting statute was enacted by the legislature in 1987, and before the Supreme Court's decisions in *Erickson v. McLerran* in 1994, and *Abbey Road* in 2009. *Abbey Road* rejected a similar argument, *i.e.*, that the vested rights doctrine had already been judicially extended to MUP applications by Division I of the Court of Appeals in *Victoria Tower P'ship v. Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987), saying "Even if *Victoria Tower* can be read to expand the common law vesting doctrine to MUP applications, it has been superseded by RCW 19.27.095(1) and our analysis in *Erickson*." *Abbey Road*, 167 Wn.2d at 254 (emphasis added).

The same is true of the alleged extension of the vested rights doctrine to shoreline permit applications. Even if *Talbot* can be read to have expanded the vested rights doctrine to shoreline permits back in 1974, it has been superseded by RCW 19.27.095(1) and the Supreme Court's analysis limiting the vested rights doctrine to building permit

applications in both *Erickson* and *Abbey Road*.

Furthermore, the facts and holding in *Talbot* do not support a claim that the *Talbot* court even intended to extend the vested rights doctrine to shoreline permits. For instance, *Talbot* may stand for the proposition that an application for a shoreline substantial development permit is vested in the shoreline regulations in effect on the date a complete application is filed; but it does not stand for the proposition that an applicant is vested in the full land use laws, rules, and regulations that are present in the zoning code (which is separate and apart from adopted shoreline regulations) simply because he files a shoreline permit. *See, e.g., Talbot v. Gray*, 11 Wn. App. at 811 (developer's rights in shoreline regulations vested upon the filing of an application for a shoreline substantial development permit and they were therefore exempt from the later enacted Shorelines Management Act); *Westside Business Park v. Pierce Cy*, 100 Wn. App. 599, 606, 5 P.3d 713 (2000) (citing *Talbot* for the narrow holding that a "developer's rights in shoreline regulations vested upon the filing of an application for a shoreline substantial development permit and they were therefore exempt from the later enacted Shorelines Management Act").

Again, the City is not aware of any Washington case holding that a shoreline permit application vests the applicant in anything more than the shoreline regulations in existence on the date a complete application is

filed. Thus, even if the vesting doctrine applies to shoreline permit applications, it does not vest an applicant in anything other than shoreline regulations.

It makes perfect legal sense to restrict the vested rights doctrine to the filing of a building permit application, because the building permit is the permit that triggers review of the entire zoning and building codes for a project. On the other hand, a shoreline permit provides only limited review; specifically, a review only of the local jurisdiction's adopted shoreline regulations as set forth by the Washington State Legislature in the SMA (Chapter 90.58 RCW), and as codified, here, by the City of Kirkland in Chapters 83 and 141 of the KZC. Moreover, in this case, shoreline review was restricted even further, *i.e.*, it was limited to only that 53-foot portion of Dargey's proposed project that lies within 200 feet of the ordinary high water line of Lake Washington. See, for instance, the first page of Dargey's shoreline approval, which clearly describes the very limited and minor improvements of his project that are proposed within the shoreline jurisdiction; which is some landscaping, a sidewalk and a small portion of one building.¹² *CP 246*. These are the only improvements subject to the shoreline permit. *CP 801*.

Additionally, the second page of Dargey's shoreline approval

¹² A copy of Dargey's shoreline approval decision, the City of Kirkland's Notice of Decision, is attached as **Appendix 4**.

plainly states that land use vesting for his project will not occur until he files a complete application for a building permit: “Pursuant to RCW 19.27.095(1), the building permit application will be subject to the zoning and land use control ordinances in effect on the date that a fully complete application is submitted.” *CP 247*.

Furthermore, the City does not have an independent vesting provision related to shoreline permit applications in any of its code provisions. In fact, quite the opposite. The City’s shoreline code, at KZC 83.40.1 (*see Appendix 7*), indicates that shoreline regulations are not part of the City’s general zoning code. This provision excludes a vesting argument. Shoreline regulations are an overlay set of regulations that apply only to certain areas in the City (within 200 feet of the ordinary high water mark of Lake Washington), and are specifically intended to be in addition to other “zoning, land use regulations, [and] development regulations.” *See KZC 83.40 – Relationship to Other Codes and Ordinances*:

1. The shoreline regulations contained in this chapter shall apply as an overlay and in addition to zoning, land use regulations, development regulations, and other regulations established by the City.

