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.

PUGET SOUNDKEEPER ALLIANCE, WASHINGTON ENVIRONMENTAL COUNCIL, and ROSEMERE NEIGHBORHOOD ASSOCIATION,

Petitioners,

and

POLLUTION CONTROL HEARINGS BOARD, and WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondents below.

PUGET SOUNDKEEPER ALLIANCE, WASHINGTON ENVIRONMENTAL COUNCIL, and ROSEMERE NEIGHBORHOOD ASSOCIATION'S REPLY IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW

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INTRODUCTION

In its answer to petitions for discretionary review filed by Puget Soundkeeper Alliance, *et al.* ("PSA") and Ecology, respondent Snohomish County asks this Court to consider an additional issue concerning "the land use doctrine of finality." Snohomish County Answer, at 16. The request—not joined by the other respondents—is surprising, since the issue was not addressed by the Court of Appeals and meets none of the criteria for a grant of discretionary review. PSA opposes the request. RAP 13.4(d) (authorizing reply).

ARGUMENT

As explained in PSA's opening brief, this case concerns a Clean Water Act permit provision that applies to development project applications submitted after July 15, 2015, as well as applications submitted prior to that date if development has not commenced by June 30, 2020. The focus of this appeal is whether the second part of this permit provision violates state vesting laws. In its answer, Snohomish County presses the argument that if this Court takes up PSA's and Ecology's request to review the Court of Appeals' ruling on vesting, it should also reach Snohomish County's argument that the provision also violates the "doctrine of finality." There are three reasons why Snohomish County's request should be denied.

First, Snohomish County fails to identify an independent source of legal authority for this claimed doctrine, or any specific duty imposed on Ecology that was violated. The primary authorities cited by Snohomish County and its chief arguments about its operation all relate to vesting, which was the subject of the decision below and the focus of the parties' briefing to date. For example, in its hypothetical example of a permit issued in December of 2014, the County's primary concern appears to be that meeting permit standards would run afoul of the vesting statutes, not any other specific source of authority. Snohomish Answer, at 18. In short, the County's "finality" argument is simply a restatement of its position on vesting, not an independent issue that merits scrutiny by this Court.

Second, Snohomish County's finality argument meets none of the criteria under RAP 13.4(b) governing discretionary review. Indeed, the County makes no effort to claim otherwise. The Court of Appeals did not even reach the issue; hence, there was nothing to conflict with either Supreme Court or other appellate precedent. Nor does the question present either "a significant question of law" under the state or federal constitutions, or an "issue of substantial public interest" requiring Supreme Court intervention. Indeed, in the Court of Appeals, the County treated the "finality" argument as an afterthought in its opening brief, and,

after it was mostly ignored by the other parties, appeared to abandon it altogether in its reply brief. The fact that the Court of Appeals chose to ignore it is unsurprising. There is little reason for the Court to take up the finality argument here.

Finally, the County's finality argument simply confirms its misunderstanding of Ecology's approach to the timing question in this permit, and highlights how far Ecology went to accommodate concerns around vesting. The gravamen of the County's concern is that permits are considered "irrefutably valid" if not challenged within the Land Use Petition Act ("LUPA") appeal window. Snohomish Answer, at 16-17. Requiring a permittee to meet the updated stormwater standards if it has not started construction by June of 2020, the County argues, requires the County to effectively withdraw and amend this "irrefutably valid" permit years after its issuance. *Id.*

But Ecology issued the permit, which included the 2020 deadline for starting construction, on August 1, 2012. Permittees should have conditioned permits issued after that date to ensure that applicants were on notice of the timing restriction. Thus, the hypothetical example of a permit issued November 6, 2014 highlights just how inflated the County's concerns are. The proponent of such a project would have been on notice of the 2020 deadline for years prior to the application. The development

permit could include a one-line permit condition stating that if construction had not started by June of 2020, updated stormwater standards would have to be achieved. The permit would not have to be amended or withdrawn, and the applicants' "finality" interests would be protected.[1]

In the briefing below, the County made the argument that applicants "have an affirmative right to receive a development permit that is not encumbered" by such a permit condition. Snohomish County Opening Appeals Court Brief, at 36. But it cited no source of authority for this claimed "right," nor could one be found. When the absence of such authority was pointed out by PSA, the issue was dropped. Simply put, there is no "finality" concern with respect to any development permit issued after August 1, 2012.

The same is true for permits issued before that date, albeit for a different reason. The vesting statute states that subdivision standards shall be valid for either five or seven years after the date of filing, depending on

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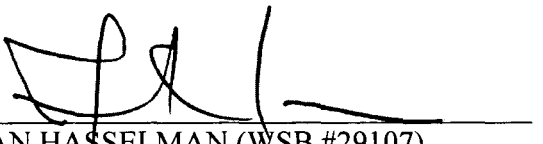
[1] The County states that, once given a preliminary plat, the proponent would have between five and seven years to "construct infrastructure, such as roads and utilities," and complains that Ecology's permit requires different treatment. Again, it misunderstands the permit, which only requires the proponent to *start* construction by 2020. Ecology's permit only takes steps to limit "permit speculation" that locks in outdated codes, and does not prevent projects that start construction before 2020 from being completed. *Erickson & Assoc. v. McLerran*, 123 Wn.2d 864 (1994).

the date of application. RCW 58.17.170. The building permit statute has no timeline at all, leaving vesting decisions to the discretion of permittees. RCW 19.27.095. Seven years after July 31, 2012 is *before* the Permit's construction cutoff of July 2020. Thus, to the extent that there is such a thing as a "finality" doctrine, the law imposes temporal limits on it. Ecology respected those limits in setting deadlines in the Permit. Snohomish County cannot identify any source of law that states that permits are valid for all time, or any duty that Ecology violated in placing a temporal limit on permits authorized to use standards that failed to meet clean water standards.

CONCLUSION

For the foregoing reasons, PSA respectfully requests that this Court deny Snohomish County's request for discretionary review of the additional issue of "finality," but otherwise grant PSA's request for discretionary review.

Respectfully submitted this 1st day of April, 2016.



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DECLARATION OF SERVICE

I declare that on April 1, 2016, I served a true and copy of the foregoing *Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association's Reply In Support of Petition for Discretionary Review* on the following parties via email:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 1st day of April, 2016, at Seattle, Washington.

Cathy Hendrickson, Litigation Assistant

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To: Cathy Hendrickson
Cc: Jan Hasselman; Janette Brimmer
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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: Cathy Hendrickson [mailto:chendrickson@earthjustice.org]
Sent: Friday, April 01, 2016 4:16 PM
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Subject: Snohomish County, et al. v. Pollution Control Hearings Board, et al., Supreme Ct. No. 92805-3

Attached is Puget Soundkeeper Alliance, et al.'s "Reply In Support of Petition for Discretionary Review" for filing in *Snohomish County, et al., v. Pollution Control Hearings Board, et al.,* Supreme Court No. 92805-3, submitted by Jan Hasselman, (206) 343-7340 ext. 1025, WSBA # 29107. Thank you.

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