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AFTER RECORDING RETURN TO:
SKAGIT COUNTY HEARING EXAMINER
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HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPLICANT: FAST BREAK ENTERPRISES LLC, JAMES A. DUFFY, and DAN ROBBINS (CC BEVERAGE (US) CORP)

ASSESSOR PARCEL NO: P36908, P36909

ABBREVIATED LEGAL DESCRIPTION: Lots A and B of Short Plat 22-82; within Section 19, Township 35 North, Range 4 East, W.M., Skagit County, Washington.

SKAGIT COUNTY HEARING EXAMINER
STATE OF WASHINGTON

FAST BREAK ENTERPRISES LLC, JAMES A. DUFFY, and DAN ROBBINS (CC BEVERAGE (US) CORP), Appellants,	)	AP 00-0221
v.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION
SKAGIT COUNTY, Respondent.	)	

THIS MATTER is an open record appeal of an administrative determination relating to the vesting of commercial development rights on certain property. The case came on regularly for hearing, after due notice, on July 12, 2000.

The Appellants were represented by Jonathan Sitkin, Attorney at Law. The Respondent County was represented by Tom Karsh, Planning Director.

The case was submitted on an agreed record. On the basis thereof, the Examiner enters the following:

FINDINGS OF FACT

1. On April 5, 2000, the Skagit County Planning and Permit Center, through Tom Karsh, Director, issued an administrative interpretation relating to vested rights for the property commonly known as the Regency Investment Corporation property.

2. The subject property comprises Lots A and B of short Plat #22-82, located on the north side of Cook Road between Interstate 5 and Old Highway 99 North. The property is within Section 19, Township 35 North, Range 4 East, Willamette Meridian.

3. In early 1977 this property was zoned Agricultural. On February 4, 1977, the prior owners, Dale and Harold Pierson, applied for a contract rezone of the property to allow commercial development within a 1000-foot radius from the intersection of Cook Road and I-5.

4. On April 25, 1977, a Contractual Agreement granting the rezone was signed between the County Commissioners and the Piersons, subject, inter alia, to the following conditions:

> 1. The rezoning of the site shall be limited to that area within 1,000 feet of the intersection of the centerline of Interstate 5 and Cook Road.
>
> 2. The uses shall be limited to highway oriented commercial uses, as determined by the Planning Department.
>
> 3. Prior to any issuance of any building permit, a detailed plot plan and landscape plan shall be submitted and approved by the Planning department.

Attached to the Contractual Agreement were several pages of drawings including one that had "Motel Site" and "Commercial Village" identified.

5. The rezone was applied for in the context of a sale of the property by the Piersons to Regency Investment Corporation.

6. The Environmental Assessment submitted with the rezone application spoke generally of development of commercial uses providing services "supportive of highway and tourist travel," including such things as "a motel, restaurants, service stations." The Assessment went on to state: "Our first priority will be the construction of a motel complex of approximately 150 units," located in the northwest portion of the property "as shown on the proposed plot plan, a copy of which is attached." The attached plan was conceptual in nature.

7. Also submitted in connection with the rezone application was a February 15, 1977 letter from Skagit County PUD No. 1 advising the County Health Department that the PUD had "sufficient water supply to serve the motel site" on the property.

8. On July 15, 1982, Regency Investment Corporation applied for a two-lot short subdivision of the subject property. This application did not identify specific plans for the development of the property. Instead, it stated "Proposed devel. unknown." The application was approved on July 19, 1982, as Short Plat #22-82.

9. The short plat application materials included reference to a Sewer Service Agreement between Regency Investment and Whatcom County Water District No. 12, which contemplated commercial developments, including a 150 unit motel and a 20,000 square foot commercial building on the subject property. The record discloses that Regency Investment made payments exceeding $13,000 to the water district under this agreement between 1977 and 1982.

10. In the 1982 application, the use of the property was described as fallow ground. In the intervening 18 years, the property has been partially developed with a service station on the southerly portion. There is neither a motel nor a commercial building on the site. No application for a building permit for either has ever been submitted.

11. Under current zoning only a 30-unit motel unit would be allowed on the property.

12. The instant appeal states that the subject land is now owned by Fastbreak Enterprises LLC and James A. Duffy. CC Beverage (US) Corporation, represented by Dan Robbins, is apparently interested in developing the site. The Appellants assert that there are vested rights to develop a 150 unit motel and a 20,000 square foot commercial building on the property.

13. The Planning and Permit Center's administrative interpretation concluded that no development rights vested for the property as a result of Regency Investment's 1982 short plat.

14. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the parties and the subject matter of this appeal. SCC 14.06.040(3)(d), SCC 14.06.110(7).

2. The argument is over the reach of the State's vesting doctrine as it applies to short plats. RCW 58.17.033 provides that vested rights attach at the time a fully completed application for short plat approval has been submitted. *Noble Manor Co. v. Pierce County,* 133 Wn.2d 269, 943 P.2d 1378 (1997) holds that the rights which vest include not only the right to divide the property under the laws and rules in effect at the date of application submittal, but also right to develop it under such laws and rules to the extent that the uses were disclosed in the application.

3. The doctrine as originally announced applied to the filing of completed building permit applications. Over time it has been extended by case law to the filing of various other permit applications. However, as a matter of common law, the doctrine has never included plat applications. The extension of the doctrine to plats was by the Legislature. RCW 58.17.033 was enacted in 1987. In *Noble Manor* the court recognized that this was a statutory enlargement of the common law doctrine.

4. Even if it is assumed here that the proposed development plans were clearly disclosed in connection with the 1982 short plat application, the statute construed in *Noble Manor* would not assist the Appellants. As noted, that statute was not passed until 1987, well after the short plat was applied for and approved. The Examiner is not aware of any evidence of intent for the legislation to be applied retroactively. The common law of vesting when Short Plat #22-82 was processed was that the vested rights doctrine does not apply to subdivision applications. *Norco Construction, Inc. v. King County*, 97 Wn.2d 680, 649 P.2d 103 (1982).

5. The Appellants seek to get around the timing of the passage of the statute by arguing that vested rights is a constitutional doctrine rooted in ideas of fundamental fairness guaranteed by the due process clause. The interpretation of the Constitution is an ongoing process of discovery. The determination of any facet of its meaning is therefore the determination of something it really meant all along. Thus, the discovery of a constitutional principle in a particular case eliminates any barrier of retroactivity as to that case.

6. It is true that some possibility of a constitutional basis for vested rights has been suggested by the Supreme Court. *Erickson & Associates, Inc. v. McLerran,* 123 Wn.2d 864, 872 P.2d 1090 (1994). But, the Appellants are asking the Examiner to expand the constitutional reach of the doctrine beyond what the Court has seen fit to declare. The opinion in *Noble Manor* says *Erickson* stands for the proposition that the Supreme Court will not extend the vested rights doctrine by judicial expansion. It hardly seems appropriate for the County Hearing Examiner to try to do what the Supreme Court refuses to do.

7. Moreover, the Examiner is not convinced that the underlying purposes of the doctrine require that it be applied in the instant case. The doctrine was developed to protect reasonable expectations -- particularly those which have been backed by investment. The need for certainty and fairness relates to this concern. But, the reasonableness of protecting expectations involves an obvious temporal dimension. The doctrine was intended to eliminate the effect of changes in law that occur during the permit processing period, after an application has been filed, but before a permit is ruled upon.

8. The appellate cases do not support the notion that the common law doctrine protects unrealized ideas advanced some 18 years ago from interim changes in the law. Indeed, the lack of a time limit in RCW 58.17.033 was particularly singled out by Justice Talmadge in *Noble Manor* as a cause for concern with the statute.

9. Further, in the absence of some connective evidence, the expectations protected ought to be those of the original development proponents. Here, a new developer apparently seeks to "tack" onto the expectations of other parties who are the ones spent money in the past toward creating commercial infrastructure. Indeed, prior to

asserting their vested rights theory, the Appellants here had to research the prior permit history.

10. In sum, the Hearing Examiner concurs with the County's legal analysis. No vested rights arose from the short platting exercise in 1982 because RCW 58.17.033 was not then in effect. Though the common law decisions may rest on a constitutional foundation, judicial interpretation has not stretched this body of law to cover the situation in this case.

11. In deciding this matter on the same basis as did the County, the Examiner declines to make any ruling on the question of whether this record shows an adequate disclosure of development plans in connection with the short plat application or to opine on whether prior development plans revealed in the course of a rezone can properly be considered in a short plat vesting case.

12. Any finding herein which may be deemed a conclusion is hereby adopted as such.

DECISION

The administrative interpretation is affirmed. The appeal is denied.

Wick Dufford

Wick Dufford, Hearing Examiner

Date of Action: September 12, 2000

Copy Transmitted to Appellants: September 12, 2000

RECONSIDERATION/APPEAL

A request for reconsideration may be filed as provided in SCC 14.06.180. The decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with the clerk of the Board within 14 days after the date of the Examiner's decision, or decision on reconsideration, if applicable.