(Emphasis added.) Thus, according to *Abbey Road*, the shoreline portion of Dargey’s project (the 53-feet that lies within the shorelines jurisdiction)

is vested only to those shoreline regulations in existence on the date Dargey filed a complete shoreline application. *See, also, Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974) (holding that an application for a shoreline substantial development permit is vested in the shoreline regulations in effect on the date a complete application is filed and, therefore, exempt from the later enacted Shorelines Management Act). In sum, Dargey's shoreline application did not vest him in the City of Kirkland's entire zoning code especially where, as here, he could have vested in the zoning code simply by filing a timely building permit application.

C. **The City's Vesting Rules Do Not Violate Due Process As The City's Code Allows Developers To Vest By Filing For A Building Permit At Any Stage Of The Development**

In his post-*Abbey Road* analysis of the vested rights doctrine, learned scholar Roger Wynne noted that the Supreme Court appears to recognize only one due process concern, and that concern is whether a local jurisdiction has adopted any provisions that unduly frustrate or prohibit a developer from filing a building permit application and obtaining vested rights. As Mr. Wynne stated: "*Abbey Road* seems to recognize a safe harbor; as long as a local jurisdiction allows a developer to file a building permit application at any time in the permitting process, there is no due process violation." Wynne, *Environmental & Land Use*

Law, p. 10 (*see Appendix 3*). “As illustrated by the facts of *Abbey Road*, a local jurisdiction may find shelter in the safe harbor by showing only that its regulations do not prevent simultaneous filing of multiple permit applications for a project, and offering testimony from staff that the jurisdiction allows an integrated permit review process.” *Id.* Here, it is uncontested that the City has complied with these safe harbor provisions. CP 86-87, 90, 95-99, 799, 802-803, 805

As background, the Supreme Court previously frowned upon those local jurisdictions that frustrated a developer’s due process rights by adopting vesting procedures that intentionally delayed vesting. *See, e.g., West Main Associates v. Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986), where a developer challenged the validity of a Bellevue vesting ordinance which provided that development rights would vest only as of the time a building permit application was filed, but then prohibited the filing of a building permit application until after a series of other procedures was complete, including administrative design review approval, site plan review approval, administrative conditional use approval, and modification of landscape approval. The Court held the Bellevue ordinance unconstitutional as a violation of due process because the City effectively denied the developer the ability to vest rights by filing for a building permit application until after a series of preliminary permits

were obtained.

In the present case, the City's process does not frustrate vesting. Quite the opposite, in fact, as it is uncontested that the City will accept building permit applications concurrently with other development applications. According to the City's Planner, a developer whose project falls under the jurisdiction of the City's Shoreline Master Program (SMP), such as Dargey's project in this case, can submit applications for both a shoreline permit and a building permit to the City at the same time. *CP 86-87, 90*. Plus, it is uncontested that Dargey was informed of his right to file for a building permit concurrently with his shoreline permit and SEPA review in writing well before the Moratorium was enacted. *CP 90*. A similar procedure was found to be in full compliance with all due process requirements in *Abbey Road*. *See, 167 Wn. 2d at 255-57*.

In his argument to the trial court below, Dargey claimed that the Shoreline Administration section of Kirkland's Zoning Code prohibited him from filing an application for a building permit to vest his rights until after his shoreline permit had been issued, violating his constitutional right to due process as set forth in *West Main Assoc. v. Bellevue, supra*. This argument is without merit. Here, it is undisputed that the City's code allows developers to file an application for a building permit at any time in the permitting and development process.

Dargey argues that the City's shoreline code prohibits a developer from obtaining a building permit until after a shoreline permit is "issued." While the City cannot "issue" a building permit approval until after a shoreline permit is issued,¹³ nothing in the Code prohibits a developer from filing an application for a building permit at any time in order to vest his rights. For instance, the relevant provision reads as follows:

3. Where a proposed development activity encompasses shoreline and nonshoreline areas, a shoreline substantial development permit or other required permit must be obtained before any part of the development, even the portion of the development activity that is entirely confined to the upland areas, can proceed.

