No. 92805-3

COURT OF APPEALS NO. 46378-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Snohomish County, et al.,

Appellants,

v.

Pollution Control Hearings Board, et al.,

Respondents.

APPELLANT KING COUNTY'S OPENING BRIEF

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I. INTRODUCTION

This case presents yet another nuance in the persistent discourse attempting to untangle Washington State's vesting doctrine. In the most general terms, state vesting laws protect applicants from having new land use regulations applied to a proposed land use after they have submitted complete permit application for that use. *See Noble Manor Company v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997); *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180 (2009). This case presents the question of whether vested rights encompass stormwater regulations when an applicant is required to disclose their stormwater and drainage plans as part of their complete land use permit application. *See* K.C.C. 20.20.040; K.C.C. Ch. 9.04.

On August 1, 2012, the Washington State Department of Ecology ("Ecology") adopted the 2013-2018 NPDES Phase I Municipal Stormwater and State Waste Discharge Permit (the "Permit"). CP 247, Appeal Board Record (ABR) at 12. The Permit requires municipal permittees to adopt and implement new regulations to control stormwater that are consistent with the "conditions" in the Permit. ABR at 22-23. Special Condition S5.C.5.a.iii (or, the "Condition") 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." ABR 26. The Condition will require King County to apply new stormwater regulations to land use permit applications that are vested under state vesting laws. *See* RCW 58.17.033; RCW 19.27.095; *see infra* at 22.

Ecology's statutory authority for requiring municipalities to update stormwater regulations is not in question. 33 U.S.C. §1342; Ch. 90.48 RCW. And, there is no question that these new regulations would apply to new development permit applications submitted after July 1, 2015. However, the requirement that municipalities impose the burden of those regulations to vested permit applicants puts King County and other municipalities in the untenable position of complying with two conflicting statutory directives.

On appeal before the Pollution Control Hearings Board (the "Board"), appellants questioned the scope of Ecology's authority to impose the Condition where it conflicts with or is inconsistent with state vesting laws. In its October 2, 2013 Order on Summary Judgment (the "Order"), the Board upheld the Condition, concluding that vesting laws did not apply to the Permit because its objectives were "environmental regulation" not "land use control." CP 191.

The Order, however, overlooks several critical points, including the ability for an environmental regulation to act as a "land use control"

when applied to local land use permits. The Board relied on inapplicable prior PCHB decisions which did not distinguish between regulations imposed on municipalities through an NPDES permit, and regulations imposed on applicants at the local level through the land use permitting process. CP 219. The Board also ignored case law from this Court directly addressing the issue of stormwater regulation vesting. *Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 599 (2000); CP 225.

The Permit's requirement that municipalities apply new stormwater regulations to local applicants through the land use permitting process triggers the vesting question and should be the focus of the Court's review. King County appeals the Board's decision seeking clarity on whether stormwater regulations mandated by Ecology can be imposed on local applicants who have vested land use permits.

II. ASSIGNMENT OF ERROR

King County assigns error to the Board's October 2, 2013 Order on Summary Judgment and March 21, 2014 Findings of Fact, Conclusions of Law, and Order.

III. ISSUE PRESENTED

Did the Board err in upholding Special Condition S5.C.5.a.iii where application of the Condition to land use permit applicants conflicts

with or is inconsistent with Washington's vested rights law, and the Condition is therefore outside Ecology's statutory authority to impose?

IV. STATEMENT OF THE CASE

For certain types of development, submission of a complete land use permit application triggers protection under the state's vesting laws and defines the regulations the County must apply for permit review. *See* RCW 58.17.033 (plat vesting); RCW 19.27.095 (building permit vesting); RCW 36.70B.170 (development agreement vesting). In King County, a complete application requires, among many other things, that the applicant establish compliance with the County's Surface Water Management Code, K.C.C. Title 9. K.C.C. 20.20.040. Applications cannot be deemed complete until an applicant determines whether "drainage review applies to the project pursuant to K.C.C. chapter 9.04 and, if applicable, all drainage plans and documentation required by the Surface Water Design Manual adopted pursuant to K.C.C. chapter 9.04." K.C.C. 20.20.040; *see also infra* at 10-11.

