Case No. 46378-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Petitioners/Appellants Below

vs.

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

Respondents/Respondents Below

SNOHOMISH COUNTY'S OPENING BRIEF

MARK K. ROE
Snohomish County Prosecuting Attorney

Alethea Hart, WSBA #32840
Laura C. Kisielius, WSBA #28255
Deputy Prosecuting Attorneys
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Avenue
Everett, Washington 98201-4046
(425)388-6330 Fax: (425)388-6333
ahart@snoco.org
laura.kisielius@snoco.org

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR 2

III. ISSUES PRESENTED 2

IV. STATEMENT OF THE CASE 3

A. The 2013-2018 Phase I Municipal Stormwater Permit 3

B. Procedural History 5

V. SUMMARY OF ARGUMENT 8

VI. ARGUMENT 11

A. Standard of Review 11

B. Special Condition S5.C.5 Requires Snohomish County to Adopt and Enforce "Land Use Controls" or "Development Regulations" 12

1. The Phase I Permit Requires Permittees to Adopt and Enforce Stormwater Regulations that Affect Physical Aspects of Development and Land Use. 13

2. "Land Use Controls" or "Development Regulations" Subject to Vesting and Other Property Rights Protections Are Defined to Include Regulations Like Those at Issue in this Case 17

a. Land Use Control Ordinances 18

b. Development Regulations 20

C. Special Condition S5.C.5.a.iii Requires Snohomish County to Adopt and Enforce Land Use Controls in a Manner Inconsistent with the Vesting Doctrine and Constitutional Protections of Property Rights 22

1. Washington's Vested Rights Doctrine....................23

2. The Second Sentence of Special Condition S5.C.5.a.iii Facially Conflicts with Washington's Vested Rights Doctrine. 26

D. Special Condition S5.C.5.a.iii Requires Snohomish County to Act in a Manner Inconsistent with the Doctrine of Finality of Land Use Decisions and Constitutional Protections Related Thereto 31

E. Clarification of the Controlling Legal Framework is Needed 37

VII. CONCLUSION 39

TABLE OF AUTHORITIES

Cases **Page(s)**

Abbey Road Group, LLC v. City of Bonney Lake, 167 Wn.2d 242, 218 P.3d 180 (2009) 24, 37

Asche v. Bloomquist, 132 Wn. App. 784, 133 P.3d 475 (2006) 34, 36

Association of Rural Residents v. Kitsap County, 141 Wn.2d 185, 4 P.3d 115 (2000) 29

Beach v. Bd. of Adjustment of Snohomish County, 73 Wn.2d 343, 438 P.2d 617 (1968) 24

Belleau Woods II, LLC v. City of Bellingham, 150 Wn. App. 228, 208 P.3d 5 (2009) 18

Cedar River Water and Sewer Dist. v. King County, 178 Wn.2d 763, 315 P.3d 1065 (2013) 37

Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002 .... 34, 36

City of Seattle v. Yes for Seattle, 122 Wn.App. 382, 93 P.3d 176 (2004) 20

Dana's Housekeeping, Inc. v. Dep't of Labor and Industries, 76 Wn.App. 600, 886 P.2d 1147 (1995) 12

Erickson & Associates, Inc. v. McLerran, 123 Wn.2d 864, 872 P.2d 1090 (1994) 24

Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wn. App. 709, 558 P.2d 821 (1977) 24

Friends of the Law v. King County, 123 Wn.2d 518, 869 P.2d 1056 (1994) 23

Habitat Watch v. Skagit County, 155 Wn.2d 397, 120 P.3d 56 (2005) 10, 33, 34, 36

Hull v. Hunt, 53 Wn.2d 125, 331 P.2d 856 (1958) 24

J.L Storedahl & Sons, Inc. v. Clark County, 143 Wn. App. 920, 180 P.3d 848 (2008) 36

James v. County of Kitsap, 154 Wn.2d 574, 115 P.3d 286 (2005) 10, 33

Juanita Bay Valley Community Ass'n. v. Kirkland, 9 Wn. App. 59, 510 P.2d 1104 (1973) 24

Koontz v. St. Johns River Water Management District, 133 S.Ct. 420, 2013 WL 3184628 (2013)....36

Lauer v. Pierce County, 173 Wn.2d 242, 267 P.3d 988 (2011)....9

Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998)....23, 37

New Castle Investments v. City of La Center, 98 Wn. App. 224, 989 P.2d 569 (1999), review denied, 140 Wn.2d.1019 (2000)....18, 38

Noble Manor Co. v. Pierce County, 133 Wn.2d 269, 943 P.2d 1378 (1997)....9, 23, 27, 28, 29, 36

Overlake Fund v. Shoreline Hearings Board, 90 Wn.App. 746, 954 P.2d 304 (1998)....12

Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health, 151 Wn.2d 428, 90 P.3d 37 (2004)....30

Potala Village Kirkland, LLC v. City of Kirkland, __ Wn. App. __, 334 P.3d 1143 (2014)....23, 25, 26

PT Air Watchers v. Ecology, 179 Wn.2d 919, 319 P.3d 23 (2014)....12

Rosemere Neighborhood Ass'n v. Clark County, 170 Wn. App. 859, 290 P.3d 142 (2012), rev. denied, 176 Wn.2d 1021, 297 P.3d 708 (2013)....18, 38

Samuel's Furniture, Inc. v. State Department of Ecology, 147 Wn.2d 440, 54 P.3d 1194 (2002)....10

Schneider Homes, Inc. v. City of Kent, 87 Wn. App. 774, 942 P.2d 1096 (1997), review denied, 134 Wn.2d 1021 (1998)....29

Skagit Surveyors and Engineers, LLC v. Friends of Skagit County, 135 Wn.2d 542, 958 P.2d 962 (1998)....12

State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp., 142 Wn.2d 328, 12 P.3d 134 (2000)....30

Talbot v. Gray, 11 Wn. App. 807, 525 P.2d 801 (1974)....24

Town of Woodway v. Snohomish County, 180 Wn.2d 165, 322 P.3d 1219, 1223 (2014)....25, 37

Twin Bridge Marine Park, L.L.C. v. State Department of Ecology, 162 Wn.2d 825, 175 P.3d 1050 (2008)....10, 33, 34

Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd., 127 Wn.2d 759, 903 P.2d 953 (1995)) 23

Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000) 34, 36

West Main Associates v. City of Bellevue, 106 Wn.2d 47, 720 P.2d 782 (1986).... 23, 37

Westside Business Park, LLC v. Pierce County, 100 Wn.App. 599, 65 P.3d 713 (2000) 18, 20, 29, 38

Administrative Decisions **Page(s)**

Advocates for Responsible Development and John E. Diehl v. Mason County, WWGMHB No. 06-2-0005, Compliance Order Stormwater and Sewers (Dec. 9, 2008), 2008 WL 5516465....21

Larson Beach Neighbors and Jeanie Wagenman v. Stevens County, EWGMHB No. 07-1-0013, Final Decision and Order (Oct. 6, 2008), 2008 WL 4948100 21

Statutes **Page(s)**

33 U.S.C. § 1251, *et. seq.* 3
Chapter 36.70A RCW....17
RCW 19.27.095 ....17, 20, 25
RCW 19.27.095(1) 25, 37
RCW 34.05.570....11
RCW 36.70A.040(3)....21
RCW 36.70A.070....21
RCW 36.70A.130(1)(d) 21
RCW 36.70B.180.... 17, 22, 25, 30, 37
RCW 36.70C.020(2)(a)....33
RCW 58.17.020 17
RCW 58.17.033 ....17, 20, 25, 26, 27, 29, 30
RCW 58.17.033(1) 25, 37
RCW 58.17.110(1) 18
RCW 58.17.140 36
RCW 58.17.140(3)(a) 31

RCW 58.17.150(1) 32
RCW 58.17.170 .... 31, 36
RCW 58.17.170(3)(a) 32
RCW 90.48.260 30

I. INTRODUCTION

This case involves the application of stormwater regulations at the local level under the direction of the Washington State Department of Ecology ("Ecology"). Ecology issued a Phase I Municipal Stormwater Permit to Snohomish County and several other jurisdictions under the State of Washington Water Pollution Control Law and the National Pollutant Discharge Elimination System program under the federal Clean Water Act ("Phase I Permit"). The Phase I Permit obligates permittees to regulate new development, redevelopment, and construction activities by both public and private entities for the purpose of controlling stormwater runoff. Pursuant to the Phase I Permit issued by Ecology, these stormwater regulations must be applied retroactively to pending permit applications as well as development permits already issued if such projects have not "started construction," as defined by Ecology, by a certain date set forth in the Phase I Permit. Snohomish County asserts this requirement constitutes an illegal condition of the Phase I Permit.