KZC 141.30(1) & (3) (emphasis added).¹⁴

In other words, if any portion of a development site lies within the shorelines jurisdiction, then a shoreline permit (or exemption) is the first approval that must be "issued" before any "work" or "activity" on any portion of the site can commence.¹⁵ But filing an application for a building permit does not constitute "work" or "development activity" under the Code, and a developer can file an application for a building

¹³ This is actually a requirement of the state Shorelines Management Act (SMA) that has properly been adopted by the City. "No development may occur on a shoreline of the state unless it is consistent with the policy of the SMA and a [shoreline] permit is first obtained." *Samuel's Furniture v. Dep't of Ecology*, 147 Wn.2d 440, 448, 54 P.3d 1194 (2002); WAC 173-27-140(1).

¹⁴ **Appendix 5.**

¹⁵ See *KZC 5.10.215 Development Permit* – Any permit or approval under this code or the Uniform Building Code that must be issued before initiating a use or development activity. **Appendix 6.**

permit contemporaneously with a shoreline permit, and/or at any time while awaiting issuance of a shoreline approval.

The statutory definitions relevant to this code provision support the City's interpretation. "Development activity," is defined as "[a]ny work, condition or activity which requires a permit or approval under this code or the Uniform Building Code." KZC 5.10.210 (emphasis added).¹⁶ Obviously, one does not need a "permit" or "approval" to apply for a building permit, thus, applying for a permit – any type of permit – does not constitute "development activity" under the Shorelines Administration Code and such applications are not prohibited by the Code. In sum, KZC 141.30(1) & (3) do not in any way impede a developer from filing an application for a building permit to vest rights.

As stated, Dargey argued below that the City code provisions above prevented him from filing a building permit to vest his rights pending processing of his shoreline application. At most, this argument amounts to nothing more than an erroneous interpretation of the City's code. And an erroneous interpretation of the City's code does not support Dargey's claim that he should be granted vested rights. This same argument was rejected by the Supreme Court in *Abbey Road*:

In the final analysis, nothing in the City's municipal code or in its application procedures conditions the submission of a

¹⁶ Appendix 6.

complete building permit application on prior approval of a site permit plan application. Abbey Road's own erroneous interpretation of the building permit application form is not a basis for finding the City's vesting procedures unconstitutional under the *West Main* standard. Abbey Road elected to proceed by obtaining site plan approval before applying for a building permit and cannot argue that its interpretation of the process it chose makes that process unconstitutional.

Abbey Road at 259-260 (emphasis added).

In sum, the City of Kirkland has no ordinance or regulation precluding Dargey from simultaneously filing a shoreline substantial development permit application and/or a request for SEPA review concurrently with a building permit application. Here, Dargey simply chose not to use this process. Instead, he chose to first obtain shoreline approval and complete environmental review before filing a building permit application. While this may make good business sense in the short term, as building plans may change significantly based upon environmental concerns or conditions of the shoreline substantial development permit, “by the same token it suggests a builder that is not ready to proceed, and thus is not entitled to vesting under the very rationale of that doctrine.” *Abbey Road*, 167 Wn.2d at 257-58, citing to Roger D. Wynne, *Washington's Vested Rights Doctrine*, 24 Seattle U. L. Rev. 851, 928-29 (2001) (noting the developer may want to hedge its bets by seeking one permit at a time, but does so at its own risk). Here, as in

Abbey Road, the City provided Dargey with a process that allowed him the ability to control the date of vesting. It was Dargey's own failure to timely file an application for a building permit that prevented vesting.

D. **The Supreme Court Has Already Rejected Dargey's Argument That The Vested Rights Doctrine Should Apply to All Land Development Permits**

Dargey argued below that the vested rights doctrine should be expanded to all land use applications. *CP 361-365*. But the Supreme Court has already declined to accept this argument:

Finally, *Abbey Road* [the developer] argues that as a matter of fundamental fairness this court should expand the vesting rights doctrine to all land use applications We find that such a rule would eviscerate the balance struck in the vesting statute **[I]nstituting such broad reforms in land use law is a job better suited to the legislature.** See *Wynne, supra*, at 916-17 (“[r]eform [of the vesting rights doctrine] should not be left to the judiciary, which must focus on one narrow fact pattern at a time”[.]