The Federal Water Pollution Control Act ("CWA"), establishes the framework for regulating water quality and pollutants discharges through the National Pollution Discharge Elimination System (NPDES) permit program. 33 U.S.C. §1251, *et seq*. Ecology administers the NPDES permit program in Washington State and requires certain municipalities to

obtain and operate under the conditions of a "Phase I" NPDES permit. RCW 90.48.260. King County is a Phase I permittee. ABR 16.

Under the 2007 NPDES Permit, Ecology mandated that Phase I permittees adopt a stormwater management program (SWMP). The SWMP is "a set of actions and activities comprising the components listed in S5" of the Permit and must be effectuated locally through local ordinance or other similar means. ABR 22; *see* RCW 90.48.260(3)(b). King County's SWMP is codified in Title 9 of the King County Code.

On August 1, 2012, Ecology issued an updated Permit which, among other requirements, mandated that permittees adopt Special Condition S5.C.5.a.iii. ABR 12; *see also* RCW 90.48.260. The Condition requires that municipalities apply the new stormwater regulations set forth in the Permit to applications submitted "prior [to] July 1, 2015, which have not started construction by June 30, 2020." ABR 27. To implement the Condition and other Permit requirements, King County will need to adopt amend its SWMP in Title 9 of the King County Code.

Concerned about how Ecology's requirement would impact the vested rights of local permit applicants, King County and other municipalities timely appealed the Condition and other requirements in the Permit to the Board per RCW 43.21B.110. CP 29; CP 193. "Issue No. 3" before the Board included the vesting question currently before this Court,

namely: "Whether Special Condition S5.C.5.a of the Permit contains requirements that are unlawful, unjust, unreasonable, impracticable, vague, ambiguous and/or beyond the authority of Ecology to impose ...[where] said requirements conflict with or are inconsistent with Washington's vested rights law..." CP 33.

On October 2, 2013, the Board issued its Order on Summary Judgment in the consolidated case. CP 191. The Board upheld Ecology's requirement that local jurisdictions apply the new stormwater regulations to projects that may already have vested rights under prior stormwater regulations if they have not started construction by June 30, 2020. CP 232. Its primary basis for upholding this requirement was its conclusion that the Permit is not a "land use control ordinance governed by the state's vested rights doctrine." CP 218. Instead, the Board characterized the stormwater conditions as "environmental regulations" that did not direct or restrict land use. *Id.*

King County now appeals the Board's final order pursuant to RCW 43.21B.180, which facilitates judicial review under the Washington Administrative Procedure Act (APA), Ch. 34.05 RCW. CP 29. King County's appeal is limited to whether the Condition, which requires application of new stormwater regulations to vested land use permits, is in conflict with or inconsistent with Washington's vested rights law.

V. ARGUMENT

A. Standard of Review and Burden of Proof

The APA governs judicial review of PCHB decisions. RCW 34.05.570; *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). "The burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a).

RCW 34.05.570(3) provides several bases for challenging the Board's adjudicative order. Critical for the Court's review here are whether the order "is outside the statutory authority or jurisdiction of the agency" and whether "the agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(b), (d). The Board's determination as to its scope of authority and its application of the relevant law are reviewed *de novo* under the error of law standard. *Overlake Fund v Shoreline Hearings Bd*, 90 Wn. App. 746, 754, 954 P.2d 304 (1998). A reviewing court "[does] not defer to an agency the power to determine the scope of its own authority." *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994).

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B. Washington's vesting laws fix the regulations that will govern an applicant's proposed land use.

In Washington, "'vesting' refers generally to the notion that a land use application, under proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission." CP 219, *citing Noble Manor*, 133 Wn.2d 269. Based on a concept of fundamental fairness, the vesting doctrine allows developers to "fix" the rules that will govern their development. *Noble Manor*, 133 Wn.2d at 278; *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 51 (1986). The doctrine protects a developer's legitimate need "for certainty and fairness in planning their development." *Id.*, at 280.

