NO. 92805-3

Court of Appeals, Div. II Case No. 46378-4-II

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

Petitioner,

And

POLLUTION CONTROL HEARINGS BOARD, PUGET SOUNDKEEPER ALLIANCE, WASHINGTON ENVIRONMENTAL COUNCIL, and ROSEMERE NEIGHBORHOOD ASSOCIATION

Respondents Below.

BUILDING INDUSTRY ASSOCIATION OF CLARK COUNTY'S RESPONSE TO PETITIONER'S PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Building Industry Association of Clark County ("BIA") is an industry trade group representing more than 12,000 people in the home building industry.

This case concerns the Dept. of Ecology's imposition of new land use regulations in a manner that conflicts with Washington's well-established law on vesting of land development applications.

The Court of Appeals correctly decided this case. No unsettled or significant questions of law under the Constitution of the State of Washington or of the United States were before the Court of Appeals, nor are any presented to this court, and no unsettled issues of substantial public interest remain to be determined.

The decision by the Court of Appeals promotes fairness and efficiency in the permitting process. The decision does not result in any improper subversion of the public's interest in clean water, as advocated by Ecology. Rather, as Ecology's regulatory regime expands into land use, the decision ensures that Ecology's land use regulations comport with

Washington's well-established law on vesting of land development applications.

Therefore, BIA joins Snohomish and King County in respectfully requesting that the Supreme Court deny the Petitions for Review filed by Ecology and Puget Soundkeeper Alliance, et al.

BIA incorporates by reference Snohomish and King County responses in opposition. This response supplements arguments filed by Snohomish and King County.

II. STATEMENT OF CASE

The federal Clean Water Act, 33 U.S.C. 1251 et seq., contains the National Pollutant Discharge Elimination System ("NPDES") permit program that regulates point sources that discharge pollutants in the waters of the United States. The NPDES permit requires States to implement stormwater management programs. In Washington, the regulated jurisdictions are split between Phase I communities, those with over 100,000 and Phase II communities, those with more than 10,000 people that also meet other conditions.

Clark, Pierce, King and Snohomish counties and the cities of Seattle and Tacoma are Phase I communities.

The Washington Department of Ecology ("Ecology") issued a new NPDES permit for the Phase I communities on August 1, 2012 with an effective date of August 1, 2013.[1] The biggest change to the Phase I permit requires local jurisdictions to implement low impact development (LID) techniques into their land use development codes.[2]

BIA being the industry regulated by the local land use ordinances derived under the Phase I permit appealed the permit because of the costs associated with employing LID in all areas. But BIA also joined Snohomish County and Clark County in a motion for summary judgment challenging Ecology's vesting rule as defined in the Phase I permit.[3] This permit condition states that "[t]he local program adopted to meet the requirements of S5.C.5.a.i through ii shall apply to all applications submitted after July 1, 2015 and shall apply to projects approved prior to July 1, 2015, which have not started construction by June 30, 2020."[4]

Prior to issuing its Final Order the PCHB issued an order denying Snohomish County's summary judgment motion and affirming Ecology's

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[1] Petitioner's Joint CP, Thurston Co. Case #14-2-00710-5, Joint EX List, Document #J-1.
[2] Phase I Permit Special Condition S5.C.5a-.b, CP, Joint EX List, Doc. #J-1.
[3] Phase I Permit Special Condition S5.C.5.a.iii, CP, Joint EX List, Doc. #J-1.
[4] Id.

cross motion that the vested rights doctrine is not applicable to stormwater control ordinances because they are environmental regulations not land use controls.[5]

III. ARGUMENT

A) NO BASIS FOR ACCEPTANCE OF REVIEW UNDER RAP 13.4(b)(3) or (4)

The Court of Appeals decision does not "expand" the vested rights doctrine, which has long applied to all land use regulations and controls, regardless of what agency promulgated them. The stormwater controls at issue require specific changes to land development site plans and thus are properly characterized as land use regulations. Ecology seeks to create a basis for review under RAP 13.4(b)(4) where none exists.

Similarly, Ecology seeks to create a preemption conflict where none exists, and there is no basis for this Court to accept review under RAP 13.4(b)(3). The Congress delegated the NPDES permit program to the State with the intent that the implementation will occur within the

[5] PCHB Nos. 12-093c and 12-097c Order on Summary Judgment October 2, 2013 p. 28-29 - Petitioner's Joint Designation of CP, Thurston Co. Case #14-2-00710-5, From PCHB #12-093c, Bates #003971-004015.

framework of state law. As correctly determined by the Court of Appeals, Washington's vested rights doctrine and Congressional goals and objectives under the Clean Water Act are not mutually exclusive. Therefore, no significant question of law under the Supremacy Clause is presented and no basis for review exists under RAP 13.4(b)(3).