Abbey Road, 167 Wn. 2d 260-61 (emphasis added; citations omitted).

In making this argument below, Dargey relied heavily upon a case that not only pre-dates *Abbey Road*, but does not even address building permit vesting, *Noble Manor v. Pierce County*, 133 Wn. 2d 269, 943 P.2d 1378 (1997). As discussed below, *Noble Manor* is completely inapplicable as it addresses subdivision vesting (versus building permit vesting) and, thus, has no application to the facts of this case.

The line of decisions interpreting Washington's subdivision

vesting statute do not apply here, where no subdivision application is involved. In *Noble Manor*, our Supreme Court interpreted the vesting language contained in the subdivision statute, RCW 58.17.033¹⁷, holding that a subdivision developer obtains a vested right not only to subdivide its property under the laws in existence at the time it submits a complete subdivision application, but also to develop its land in accord with the zoning and land use laws existing at the time it files its application. *Noble Manor*, 133 Wn.2d at 285.

Noble Manor is distinguishable because it relied upon a vesting provision in the state subdivision statute, RCW 58.17.033, which is not applicable to building permit cases. Building permit cases rely upon the statutory vesting provisions of RCW 19.27.095(1).¹⁸ *Noble Manor* even discussed the distinction between the statutory vesting provisions for subdivisions and building permits, noting that at common law, this state's vested rights doctrine had long entitled developers to have a land

¹⁷ RCW 58.17.033, the subdivision statute:

- (1) A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.

¹⁸ RCW 19.27.095(1), the building permit vesting statute:

A valid and fully complete building permit application . . . shall be considered under . . . the zoning or other land use control ordinances in effect on the date of application.

(Emphasis added.)

development proposal processed under the regulations in effect at the time a complete building permit application was filed. *Noble Manor*, 133 Wn.2d at 175, citing *Erickson v. McLerran*, 123 Wn.2d at 867-68. But under the common law, the vested rights doctrine had never been extended to applications for preliminary or short plat approval. Then, in 1987, the legislature stepped in and: (1) codified the vested rights doctrine as to building permits (*RCW 19.27.095(1)*); and (2) expanded the vesting doctrine to also apply – for the first time – to subdivision and short subdivision applications (*RCW 58.17.033*). Laws of 1987, ch. 104. *Noble Manor* was the Supreme Court’s first opportunity to interpret the subdivision vesting statute. Both *Noble Manor* and the subdivision vesting statute are unique to subdivision applications. Here, Dargey did not file an application to subdivide property, and neither *Noble Manor* nor the state subdivision vesting statute is applicable or helpful to Dargey with regard to the vested rights issue now before this Court.

Furthermore, the fact that the legislature, in 1987, applied the vested rights doctrine to only two types of permits, subdivision permits and building permits, implies that it intended not to have the doctrine apply to any other permit application. This reasoning is a canon of statutory construction known as *expressio unius est exclusio alterius*, which means to express one thing in a statute implies the exclusion of the

other. *State v. Delgado*, 148 Wash.2d 723, 729, 63 P.3d 792 (2003). Had the legislature intended for the vested rights doctrine to be expanded to any other land use permits other than subdivision permits and building permits when it enacted the state vesting statutes in 1987, it would have either done so then – or at any time since. It has not.

The second case relied upon by Dargey in support of his argument that the vested rights doctrine should be applied to all permit applications was *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (2000). *Weyerhaeuser* is an old Division II decision that, when read and analyzed, was obviously not only poorly decided at the time, but has since been specifically questioned by the Supreme Court in *Abbey Road*, as discussed more fully below. In *Weyerhaeuser*, Division II had to decide whether the common law vested rights doctrine should be extended to an application for a conditional use permit (CUP). Relying principally on *Noble Manor v. Pierce County, supra*, (a subdivision case), Division II held that it did. But *Weyerhaeuser* was not a subdivision case, and *Noble Manor* should not have been relied upon for any reason under the facts in *Weyerhaeuser*.

Furthermore, as the City noted above, had the legislature intended for the vested rights doctrine to be expanded to conditional use permits (or any permits other than subdivision and building permits) when it enacted

the state vesting statute in 1987, it would have either done so then – or at any time since.

