Court of Appeals No. 46378-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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

Petitioners/Appellants Below,

v.

POLLUTION CONTROL HEARINGS BOARD and WASHINGTON STATE DEPARTMENT OF ECOLOGY, and PUGET SOUNDKEEPER ALLIANCE, WASHINGTON ENVIRONMENTAL COUNCIL, and ROSEMERE NEIGHBORHOOD ASSOCIATION

Respondents/Respondents Below.

BRIEF OF AMICUS CURIAE MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES

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I. INTRODUCTION

The Master Builders Association of King and Snohomish Counties ("MBA") submits the following Amicus Curie Brief in support of Appellants King and Snohomish Counties and the Building Industry Association of Clark County.

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.

This case involves the question of whether the challenged Phase I Permit's Special Condition S5.C.5.a.iii conflicts with Washington's vested rights laws. The resolution of this case will have a profound impact on the building industry and, therefore, it is of vital importance to MBA members. On behalf of its 2,771 members, the MBA urges the Court to reverse the Pollution Control Hearings Board's October 2, 2013 Order ("Board's Order") and reinstate the predictability, due process, and fundamental fairness assured by the continued application of vested rights to stormwater regulations.

III. ISSUES ADDRESSED BY AMICUS

Is the Phase I Permit's Special Condition S5.C.5.a.iii, which requires municipal permittees to apply new stormwater regulations to local permit "applications submitted prior [to] July 1, 2015, which have not started construction by June 30, 2020," in conflict with or inconsistent with Washington's vested rights laws?

IV. STATEMENT OF THE CASE

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

V. ARGUMENT

A. Washington's vested rights laws balance the interests of regulators and property owners by establishing a precise moment in time when existing land use regulations will apply to a proposed development and subsequently adopted regulations will not apply.

When governments adopt new development regulations, conflicts naturally arise with plans and expectations of property owners intending to develop their properties. On the one hand, if governments were able to adopt and enforce newly adopted regulations on planned projects at any stage of the development process, property owners would be unable to predict with any certainty the end result of their development projects, which would instead be subject to fluctuating land use policies and the regulatory whims of elected officials, resulting in increased costs and the decreased ability to build affordable homes. On the other hand, in order to

serve the public interest, governments need to be able to adopt and enforce new regulations to potential development projects when those projects are not sufficiently definite enough to implicate due process concerns. Washington law strikes a balance between these competing interests by drawing a bright line between the time an anticipated project can be subject to new regulations and the time that a proposed project is sufficiently defined so that the property owner's development rights "vest" to existing regulations.

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). The Supreme Court in *Noble Manor* 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. Recently, the Supreme Court re-affirmed the purpose for the vested rights rule:

> 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).

While not all development applications trigger vested rights,[1] it is unquestionable that state statutes provide for vesting of applications for building permits and subdivisions, and vesting pursuant to development agreements. 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). Because MBA's 2,771 members include a large number of single-family developers and builders, this brief focuses on the vesting provisions for building permits and subdivisions. If any of the vesting statutes applies to stormwater regulations, then Special Condition S5.C.5.a.iii violates state law and the Board's Order must be reversed.

B. The application of vested rights is vitally important to MBA members and other developers and builders 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 making homes affordable for the residents of King and Snohomish Counties. Vital to the ability to develop land and construct quality homes at reasonable prices is the transparency and predictability of land use regulations. The vested rights doctrine and state statutes codifying the doctrine are critical to the ability

[1] *See, e.g., Potala Village Kirkland v. City of Kirkland*, 183 Wn. App. 191, 334 P.3d 1143 (2014), *petition for review denied* (Feb. 4, 2015) (No. 90819-2) (holding that developer's filing of application for shoreline substantial development permit did not vest rights to land use control ordinances for the entire project that existed on the date of application).

of MBA members and other land owners to predict with certainty the land use regulations that will apply to their development projects.