B) WASHINGTON'S VESTED RIGHTS DOCTRINE – NO "EXPANSION" OF VESTED RIGHTS DOCTRINE HAS OCCURRED

The Court of Appeals decision does not "expand" the vested rights doctrine. The well-established case law applies the doctrine to all land use regulations and controls. The stormwater controls at issue require specific changes to land development site plans and thus are properly characterized as land use regulations. Ecology seeks to create a basis for review under RAP 13.4(b)(4) where none exists.

In Washington, developers have a vested right to proceed under land use plans and regulations in effect when a complete permit application is filed. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 169, 322 P.3d 1219 (2014). In *Town of Woodway*, this Court held that the vested rights doctrine applies even where applicable regulations were subsequently

found to be noncompliant with the State Environmental Policy Act (SEPA), Chapter 43.21C RCW. This Court emphasized that Washington's vested rights doctrine strongly protects the right to develop property, and provides a "date certain" standard for vesting.[6] Under the date certain standard, developers are entitled "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." *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, citing *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009). 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, quoting *Abbey Rd. Grp. LLC v. City of Bonney Lake*, 167 Wn.2d at 251 (quoting *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987)).

[6] *Town of Woodway v. Snohomish County*, 180 Wn.2d 165.

Though derived from common law, the vested rights doctrine is now statutory. *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 867-68, 872 P.2d 1090 (1994); RCW 19.27.095(1) (building permits); RCW 58.17.033(1) (subdivision applications); RCW 36.70B.180 (development agreements).[7]

Washington's vested rights doctrine entitles developers to have a land development proposal processed under the regulations in effect at the time a complete application is submitted, regardless of subsequent changes in zoning or other land use regulations.[8] [9]

At common law, "[t]he purpose of the vested rights doctrine [was] to provide a measure of certainty to developers and to protect their expectations against fluctuating land use policy." *New Castle Invs. v. City of LaCenter*, 98 Wn.App. 224, 989 P.2d 569 (1999) citing *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 278, 943 P.2d 1378 (1997). This doctrine enables owners to plan with reasonable certainty, by ensuring that "land use control ordinances" in effect at the time of vesting will remain constant during the project. The Court of Appeals correctly

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[7] *Town of Woodway v. Snohomish County*, 180 Wn.2d 165.
[8] RCW 19.27.095(1)
[9] *Erickson & Assoc., v. McLerran*, 123 Wn.2d 864.

held that Ecology's 2013 – 2018 Permit required new stormwater regulations that are "land use control ordinances" because they require specific changes to land development site plans, and are thus subject to the vested rights statutes. This decision adheres to established case law.

In *New Castle*, the Court explained what "land use control ordinances" are subject to the vested rights doctrine.[10]

In that case, the Court decided that Transportation Impact Fees (TIFs) did not constitute "land use control ordinances" because they do not directly affect land development site plans. Unlike the TIFs at issue in *New Castle*, the stormwater controls at issue are not simply "charges." They mandate physical aspects of the development itself, and force site plan changes that differ from what was required when an application was complete and vested.

The court in *New Castle* noted that the phrase "land use control ordinances" is not defined in the statute.[11] The test applied in *New Castle* was whether the regulation "controls" development **by limiting or**

[10] *New Castle Inv. v. City of LaCenter, 98 Wn.App.* 224.
[11] *New Castle Inv. v. City of LaCenter*, 98 Wn.App. 224, 228.

changing the development in any way.[12] The Court determined that TIFs do not exercise a restraining or directing influence over land use, as they function only as a charge or fee and do not alter the physical aspects of the development. It concluded that requirements affecting physical aspects of development (i.e., building height, setbacks, or sidewalk widths), or the type of uses allowed (i.e., residential, commercial, or industrial), are subject to the vested rights doctrine. Because Ecology's regulations do affect the physical aspects of development, they are subject to the vested rights doctrine.

The simple question is whether Ecology's new stormwater regulations require an owner to use land or build differently from what they were able to do at the time their application was complete. The Court of Appeals correctly answered yes, and correctly concluded the regulations are "land use control ordinances" subject to Washington's vested rights doctrine. The record established that the regulations force owners to modify existing, complete applications, to meet new requirements for stormwater, maintenance of natural drainage patterns, construction of stormwater treatment facilities, and implementation of flow control standards.

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[12] *New Castle Inv. v. City of LaCenter*, 98 Wn.App. 224. (emphasis added).

The decision by the Court of Appeals cannot be characterized as an expansion of the vested rights doctrine in light of well-established case law interpreting statutory provisions.

NO FRUSTRATION OR IMPAIRMENT OF CONGRESSIONAL OBJECTIVE TO REDUCE MUNICIPAL STORMWATER - NO PREEMPTION CONFLICT

Washington State's vested rights doctrine does not make compliance with the federal Clean Water Act impossible, nor does it frustrate the purposes and objectives of Congress. There is no evidence in the record that the prior Ecology stormwater regulations did not comply with the Clean Water Act.