The parameters of the vesting doctrine are constantly challenged, limited, and arguably expanded by the Courts. *Potala Village Kirkland, LLC v. City of Kirkland*, 334 P.3d 1143 (2014); *Town of Woodway v. Snohomish Cnty.*, 180 Wn.2d 165, 322 P.3d 1219 (2014); *Noble Manor*, 133 Wn.2d 269; *West Main*, 106 Wn.2d 47. In this case, the type of *permit* is not particularly relevant.[1] Using uncontroversial "statutory vesting" permits, we get to the relevant question here: what type of

[1] In order to avoid the potential rabbit hole of discourse on what types of permits vest, King County focuses on land use permits that have a clear statutory mandate to apply vesting rules: namely, building permits, plat applications and development agreements. *See* RCW 58.17.033 (plat vesting); RCW 19.27.095 (building permit vesting); RCW 36.70B.170 (development agreement vesting); *see also Potala Village Kirkland, LLC v. City of Kirkland*, 334 P.3d 1143 (2014).

regulation will vest for review of an applicant's permit. *See* RCW 58.17.033 (plat vesting); RCW 19.27.095 (building permit vesting); RCW 36.70B.170 (development agreement vesting). In other words, when an applicant submits a complete application for a preliminary plat, what regulations are "fixed" in the bundle of vested rights?

i. An applicant obtains vested rights when a use is disclosed as part of a complete permit application.

Noble Manor provides the first guiding step. In *Noble Manor*, the Court considered whether an applicant's short plat application triggered vested rights to have building permit applications for the short plat lots reviewed under the land use controls in effect at the time the short plat application was deemed complete. *Noble Manor* at 272-73; RCW 58.17.033. Employing a broad analysis, the Court stated that "[t]he sole question before us is what rights vest at the time of an application for a short plat." *Id.* at 273.

The Court interpreted RCW 58.17.033 to allow vesting of the uses that are contemplated in the application. "...[I]f the County requires an applicant to apply for a use for the property in the subdivision application, and the applicant discloses the requested use, then the applicant has the right to have the application considered for that use under the laws existing on the date of the application." *Id.* at 278. "[W]hat is vested is

what is sought in the application...." *Noble Manor*, at 284. *Noble Manor* used this analysis to give the applicant vested rights to submit a separate permit. The ruling would apply equally, however, to discern what categories of regulations vest within a single permit application.

ii. An applicant obtains vested rights to stormwater regulations when they are disclosed and applied as part of a complete application.

In line with the holding in *Noble Manor*, we look to what an applicant is required to disclose in their permit application to determine what regulations an applicant vests to upon submission of a complete application. Specifically, when an applicant submits a plat application or other land use permit, are they required to disclose their drainage and stormwater plans? In King County, the answer is yes.

In King County, stormwater regulation is inexorably tied to the land use permit process at the application stage. Applicants for land use permits are required to determine if the project requires "drainage review" prior to submitting a permit application. K.C.C. 20.20.040. Under K.C.C. 9.04.030, "[d]rainage review is required when any proposed project is subject to a King County development permit or approval" if the project meets certain threshold criteria. "Development" is defined as:

> any activity that requires a permit or approval, including, but not limited to, a building permit, grading permit, shoreline substantial development permit, conditional use

> permit, special use permit, zoning variance or reclassification, subdivision, short subdivision, urban planned development, binding site plan, site development permit or right-of-way use permit.

K.C.C. 9.04.020(I). Any of the permits that have statutory vesting would be considered "development" permits and could require drainage review.

If a proposed project is required to go through drainage review, a permit application will not be deemed "complete" for purposes of vesting until the applicant submits all necessary "drainage plans and documentation required by the Surface Water Design Manual adopted pursuant to K.C.C. chapter 9.04." K.C.C. 20.20.040.A.14; *See also* K.C.C. 16.02.260 (application for building permit requires compliance with the complete application requirements of K.C.C. 20.20.040); K.C.C. 19A.08.060 (review of plat and subdivision applications are reviewed in accordance with K.C.C. 20.20 and for consistency with K.C.C. Title 9).[2] An applicant is also required to pay fees, including stormwater engineering review fees if applicable, at the time a plat application is submitted. K.C.C. 20.20.040.A.10.