King and Snohomish Counties have subdivision processes that require MBA members to invest substantial amounts of time and money and to go through multiple steps that can take several years to complete. First, they need to obtain approval of a preliminary plat (an approximate drawing of the proposed subdivision, including the general layout of streets and other required elements).[2] This requires hiring engineers and other consultants to evaluate the property and prepare the necessary plans and reports required by local regulations.[3] Once the preliminary plat is approved, the developer must construct the infrastructure (e.g., roads, sidewalks, underground utilities, compressed soil for building pads, etc.) to support the later construction of homes and related improvements within the plat.[4] In King and Snohomish Counties (and throughout western Washington), site development activities are limited outside of the dry season (i.e., May through September),[5] so infrastructure construction can be delayed for several months.

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[2] RCW 58.17.070; *See generally* Ch. 19A.12 KCC and Ch. 30.41A SCC.
[3] KCC 19A.08.150; SCC 30.41A.050; SCC 30.70.030; Preliminary Subdivision Submittal Checklist (http://snohomishcountywa.gov/DocumentCenter/View/9181) (last visited February 4, 2014).
[4] KCC 19A.08.160 (setting forth the minimum improvements to be completed or bonded to ensure completion prior to final plat recording); SCC 30.41A.410 (requiring the completion of or bonding for the completion of minimum improvements prior to final plat approval).
[5] KCC 16.82.095 (limiting site development activities during the October 1 through April 30 wet season); SCC 30.63A.450 (limiting site development activities during the October 1 through April 30 wet season).

After the infrastructure has been constructed and the applicant has met all of the other state and local code requirements and conditions in the preliminary plat approval, the legislative authority for the local government (typically the city or county council) then must approve the final plat application.[6] Upon approval, the final plat map is recorded in the real property records, the property is officially subdivided into separate lots, and individual lots can be assigned tax identification numbers by the local assessor's office. At that point, the developer may seek building permits[7] and begin constructing homes.

Because the subdivision process requires a large, up-front investment and can take many years to complete, at some point in time the regulations that will apply to subdivision applications need to be fixed and not subject to change so that the land owner will have some certainty as to the layout and feasibility of the planned subdivision. In 1987, the Legislature assured that certainty by enacting RCW 58.17.033, which provides that when a fully completed application for preliminary plat approval has been submitted, it "shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, [then] in effect." Also in conformance with the long timeline for subdividing property, the Legislature adopted RCW 58.17.140,

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[6] RCW 58.17.170.

[7] RCW 19.27.095-.097 (requiring building permit applications to include, at minimum, a legal description or tax parcel number for the site and to provide evidence of an adequate water supply serving the lot).

assuring that an approved preliminary plat remains valid for at least five years and in some cases seven or ten years.

Under these statutes, a preliminary plat applied for in November 2013 is vested to November 2013 regulations. When the preliminary plat is approved in December 2014, the project remains vested to the November 2013 regulations. It continues to remain vested when infrastructure is built in 2015 and 2016. When the final plat is approved in 2017, the project is designed to the 2013 regulations. After the subdivision creates new lots in 2017, it may take a few more years to complete construction of the homes. To accommodate home construction on lots created pursuant to regulations that may subsequently have changed, the Legislature enacted RCW 58.17.170, which provides that the use and development of the lots within the final plat also are vested for five, seven or ten years after the final plat approval. If the final plat were approved in 2017, then the use and development of the lots would be vested through 2022, 2023 or 2027.

The state vesting statutes thus recognize and accommodate the realities of the subdivision process in Washington. Special Condition S5.C.5.a.iii requires King and Snohomish Counties to apply stormwater regulations retroactively to vested projects, thereby unraveling years of work and investment by MBA members and County employees. That result is burdensome, unworkable and contrary to state vesting statutes.

