



CASE REPORT

LAND USE PETITION ACT - VESTED RIGHTS. Building permit applications containing material misrepresentations or omissions of fact do not give rise to vested rights. *Lauer v. Pierce County*, No. 85177-8, Washington Supreme Court (Dec. 15, 2011).

I. Facts. The Garrisons applied for a building permit in 2004. Their application showed the location of the home they intended to build, but omitted the fact that there was a stream that crossed their property and that they were proposing to build within the stream buffer. The County approved the permit and construction began, but when a later on-site inspection revealed the facts, the County issued a cease and desist order and required that the Garrisons apply for a critical areas variance in order to continue construction. The Garrisons appealed the cease and desist order, but ultimately abandoned the appeal based upon the County's representation that they could apply for a variance under the 2004 variance criteria. The Garrisons then applied for the variance some two years after the County's variance criteria had changed, which occurred between the time the Garrisons originally applied for the building permit and the time they applied for the variance. The Garrisons argued, and the County concurred, that the filing of the building permit application vested them to the old criteria, and the variance was approved under the less-stringent criteria. Lauer and another neighbor filed a LUPA appeal challenging the variance.

II. Applicable Law and Analysis. The Supreme Court reversed the Court of Appeals and held that, where the applicants made knowing misrepresentations of fact, the building permit did not vest because it was not valid and did not comply with the County's regulations in place at the time the application was submitted. RCW 19.27.095 provides that a "valid and fully complete building permit application" shall be considered under the building permit and zoning ordinances in effect at the time of the application. The requirements for a "fully completed application" are defined by local ordinance. RCW 19.27.095(2). Under Pierce County's regulations governing the definition of a "fully completed application," the applicant was required to include a site plan that included "all set backs from buildings." In addition, it required any land use permits required to approve the building permit application to be applied for "prior to or with the building permit application." Consequently, the Court found that, according to the plain language of Pierce County's regulations, the Garrisons' application was not fully completed and did not vest.

The Court rejected the Court of Appeals' interpretation of RCW 36.70B.070,¹ stating that it ignored the language of RCW 19.27.095 requiring an application to be both fully completed and

¹ RCW 36.70B.070(4)(a) provides that a project permit application will be deemed complete "if the local government does not provide a written determination to the applicant that the application is incomplete" within 28

valid prior to vesting. Specifically, the Court noted that “vesting requires more than full completeness” under RCW 19.27.095. Turning to what is meant by “validity,” the Court stated that the plain meaning of “valid” is “legally sufficient” or “meritorious,” which the Garrisons’ application clearly was not. Finally, the Court noted that it had previously required local governments to act in good faith and not subvert the legitimate efforts of a developer to vest his or her rights. The requirement that a building application be “valid” assures that the good faith requirement is not only one way. Thus, because the Garrisons clearly violated the Pierce County ordinance when they made knowing misrepresentations in their application, they did not vest to the 2004 variance criteria.

In addition to addressing the question of vesting, the Supreme Court also found that the neighbors had standing to file a LUPA petition and that they were entitled to support their standing with facts that were not already contained in the administrative record before the superior court. The neighbors, owning properties adjacent to the Garrisons’ property, were able to satisfy standing requirements by alleging that clearing and development within the buffer area would cause specific injury to their properties.

III. Conclusion. A permit application that is not allowed under the regulations in place at the time it is submitted and that is issued under a knowing misrepresentation or omission of material fact confers no rights on the applicant. In reaching this holding, the Court rejected the interpretation that RCW 36.70B.070 operates to vest applications in every instance that the local government fails to inform the applicant that the application is incomplete. This interpretation would have yielded the troubling result that local government would have the daunting task of investigating every application to determine its accuracy within a 28-day period.

It is unclear whether the result in this case would have been the same had the Garrisons not abandoned their appeal regarding the cease and desist order. The Supreme Court previously determined in *Chelan County v. Nykreim* that permits issued in error confer rights upon an applicant if not appealed within LUPA’s 21-day statute of limitations. *Nykreim* was not discussed or even cited in this case. Nevertheless, the *Lauer* rule must be applied when analyzing vested rights. If you have additional questions relating to vested rights, please contact your City Attorney.

days of receipt. The Court of Appeals agreed that because the County did not inform the applicant that their application was incomplete, it became complete by operation of law.