Additionally, *Weyerhaeuser* is in direct conflict with Supreme Court authority interpreting the vested rights doctrine as it applies to the building permit vesting statute, RCW 19.27.095(1), as interpreted by the Court in *Erickson v. McLerran, supra*, and *Abbey Road v. Bonney Lake, supra*. In both *Erickson* and *Abbey Road*, the Supreme Court made it very clear that the vested rights doctrine applied to building permit applications only, even going so far as to hold that a prior case decided by a lower court that might be interpreted as having expanded the vested rights doctrine to Master Use Permit (MUP) applications had been “superseded” by RCW 19.27.095(1). See *Abbey Road*, 167 Wn.2d at 254 (criticizing the applicant’s claim that the vested rights doctrine had already been judicially extended to MUP applications by this Court, Division I, in *Victoria Tower v. Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987), saying “Even if *Victoria Tower* can be read to expand the common law vesting doctrine to MUP applications, it has been superseded by RCW 19.27.095(1) and our analysis in *Erickson*.”) (emphasis added).

Finally, *Weyerhaeuser* appears to have relied upon out-of-context dicta from another pre-*Abbey Road* case for the proposition that the vested rights doctrine had already been judicially applied to CUP applications.

Weyerhaeuser makes reference to *Beach v. Board of Adjustment*, 73 Wn.2d 343, 347, 438 P.2d 617 (1968), where the state Supreme Court remanded the judicial appeal of a final land use decision back to the local jurisdiction for a new CUP hearing because the City had failed to record the first hearing and, thus, there was no verbatim record on appeal. The *Beach* court stated that although the regulations applicable to CUPs had changed since the first hearing, those changes could not be applied to the applicant in this situation, where the only reason for the delay and a new hearing was the City's failure to properly record the first hearing. *Id.*

Weyerhaeuser took this statement from *Beach* out of context, noting that a "subsequent change in the zoning ordinance does not operate retroactively so as to affect vested rights." *Weyerhaeuser*, 95 Wn. App. at 892-93, citing *Beach*, 73 Wn.2d at 347. In fact, the vested rights doctrine probably does not come into play at all when, as in *Beach*, an appeal is remanded for a new hearing based upon the local jurisdiction's failure to record the first hearing. But even if *Beach* might be interpreted as stating that the vested rights doctrine applies to CUP permits, this statement was only set forth in dicta, and courts cannot rely upon dicta as *stare decisis*. *State ex rel. Evergreen Freedom Found. v. Nat'l Educ. Ass'n*, 119 Wn. App. 445, 452, n.9, 81 P.3d 911 (2003). Also, as explained above, *Beach*'s decision on vested rights (if any) has been superseded by RCW 19.27.095(1), and

the Supreme Court's analysis in both *Erickson* and *Abbey Road*. *Abbey Road*, 167 Wn.2d at 254.

Finally, this Court should take notice of footnote 8 in *Abbey Road*, which specifically cites with disfavor to *Weyerhaeuser* (along with other non-building-permit decisions from the Courts of Appeals, such as *Beach v. Bd. of Adjustment* and *Talbot v. Gray*):

Abbey Road also argues that we should expand the vested rights doctrine based on case law, contending that there is no "rational reason" for refusing to expand the doctrine to site plan applications when the courts have done so in other contexts. . . . See *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 510 P.2d 1140 (1973) (grading permit applications); *Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974) (shoreline permit applications); *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 558 P.2d 821 (1977) (septic tank permit application); *Beach v. Bd. of Adjustment*, 73 Wn.2d 343, 438 P.2d 617 (1968) (conditional use permit applications); *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (1999) (conditional use permit applications). Again, in *Erickson*, we considered and rejected similar arguments, and we are not persuaded to overrule our analysis or holding in *Erickson*.