Ecology's Phase I Permit puts local jurisdictions in a precarious position. Although they are required to comply with their Phase I Permit, they also are required to adhere to state law regarding the protection of property rights. Washington, unlike the majority of other states, provides broad protections to property owners in the process of developing their

land, primarily under the doctrines of *vested rights* and *finality*. If local jurisdictions subject to the Phase I Permit apply the required stormwater regulations retroactively to certain pending permit applications and approved development permits at Ecology's direction, they expose themselves to significant liability for violating protected property rights. This appeal seeks to resolve that dilemma.

II. ASSIGNMENT OF ERROR

Snohomish County assigns error to the October 2, 2013, Order on Summary Judgment ("Order") of the Pollution Control Hearings Board ("Board").

III. ISSUES PRESENTED

A. Did the Board err when it determined that the regulations permittees are required to adopt under Special Condition S5.C.5 of the Phase I Permit do not constitute "development regulations" or "land use controls" and are instead "environmental regulations" adopted under the direction and control of Ecology?

B. Did the Board err when it determined that the requirement in Special Condition S5.C.5 of the Phase I Permit that regulations adopted by permittees be applied to approved and pending project permit applications does not conflict with the land use doctrines of vested rights and finality?

IV. STATEMENT OF THE CASE

A. The 2013-2018 Phase I Municipal Stormwater Permit

On August 1, 2012, Ecology issued the Phase I Permit pursuant to the State of Washington Water Pollution Control Law, chapter 90.48 RCW (WPCL), and the National Pollutant Discharge Elimination System (NPDES) permitting program established by Section 402, 33 U.S.C. § 1342, of the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.* The Phase I Permit has an effective date of August 1, 2013, and an expiration date of July 31, 2018. The Phase I Permit covers discharges from large and medium municipal separate storm sewer systems (MS4), as that term is defined by the CWA.[1] Snohomish County is subject to the Phase I Permit.

The Phase I Permit authorizes the discharge of stormwater to surface and ground waters of the state from MS4s owned or operated by a permittee.[2] The Phase I Permit contains numerous requirements imposed directly on permittees, as well as requirements and standards that

[1] Certified Appeal Board Record (CABR) at 003975-003976 ("An MS4 itself can be described as all the conveyances or systems of conveyances that are designed or used for collecting or conveying stormwater including roads with drainage systems, municipal streets, catch basins, curb gutters, ditches, manmade channels or storm drains."). Reference to the "CABR" is to the six digit bates numbered record certified by the Board and designated as clerk's papers. Reference to Clerk's Papers (CP) is to the documents filed with Thurston County Superior Court and designated as clerk's papers. The numbering of these two sets of documents overlaps and this naming convention is intended to avoid confusion.
[2] CABR at 003975.

permittees must impose within their jurisdictions, including, relevant here, the regulation and control of stormwater runoff from both private and public new development, redevelopment, and construction activities as described in Special Condition S5.C.5.[3] To that end, each permittee is required, by June 30, 2015, to adopt and make effective a local program of regulation, made up of ordinances and other enforceable documents, that meets specific and detailed requirements for controlling stormwater drainage and runoff to the permittee's MS4 from new development, redevelopment, and construction activities at the site and subdivision scale of development.[4] Ecology review and approval of this local program is required.[5]

Central to the dispute here, the Phase I Permit, Special Condition S5.C.5.a.iii, including footnotes, reads, in part, as follows:

> No later than June 30, 2015, each Permittee shall adopt and make effective a local program that meets the requirements in S5.C.5.a.i through ii., above. The local program adopted to meet the requirements of S5.C.5.a.i through ii shall apply to all applications[2] submitted after July 1, 2015 and shall apply to projects approved prior [to] July 1, 2015, which have not started construction[3] by June 30, 2020.
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> [2] In this context, "application" means, at a minimum a complete; [sic] project description, site plan, and, if applicable, SEPA checklist. Permittees may establish additional elements of a complete application.

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[3] CABR at 003978-003979.
[4] CABR at 003982.
[5] CABR at 004998 (Special Condition S5.C.5.a.iii).

> [3] In this context, "started construction" means, at a minimum the site work associated with, and directly related to the approved project has begun. For example, grading the project site to final grade or utility installation. Simply clearing the project site does not constitute the start of construction. Permittees may establish additional requirements related to the start of construction.

(Emphasis added.) On summary judgment, the Board directed Ecology to modify the emphasized sentence above by replacing the phrase "projects approved" with "application submitted" as follows:

> The 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 application [sic] submitted prior [to] July 1, 2015, which have not started construction by June 30, 2020.[6]

It is the County's contention that the second sentence of Special Condition S5.C.5.a.iii facially conflicts with Washington's legal protections for property rights by requiring Phase I permittees to apply new stormwater regulations to approved and pending project applications in violation of those legal protections, including the land use doctrines of finality and vested rights.

B. Procedural History

Upon Ecology's issuance of the Phase I Permit on August 1, 2012, Snohomish County, together with King, Pierce and Clark Counties and

[6] CABR at 004011-004012 (emphasis added).

the Building Industry Association of Clark County, timely appealed certain portions of the Phase I Permit to the Board.[7] The City of Seattle, the City of Tacoma and the Washington State Department of Transportation each sought and received permission to intervene in the appeals of the Phase I Permit.[8] Three additional parties, Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association (collectively, "PSA"), sought and received permission to intervene in the appeals of the Phase I Permit on behalf of Ecology as Respondent Intervenors.[9] By order dated November 8, 2012, the Board consolidated the five separate appeals of the Phase I Permit into one case, PCHB No. 12-093c.[10] Multiple parties timely appealed portions of the 2013-2018 Phase II Western Washington NPDES Municipal Stormwater Permit ("Phase II Permit") to the Board in August 2012, although the Phase II Permit is not at issue in this appeal.[11]

The Board determined that certain issues raised in the consolidated Phase I Permit appeal and in the consolidated Phase II Permit appeal involved common questions of law and/or fact. For efficiency and

[7] CABR at 000210
[8] CABR at 000210; 000224.
[9] CABR at 000224-000227.
[10] CABR at 000223.
[11] CABR at 003973.

convenience, the Board consolidated the overlapping issues from the Phase I and Phase II appeals.[12]

Various parties moved for summary judgment on the Phase I Issues 3, 17(a) and 20 and Phase II Issues 2(a) and 3(a) related to the issues identified in Section II, above. The Board granted summary judgment to Ecology and PSA.[13] The Board held, in part, that the local program stormwater regulations that government permittees are obligated to enact and enforce pursuant to Special Condition S5.C.5. of the Phase I Permit to control stormwater runoff from new development and redevelopment are not "development regulations" or "land use control ordinances" and are not subject to the Washington land use law doctrines of vested rights and finality.[14]

Trial occurred in October of 2013, on the remaining issues. On March 21, 2014, the Board issued its final decision and order in the consolidated case.[15]

Snohomish County, King County, and the Building Industry Association of Clark County ("Petitioners") timely filed Petitions for Review in Thurston County Superior Court, challenging only the Order

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[12] CABR at 003973.
[13] CABR at 004012.
[14] CABR at 003998-003999; 004007.
[15] CABR at 004046-004137.

dated October 2, 2013.[16] By stipulated motion, Petitioners and Ecology sought consolidation of these appeals.[17] By Order of Consolidation dated May 23, 2014, the Thurston County Superior Court consolidated these matters under Cause No. 14-2-00710-5.[18]

Petitioners timely applied for Direct Review and the Board issued a Certificate of Appealability dated May 29, 2014.[19] Petitioners filed a Joint Notice of Discretionary Review with Thurston County Superior Court on June 13, 2014,[20] and a Joint Motion for Discretionary Review with this Court on June 27, 2014. This Court granted discretionary review by Order dated September 5, 2014.