C. This Court already has held that stormwater regulations are land use control ordinances that are subject to vesting.

When an application vests pursuant to RCW 19.27.095[8] or RCW 58.17.033,[9] it vests to the "zoning or other land use control ordinances" then in effect. This Court's holdings in *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999), and *Westside Business Park v. Pierce County*, 100 Wn. App. 599, 5 P.3d 713 (2000), explain when a regulation is a land use control ordinance subject to vesting.

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:

> 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

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[8] "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." (Emphasis added).

[9] "A proposed division of land...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." (Emphasis added).

> 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. 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, just like in *Westside*, the stormwater regulations imposed pursuant to the Phase I Permit exert a restraining or directing influence over land use. The Phase I Permit requires King and Snohomish Counties and other Phase I Permittees to "adopt a program to prevent and control the impacts of runoff from new development, redevelopment, and construction activities."[10] An example of how the regulations contained in these local programs control the use of land is the requirement that projects achieve "Full Dispersion"[11] in accordance with the Stormwater Management Manual for Western Washington ("Stormwater Manual").[12] To meet the Full Dispersion requirement, the Stormwater Manual explains

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[10] Certified Appeal Board Record ("CABR") at 004997 (Phase I Permit at S5.C.5).
[11] Dispersion is the "[r]elease of surface and stormwater runoff such that the flow spreads over a wide area" which avoids concentrated discharges to drainage channels. *See* CABR 005587 (Stormwater Manual at Appendix G, pg. G-12).
[12] CABR 005077 (Phase I Permit, Appendix 1 at pg. 21, List #1).

that a portion of the development site is to be kept in its native condition and set aside to receive the surface and stormwater runoff.[13] In other words, the regulations require land within a new development site to be set aside and not developed.

Another example is the requirement that certain projects demonstrate compliance with a Low Impact Development ("LID") Performance Standard.[14] LID Performance Standards also require that land be used in specific ways, such as for infiltration facilities and for detention facilities on the land within a project site.[15] The design, sizing, and placement of such facilities are controlled by the Stormwater Manual.[16] These local regulations required by the Phase I Permit directly impact the amount and location of land available for other uses. The dispersion and LID requirements are just two of the many requirements in the Phase I Permit that directly influence the use of land.[17] Unquestionably, the requirements exert a restraining or directing influence over land use.

Yet both the Board and Ecology have come to the perplexing conclusion that the Phase I Permit does not regulate the use of land.[18]

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[13] CABR 005914 (Stormwater Manual, Volume V at BMP T5.30, pg. 5-30).
[14] CABR 005076-77 (Phase I Permit, Appendix 1, pgs. 20-21).
[15] CABR 005077-79 (Phase I Permit, Appendix 1, pgs. 21-23).
[16] CABR 005082-83 (Phase I Permit, Appendix 1, pgs. 26-27).
[17] For more examples, *see* Snohomish County Reply Brief at footnote 5 (describing how the Phase I Permit incorporates regulations in the Stormwater Manual that specify setbacks, location of required detention ponds, spacing for landscaping in stormwater tracts, and minimum spacing for stormwater facilities from septic tanks).
[18] *See* CABR 004001 (Board's Order at 31) (stating that the local regulations imposed pursuant to the Phase I Permit "do not resemble a zoning law or other development regulation, even in the loosest definition of the term"); Ecology Response Brief at pg. 19 (stating that the "requirements in the 2013 [Phase I] Permit...do not limit the use of land.").

Their only explanation for this conclusion is that the Permit has an environmental objective.[19] But a regulation may have an environmental objective and still be a land use control ordinance subject to vesting. Critical areas ordinances have an environmental objective (limiting the development of wetlands, aquatic areas, etc.), but land owners applications nonetheless vest to such regulations.[20]

Nothing about the environmental objective of the Phase I Permit authorizes it to be applied inconsistently with state vesting laws. In fact, the Permit states expressly that the required local stormwater regulations are mandatory only "[t]o the extent allowable under state and federal law."[21] As this Court already held in *Westside*, stormwater regulations are land use controls and state vesting statutes prohibit applying them retroactively to vested permit applications.

