NO. 92805-3

SUPREME COURT OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY, KING COUNTY, and BUILDING INDUSTRY ASSOCIATION OF CLARK COUNTY,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY, PUGET SOUNDKEEPER ALLIANCE, WASHINGTON ENVIRONMENTAL COUNCIL, ROSEMERE NEIGHBORHOOD ASSOCIATION

Petitioners,

and

POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTY'S AMICUS CURIAE MEMORANDUM

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I. INTRODUCTION

The Master Builders Association of King and Snohomish Counties ("MBA") submits the following Amicus Curie Memorandum in opposition to the Petitions for Review filed by the Washington State Department of Ecology, Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association ("Petitioners").

II. IDENTITY AND INTEREST OF AMICUS CURIAE

MBA is a trade organization comprised of professional home builders, architects, remodelers, suppliers, manufacturers and sales and marketing professionals. Because of its active approach to the region's housing needs, MBA has become the largest local home builders association in the United States. With 2,771 member companies, representing all facets of housing construction, the MBA is the authoritative voice on housing issues in the greater Seattle metropolitan area. The MBA is familiar with the issues and the parties' arguments and submits this Amicus Curiae Memorandum opposing the Petitions for Review in order to address the importance and practical effect of the Court of Appeals decision.

In its decision below, the Court of Appeals held that the Department of Ecology ("Ecology") cannot require local jurisdictions to impose stormwater regulations, which control and restrain the use of land,

in a manner that conflicts with Washington's vested rights laws.[1] The decision is in accordance with established case law, complies with the plain language of federal law and state vesting statutes, and makes sense in the real world given the practical realities of private property development. Petitioners have identified no significant state or federal constitutional issue under RAP 13.4(b)(3) and no issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4). The petitions for review should be denied.

III. STATEMENT OF THE CASE

MBA adopts the statement of the case from the Answers filed by King County, Snohomish County, and the Building Industry Association of Clark County.

IV. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

A. Washington's vested rights laws strike an important balance between the interests of regulators and private property owners, which results in the consistent and predictable application of land use regulations to development projects.

The practical reality of developing real property requires that the regulations that will apply to a development project must be fixed at some point in time in order for the project to move forward with certainty. Developing real property is expensive, difficult, and often takes years to plan, permit, and construct. When governments adopt new development

[1] *Snohomish County v. Pollution Control Hearings Board*, No. 46378-4-II (Wash. Ct. App. Jan. 19, 2016).

regulations, those regulations can frustrate the reasonable expectations of property owners in the process of redeveloping their land.

Both the government and property owners have important interests at stake that need to be balanced. On the one hand, due process requires that at some fixed point in time property owners should know which regulations will apply to their development projects in order to plan and implement those projects in a predictable manner. On the other hand, governments need to be able to adopt and enforce new regulations to potential development projects when those projects have not advanced to a point where due process concerns are triggered.

Washington law strikes a balance between these competing interests by drawing a bright line between the time an early-stage project can be subject to new regulations and the time that a project is sufficiently defined so that the property owner's development rights "vest" to the regulations then in effect. Washington's bright line rule is known as the "date of application" vested rights rule. Generally, the rule provides that once a complete application has been filed, the application must be considered under the statutes and ordinances in effect at the time of application submittal. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 275, 943 P.2d 1378 (1997).

In *Noble Manor,* this Court explained: "The purpose of the vested rights doctrine is to provide a measure of certainty to developers and to protect their expectations against fluctuating land use policy." *Id.* at 278. More recently, this Court explained:

> Washington adopted this rule because we recognize that development rights are valuable property interests, and 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.

Town of Woodway v. Snohomish County, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014) (internal citations omitted). The vested rights doctrine originally developed through case law, but has since been codified for building permits, subdivisions, and development agreements.[2]

The application of vested rights is vitally important to MBA members and other land owners in the State of Washington. Many MBA members invest substantial sums of money to purchase property for development, subdivide the property into smaller individual lots, and construct homes on the lots for sale to citizens of King and Snohomish Counties. MBA is dedicated to building quality homes that are affordable to the residents of King and Snohomish Counties.

The transparency and predictability of land use regulations plays an important role in the ability to buy land and construct quality homes at reasonable prices. As regulations change to become more restrictive or require additional processing, development costs increase. As a result, vesting laws are essential to the ability of MBA members and other land owners to predict with certainty the land use regulations will apply to their projects and the corresponding costs they will incur.