V. SUMMARY OF ARGUMENT

The second sentence of Special Condition S5.C.5.a.iii facially conflicts with Washington's legal protections for property rights by requiring Phase I permittees to apply new stormwater regulations to approved and pending project applications in violation of those legal protections, including the land use doctrines of finality and vested rights. In promulgating a Phase I Permit requirement that directly conflicts with state law, Ecology exceeded its authority under chapter 90.48 RCW.

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[16] CP 12-165; CP 248-402; CP 413-581.
[17] CP 173.
[18] CP 173-174.
[19] See CP 166-172; CP 403-410; CP 582-586; CP 175-184.
[20] CP 185-246.

Further, Phase I permittees lack authority to adopt development regulations in conflict with general state law. Deletion of the second sentence of Special Condition S5.C.5.a.iii would resolve all of these concerns.

The vested rights doctrine provides property owners the right to have certain development project permit applications evaluated under the land use control ordinances or development regulations in effect on the date a complete project permit application is submitted.[21] A complete project permit application "vests" to the land use control ordinances in effect at the time the complete application is submitted.[22] Ecology's requirement that Phase I permittees apply new stormwater regulations to complete permit applications forces Phase I permittees to violate the vested rights doctrine, and the second sentence of Special Condition S5.C.5.a.iii therefore constitutes an illegal condition. The Board's conclusion that the required stormwater regulations are not land use control ordinances or development regulations and are not subject to the vesting doctrine is contrary to law.

The finality doctrine provides a property right to project applicants upon receipt of a final land use decision on a project permit application. Once a jurisdiction issues a project permit, that project permit becomes

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[21] Lauer v. Pierce County, 173 Wn.2d 242, 258, 267 P.3d 988 (2011).
[22] Noble Manor Co. v. Pierce County, 133 Wn.2d 269, 275, 943 P.2d 1378 (1997).

irrefutably valid if not challenged under the Land Use Petition Act (LUPA), chapter 30.70C RCW, within 21 days.[23] This strict time limit is a product of Washington's strong public policy favoring finality and certainty in land use decisions.[24] In Washington land use law it is a bright-line rule that an approved project permit is a valid right in and to real property that may not be abrogated once LUPA's 21-day statute of limitations has passed. Ecology's requirement that Phase I permittees apply new stormwater regulations to approved permit applications forces Phase I permittees to violate the finality doctrine, and the second sentence of Special Condition S5.C.5.a.iii therefore constitutes an illegal condition. The Board's conclusion that the requirement in the second sentence of Special Condition S5.C.5.a.iii does not conflict with the finality doctrine is contrary to law.

The second sentence of Special Condition S5.C.5.a.iii places Phase I permittees in the difficult position of having to choose between (1) applying new stormwater regulations in violation of controlling land use laws and constitutional protections of property rights; and (2) violating the terms of their Phase I Permit. Snohomish County seeks clear

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[23] Habitat Watch v. Skagit County, 155 Wn.2d 397, 406, 120 P.3d 56 (2005).
[24] Twin Bridge Marine Park, L.L.C. v. State Department of Ecology, 162 Wn.2d 825, 843, 175 P.3d 1050 (2008); James v. County of Kitsap, 154 Wn.2d 574, 589, 115 P.3d 286 (2005); Samuel's Furniture, Inc. v. State Department of Ecology, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002).

direction from this Court regarding the controlling legal framework of the issues presented to extricate Phase I permittees from this catch-22.

VI. ARGUMENT

A. Standard of Review

Review of Board decisions is governed by the Washington Administrative Procedure Act, chapter 34.05 RCW. Snohomish County, as the party asserting the invalidity of agency action, bears the burden of demonstrating invalidity. RCW 34.05.570(1)(a). The reviewing court "shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

Under RCW 34.05.570(3), a party may challenge an agency's order in adjudicative proceedings on nine bases. Relevant here are the following subsections of RCW 34.05.570(3): (a) the order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied; (b) the order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law; and (d) the agency has erroneously interpreted or applied the law.

Legal determinations of administrative agencies are reviewed de novo under an error of law standard which permits this Court to substitute

its interpretation of the law for that of the agency.[25] While a reviewing court will grant substantial weight and deference to an agency's interpretation of its own regulations, an agency's legal interpretation in areas outside its expertise is not entitled to deference and this Court is not bound by the agency's statutory interpretation.[26] "[A]dministrative agencies are creatures of the Legislature, without inherent or common-law powers and, as such, may exercise only those powers conferred by statute, either expressly or by necessary implication."[27]

B. Special Condition S5.C.5 Requires Snohomish County to Adopt and Enforce "Land Use Controls" or "Development Regulations"

The Board erred when it held that Special Condition S5.C.5 of the Phase I Permit does not obligate Phase I permittees to adopt and enforce land use controls or development regulations, but instead concluded that the required stormwater regulations are "environmental regulations" not subject to constitutional and statutory protections of property rights. This holding is inconsistent with law and ignores the regulatory function of the required local stormwater program that Phase I permittees must adopt and

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[25] Overlake Fund v. Shoreline Hearings Board, 90 Wn.App. 746, 754, 954 P.2d 304 (1998).

[26] PT Air Watchers v. Ecology, 179 Wn.2d 919, 319 P.3d 23 (2014); Dana's Housekeeping, Inc. v. Dep't of Labor and Industries, 76 Wn.App. 600, 605, 886 P.2d 1147 (1995).

[27] Skagit Surveyors and Engineers, LLC v. Friends of Skagit County, 135 Wn.2d 542, 558, 958 P.2d 962 (1998).

enforce within their jurisdictions. The Board's legal conclusions are not entitled to deference by this Court as they are outside of the Board's expertise.

1. The Phase I Permit Requires Permittees to Adopt and Enforce Stormwater Regulations that Affect Physical Aspects of Development and Land Use.

Snohomish County's ("the County") obligations under the Phase I Permit do not simply include actions that the County must take in relation to its own stormwater facilities and systems. The County is obligated under Special Condition S5.C.5 to regulate new development, redevelopment, and construction activities by both public and private entities for the purpose of controlling stormwater runoff to the County's MS4.[28] The following illustrative discussion demonstrates that the required stormwater regulations affect the use and physical development of land.

The local stormwater program required by Special Condition S5.C.5 must set forth the minimum requirements, thresholds, and definitions in Appendix 1 of the Phase I Permit to be applied to both public and private new development, redevelopment, and construction sites.[29] These regulations must control the use and development of real

[28] CABR at 003978-003979.
[29] CABR at 004997 (Special Condition S5.C.5.a.i).

property in ways that will protect water quality and control stormwater runoff.[30]

For example, Appendix 1, Section 4.5,[31] describes certain on-site stormwater management requirements. Smaller projects, those involving between 2,001 and 5,000 square feet of hard surface[32] or more than 7,000 square feet of land disturbing activity, must use either on-site Stormwater Management Best Management Practices[33] (BMPs) from List #1 in Appendix 1 or demonstrate compliance with a Low Impact Development[34] (LID) Performance Standard.[35] The BMPs must be considered in the order listed in Appendix 1 and the first feasible BMP must be used.[36] The first required BMP for both roofs and other hard surfaces is full dispersion of stormwater. Detailed specifications and design guidelines for full dispersion are stated in the 2012 Stormwater

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[30] CABR at 004997 (Special Condition S5.C.5.a.ii).
[31] CABR at 005076-005079.
[32] "Hard surface" is defined in the Phase I Permit, Appendix 1, as "[a]n impervious surface, a permeable pavement, or a vegetated roof." CABR at 005059.
[33] "Best management practices" are defined in the Phase I Permit as "the schedule of activities, prohibitions of practices, maintenance procedures, and structural and/or managerial practices approved by Ecology that, when used singly or in combination, prevent or reduce the release of pollutants and other adverse impacts to waters of Washington State." CABR at 005050.
[34] The Phase I Permit defines "low impact development" as "a stormwater and land use management strategy that strives to mimic pre-disturbance hydrologic processes of infiltration, filtration, storage, evaporation and transpiration by emphasizing conservation, use of on-site natural features, site planning, and distributed stormwater management practices that are integrated into a project design." CABR at 005052; 005060 (emphasis added).
[35] Phase I Permit Appendix 1, Sections 3.2, 3.3, and 4.5. CABR at 005067; 005076.
[36] Standards for determining feasibility are set forth in Appendix 1 and in the Manual. CABR at 005077.