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

Finally, the trial court appears to have relied in general on pre-*Abbey Road* case law in making its decision to apply the vested rights doctrine to Dargey's shoreline permit application. Specifically, before

Abbey Road was decided, various courts had extended vesting principles to single permit applications, such as applications for grading permits¹⁹ and septic tank permits.²⁰ This extension of vesting principles is best described as “permit vesting” (versus “project vesting”). Under the permit vesting cases, the issue was not whether an entire “project” vested to the zoning code in effect at the time a particular permit application was filed; but only whether the permit itself vested in existing regulations, such that subsequently enacted regulations could not be applied to that specific permit. *See, for instance, Juanita Bay v. Kirkland*, 9 Wn. App. at 82-85 (grading permit was not subject to zoning changes adopted after the date a complete application for the grading permit had been filed); and *Ford v. Bellingham & Whatcom Cy*, 16 Wn. App. at 714-715 (property owners who failed to file applications for septic tank permits before new regulations were enacted were not entitled to have septic tank permits issued under prior regulations; but were instead required to comply with the septic tank regulations in effect on the date they filed complete permit applications). Based on these cases, the courts held that specific permits, such as grading permits and septic tank permits – *not* entire development projects – were subject to vesting protections. This “permit vesting” issue

¹⁹ *Juanita Bay v. Kirkland*, 9 Wn. App. 59, 84, 510 P.2d 1140 (1973), *rev. den.*, 83 Wn.2d 1002, 1003 (1973).

²⁰ *Ford v. Bellingham-Whatcom Cty Dist. Bd. Of Health*, 16 Wn. App. 709, 715, 558 P.2d 821 (1977).

is not before the Court of Appeals today. Instead, the City agrees that permit vesting may be appropriate here, *i.e.*, that Dargey may, in fact, be vested in the shoreline regulations in effect when he filed a complete shoreline permit application. The City simply does not agree that a shoreline permit application can confer vested rights to a local jurisdiction's entire zoning code (not just the adopted shoreline regulations) on an applicant's entire project (here, not just the 53 feet of Dargey's properties that lie within the shoreline's jurisdiction).

A little further discussion of this Court's decision in *Talbot v. Gray, supra*, may be helpful. The same "permit vesting" analysis found in *Juanita Bay* and *Ford* was used by Division I back in 1975 when this Court decided whether to apply "permit vesting" to a shoreline permit application. *Talbot* held that a residential property owner who wanted to build a dock adjacent to his home on Lake Washington was "vested" in the notice provisions of the State Shoreline Management Act (SMA) in effect at the time he filed his dock application. *Talbot*, 11 Wn. App. at 811. A careful reading of *Talbot* shows that the case was strictly limited to the notice provisions of the SMA, and further limited to a single private residential dock. The issue of "project vesting" was not addressed in *Talbot*. The issue of whether the filing of a shoreline permit application could vest a large project – such as Dargey's mixed-use development

project with a proposed 143 residential units – was not addressed at all in *Talbot* or *Juanita Bay* or *Ford*.

Furthermore, the trial Court's order is also contrary to *Beuchel v. State*, 125 Wn.2d 196, 884 P.2d 910 (1994), which is the only State Supreme Court case the City could find that appears to directly address the vested rights doctrine as applied to shoreline permits. In *Beuchel*, the Supreme Court limited its analysis to "permit" vesting, not "project" vesting. *Beuchel* held that a shoreline application vested the applicant in the County's existing shoreline regulations, and later-enacted shoreline regulations could not be imposed on the applicant. *Beuchel*, 125 Wn.2d at 206-207. No mention of possible vesting in any other regulations, much less the County's entire zoning code, was made in *Beuchel*.

In conclusion, the trial court's reliance on Division I's 1975 decision in *Talbot* and/or the Supreme Court's decision in *Beuchel* to apply "project" vesting to Dargey's filing of a shoreline permit application goes far beyond the holdings of these cases. It also expands the vested rights doctrine far beyond what the legislature intended when it enacted the vesting provisions for subdivisions and building permits back in 1987, resulting in "broad land use reform," which is a "job better suited to the

legislature.” *Abbey Road*, 167 Wn.2d at 260-261.²¹

E. Dargey is not entitled to relief under the Declaratory Judgments Act

Dargey asked the trial court to declare that (1) his project was vested in the BN zoning regulations and other land use regulations in place on the date he submitted his application for a shoreline substantial development permit, and (2) the City must accept and process his building permit application under those “vested” regulations. As set forth above, Dargey did not obtain vested development rights by virtue of filing only a shoreline permit application. But even if he had, he is not entitled to relief under the Declaratory Judgments Act given the issue presented here.