D. Special Condition S5.C.5.a.iii requires Phase I Permittees to apply stormwater regulations retroactively to vested projects in violation of state vesting statutes.

The Phase I Permit requires Phase I Permittees, including King and Snohomish Counties, to adopt and implement a new local regulatory program that meets specific and detailed requirements for controlling

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[19] CABR 004000-02 (Board's Order at 30-32); Ecology Response Brief at pg. 19.
[20] *See* RCW 58.17.033 (vesting subdivision applications to "land use control ordinances"); RCW 36.70A.037 (defining development regulations as "controls placed on development or land use activities...including, but not limited to...critical area ordinances"); *See also Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (1999) (holding that the applicant for a permit to construct a solid waste landfill that would require filling 30 acres of wetlands was vested to the wetland regulations existing seven years earlier at the time of filing a complete permit application).
[21] CABR 004993 (Phase I Permit at S5.C).

stormwater drainage and runoff to the Permittees' municipal separate storm sewer system ("MS4") from new development, redevelopment, and construction activities at the site and subdivision level.[22] At issue in this appeal is Special Condition S5.C.5.a.iii, which (as modified by the Board's Order)[23] requires municipal permittees to apply the new stormwater regulations to local permit "applications submitted prior [to] July 1, 2015, which have not started construction by June 30, 2020."[24]

As described above, vesting occurs at the time of filing a complete permit application, not after construction starts. Thus, the quoted portion of the Special Condition S5.C.5.a.iii is in direct conflict with the vesting statutes (and this Court's holding in *Westside*) because it imposes a new land use control ordinance on projects that previously vested. The Board's Order cites four legal bases for its conclusion that Special Condition S5.C.5.a.iii does not conflict with the vesting statutes, but the Board's justifications do not stand up to scrutiny.

E. The Board's Order relies on four flawed bases for its determination that the local stormwater regulations implemented pursuant to the Phase I Permit are not land use control ordinances.

The Board's Order cited the following four bases in support of its conclusion that the local stormwater regulations adopted by Phase I

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[22] CABR 004987 (Phase I Permit at S1.A).
[23] Originally, the Special Condition stated that it "shall apply to projects approved prior [to] July 1, 2015, which have not started construction by June 30, 2020," but the Board's Order directed Ecology to replace "projects approved" with "applications submitted"). *See* CABR 004012 (Board's Order at pg. 42).
[24] CABR 004998 (Phase I Permit at S5.C.5.a.iii).

Permittees are not land use control ordinances subject to vesting: (1) the Phase I Permit implements state and federal laws to address water quality, not control land use; (2) the Board will not judicially expand the vested rights doctrine; (3) the Legislature has directly addressed the inclusion of LID requirements in the Permits; and (4) the municipalities must comply with state water quality laws and require those they regulate to do so as well.[25]

The Board's first basis, that the Phase I Permit implements state and federal laws to address water quality, not control land use, sidesteps the question of whether the *effect* of the Phase I Permit is to control land use and therefore is subject to vesting statutes. The Board's Order strains to characterize the effect of the Permit as something other than requiring local jurisdictions to regulate and control the use of land.[26] In fact, the Phase I Permit requires local regulations to employ "Low Impact Development" as a strategy, which is defined expressly in the Permit to mean "a stormwater and land use management strategy..."[27] Regardless of the stated goal for the Permit, the effect is to control land use through local regulatory programs. As such, the regulations mandated by the Permit are subject to vesting.

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[25] CABR 003998-99 (Board's Order at pgs. 28-29).
[26] *See* CABR 004001 (Board's Order at pg. 31) ("...under the terms of the permits the municipalities must adopt programs or locally enforceable provisions that require further implementation of [the] water quality control measures by construction or industrial sources in the community").
[27] CABR 005052 (Phase I Permit at pg. 70 – Definitions and Acronyms).