The goal of municipal stormwater regulation is enhanced by the certainty and predictability of vested rights. Standards in effect at the time of complete application submittal will apply, providing reasonable due process protection to owners working to complete vested projects. Fairness and efficiency in permitting are legitimate goals that do not frustrate or impair Congressional goals and objectives.

Here, the Appellate Court correctly distinguished between the terms "maximum extent **practicable**" as contrasted with "maximum extent **possible**," and correctly concluded that 33 U.S.C. § 1342(p)(3)(B) provides flexibility to states adopting stormwater control regulations.[13] Additionally, the Court noted the absence of any federal directive requiring the adoption of Ecology's new regulations within specific timeframes.

Ecology asserts a preemption conflict where none exists. There is no basis for this Court to accept review under RAP 13.4(b)(3). Congress never required the NPDES program to trump state law where no preemption conflict exists.

State law is preempted to the extent of any conflict with a federal statute, that is, when compliance with both federal and state regulations is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hillman v. Maretta*, 569 U.S. __, 133 S. Ct. 1943, 186 L. Ed. 2d 43 (2013); citing U.S.C.A. Const. Art. 6, cl. 2. In applying the Supremacy

[13] 33 U.S.C. 1342(p)(3)(B) (emphasis added).

Clause to subjects regulated by Congress, the Court must ascertain whether a challenged state law is compatible with the policy of the federal statute.

Washington's vested rights doctrine does not impede the accomplishment and execution of the full purposes and objectives of Congress; those in effect at the time vested submittals are completed. The vested rights doctrine comports with Congressional purposes and objectives and provides a date certain for all participants to rely on, including owners, regulators, lenders, tenants and buyers.

NO FRUSTRATION OR IMPAIRMENT OF ECOLOGY'S AUTHORITY UNDER RCW 90.48.260(1)(a) TO ESTABLISH AND ADMINISTER PROGRAM

Congress authorized EPA delegation of the NPDES program to the states. 33 U.S.C. § 1342(b). The vested rights doctrine does not impair Ecology's authority under RCW 90.48.260(1)(a) to regulate water pollution. Ecology can establish and apply program elements to land development under regulations which exist when a complete development application is submitted. Presumably, the program elements in existence

on the application submittal date constitute appropriate standards as of the date the project vests.

The simple point is that the water pollution requirements under the Clean Water Act, and requirements adopted by Ecology under Chapter 90.48 RCW will in fact be applied to development projects as of the date the projects vest.

IV. CONCLUSION

The decision by the Court of Appeals promotes fairness, certainty and efficiency in the permitting process. The decision does not "expand" the vested rights doctrine, and no basis for review exists under RAP 13.4(b)(4). Additionally, Washington's vested rights doctrine and Congressional goals and objectives under the Clean Water Act are not mutually exclusive, and no significant question of law under the Supremacy Clause provides any basis for review under RAP 13.4(b)(3).

For the reasons discussed above, and for the reasons set forth in the King County and Snohomish County responses, BIA respectfully requests that the Court deny the Petitions for Review filed by the Department of

Ecology, Puget Soundkeeper Alliance, Washington Environmental Council and Rosemere Neighborhood Association.

RESPECTFULLY SUBMITTED this 18th day of March, 2016.

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(AMENDED) DECLARATION OF SERVICE

I hereby certify that on the date shown below, I served a true and correct copy of the foregoing APPELLANT BUILDING INDUSTRY ASSOCIATION OF CLARK COUNTY'S REPLY BRIEF on the following parties by the method indicated:

By E-Mail Filing Service
Washington Supreme Court
415 12th Street W
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DATED: March 8th, 2016.

Lisa D. McKee, Legal Assistant
To James D. Howsley for
Respondents Building Industry Association
of Clark County

OFFICE RECEPTIONIST, CLERK

To: Lisa McKee
Subject: RE: Filing - BIA of Clark County's Response to Petitioner's Petition for Review w/AMENDED COS

Rec'd 3/18/2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Lisa McKee [mailto:lisa.mckee@jordanramis.com]
Sent: Friday, March 18, 2016 4:18 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Filing - BIA of Clark County's Response to Petitioner's Petition for Review w/AMENDED COS

Hello,

Please find attached Building Industry Association of Clark County's Response to Petitioner's Petition for Review which was previously filed and accepted today.

New to this filing is an AMENDED Certificate of Service.

Case Name:

Snohomish County, King County, and Building Industry Association of Clark County, Respondents, v. Washington State Department of Ecology, Petitioner, and Pollution Control Hearings Board, Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association, Respondents Below.

Case Number:

Supreme Court Case No. 925805-3, COA, Div. II Case No. 46378-4-II

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