Declaratory judgment is used to determine questions of construction or validity of a statute or ordinance. *Federal Way v. King County*, 62 Wn. App. 530, 534-35, 815 P.2d 790 (1991). It is the proper form of action to determine the “facial validity of an enactment, as opposed to its application or administration.” *Federal Way*, 62 Wn. App.

²¹ The City asks this Court to recall and consider that Washington's vested rights doctrine is the minority rule, and it offers more protection of development rights than other jurisdictions. In other jurisdictions, the majority rule provides that development is not immune from subsequently adopted regulations until a building permit has been obtained and substantial development has occurred in “reliance” on the permit. Washington rejected this reliance-based rule. By adopting a date certain vesting point, Washington’s doctrine ensures that new land-use ordinances do not oppress development rights, thereby denying a property owner's right to due process under the law. That date certain is the date a developer files an application for a building permit. Washington’s vested rights rule is very generous to developers, more so than in any other state; all a developer has to do is file a building permit application.

at 535. Ordinarily, if a plaintiff has another completely adequate remedy, he is not entitled to relief by way of a declaratory judgment. *Id.* Thus, in a typical land use case, e.g., one which challenges the decision to issue or deny a permit, resort to a declaratory judgment procedure is not permitted because the Land Use Petition Act (LUPA) RCW Ch. 36.70C, provides an adequate remedy. *Id.* Here, given the fact that Dargey sought to file a permit application during the City's Moratorium, and his application was rejected due to the Moratorium, it appeared proper to the parties to proceed forward with a mandamus action. Ultimately, then, the seminal issue – whether or not Dargey could obtain vested rights merely by filing an application for a shoreline permit – was decided on summary judgment pursuant to CR 56.

But declaratory judgment is not a proper cause of action here because Dargey did not challenge the facial validity of an enactment (*i.e.*, he did not challenging the legality of the Moratorium itself), he merely challenged its application to his properties. Dargey can fully address this as-applied challenge in his request for mandamus. Accordingly, his request for a declaratory judgment should have been denied and dismissed by the trial court below.

Dargey cited to *Woodway v. Snohomish County*, 172 Wn.App. 643, 291 P.3d 278 (2013), for the proposition that the courts can decide the

application of the vested rights doctrine to a pending land use case in a declaratory judgment action. But *Woodway* is inapposite. Here, unlike *Woodway*, there is no “pending” land use decision; instead, *Dargey’s* building permit application was rejected at the counter. Furthermore, in *Woodway*, the declaratory judgment action was not filed by either the applicant or the permitting jurisdiction (which were both constrained to resolving any land use disputes between them via the LUPA), but by third parties whose only means of inserting their interests was via the Declaratory Judgment Act.

F. **Woodway V. Snohomish County Is Inapplicable to the Vested Rights Issue on Appeal in this Case**

In the Order on summary judgment on appeal in this case, the trial judge hand-wrote in, without any explanation, a citation to “*Town of Woodway v. Snohomish County*, 172 Wash. App. 643 (2013).” CP 995. To the extent she meant for *Woodway* to support her grant of relief under the Declaratory Judgment Act, her Order is in error and should be reversed by this Court as set forth above.

To the extent the trial judge intended for her citation to *Woodway* to support her conclusion that vested rights are triggered by a shoreline permit application, her order is also in error. *Woodway* does not hold that project vesting is triggered by a shoreline permit application; in fact, the

vesting doctrine as applied to shoreline permits is not even discussed in *Woodway*. In *Woodway*, the developer of a large project located on a 61-acre site had filed many permit applications with the County; including, among others, a subdivision permit and a building permit. Because these two applications were deemed complete, under both the common law vested rights doctrine and the state vesting statutes, the entire 61-acre “project” was indisputably vested.²² The fact that the developer filed additional permit applications, such as an application for a shoreline substantial development permit, was immaterial to the vesting issue. After the developer’s project was fully vested via its subdivision application and building permit application, the Growth Management Hearings Board (GMHB) issued a decision holding that some of the zoning regulations to which the developer had been vested were “invalid” because they had not been adopted in compliance with SEPA. Thus, the core issue in *Woodway* was whether the developer could remain vested in regulations that were subsequently deemed “invalid” by the GMHB. *Woodway* held that pursuant to the vested rights doctrine, the developer’s project was allowed to remain vested to these regulations, even though they were “invalid” for all other future projects. *Woodway*, 172 Wn. App. at 664.