Management Manual for Western Washington ("Manual")[37] and include, but are not limited to, the placing of the preserved dispersion area in a separate tract or protecting through recorded easements for individual lots, limiting to 10% impervious areas of the entire site the developed areas that drain to the dispersion area, restriction on the placement of septic systems within the dispersion area, and restrictions on the types of activities ("passive recreation") that may occur in the dispersion area.[38] The LID Performance Standard requires that stormwater discharges be controlled to match developed discharge durations to pre-developed durations at a certain standard through, for example, the use of detention facilities, the design, size, and placement of which are specified in the Manual.[39]

Stormwater regulations required by the Phase I Permit also include, by way of example and not by way of limitation, the following:

i. Requiring the performance of surveys and soils studies on the property prior to development design;[40]

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[37] The Manual is incorporated by reference into the Phase I Permit. See CABR at 004997-004998 (Special Condition S5.C.5.a).

[38] CABR at 005914-005922.

[39] CABR at 005668.

[40] CABR at 005068 (Minimum Requirement #1); CABR at 005517 ("Low impact development site design is intended to complement the predevelopment conditions on the site. However, not all sites are appropriate for a complete LID project, as site conditions determine the feasibility of using LID techniques. The development context shall be established by an initial site analysis consistent with the requirements of this section. The initial inventory and analysis process will provide baseline information necessary to

ii. Requiring natural drainage patterns of the property to be maintained;[41]

iii. Minimizing site disturbance, minimizing the creation of impervious surfaces and retaining native soils and vegetation on the development site;[42]

iv. Requiring the construction and/or use of particular on-site stormwater management facilities or practices, such as full dispersion,[43] rain gardens,[44] bioretention facilities,[45] permeable pavement,[46] and downspout dispersion,[47] each in accordance with detailed instructions and specifications.

These regulations, once adopted by the Snohomish County Council, will be located in the County's Unified Development Code, Title 30 of the Snohomish County Code, and associated rules, which govern development in unincorporated Snohomish County. They will be applied to projects during the land use application review process by planners and engineers in the County's Department of Planning and Development

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design strategies that utilize areas most appropriate to evaporate, transpire, and infiltrate stormwater…").

[41] CABR at 005076 (Minimum Requirement #4).

[42] CABR at 005068; 005076-005079; CABR at 005517-00005522; CABR at 005891-005894.

[43] CABR at 005078-005079; CABR at 005914-005922.

[44] CABR at 005078-005079; CABR at 005895.

[45] CABR at 005078-005079; CABR at 005896; CABR at 005931-005953.

[46] CABR at 005078-005079; CABR at 005897-005907.

[47] CABR at 005078-005079; CABR at 005660-005665.

Services. The regulations will determine how the applicant's land may be used consistent with the stormwater and drainage standards, how pavement must be constructed, where structures may be located, and what stormwater management facilities must be constructed. These regulations, therefore, will directly affect the use and physical development of real property.

2. "Land Use Controls" or "Development Regulations" Subject to Vesting and Other Property Rights Protections Are Defined to Include Regulations Like Those at Issue in this Case.

Because the stormwater regulations required under Special Condition S5.C.5 affect the use and physical development of land, those regulations constitute "land use control ordinances" as that phrase is used in the statutory vesting provisions, RCW 58.17.033[48] and RCW 19.27.095,[49] and "development regulations" as used in RCW 36.70B.180,[50] applicable to development agreements, and defined in the Growth Management Act, chapter 36.70A RCW (GMA).

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[48] "A proposed division of land, as defined in RCW 58.17.020, 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).

[49] "A valid and 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).

[50] "A development agreement and the development standards in the agreement govern during the term of the agreement, or for all or that part of the build-out period specified in

a. Land Use Control Ordinances

"Land use control ordinances" are defined in case law as those regulations that affect the physical aspects of development or exert a restraining or directing influence over land use.[51] This Court in New Castle, which concluded that impact fees are not "other land use control ordinances" because they only increase the cost of development, observed that if impact fees did affect the physical aspects of development, then impact fees would be land use controls.[52] Significant here, this Court has expressly held that "[s]torm water drainage ordinances are land use control ordinances."[53] As noted by this Court, "[a]s a mandatory prerequisite to short subdivision approval, storm water drainage ordinances do exert a 'restraining or directing' influence over land use and are therefore land use control ordinances."[54] Compliance with the local program stormwater regulations required in Special Condition

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the agreement, and may not be subject to an amendment to a zoning ordinance or development standard or regulation or a new zoning ordinance or development standard or regulation adopted after the effective date of the agreement." (Emphasis added).

[51] New Castle Investments v. City of La Center, 98 Wn. App. 224, 237, 989 P.2d 569 (1999), review denied, 140 Wn.2d.1019 (2000) (increasing the amount of impact fees a developer must pay in connection with his or her development project does not require the developer to use or develop its land in a particular way or build differently); Belleau Woods II, LLC v. City of Bellingham, 150 Wn. App. 228, 238-39, 208 P.3d 5 (2009).

[52] New Castle Investments v. City of La Center, 98 Wn. App. 224, 237, 989 P.2d 569 (1999).

[53] Westside Business Park, LLC v. Pierce County, 100 Wn.App. 599, 607, 5 P.3d 713 (2000). This Court in Rosemere expressly declined to address the question of whether the regulations at issue in that case were "land use" regulations or "environmental" regulations. Rosemere Neighborhood Ass'n v. Clark County, 170 Wn. App. 859, 869, 874 & 876, 290 P.3d 142 (2012), rev. denied, 176 Wn.2d 1021, 297 P.3d 708 (2013).

[54] Westside, 100 Wn.App. at 607 (citing RCW 58.17.110(1)).

S5.C.5 is also a "mandatory prerequisite" to short subdivision and other development application approvals here.

Phase I jurisdictions must apply the stormwater minimum requirements, standards, and technical specifications in Appendix 1 and the Manual to "new development."[55] "New development" is defined in the Phase I Permit as

> [L]and disturbing activities, including Class IV-General Forest Practices that are conversions from timber land to other uses; structural development, including construction or installation of a building or other structure; creation of hard surfaces; <u>and subdivision, short subdivision and binding site plans, as defined and applied in chapter 58.17 RCW</u>.[56]

By the plain language of the Phase I Permit, the County must apply, and ensure conformance with, the stormwater standards, technical specifications, and regulations in Appendix 1 and the Manual for applications for subdivision submitted to the County on or after June 30, 2015, (and before June 30, 2015, if construction does not start by June 30, 2020).[57] Nevertheless, the Board concluded that the required stormwater regulations adopted by permittees are not related to land use and development approvals, including, specifically, subdivision approvals.[58]

[55] CABR at 004997 (Special Condition S5.C.5.a.i).
[56] CABR at 005053 (emphasis added).
[57] CABR at 004998 (Special Condition S5.C.5.a.iii).
[58] CABR at 004006 ("the requirement imposed by the municipalities under the Phase I and Phase II Permits are not related to subdivision approvals…"); CABR at 004000-

It is erroneous for the Board to conclude that the required stormwater regulations do not relate to or control the subdivision of land when Phase I permittees are specifically obligated to apply these regulations to applications seeking subdivision of land.[59] Phase I permittees are placed in an impossible position by this reasoning. The Board erred when it concluded that the stormwater regulations at issue here are not land use control ordinances subject to RCW 58.17.033 and RCW 19.27.095.

b. Development Regulations

The GMA defines "development regulations" as:

> [T]he 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 together with any amendments thereto.