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[2] Notably, this was not always the case. In *Friends of the Law v. King County*, the court questioned whether an applicant obtained vested rights to their plat application where they failed to submit drainage plans with their application. 63 Wn. App. 650, 655, 821 P.2d 539 (1991). Finding that the existing King County code did not require drainage plans as part of a complete application, the court concluded that by complying with the existing County requirements for a complete application, the applicant vested per RCW 58.17.033. *Id.* King County would expect a different result now that the Code explicitly requires submission of drainage plans for a fully complete permit application.

The incorporation of stormwater regulation into land use planning necessitates disclosure of drainage plans at the outset of the permit application process. Planning for compliance with the SWMP at the outset of the application process is essential to determine impervious surface limits, flow control, stormwater conveyance, necessary drainage facilities, and, consequently, what areas remain available for development. Ch. 9.04 K.C.C. Leaving drainage planning until later in the plat approval process would be irresponsible, as it is fundamental to establishing whether the planned project is even feasible.

Because stormwater plans are required at the front-end of the permitting process, an applicant would reasonably expect that those regulations vest through submission of a complete permit application. *See* K.C.C. 9.04.095 (explicitly vesting the development of a lot within a recorded short plat to Ch. 9.04 K.C.C. for five years after recording of the short plat). After submitting a permit application that applies the SWMP to the proposed project, subsequent changes to Title 9 would require parallel changes in the applicant's project. Protecting a developer from these legislative changes through the vesting doctrine comports with the objective to "protect the expectations of the developer against fluctuating land use laws." *Noble Manor*, 133 Wn.2d at 283.

C. Stormwater regulations are subject to the vesting doctrine because they "direct and restrain" a proposed land use permit.

After acknowledging that stormwater regulations are incorporated into the land use permit application framework, we ask whether the regulations are subject to the vesting doctrine as "land use controls" that "direct and restrain" the use of property. *Westside Business Park,* 100 Wn. App. at 606-7.

i. Stormwater regulations are land use controls because they exert a directing or restraining influence over land use.

The most instructive case on this issue is *Westside*, wherein this Court has already decided the issue. *Id., citing New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 989 P.2d 569, 572 (1999). This Court could not have been clearer in resolving that "[s]torm water drainage ordinances are land use control ordinances." *Id.* at 607.

In *Westside*, the Court was asked whether state vesting laws protect a developer's right to have a short plat application reviewed under the stormwater drainage ordinance in effect at submission of a complete application. In reaching an affirmative conclusion, the Court looked first to the definition of "land use control." The *New Castle* decision defined "land use control ordinance" as "an ordinance that exerts a 'restraining or directing influence over land use." *Id.*, at 607, *quoting New Castle,* 98 Wn. App. at 232. In *New Castle*, the Court found that impact fees were

not land use controls where they did not effect "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)." 98 Wn. App. at 237. The Court reasoned that impact fees do not "control" land use because they "do not affect the developer's rights with regard to the physical use of his or her land" but only increase the developer's costs. *Id.* at 237-38. "In other words, "[the developer] is not being forced to use its land or build differently from that which [the developer] was able to do at the time its plans were approved...." *Id.* at 237.

The *Westside* decision readily distinguished impact fees from the stormwater regulation at issue. The Court relied on the incorporation of stormwater regulations into the project review process to establish the physical impact those regulations have on land use. *Id.*, *citing* RCW 58.17.110(1). The Court resolved that because drainage review was 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." *Id.* It then follows, as the Court concluded, that surface water drainage ordinances are subject to the state vesting laws. *Id.*, at 607-08.