In conclusion, *Woodway* does not support the proposition that the

²² See, the subdivision statute, RCW 58.17.033; and the building permit vesting statute, RCW 19.27.095(1), discussed at length in this brief.

filing of a complete shoreline permit application can or does trigger “project” vesting under the vested rights doctrine. In fact, the City could not find any Washington case that supports this proposition. This is an issue of first impression. The result of the trial court’s Order on appeal is to expand “project” vesting under the vested rights doctrine to shoreline permit applications for the first time. As already fully explored and explained above, given the fact that the legislature did not include shoreline permits in its vesting statutes in 1987 (or at any time since); and further given the fact that the Washington State Supreme Court has twice refused to expand the vested rights doctrine to any permit other than a building permit (in both *Erikson* and *Abbey Road*), the City believes the trial court’s Order is in error and respectfully requests that it be reversed on appeal by this Court.

V. CONCLUSION

Washington’s vested rights doctrine, as it was originally judicially recognized, entitles developers to have a land development 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. In 1987, the Washington legislature codified the above-noted judicially recognized principles in RCW 19.27.095(1). The state vesting statute now explicitly confers vested rights upon the

submission of a complete building permit application, reading as follows:

“A valid and fully complete building permit application . . . shall be considered under . . . the zoning or other land use control ordinances in effect on the date of application.” (Emphasis added).

The reach of the vested rights doctrine is not ambiguous. In general, it applies only to building permit applications. In its most recent decision on this issue, *Abbey Road v. Bonney Lake, supra*, the Washington Supreme Court declined to expand the vested rights doctrine to applications for site plan review, even though the Court knew that the developers had expended a large amount of time and money in preparing their site plan application. *Abbey Road* noted that as long as a local jurisdiction allows a developer to file a building permit application and obtain vested rights at any time in the permitting process, then there is no reason to expand this state’s already liberal vesting doctrine to other permit applications.

Finally, this case presents facts even more persuasive than the facts presented in *Abbey Road*, because here it is undisputed that (1) the developer was represented by knowledgeable legal counsel during the entire application process; (2) both the developer and his counsel were given prior warnings that a moratorium was likely going to be enacted; and (3) the developer was specifically told by the City’s Senior Planner

that he was not vested by virtue of having filed a shoreline application, and that he could vest his rights by filing an application for a building permit. Despite these facts, the developer chose not to file a building permit application before the Moratorium was enacted. There is nothing about these facts that warrant the extension of the vested rights doctrine to shoreline permit applications as requested by Dargey.

In conclusion, Dargey could have vested his rights simply by filing a building permit application simultaneous with his shoreline permit application and request for SEPA review – or at any time prior to the enactment of the development moratorium affecting his property – but, for some reason, he chose not to. Although the City agrees that Dargey is vested in the City’s shoreline regulations in effect at that at the time he filed his shoreline permit application, his shoreline application alone did not vest him in the City’s entire zoning code, land use laws and regulations. Because he was not vested, the City acted properly when it refused to accept his application for a building permit during the pendency of the Moratorium. Thus, the City respectfully requests that this Court reverse the trial court order granting summary judgment to the Plaintiff Dargey. The City also respectfully requests that the Court grant its cross-motion for summary judgment, which seeks to establish that Plaintiff Dargey did not vest to all of the land use laws and regulations in effect on

the date he filed an application for a shoreline development permit,
because he could only obtain full vested rights by filing a building permit
application.

Respectfully submitted this ____ day of October, 2013.

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DECLARATION OF SERVICE

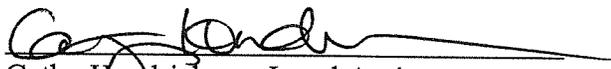
I declare that on October 28, 2013, a true and correct copy of the foregoing document was sent to the following parties of record via method indicated:

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DATED this 28th day of October, 2013.


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