Washington courts have summarized this definition by stating that "a development regulation is a control placed on development or land use."[60] Further, the GMA requires, as part of a jurisdiction's comprehensive plan, "guidance for corrective actions to mitigate and cleanse those discharges

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004001 ("the requirement to use various best management practices to control stormwater runoff from new development or redevelopment, including LID BMPs … is [not] a tool to regulate the subdivision of land").

[59] The Board's conclusion is also inconsistent with RCW 58.17.110(2), which provides that a proposed subdivision and dedication shall not be approved unless written findings are made concerning appropriate provision for drainage ways. See Westside, 100 Wn.App. at 607.

[60] City of Seattle v. Yes for Seattle, 122 Wn.App. 382, 390, 93 P.3d 176 (2004).

that pollute waters of the state..."[61] and further requires adoption of development regulations to implement the adopted comprehensive plan.[62] Stormwater regulations have been treated as the proper subject of Growth Management Hearings Board review.[63] It is difficult, therefore, to reconcile the treatment of stormwater regulations in statute, case law, and administrative decisions with the conclusion of the Board that such regulations are not "development regulations."

Such reconciliation is further complicated when the Board places the local program stormwater regulations required in Special Condition S5.C.5 squarely within the regulatory context of the GMA. The Board noted that "[t]he GMA requires local governments to address drainage, flooding, and stormwater runoff to mitigate or cleanse discharges of water pollution, and the Phase I Permit sets forth the methods to accomplish this requirement."[64] Despite this statement, the Board nonetheless concluded that the stormwater regulations that the Phase I Permit requires permittees

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[61] RCW 36.70A.070.
[62] RCW 36.70A.040(3); RCW 36.70A.130(1)(d).
[63] See e.g., Advocates for Responsible Development and John E. Diehl v. Mason County, WWGMHB No. 06-2-0005, Compliance Order Stormwater and Sewers (Dec. 9, 2008), 2008 WL 5516465 at *4-*5 (adoption of LID stormwater standards and Ecology's 2005 Stormwater Manual satisfy requirement for development regulations to implement stormwater plan described in comprehensive plan); Larson Beach Neighbors and Jeanie Wagenman v. Stevens County, EWGMHB No. 07-1-0013, Final Decision and Order (Oct. 6, 2008), 2008 WL 4948100 at *35 (subdivision and short subdivision codes remanded for legislative action to adopt development regulations to address impervious surface coverage and stormwater discharge within rural areas).
[64] CABR at 003988.

to impose on new development and redevelopment that drains to MS4s in their respective jurisdictions are not land use controls or development regulations "even in the loosest definition of that term."[65] As demonstrated above, the Board erred when it concluded that the stormwater regulations required in Special Condition S5.C.5 are not development regulations as contemplated in RCW 36.70B.180 and the GMA.

The local program stormwater regulations that the County must adopt pursuant to Special Condition S5.C.5 control the physical development of land and are land use controls or development regulations as those terms are defined in law. Accordingly, application of those stormwater regulations to new development and redevelopment in Phase I jurisdictions must be consistent with the statutory framework applicable to land use controls and development regulations. Phase I permittees cannot apply stormwater regulations consistent with the second sentence of Special Condition S5.C.5.a.iii without being in conflict with this body of law, as demonstrated below.

C. Special Condition S5.C.5.a.iii Requires Snohomish County to Adopt and Enforce Land Use Controls in a Manner Inconsistent with the Vesting Doctrine and Constitutional Protections of Property Rights

[65] CABR at 004001.

The second sentence of Special Condition S5.C.5.a.iii requires the County to apply newly adopted stormwater regulations to applications submitted prior to July 1, 2015, which have not started construction by June 30, 2020. This mandate conflicts with Washington's vested rights doctrine and constitutional protections of property rights.[66] The recent curtailment of the vesting doctrine announced in Potala Village Kirkland, LLC v. City of Kirkland, __ Wn. App. __, 334 P.3d 1143 (2014), while narrowing in some respects the scope of the County's concerns regarding conflicts between vesting and the second sentence of Special Condition S5.C.5.a.iii, does not eliminate entirely those concerns, as described in more detail below.

1. Washington's Vested Rights Doctrine.

In Washington, "vesting" refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the applicant's submission.[67] This date is referred to as the "vesting date" of the application. Subsequent changes to the jurisdiction's land use statutes and

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[66] Washington law recognizes that development rights – the right to use and develop land – are valuable real property rights. The federal and state constitutions protect vested property rights. Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 962-63, 954 P.2d 250 (1998); West Main Associates v. City of Bellevue, 106 Wn.2d 47, 50, 720 P.2d 782 (1986).

[67] Noble Manor Co. v. Pierce County, 133 Wn.2d 269, 275, 943 P.2d 1378 (1997) (citing Friends of the Law v. King County, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994)); Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd., 127 Wn.2d 759, 767-68, 903 P.2d 953 (1995)).

ordinances are irrelevant to both a vested project permit application and the project permit issued pursuant to that application.[68] Washington's vesting doctrine "is rooted in constitutional principles of fundamental fairness" and "reflects a recognition that development rights represent a valuable and protectable property right."[69]

From the initial judicial expressions of the vested rights doctrine as applicable to building permit applications,[70] Washington courts slowly extended applicability of the doctrine to cover other types of land use development applications. The common law vested rights doctrine was extended to the following development applications: conditional use permits;[71] septic permits;[72] grading permits;[73] and shoreline substantial development permits.[74] In 1987, the Legislature codified the traditional vested rights doctrine regarding vesting upon application of building permits, and enlarged the vesting doctrine to also apply to subdivision and

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[68] Abbey Road Group, LLC v. City of Bonney Lake, 167 Wn.2d 242, 250, 218 P.3d 180 (2009).
[69] Erickson & Associates, Inc. v. McLerran, 123 Wn.2d 864, 870, 872 P.2d 1090 (1994) (observing that due process requirements are satisfied by this date certain standard).
[70] See Hull v. Hunt, 53 Wn.2d 125, 130, 331 P.2d 856 (1958).
[71] Beach v. Bd. of Adjustment of Snohomish County, 73 Wn.2d 343, 438 P.2d 617 (1968).
[72] Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wn. App. 709, 558 P.2d 821 (1977).
[73] Juanita Bay Valley Community Ass'n. v. Kirkland, 9 Wn. App. 59, 510 P.2d 1104 (1973).
[74] Talbot v. Gray, 11 Wn. App. 807, 525 P.2d 801 (1974).

short subdivision applications. See RCW 19.27.095(1) (building permits); RCW 58.17.033(1) (preliminary plats and short plats).

Since the codification of the vested rights doctrine by the Legislature in 1987, the statutory vested rights doctrine and common law vested rights doctrine developed by the courts existed contemporaneously. However, that co-existence was recently curtailed. On August 25, 2014, Division I of the Washington State Court of Appeals issued a ruling that significantly diminishes the breadth of Washington's vested rights doctrine. In Potala Village, Division I determined that, under the language of a recent Washington State Supreme Court decision, [75] the vested rights doctrine is now governed solely by statutory law and not by common law. Thus, the effect of the decision, although purporting to limit its holding to the filing of a shoreline substantial development permit application, is that the vested rights doctrine now only applies to the following: building permit applications (RCW 19.27.095), preliminary plats and short plat applications (RCW 58.17.033), and development agreements (RCW 36.70B.180). Although a petition for review of this decision has been filed with the Washington Supreme Court, Snohomish County here frames its argument regarding conflicts between Special Condition S5.C.5.a.iii

[75] Most recently, in Town of Woodway v. Snohomish County, 180 Wn.2d 165, 322 P.3d 1219, 1223 (2014), the Washington State Supreme Court stated that "[w]hile it originated at common law, the vested rights doctrine is now statutory."

and vesting consistent with the decision. However, should the Potala Village decision be overturned by the Supreme Court, then the decision made by this Court should apply equally to all types of development applications that are deemed to vest upon submittal of a complete application either by statute or under common law.