The Board next states that it will not judicially expand the vested rights doctrine. This is a classic straw man argument. The Appellants are not arguing for expansion of the vested rights doctrine, but for application of statutes that already support the conclusion that stormwater regulations are land use control ordinances subject to vesting.[28] Rather than expanding the doctrine, the Board's Order "judicially" narrows the application of statutory vesting in direct conflict with this Court's holding in *Westside*.

The Board erroneously concluded that the regulations are not land use control ordinances because the "Legislature has never defined [such regulations] as 'land use controls' within the purview of vested rights."[29] But the Board's statement is of little value, since the Legislature has not defined "land use controls" to expressly include or exclude stormwater regulations. The Legislature has, however, defined "development regulations" as land use controls, by stating that development regulations include "controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances..." RCW 36.70A.030(7) (emphasis added).[30]

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[28] RCW 58.17.033 (vesting subdivision applications to "land use control ordinances"); RCW 36.70A.037 (defining development regulations as "controls placed on development or land use activities by a county or city" and including within the definition regulations with environmental objectives, such as critical areas ordinances and shoreline master programs).

[29] CABR 004002 (Board's Order at 32).

[30] By including the phrase "including, but not limited to," the Legislature recognized that the phrase "controls placed on development of land use activities" encompasses more than the limited list of regulations included in the statute. Yet, here, Ecology argues that

The Board suggests that LID requirements are not land use controls subject to vesting because the Legislature has directly addressed the inclusion of LID requirements in the Permits. But inclusion of LID requirements does not mean that the Legislature required Ecology to retroactively apply those requirements via Special Condition S5.C.5.a.iii. In fact, the Permit states expressly that the required local stormwater regulations are mandatory only "[t]o the extent allowable under state and federal law."[31] There is no directive from the Legislature to violate vesting statutes. A local regulation that conflicts with and thwarts state statutes is unconstitutional.[32] Without express authority from the Legislature, Ecology cannot require King and Snohomish Counties to thwart the operation of state vesting statutes.

Finally, the Board states that municipalities must comply with state water quality laws and require those they regulate to do so as well. The Board's statement relies on the premise that state vesting laws cannot exist in harmony with water quality laws. This is not true. The regulations imposed pursuant to the Phase I Permit are triggered by development, redevelopment, and construction activities.[33] They do not apply

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the phrase "land use control ordinances" in the vesting statutes must exclude any regulation not expressly listed in the statutes. Under the rules of statutory construction, the Court should not conclude that the Legislature intended for "land use control ordinances" to be strictly limited to regulations described in the statute, but "controls placed on development or land use" to be open to including more than the regulations described in the statute. As described above, stormwater regulations are land use controls.

[31] Phase I Permit at S5.C.

[32] *Dept. of Ecology v. Wahkiakum County*, ___ Wn. App. ___, 337 P.3d 364, 2014 WL 5652318 (2014) (holding that county's ordinance banning use of most common class of biosolids within county conflicted with state law and, thus, was unconstitutional).

[33] CABR 004997 (Phase I Permit at S5.C.5).

retroactively to land owners with no plans to conduct such activities. By adopting vesting statutes, the Legislature has struck a balance between the goals and public policies embodied in newly adopted land use regulations and the due process rights of land owners seeking to develop their properties.[34] Ecology's position is one step away from requiring every home and commercial building in the state to be torn down and redesigned to provide stormwater controls in compliance with the Phase I Permit.

Ecology's position falsely assumes that achieving the Legislature's water quality goals requires retroactive application of local regulations to vested projects. To the contrary, the fact that the vested rights statutes will prevent some projects from being subject to the new regulations over the next few years will not undermine the overall goals of the State's water quality regulations. Rather, over time, development, redevelopment and construction activities will continue to occur and the Phase I Permit's requirements will continue to be updated and applied to those projects. In time, the State's water quality objectives will be achieved. This is the balance between the public interest and private rights that the Legislature intended when it enacted the vesting statutes in the first place. There is no Legislative directive or practical need to violate vested rights and state

[34] *See Noble Manor*, 133 Wn.2d at 280 (identifying the competing interests of developers and the public interest and concluding: "In extending the common law vested rights doctrine to include short and long plat applications, the Legislature has made the policy decision that developers should be able to develop their property according to the laws in effect at the time they make completed application for subdivision or short subdivision of their property.").

statutes protecting those rights in order to achieve the State's water quality objectives.