The *Westside* decision also cited the persuasive analysis in *Phillips*, which "held that the vested rights doctrine required the county to

apply the surface water drainage regulations in effect at the time of the developer's application for preliminary plat approval." *Id.* at 607; *citing Phillips v. King County*, 136 Wn.2d 946, 951, 963, 968 P.2d 871 (1998) (determining that a plat application vested to the surface water drainage code that was in effect upon submission of a complete plat application, in lieu of applying subsequently adopted regulations).

We reach the same logical result here. King County regulations require developers to show compliance with the jurisdiction's stormwater regulations to have a complete permit application. K.C.C. 20.20.040.A.14. Upon submission of that complete application, King County review's the project for consistency with those stormwater regulations prior to plat approval. RCW 58.17.110(1). Because the reviewing department applies the stormwater regulations to review and, where necessary, condition a development permit, those regulations "exert a 'restraining or directing influence' over land use" and are therefore subject to the state vesting laws. *Westside*, 100 Wn. App. at 607, *quoting New Castle,* 98 Wn. App. at 232.

ii. <u>Labeling stormwater regulations "environmental regulations" does not avoid the applicability of state vesting laws.</u>

The Board's Order states that the appellant's argument "rises or falls" on the characterization of the Permit as a land use control or

"environmental regulation." CP 220. But this depiction of the core issue is imprecise. The County does not dispute that the NPDES permit program is environmental in its statutory origin and objectives. The environmental purposes of the CWA and the NPDES program, however, do not diminish the land use control component of *applying* stormwater regulations to local land use permits.

The Board failed to address this distinction, ignoring the explicit land use and development impacts of the Permit conditions.[3] The Permit provides ample examples of the "development" component to stormwater regulation, and the land use impact that will result from the new regulations. The Permit contains "site planning" requirements and "site and subdivision scale requirements" which are indisputably development planning regulations. ABR 26 (conditions will "control the impacts of runoff from new development..." requiring municipalities to adopt "minimum requirements, thresholds and definitions...for new development, redevelopment and construction sites...."); CP 276 (low impact development principles are "land use management strategies... integrated into a project design). In fact, the Permit regulations would

[3] In at least one prior decision, the Board has acknowledged that development such as requiring a stormwater retention pond, would "constitut[e] a land use restriction." *Puget Soundkeeper Alliance, et al. v. State Dept. of Ecology*, PCHB Nos. 07-021, 07-026, 07-027, 07-028, 07-029,07-030 & 07-037, Order on Dispositive Motions (Phase I Municipal Stormwater Permit) (2008) at 22-23, 2008 WL 5510410 at *13.

effectively be meaningless if they did not impact the scope and intensity of land use. The Permit conditions reflect a clear understanding that, at the local level, the new stormwater regulations will be imposed on applicants in a way that directs and limits a developer's use of land.

The fields of environmental and land use regulation are not mutually exclusive. On the contrary, the two are necessarily and increasingly intertwined. *See* Title 21A K.C.C. (zoning); Ch. 21A.24 (critical area regulations); Ch. 21A.25 (shoreline regulations). The inevitable overlap is also recognized in state law. *See e.g. Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 936 (9th Cir. 1988) (the Shoreline Management Act "is a mixed statute containing both land use and environmental regulations."); *Puget Soundkeeper Alliance, et al.*, PCHB Nos. 07-021, *et seq*, (Order on Dispositive Motions Phase I Municipal Stormwater Permit) (there is necessarily "an area of interface and overlap between the GMA and the WPCA.").

Characterizing any of the above regulations as "environmental" does not limit their ability to restrain or direct land use. And, where environmental regulations are disclosed in a permit application and impact the physical aspects of development, those regulations will vest when a complete permit application is submitted. For example, regulation of "environmentally critical areas" is authorized by the Growth Management

Act. Ch. 36.70A RCW. An applicant for a plat in King County whose property has critical areas such as wetlands, aquatic areas, or wildlife habitat conservation areas, is subject to the development limitations in Ch. 21A.24 K.C.C. Their ability to develop will be conscribed to protect the environmental value of the critical area. *See e.g.* K.C.C. 21A.24.325 (setting wetland buffers where development is precluded); K.C.C. 21A.24.358 (setting aquatic area buffers where development is precluded); K.C.C. 21A.24.382 (setting development standards and limitations in wildlife habitat conservation areas).