2. The Second Sentence of Special Condition S5.C.5.a.iii Facially Conflicts with Washington's Vested Rights Doctrine.

Snohomish County cannot apply the second sentence of Special Condition S5.C.5.a.iii without running afoul of clear statutory protections for vested development applications. Contrary to the Board's characterization, the County is not seeking expansion of the vested rights doctrine.[76]

RCW 58.17.033 provides that 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.

To the extent a complete application for preliminary plat or short plat approval is submitted prior to the adoption of new stormwater regulations on or before June 30, 2015, the County has no choice but to apply the

[76] CABR at 004005.

subdivision, zoning and other land use control ordinances in effect when the complete application is submitted. To act otherwise is contrary to RCW 58.17.033. The County cannot apply the local program stormwater regulations to be adopted by June 30, 2015, to "application[s] submitted prior to July 1, 2015," under any circumstance, including whether or not such projects have "started construction," as defined by Ecology, by June 30, 2020. The second sentence of Special Condition S5.C.5.a.iii is, on its face, inconsistent with RCW 58.17.033, and must be found invalid on that basis.

Additionally, the statutory protections for vested applications have been interpreted by courts to extend, in some circumstances, beyond vesting only to a division of land. The case of Noble Manor Co. v. Pierce County, 133 Wn.2d 269, 943 P.2d 1378 (1997), illustrates the application of the vesting doctrine to a short subdivision. In that case, the Noble Manor Company ("Noble Manor") owned approximately 1 acre (43,560 square feet) of land in Pierce County.[77] At the time, Pierce County's development regulations allowed duplexes to be built on lots having a minimum size of 13,500 square feet.[78] With approximately 43,560 square feet of land, Noble Manor had enough land to support three new duplexes. On August 2, 1990, Noble Manor submitted a project permit application to

[77] Noble Manor Co. v. Pierce County, 133 Wn.2d 269, 271-72, 943 P.2d 1378 (1997).
[78] Noble Manor, 133 Wn.2d at 272.

Pierce County seeking to subdivide its land into three lots, on each of which Noble Manor proposed to construct a duplex.[79]

In October of 1990, after Noble Manor had submitted its complete application for a short subdivision of its property, but before that application had been approved by the Pierce County Planning Department, Pierce County amended its development regulations to change the minimum lot size for a duplex to 20,000 square feet.[80] Noble Manor's proposed new lots were each smaller than 20,000 square feet.[81]

On July 2, 1991, the Pierce County Planning Department approved Noble Manor's application for a short subdivision.[82] Noble Manor then submitted applications for building permits to construct a duplex on each of its newly created legal lots.[83] Pierce County denied the building permit applications, citing the new minimum lot size of 20,000 sq. ft. as the basis for the denial.[84]

Noble Manor challenged the denial, arguing that its right to use and develop the property (i.e. to construct duplexes on the property) had vested to the development regulations in effect on the date it submitted its

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[79] Noble Manor, 133 Wn.2d at 272.
[80] Noble Manor, 133 Wn.2d at 272.
[81] Noble Manor, 133 Wn.2d at 272.
[82] Noble Manor, 133 Wn.2d at 273.
[83] Noble Manor, 133 Wn.2d at 273.
[84] Noble Manor, 133 Wn.2d at 276-77.

subdivision application.[85] The Supreme Court held in favor of Noble Manor, stating that under Washington's vested rights doctrine, as codified by the legislature in RCW 58.17.033, "it is not only the right to divide land which vests at the time of a short subdivision application, but also the right to develop or use property under the laws as they exist at the time of application."[86] Since Noble Manor's short subdivision application disclosed that Noble Manor intended to construct a duplex on each of its three proposed new lots, all project permit applications necessary to develop those duplexes were vested to the development regulations in effect on the date the short subdivision application was submitted.[87] Subsequent cases hold similarly.[88]

Under the reasoning of Noble Manor, a short subdivision application submitted to a Phase I permittee before June 30, 2015, vests not only the short subdivision application, but all subsequent permit applications in furtherance of the development or use of the property disclosed in the short subdivision application. A subsequent building

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[85] Noble Manor, 133 Wn.2d at 274.
[86] Noble Manor, 133 Wn.2d at 283.
[87] Noble Manor, 133 Wn.2d at 283.
[88] Association of Rural Residents v. Kitsap County, 141 Wn.2d 185, 193-94, 4 P.3d 115 (2000), citing Noble Manor, 133 Wn.2d 269 and Schneider Homes, Inc. v. City of Kent, 87 Wn. App. 774, 779, 942 P.2d 1096 (1997), review denied, 134 Wn.2d 1021 (1998) (subdivision application combined with planned unit development proposal creates a vested right to have the entire application considered under the ordinances in effect at the time of filing); Westside Business Park, LLC v. Pierce County, 100 Wn. App. 599, 601 & 605, 5 P.3d 713 (2000).

permit application or grading permit application, in furtherance of a disclosed use, is vested to the pre-June 30, 2015, land use control ordinances, including stormwater drainage regulations, even if that complete application is received after June 30, 2015, and regardless of whether construction has started by June 30, 2020.

The Washington legislature did not provide Ecology with express or implied authority to compel Phase I permittees to act contrary to clear statutory mandates found elsewhere in the Revised Code of Washington and it is not reasonable to read RCW 90.48.260 in that manner.[89] Likewise, the County and other Phase I permittees have no authority to adopt development regulations consistent with the second sentence of Special Condition S5.C.5.a.iii, as any such local regulation that conflicts with general state law, as this would here, is invalid and unenforceable.[90]

The County cannot comply with the second sentence of Special Condition S5.C.5.a.iii and with RCW 58.17.033, as interpreted by the Washington Supreme Court.[91] Ecology's requirement in the second

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[89] "The construction of two statutes shall be made with the assumption that the Legislature does not intend to create an inconsistency. Statutes are to be read together, whenever possible, to achieve a 'harmonious total statutory scheme… which maintains the integrity of the respective statutes.'" State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp., 142 Wn.2d 328, 342, 12 P.3d 134 (2000).

[90] Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health, 151 Wn.2d 428, 434, 90 P.3d 37 (2004) ("A local regulation that conflicts with state law fails in its entirety").

[91] The same analysis and conclusion is applicable to vesting for development agreements under RCW 36.70B.180.

sentence of Special Condition S5.C.5.a.iii is an illegal condition because it is not reasonable, practicable, or lawful to require as a permit condition action contrary to law.

D. Special Condition S5.C.5.a.iii Requires Snohomish County to Act in a Manner Inconsistent with the Doctrine of Finality of Land Use Decisions and Constitutional Protections Related Thereto

Recall that the second sentence of Special Condition S5.C.5.a.iii requires the County to apply newly adopted stormwater regulations to applications submitted prior to July 1, 2015, including approved projects that have not started construction by June 30, 2020. The County has no authority to unilaterally amend, alter or revoke an approved project permit.

When a preliminary plat application has been approved, RCW 58.17.140(3)(a) establishes the time period during which the property owner may obtain final plat approval consistent with the approved preliminary plat.[92] A final plat shall be submitted for approval within seven (7) years of the date of preliminary plat approval if the date of preliminary plat approval is on or before December 31, 2014; the final plat

[92] See RCW 58.17.170 ("When the legislative body of the city, town or county finds that the subdivision proposed for final plat approval conforms to all terms of the preliminary plat approval, and that said subdivision meets the requirements of this chapter, other applicable state laws, and any local ordinances adopted under this chapter which were in effect at the time of preliminary plat approval, it shall suitably inscribe and execute its written approval on the face of the plat").

must be submitted for approval within five (5) years of the date of preliminary plat approval if the date of preliminary plat approval is on or after January 1, 2015. Ecology's requirement in the second sentence of Special Condition S5.C.5.a.iii is inconsistent with this clear statutory language.