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[2] RCW 19.27.095 (building permits); RCW 58.17.033 (subdivision applications); RCW 36.70B.170 (development agreements); and RCW 58.17.170(2) (lots within a subdivision).

B. Applying stormwater regulations retroactively to vested projects undermines the certainty and predictability provided by vesting laws.

Petitioners ask the Court to accept their Petitions for Review and hold that vesting laws do not apply to land use regulations imposed in response to Ecology's Phase I Permit. In addition to being contrary to established law and the plain terms of the vesting statutes, if stormwater regulations are not subject to vesting, then much of the certainty that vesting statutes are meant to provide would be lost.

Stormwater regulations affect the physical layout of development sites. For example, stormwater regulations dictate the size of stormwater detention vaults and require land to be reserved for specific uses, such as for dispersion or infiltration of stormwater. Applying stormwater regulations retroactively would mean that projects that are otherwise vested to all other land use regulations would need to be redesigned potentially years after the project's vesting date to comply with updated stormwater regulations. Those changes to the project would likely require corresponding adjustments to other aspects of the project that are otherwise unrelated to stormwater, such as the number of lots available for building homes or the size of common area recreation spaces.

Under many local codes, if the changes to a project are significant enough, then the project will need to be reviewed as a new application, thereby extinguishing the vested status for the entire project. That would mean that those projects literally would be sent back to the drawing board.

This is exactly the type of fluctuating land use policy that the vested rights doctrine and vesting statutes are meant to guard against. Under state vesting statutes, property owners are protected from these disastrous practical implications.

C. The Court of Appeals decided correctly that stormwater regulations are "land use controls" subject to state vesting statutes and that the Clean Water Act does not preempt state vesting statutes where the Act's "maximum extent practicable" requirement can be applied in harmony with both state and federal law.

The Court of Appeals correctly concluded that Permit Condition S5.C.5.a.iii[3] conflicts with the State's vested rights statutes. The decision is supported by existing case law that addresses when a regulation is a land use control ordinance subject to vesting. *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999); *Westside Business Park v. Pierce County*, 100 Wn. App. 599, 5 P.3d 713 (2000).

In *New Castle*, the issue before the Court was whether the vesting provisions of RCW 58.17.033 applied to transportation impact fees ("TIFs") assessed on new developments. The Court held that a "land use control ordinance" under RCW 58.17.033 is one that exerts "a restraining or directing influence over land use." *New Castle*, 98 Wn. App. at 229. The Court then explained that the requirement to pay a fee did not exert a restraining or directing influence on the use of land:

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[3] Permit Condition S5.C.5.a.iii requires Phase I municipal permittees, including King and Snohomish Counties, to apply new stormwater regulations to local permit "applications submitted prior [to] July 1, 2015, which have not started construction by June 30, 2020."

> TIFs do not affect the physical aspects of development (i.e., building height, setbacks, or sidewalk widths) or the type of uses allowed (i.e., residential, commercial, or industrial). If they did, then TIFs would be subject to the vested rights doctrine....[But b]ecause TIFs do not "control" land use, do not affect the developer's rights with regard to the physical use of his or her land, and are best characterized as revenue raising devises rather than land use regulation, we hold that the definition of "land use control ordinances" does not include TIFs.

Id. at 237-38.

In *Westside*, the Court relied on its holding in *New Castle* and concluded expressly that "storm water drainage ordinances do exert a 'restraining or directing influence' over land use and are therefore land use control ordinances." *Westside*, 100 Wn. App. at 607. Stormwater regulations do affect the physical aspects of development. Thus, the Court held: "Storm water drainage ordinances are land use control ordinances" that are subject to the vesting provisions of RCW 58.17.033. *Id.* (emphasis added).

Here, the Permit unquestionably exerts a restraining and directing influence over land use. As explained by the Court of Appeals:

> The 2013-2018 Permit requirements by their very design are intended to exert a restraining and directing influence over the development and redevelopment of land to effectuate Ecology's regulation of stormwater discharges into Washington's waters. Certain project developers must comply with local ordinances enacted under the 2013-2018 Permit requiring, for example, that they utilize source control best management practices, implement on-site stormwater best management practices, and implement flow control standards to reduce the impacts of stormwater

> runoff. These and other 2013-2018 Permit requirements would significantly curtail how developers use their land.