Upon the submission of a complete plat application, a developer vests to the critical areas regulations[4] to "protect the expectations of the developer against fluctuating land use laws." *Noble Manor*, 133 Wn.2d at 283; *see Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Bd.*, 160 Wn. App 250, 261-264, 255 P.3d 696 (2011). Thus, although critical area regulations are based in environmental objectives, they have a directing and restraining influence on an applicant's development and are therefore within the bundle of regulations that vest for review of a permit application.

[4] Some critical areas regulations do not vest because of overriding health, safety and welfare concerns, in which case the County applies current regulations under its police power.

The Board's exclusion of stormwater regulations from the reach of the vesting doctrine because they are "environmental" is an over-simplistic segregation. It is not the label of the regulation, but the application of that regulation to a local permit that should determine whether the vesting doctrine applies.

iii. Where a new stormwater regulation will burden an applicant to modify physical aspects of the development, the vesting doctrine applies.

The Board's conclusion that the vesting doctrine did not apply to stormwater regulations was based in large part on its prior decision, *Rosemere v. Ecology*, PCHB No. 10-013 (Order Denying Summary Judgment). CP 226. Although *Rosemere* might appear relevant at first blush because it reviews whether NPDES permit regulations can be applied to a vested local permit application, the facts of *Rosemere* do not support the Board's reasoning here.

In *Rosemere*, the Board considered whether Clark County's "flow control" regulations were adequate to meet Special Condition S5 of their Phase I NPDES Permit. *Rosemere*, at 3-4. Clark County held applicants to a more lenient standard and agreed to create a mitigation plan that would require the County to "make up the difference" in flow control protection that developers would not be required to achieve. *Id.* at 5. The Board concluded that the vested rights doctrine was not implicated where

there were no new regulations being imposed on applicants that would impact their development.

In reaching that decision they relied on the *type* of regulation and the *party subject to* the regulation. First, the new requirement was for mitigation, which would not restrain the physical project development, but would instead require some additional cost for the project, similar to the fee impact scenario in *New Castle*. *Id.*; *New Castle*, 98 Wn. App. 224. Here, the Permit conditions will, commensurate with Ecology's intent, alter the physical aspects of an applicant's vested project. *See* ABR 21-71.

Also unlike in *Rosemere*, the Permit conditions change the obligations for applicants. The onus will be on land use applicants, not the municipal permittees, to meet the new regulatory requirements. In *Rosemere*, the Board stated that the new regulations would not "exert a 'restraining or directing influence' over land use because it was the municipal permittees that would bear the burden of meeting the requirements, not developers." *Rosemere*, at 14; *Rosemere*, 170 Wn. App. at 875. "Nothing in the Permit or the Board's order requires the County to pass ordinances obligating the developer to incur the more onerous burden

of mitigating to the historic levels." *Rosemere*, 170 Wn. App. at 875.[5]

In *Rosemere*, there was negligible risk to Clark County for a legal challenge by developers where the only anticipated burden would be to itself. *See Rosemere*, 170 Wn. App. at 875. Here, the vesting issue puts municipalities in a position where they will violate either Ecology's mandate to implement the Condition, or violate the vested rights of an applicant whose project has been restricted by imposition of new stormwater regulations. Based on the physical impact of the regulations to local projects, and the burden falling to the vested applicants, the Board's reliance on *Rosemere* in lieu of *Westside* is unsupported.

iv. The vested rights doctrine applies to land use applications, not NPDES permits.