For example, a preliminary plat approved on November 6, 2014, would be valid for at least seven (7) years from the date of preliminary plat approval and the project proponent would have until November 5, 2021, to construct infrastructure, such as roads and utilities, as shown on the preliminary plat and obtain final plat approval. A preliminary plat approved by a Phase I permittee any time between July 1, 2013, and June 30, 2015, is entitled, by statute, to treatment in a manner different than the Phase I permit directs the County to act in regard to that development approval.[93] This puts Phase I permittees in a difficult position.

This obligation, as set forth in the second sentence of Special Condition S5.C.5.a.iii, to require approved projects to go back to the drawing board to be redesigned consistent with new stormwater

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[93] The same conclusion is reached regarding final plat approval given the final plat durations established in RCW 58.17.170(3)(a). RCW 58.17.170(3)(a) establishes the minimum duration for a final plat, which "shall be governed by the terms of approval of the final plat, and the statutes, ordinances, and regulations in effect at the time of approval under RCW 58.17.150(1) and (3)" for a period of seven years, if final plat approval is on or before December 31, 2014, and five years if final plat approval is on or after January 1, 2015.

regulations if they have not "started construction" by June 30, 2020, conflicts with specific legislative directives on the duration of approved project permits for preliminary and final plats, as noted above, and more broadly runs afoul of the doctrine of finality of land use decisions and constitutional protections related thereto.

The County has no authority to unilaterally amend, alter or revoke an approved project permit. A local jurisdiction's decision to approve a project permit application and issue the requested project permit(s) constitutes a "final land use decision" as that term is defined by LUPA.[94] Once a jurisdiction issues a project permit, that project permit becomes irrefutably valid if not challenged under LUPA within 21-days.[95] This strict time limit is a product of Washington's strong public policy favoring finality and certainty in land use decisions.[96] Both Washington courts and the legislature place such a high value on finality and certainty in land use decisions that even if a project permit is issued erroneously or illegally, after LUPA's 21-day statute of limitations has passed, that project permit

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[94] LUPA defines the term "land use decision" to include decisions regarding "approval[s] required by law before real property may be improved, developed, modified, sold, transferred, or used." RCW 36.70C.020(2)(a).

[95] Habitat Watch v. Skagit County, 155 Wn.2d 397, 406, 120 P.3d 56 (2005).

[96] Twin Bridge Marine Park, L.L.C. v. State Department of Ecology, 162 Wn.2d 825, 843, 175 P.3d 1050 (2008); James v. County of Kitsap, 154 Wn.2d 574, 589, 115 P.3d 286 (2005); Samuel's Furniture, Inc. v. State Department of Ecology, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002).

is deemed valid and cannot be challenged, revoked or amended.[97] In Washington land use law it is a bright-line rule that an approved project permit is a valid right in and to real property that may not be abrogated once LUPA's 21-day statute of limitations has passed.[98]

After LUPA's 21-day statute of limitations has expired, a local jurisdiction has no authority or ability to alter or revoke a project permit it has issued even if that project permit was issued erroneously. Accordingly, as a matter of law, the County cannot unilaterally amend, alter or revoke project permits in the manner required by the second sentence of Special Condition S5.C.5.a.iii.

The Board's treatment of this issue is cursory and evidences a lack of understanding of land use decision-making processes. The Board notes that application of "environmental regulations" to proposed development "is not in the nature of a land use decision."[99] This assertion is confusing and inaccurate as all relevant laws, rules, and regulations, regardless of whether the Board might characterize them as "environmental regulations" or not, are considered and applied as part of the land use

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[97] Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 181, 4 P.3d 123 (2000); Asche v. Bloomquist, 132 Wn. App. 784, 795-96, 133 P.3d 475 (2006).
[98] See Chelan County v. Nykreim, 146 Wn.2d 904, 909, 52 P.3d 1 (2002); Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology, 162 Wn.2d 825, 843-44, 175 P.3d 1050 (2008); Habitat Watch v. Skagit County, 155 Wn.2d 397, 406-08, 120 P.3d 56 (2005); Asche v. Bloomquist, 132 Wn. App. 784, 795-96, 133 P.3d 475 (2006).
[99] CABR at 004007.

decision-making process on a proposed development. In fact, as noted in Section VI.B.2.a, above, the County is obligated by the plain language of its Phase I Permit to apply the stormwater regulations required in Appendix 1 and the Manual to "new development," which includes applications for subdivision and the building of structures.

The Board further states, without justification or explanation, that Phase I jurisdictions are not required to amend or revoke permits already issued in order to comply with Special Condition S5.C.5.a.iii. It is entirely unclear to Snohomish County how it is supposed to "apply" the newly adopted local program stormwater regulations to projects already approved under pre-June 30, 2015, stormwater regulations without amending or revoking the already issued permits. To the extent the Board concluded that Ecology's suggested imposition of a condition on all project approvals issued by the County on or after June 30, 2013, is the solution, both the Board and Ecology are mistaken.[100]

Ecology argued below, and will likely argue before this Court, that the County and other Phase I jurisdictions can simply condition any project approval issued on or after June 30, 2013, with a statement along

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[100] The Board stated that "the project approvals the County issues after June 30, 2013, will need to comply with the local stormwater ordinance the County later adopts (by June 30, 2015)." CABR at 004008. We assume this is an acknowledgement of Ecology's suggestion to condition all development approvals issued on or after June 30, 2013. See CABR at 001256. On its face, however, the Board's statement is not supported by the plain language of Special Condition S5.C.5.a.iii.

the lines of the following: If the development project at issue does not start construction by June 30, 2020, then the development project must be re-designed to comply with then-applicable drainage and stormwater regulations.[101] While perhaps facially attractive, Ecology's proposed solution is illegal under Washington land use law.

Ecology's proposed permit condition is substantively flawed because property owners have an affirmative right to receive a development permit that is not encumbered by the condition Ecology proposed.[102] If a vested permit application is consistent with applicable development regulations, the property owner has a right to receive the requested permit.[103] Once issued, the permit is valid if not challenged within LUPA's 21-day statute of limitations.[104] A valid permit must remain valid and may not be revoked for at least the minimum term specified by statute.[105] At any time during the permit term, the property

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[101] CABR at 001255-001256.

[102] See e.g., Koontz v. St. Johns River Water Management District, 133 S.Ct. 420, 2013 WL 3184628 at *7 (2013) (citing the unconstitutional conditions doctrine, which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up").

[103] RCW 36.70B.030 & .040; J.L Storedahl & Sons, Inc. v. Clark County, 143 Wn. App. 920, 928-32, 180 P.3d 848 (2008) (holding Clark County was required by the Local Project Review Act to approve an application for a site-specific rezone meeting the criteria contained in Clark County's development regulations).

[104] Habitat Watch v. Skagit County, 155 Wn.2d 397, 120 P.3d 56 (2005); Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 181, 4 P.3d 123 (2000); Asche v. Bloomquist, 132 Wn. App. 784, 795-96, 133 P.3d 475 (2006).

[105] RCW 58.17.140 & .170; Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002); Noble Manor Co. v. Pierce County, 133 Wn.2d 269, 943 P.2d 1378 (1997).

owner may perform the permitted development project.[106] Imposing a condition that cuts the permit term short if the development project at issue has not "started construction" by June 30, 2020, deprives the property owner of part of the development rights to which the property owner is entitled. It is no more lawful for the County to truncate vested property rights by imposing a permit condition on a project approval than it is for the County to truncate vested property rights by enacting new development regulations and applying them to vested applications.

E. Clarification of the Controlling Legal Framework is Needed

Both the Washington legislature and Washington courts have established public policy emphasizing the importance of certainty and predictability in regulations controlling the development of land.[107] The objective of this public policy is to enable land owners "to plan their conduct with reasonable certainty,"[108] because "[s]ociety suffers if property owners cannot plan developments with reasonably certainty, and cannot carry out the developments they begin."[109] The Board's holding requires Phase I permittees to apply stormwater regulations that exert a

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[106] Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998).
[107] See Cedar River Water and Sewer Dist. v. King County, 178 Wn.2d 763, 781 & 782 n.8, 315 P.3d 1065 (2013), citing RCW 36.70C.010; Town of Woodway v. Snohomish County, 180 Wn.2d 165, 322 P.3d 1219, 1223 (2014), citing RCW 19.27.095(1), RCW 58.17.033(1) & RCW 36.70B.180.
[108] Abbey Road Group, LLC v. City of Bonney Lake, 167 Wn.2d 242, 251, 218 P.3d 180 (2009).
[109] West Main Associates v. City of Bellevue, 106 Wn.2d 47, 51, 720 P.2d 782 (1986).