F. The practical impact of the Special Condition would be to create an unworkable, burdensome, and frustrating regulatory environment for property owners and homebuilders, contrary to the spirit, intent, and plain language of the vesting statutes.

If the Court upholds the Board's Order, King and Snohomish Counties and other Phase I Permittees will be required to apply newly adopted stormwater regulations to vested permit applications. This means that the stormwater regulations applicable to a development project might change for certain projects midstream in the development process. The practical impact is to create a cumbersome, if not totally unworkable regulatory environment for both the local jurisdictions and the land owner.

Stormwater regulations are inextricably intertwined with the land use permitting and design process. Designing for compliance with stormwater regulations at the outset of the application process is essential to determine impervious surface limits, flow control, necessary drainage facilities (often requiring the creation of separate tracts), and the areas that remain available for development. For these reasons, the feasibility of a project depends on analysis of stormwater compliance at the outset of the planning process. This is why compliance with stormwater regulations often is required before a subdivision application can be deemed complete for vesting purposes.[35]

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[35] *See, e.g.,* King County Opening Brief at pgs. 10-11 (citing KCC 20.20.040A.14 and explaining that in King County a permit application will not be deemed complete for

Changes to the stormwater design will mean corresponding changes to the overall design of the project. Thus, if the plan for stormwater compliance needs to be changed at a later date, then those changes easily could lead to substantial changes in the design of the project, potentially making the project economically infeasible. Application of Special Condition S5.C.5.a.iii in the context of the subdivision approval process (described in Section V.B of this brief) illustrates how burdensome and unworkable it will be for MBA members.

RCW 58.17.033 provides that when a fully completed application for preliminary plat approval has been submitted, it "shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, [then] in effect." RCW 58.17.110 requires that applicants demonstrate that "appropriate provisions are made for...drainage ways" at the preliminary plat approval stage of review. This means that stormwater drainage is evaluated and the lands set aside for stormwater control and drainage ways are determined early in the subdivision approval process. As described in Section V.A above, applicable vesting statutes assure that the stormwater design remains fixed throughout the lengthy process of subdivision and home building review and construction.

In its current form, Special Condition S5.C.5.a.iii would require local jurisdictions to ignore these legislative mandates and apply new stormwater regulations to a preliminary plat that had not started

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purposes of vesting until the applicant submits necessary drainage plans and documentation required by the County's Surface Water Design Manual).

construction by June 30, 2020. If, for example, a developer submitted a complete preliminary plat application on January 1, 2014 and the preliminary plat was approved on July 1, 2016, then the applicant would be vested to the land use control ordinances in effect on January 1, 2014. But, if the retroactive provision in the Special Condition applied, then the local jurisdiction would be required to impose new stormwater regulations on the plat after it had been approved under existing standards.

This retroactive application of stormwater regulations would be unworkable and potentially disastrous for MBA members and other property owners in Washington. In the situation described above, the land developer would be required to incur additional costs to rehire consultants to do new investigations and redraft proposed drainage plans in accordance with the new standards. Those plans necessarily would lead to modifications in the development of the site as a whole, possibly making the entire project infeasible because of the added costs and potential loss of developable land. In addition, the new regulations could require that a certain acreage be devoted to stormwater dispersion or detention, leading to the loss of residential lots. As MBA members are keenly aware, these are not insignificant losses in the difficult and economically risky world of land development.