The Board's Order also reflects some confusion as to which "permit" is the subject of vested rights protections. *Order*, at 219, 226. The vesting doctrine applies to "land use applications." *Noble Manor*, at 275. The Board's Order mistakenly focuses on whether the vested rights laws apply to the NPDES Permit. *Order*, at 219, 226, *citing Cox v. Ecology*, PCHB No. 08-077, Order Granting Summary Judgment (complete subdivision application did not vest applicant to regulations for

[5] On review of the Board's decision in *Rosemere*, this Court did not take up the issue of whether, once the permittees passed legislation adopting Ecology's requirements, those new local regulations would create a vesting issue. The Court did not reach the vesting issue, but did acknowledge that because the January 2010 Agreed Order had an effective date of April 2009 "in theory, would violate Washington's vesting law...." At 875.

subsequent NPDES permit required by Ecology). The applicability of the vested rights doctrine to an NPDES permit is not in dispute: It does not apply. The Board's decision disregards the impact of the NPDES regulations on vested land use permits, which is the real issue before the Court. The two permit processes cannot be conflated where one is entitled to vesting rights and the other is not.

D. Special Condition S5.C.5.a.iii requires local jurisdictions to adopt development regulations that conflict with state vesting statutes.

Special Condition S5.C.5.a.iii requires municipalities to adopt legislation that applies new stormwater regulations to all land use applications submitted "prior July 1, 2015, which have not started construction by June 30, 2020." ABR 27 (footnotes omitted). As discussed *supra at 10-11*, an applicant typically discloses stormwater plans in their permit application and, after submission of a complete application, imposition of new stormwater regulations as mandated in the Condition will restrain the physical aspects of an applicant's development.

The Condition therefore conflicts with Washington vesting law by imposing new, more stringent regulations to land use permit applicants who have vested development rights. By imposing the Condition, Ecology has exceeded its statutory authority and the Condition should be declared invalid. RCW 34.05.570(2)(c).

Part of the disconnect in this case is a lack of understanding as to how the local permitting process works and the typical timeframe for permit approval. While the Condition's five-year window from permit submittal to "start of construction" may seem adequate (and may in fact be adequate in some situations), there are many permit processes that cannot go from application to breaking ground in that timeframe.

Although this litigation is a facial challenge to Ecology's requirement, examples of how the Condition would impact vested permit rights are instructive. Using examples in the context of plats, building permits and development agreements, the potential for conflicting municipal obligations becomes evident.

i. The Condition curtails vested rights for preliminary plats under RCW 58.17.033.

RCW 58.17.033 provides vesting protection for preliminary plat approvals, stating that they "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...." RCW 58.17.033. This vesting protection applies through the duration of a jurisdiction's permit processing.

Under the King County Code, a preliminary subdivision **approval** is valid for seven years if approved prior to December 31, 2014. K.C.C. 19A.12.020.G.1 (emphasis added); *see also* K.C.C. 19A.12.040 (short subdivisions). An applicant is therefore protected under the vested rights doctrine both while the complete plat application is being reviewed, and while the approved work is being designed and implemented over the course of several years.

Condition S5.C.5.a.iii would require King County to ignore this legislative mandate and apply new stormwater regulations to a preliminary plat that had not started construction by June 30, 2020. If, for example, a developer submitted a complete plat application on December 31, 2014 and that plat was approved two years later, the applicant would be vested to the regulations that were in effect at the time a complete application was submitted until December 31, 2023. RCW 58.17.033; K.C.C. 19A.12.020.G.1. In this scenario, the Condition would require King County to impose new stormwater regulations on plat applications after the plat had been approved under existing standards.

Moreover, as a practical matter, implementation of the new regulations after plat approval would be challenging for the municipality and the applicant. In addition to the additional cost and technical complications of project redesign, it is entirely plausible that imposing

new standards would render a project infeasible where new regulations required significant project redesign. *See* ABR at 93-117. King County would need to initiate a new review process for the approved preliminary plat which, with more stringent regulations, could be a "substantial" revision, requiring the applicant to start the plat application from scratch. K.C.C. 19A.12.030. Thus, not only would the applicant lose vested rights to stormwater regulations, they would risk losing all vested rights for their project. This is the type of conflict and inequity King County seeks to resolve through this appeal.

ii. The Condition curtails vested rights to obtain building permits for lots within approved final plats under RCW 58.17.170(2)(a).