Slip Op. at 13.

Contrary to Petitioners' arguments, the Court of Appeals decision does not expand the vesting doctrine, but rather applies it consistently with established case law and in accordance with the plain language of the vesting statutes. Even Petitioners do not dispute that the effect of stormwater regulations is to regulate and control the use of land. Instead, Petitioners argue that because stormwater regulations are aimed at achieving an environmental objective, they cannot be land use controls. In essence, Petitioners argue that a regulation can either be an environmental regulation or a land use control regulation, but not both. This argument is not supported by a number of cases cited by the Court of Appeals in which courts have found several environmental regulations to be subject to vested rights. Slip op., at 14 (citing examples of regulations addressing water course buffers, water drainage, riparian buffers, and storm drainage—all of which were subject to vesting).

The Court of Appeals' decision is well reasoned and supported by prior decisions and the text of the vesting statutes. Stormwater regulations are land use control ordinances subject to state vesting statutes and local jurisdictions cannot apply newly adopted stormwater regulations to vested permit applicants. Petitioners arguments to the contrary fail.

Petitioners preemption arguments also fail. In Washington, there is a strong presumption against finding preemption. *Hisle v. Todd Pac.*

Shipyards Corp., 151 Wn.2d 853, 864, 93 P.3d 108 (2004). "Preemption may be found only if federal law clearly evinces a congressional intent to preempt state law, or there is such a direct and positive conflict that the two acts cannot be reconciled or consistently stand together." *Id.* (*citing Dept. of Labor Indus. v. Common Carriers, Inc.*, 111 Wn.2d 586, 588, 762 P.2d 348 (1988)). The Court of Appeals correctly found no such congressional intent or an irreconcilable conflict between the federal requirements and state vesting laws. Slip Op. at 21-25.

The federal Clean Water Act ("CWA") delegates authority to the states to implement "controls to reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. 1342(p)(3)(B)(iii). The phrase "maximum extent *practicable*" provides the necessary flexibility for state agencies to achieve CWA goals without creating unnecessary conflicts with state laws. The federal delegation grants Ecology and other state agencies significant discretion to determine the methods and timing for meeting discharge limitation goals.

The CWA does not provide a specific compliance date. Those timing issues are within the reasonable discretion of the state agency. Here, Ecology argues that state vesting laws are trumped by CWA requirements, but the CWA provides Ecology the flexibility to implement CWA standards in harmony with state vesting laws, and the Court of Appeals correctly ruled that it must do so.

The Court of Appeals decision does not prevent Ecology from developing and implementing stringent water quality standards as required

by the CWA. Rather, the decision requires that Ecology implement those standards in a manner that does not violate important protections in state law for private property owners. Even Ecology recognizes that "[t]he only issue in this appeal is the timing requirement for implementation of the stormwater controls." Ecology Petition at 13. The Permit's requirements will be implemented for all development projects that have not already reached a point in the development process where they have vested to prior requirements. State vesting laws do not prevent implementation of federal law, they simply establish the point in time when applying new regulations to established projects is no longer *practicable*.

V. CONCLUSION

The Court of Appeals' decision is in accordance with established case law, complies with the plain language of federal law and state vesting statutes, and makes sense in the real world given the practical realities of private property development. Petitioners have identified no significant state or federal constitutional issue under RAP 13.4(b)(3) and no issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4). The petitions for review should be denied.

DATED this 13th day of April, 2016.

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Certificate of Service

I, Rachel T. Wang, certify under penalty of perjury of the laws of the State of Washington that on April 13, 2016, I caused to be filed with the Washington State Supreme Court this AMICUS CURIAE MEMORANDUM and this CERTIFICATE OF SERVICE; as well as a copy of the same to be served on the following parties in the manner noted below:

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DATED this 13th day of April, 2016, at Seattle, Washington.

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Dear Clerk of the Washington State Supreme Court:

Attached please find the following two documents for filing in the Snohomish County, et al. v. WA State Dept. of Ecology, et al. and Pollution Control Hearings Board (Supreme Court No. 92805-3) matter:

1. Master Builders Association of King and Snohomish County's Motion to file Amicus Curiae Memorandum; and

2. Master Builder Association of King and Snohomish County's Amicus Curie Memorandum.

These pleadings are respectfully submitted on behalf of:

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