Further, the local jurisdiction would likely need to re-review the revised preliminary plat, possibly triggering additional public hearings. And, if changes to the plat were substantial enough, the proposed plat might need to be reviewed as a new application, thereby extinguishing the

vested status for the entire project.[36] That literally would mean back to the drawing board for the developer. This is exactly the type of fluctuating land use policy that the vested rights doctrine and vesting statutes are meant to guard against.

VI. CONCLUSION

This Court should reverse the Board's Order and hold that Ecology has exceeded its regulatory authority by imposing Special Condition S5.C.5.a.iii in violation of state vesting laws. The Court should remand the matter to the Board for removal of the following language in Special Condition S5.C.5.a.iii: "and prior [to] July 1, 2015, which have not started construction by June 30, 2020."

DATED this 5th day of February, 2015.

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[36] *See, e.g.*, KCC 19A.12.030 ("Proposed revisions to a preliminary subdivision that would result in a substantial change, as determined by the department, shall be treated as a new application for purposes of vesting").

CERTIFICATE OF SERVICE

I, Rachel T. Wang, declare that I caused to be filed with the Court of Appeals, Division II, BRIEF OF AMICUS CURIAE MASTER BUILDER ASSOCIATION OF KING AND SNOHOMISH COUNTIES and this CERTIFICATE OF SERVICE; as well as a copy of the same to be served on the following parties in the matter noted below.

Pollution Control Hearings Board Diane L. McDaniel Sr. Assistant Attorney General Licensing & Administrative Law Division P.O. Box 40110 Olympia, WA 98504-0110 *Via Email:* *dianem@atg.wa.gov* *Amyp4@atg.wa.gov*	**Department of Ecology** Ronald L. Lavinge Office of Attorney General of WA Ecology Division P.O. Box 40117 Olympia, WA 98504-0117 *Via Email:* *ronaldl@atg.wa.gov* *ecyoyef@atg.wa.gov* *donnaf@atg.wa.gov*
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Pierce County & Coalition of Gov't Entities Lori Terry Gregory Foster Pepper PLLC 111 Third Avenue, Ste 3400 Seattle, WA 98101-3922 *Via Email: terrl@foster.com* John Ray Nelson Foster Pepper PLLC U.S. Bank Bldg. West 422 Riverside Ave., Ste. 1310 Spokane, WA 99201 *Via Email: nelsj@foster.com* *mccap@foster.com* *ToveS@foster.com*	**Snohomish County** Laura C. Kisielius Althea M. Hart Deputy Prosecuting Attorneys Civil Division Robert Drewel Bldg., Eighth Floor, M/S 504 3000 Rockefeller Avenue Everett, WA 98201-4060 *Via Email: laura.kisielius@snoco.org* *ahart@snoco.org*
Intervenor City of Seattle Theresa R. Wagner Sr. Assistant City Attorney Seattle City Attorney's Office 600 Fourth Avenue, Fourth Floor P.O. Box 94769 Seattle, WA 98124-4769 *Via Email: Theresa.wagner@seattle.gov* *Cynthia.michaelena@seattle.gov*	**Intervenor City of Tacoma** Keith Echterling Tacoma City Attorney's Office 747 Market Street, Room 1120 Tacoma, WA 98402-3767 *Via Email: kechterling@ci.tacoma.wa.us* *and via Legal Messenger*
Puget Soundkeeper Alliance, Washington Environmental Council and Rosemere Neighborhood Association Jan Hasselman Janette K. Brimmer Earth Justice 705 Second Avenue, Ste. 203 Seattle, WA 98104-1711 *Via Email: jbrimmer@earthjustice.org* *jhasselman@earthjustice.org* *chamborg@earthjustice.org*	**King County** Daniel T. Satterberg, King County Prosecuitng Attorney Devon Shannon, Senior Deputy Prosecuting Attorney King County Courthouse 516 Third Avenue, Suite W400 Seattle, WA 98104 *Via Email: Devon.Shannon@kingcounty.gov*

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of February, 2015, at Seattle, Washington.

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