Another way King County foresees Ecology's condition conflicting with an applicants vested rights is through final plat approval and the associated right to develop lots within the plat. Under RCW 58.17.170(2)(a) "any lots in a final plat filed for record shall be a valid land use notwithstanding any change in zoning laws for a period of seven years from the date of filing if the date of filing is on or before December 31, 2014, and for a period of five years from the date of filing if the date of filing is on or after January 1, 2015." If a final plat were filed on December 31, 2014, an application to make use of one of the lots in a way that was disclosed in the plat application should be valid until December

31, 2021. *See Noble Manor*, 133 Wn.2d 269 (1997). As in *Noble Manor*, this could likely come in the form of building permit applications for development of lots that had been approved in the plat. *Id.*

Ecology's Condition would require municipalities to ignore this statutory requirement and mandate any building permit applications within the final plat to be reviewed under new stormwater regulations if construction were not commenced by June 30, 2020. As above, it does not require a crystal ball to see the problematic practical implications of this conflict. Because stormwater regulations are such an integral part of "site planning," application of more stringent regulations are likely to limit the scope and scale of development both within a plat and on individual lots. King County is then put in the position of violating a developer's vested rights, potentially creating unbuildable lots in final, recorded plats in order to implement Ecology's regulations.

iii. <u>The Condition curtails vested rights in development agreements authorized in RCW 36.70B.170.</u>

Development agreements are authorized under RCW 36.70B.170. When a development agreement is used, the agreement and associated Urban Planned Development (UPD) Permit spell out in great detail what regulations will apply to the long-term development of the UPD. *Id.* These agreements frequently span 15-20 years and contain explicit detail

on applicable development standards, including the drainage and water quality standards that will apply throughout the duration of the development agreement. *See* RCW 36.70B.170(1).

"A development agreement must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement." RCW 36.70B.170(1). "Development standards" for purposes of a development agreement specifically include "design standards such as maximum heights, setbacks, **drainage and water quality requirements**, landscaping and other development features." RCW 36.70B.170(3)(d) (emphasis added). The development agreement is also required to provide a "build-out or vesting period" for the development standards. RCW 36.70B.170(3)(i). There is no statutory limit imposed on vesting period duration. *See* RCW 36.70B.180.[6]

The potential conflict here is self-evident. Development agreements have extended vesting periods which are authorized by state statute and have been adopted by Ordinance. The Condition would

[6] Other types of permits which would be impacted by the Condition include commercial site development permits and demonstration projects. *See* Ch. 21A.41 K.C.C.; Ch. 21A.55 K.C.C.

require municipalities to ignore the terms of the development agreement to apply Ecology's new stormwater regulations.

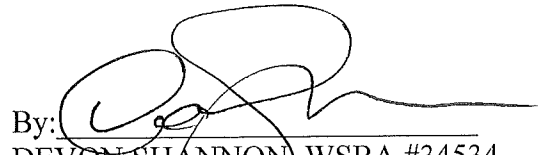
VI. CONCLUSION

Based on the argument presented here, King County respectfully requests that the Court find Ecology has exceeded its regulatory authority by imposing Special Condition S5.C.5.a.iii, which conflicts with or is inconsistent with state vesting laws. King County further requests that the Court remand the matter to the Board for removal of the offending language in the Condition.[7]

DATED this 20 day of November 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: _____
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[7] The specific language King County asks to have removed in Special Condition S5.C.5.a.iii is: "...and shall apply to projects approved prior [to] July 1, 2015, which have not started construction by June 30, 2020."

Certificate of Service

I, Rita Hagan, declare that I caused to be filed with the Court of Appeals, Division II, APPELLANT KING COUNTY'S OPENING BRIEF and this CERTIFICATE OF SERVICE; as well as a copy of the same to be served on the following parties in the manner noted below.

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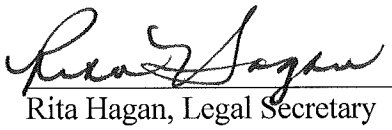
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Rita Hagan, Legal Secretary
Done in Seattle, Washington

11/20/14
Date

KING COUNTY PROSECUTOR

November 20, 2014 - 11:51 AM

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