"restraining or directing influence of land use"[110] and "affect the physical aspects of development"[111] in a manner contrary to law. Accordingly, it is the position of Snohomish County that the second sentence of Special Condition S5.C.5.a.iii facially conflicts with controlling Washington law, thus constituting an illegal condition that is neither reasonable nor practicable.

Actions by Snohomish County consistent with the second sentence of Special Condition S5.C.5.a.iii, which are inconsistent with legal protections of property rights, will be subject to challenges under the Land Use Petition Act, chapter 36.70C RCW, together with claims for damages, as well as attorney's fees and costs, under chapter 64.40 RCW for acts "which are arbitrary, capricious, unlawful, or exceed lawful authority."[112]

The Board's decision substantially prejudices Snohomish County by subjecting it to legal liability by forcing it to violate either the Phase I Permit or the real property rights of its citizens established by the Washington courts and the legislature. Whatever this Court decides, the

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[110] Westside Business Park, LLC v. Pierce County, 100 Wn.App. 599, 607, 5 P.3d 713 (2000).
[111] New Castle Investments v. City of LaCenter, 98 Wn.App. 224, 237, 989 P.2d 569 (1999).
[112] At the time Snohomish County is subject to such lawsuits, it will be too late for the County to challenge the terms of the Phase I permit. This appeal is the County's one and only opportunity to contest the legality, reasonableness and practicability of the Phase I Permit. See Rosemere Neighborhood Ass'n v. Clark County, 170 Wn.App. 859, 888, 290 P.3d 142 (2012), review denied, 176 Wn.2d 1021 (2013) ("[b]ut the issue of whether the Permit standards create such a situation [requiring the imposition of fees prohibited by statute] should have been appealed when the Permit itself was appealable.")

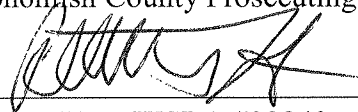
County requests the decision provide clear direction on the controlling legal framework applicable in this circumstance such that the County may comply with the Phase I Permit without subjecting it to liability from its citizens.

VII. CONCLUSION

For the foregoing reasons, Snohomish County requests the Court set aside the Board's October 2, 2013, decision on summary judgment and remand to the Board with direction to modify its ruling in accordance with this Court's opinion striking the second sentence of Special Condition S5.C.5.a.iii.

Respectfully submitted this 20th day of November, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney



Alethea Hart, WSBA #32840
Laura C. Kisielius, WSBA #28255
Deputy Prosecuting Attorneys
Attorneys for Snohomish County

CERTIFICATE OF SERVICE

I, Cindy Ryden, hereby certify that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney and that on this 20th day of November, 2014, I served a true and correct copy of Snohomish County's Opening Brief upon the persons listed herein and by the following method indicated:

Parties of Record

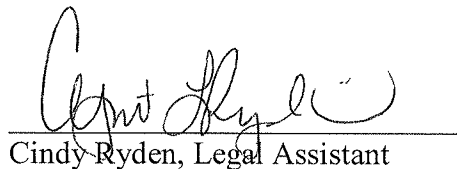
Pollution Control Hearings Board: Diane L. McDaniel Sr. Assistant Attorney General Licensing & Administrative Law Division P.O. Box 40110 Olympia, WA 98504-0110	☒ ***E-Service: dianem@atg.wa.gov*** ***Amyp4@atg.wa.gov*** ☐ Facsimile: ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service
Dept. of Ecology: Ronald L. Lavigne Attorney General of Washington Ecology Division P.O. Box 40117 Olympia, WA 98504-0117	☒ ***E-Service: ronaldl@atg.wa.gov*** ***ecyolyef@atg.wa.gov*** ***donnaf@atg.wa.gov*** ☐ Facsimile: (360) 586-6760 ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service
King County: Devon Shannon Darren Carnell Joseph B. Rochelle Deputy Prosecuting Attorneys King County Prosecuting Attorney's Office 516 Third Ave., W400 Seattle, WA 98104	☒ ***E-Service:*** ***devon.shannon@kingcounty.gov;*** ***darren.carnell@kingcounty.gov*** ***joe.rochelle@kingcounty.gov*** ***Mary.Livermore@kingcounty.gov*** ☐ Facsimile: (206) 296-0191 ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service

Pierce County & Coalition of Gov't Entities:	
Lori Terry Gregory Foster Pepper PLLC 1111 Third Ave., Ste. 3400 Seattle, WA 98101-3922	☒ ***E-Service: terrl@foster.com*** ☐ Facsimile: (206) 749-2002 ☒ ***U.S. Mail*** ☐ Hand Delivery ☐ Messenger Service
John Ray Nelson Foster Pepper PLLC U.S. Bank Bldg. West 422 Riverside Ave., Ste. 1310 Spokane, WA 99201-0302	☒ ***E-Service: nelsj@foster.com*** ***mccap@foster.com;*** ***ToveS@foster.com*** ☐ Facsimile: (509) 777-1616 ☒ ***U.S. Mail*** ☐ Hand Delivery ☐ Messenger Service
Clark County: Christine M. Cook Christopher Horne Deputy Prosecuting Attorney Clark County Prosecuting Attorney's Office Civil Division P.O. Box 5000 Vancouver, WA 98666-5000	☒ **E-Service:** ***Christine.cook@clark.wa.gov*** ***chris horne@clark.wa.gov*** ***Thelma.kremer@clark.wa.gov*** ☐ Facsimile: (360) 397-2184 ☒ ***U.S. Mail*** ☐ Hand Delivery ☐ Messenger Service
BIA of Clark County: James D. Howsley Jordan Ramis PC 1499 SE Tech Center Pl., #380 Vancouver, WA 98664	☒ ***E-Service:*** ***jamie.howsley@jordanramis.com*** ***lisa.mckee@jordanramis.com*** ***joseph.schaefer@jordanramis.com*** ☐ Facsimile: (503) 598-7373 ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service
Intervenor City of Seattle: Theresa R. Wagner Sr. Assistant City Attorney Seattle City Attorney's Office 600 Fourth Ave., 4th Fl. P.O. Box 94769 Seattle, WA 98124-4769	☒ ***E-Service:*** ***theresa.wagner@seattle.gov*** ***cynthia.michelena@seattle.gov*** ☐ Facsimile: (206) 684-8284 ☒ ***U.S. Mail*** ☐ Hand Delivery ☐ Messenger Service

Intervenor City of Tacoma: Jon Walker City Attorney Tacoma City Attorney's Office 747 Market Street, Room 1120 Tacoma, WA 98402-3767	☒ ***E-Service:*** *jon.walker@ci.tacoma.wa.us* ***tkropelnicki@ci.tacoma.wa.us*** ☐ Facsimile: (253) 591-5755 ☒ ***U.S. Mail*** ☐ Hand Delivery ☐ Messenger Service
Puget Soundkeeper Alliance, Washington Environmental Council and Rosemere Neighborhood Association: Jan Hasselman Janette K. Brimmer Earth Justice 705 Second Ave., Ste. 203 Seattle, WA 98104-1711	☒ ***E-Service:*** ***jbrimmer@earthjustice.org*** *jhasselman@earthjustice.org* ***chamborg@earthjustice.org*** ☐ Facsimile: (206) 343-1526 ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 20th day of November, 2014.



Cindy Ryden, Legal Assistant

SNOHOMISH COUNTY PROSECUTOR

November 20, 2014 - 12:57 PM

Transmittal Letter

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Case Name: Snohomish County, et al. v. Pollution Control Hearings Board, et al.
Court of Appeals Case Number: 46378-4

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Comments:

Appellant Snohomish County's Opening Brief

Sender Name: Cynthia L Ryden - Email: cryden@snoco.org