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

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY

Petitioner,

And

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

Respondents Below.

**BUILDING INDUSTRY ASSOCIATION OF CLARK COUNTY'S
SUPPLEMENTAL BRIEF**

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 ORIGINAL

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Muddled a Simple Concept and How We Can Reclaim It*, 24 Seattle
U.L. Rev 851, 868-869. (2001)3

I. INTRODUCTION

This Court will receive numerous briefs for this case. But the analysis of the two issues, whether local stormwater ordinances remain subject to vesting and whether Congress intended to override state land use laws is straightforward. Simply put, the Court of Appeals ruled correctly.

Vesting means that local government evaluates land use applications under the statutes and ordinances in effect at the time of application submittal.¹ Vested rights blossomed out of the 14th Amendment's Due Process clause² and from Washington's Constitution, common law and statutes. In *Erickson & Associates v. McLerran*, this Court held:

[O]ur vesting doctrine is rooted in constitutional principles of fundamental fairness. The doctrine reflects a recognition that development rights represent a valuable and protectable property right."³

The continuing recognition of Constitutional principles by Washington courts gives the vesting doctrine a unique, steady lineage in

¹*Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 275 (1997).

²Rathkopf, *The Law of Zoning and Planning*, §50-03(1).

³*Erickson & Associates v. McLerran*, 123 Wn.2d 864, 870 (1984)(citing *West Main Associates v. City of Bellevue*, 106 Wn. 2d at 50 (citing *Louthan v. King County*, 94 Wn.2d 422, 428 (1980)).

the burgeoning field of land use law. The Court of Appeals affirmed this long lineage by recognizing that stormwater ordinances restrain the land, thus property rights should be protected though vesting.

Secondly, the Court of Appeals held that Congress did not manifestly intend to trudge any states' self-determining land use systems. Congress recognizes that each state maintains unique characteristics and that a methodical, collaborative, iterative approach between the federal, state and local governments is best to address water pollution.⁴ This also means that the regulatory environment and techniques used to reduce pollutants evolve over time and harmonize with the other objectives contained within a state's given land use regime.

II. STATEMENT OF THE CASE

BIA adopts its prior submitted statement of the case along with those that were or will be submitted by Snohomish and King Counties.

III. ARGUMENT

A. STORMWATER ORDINANCES EXERT A RESTRAINING INFLUENCE OVER THE LAND AND THEREFORE ARE SUBJECT TO VESTING

⁴ 40 CFR 122.26(d)(2)(v) and 122.34(g). These provisions require MS4s to evaluate a program for its effectiveness in an iterative process. See November 26, 2014 Memorandum from the United State Environmental Protection Agency p. 2. http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA_SW_TMDL_Memo.pdf
See also: http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/region3_factsheet_swmp.pdf page 4 for a description of the process.

As stated above, vesting developed out of the fundamental Constitutional principles of due process.⁵ In *Ogden v. City of Bellevue*, one of the first land use vesting cases, the court shielded a property owner who filed a timely building permit from changes in the zoning regulations.⁶ Another early leading case, *Hull v. Hunt*, recognized the right of a developer to finish construction of a twelve story apartment building under a building permit issued one day before a new height limitation took effect in Seattle.⁷ Washington courts continually recognize that development rights are valuable property interests entitled to protection against new land use ordinances that could adversely impact a property owner's due process.⁸

Land development in Washington has evolved into an extremely complex process, distant from the fact patterns of early cases. Cognizant of the increasing complexity, the Legislature codified the common law vesting doctrine for building permits and expanded it to include land divisions in 1987.⁹ The statute requires that permits be considered under the "zoning or other land use control ordinances" in effect when a fully

⁵ *Erickson* at 870.

⁶ *Ogden v. City of Bellevue*, 45 Wash. 2d 492 (1954).

⁷ *Hull v. Hunt*, 53 Wn. 2d 125 (1958).

⁸ *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251 (2009).

⁹ *Noble*, at 275. See also Roger D. Wynne, *Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, 24 Seattle U.L. Rev 851, 868-869. (2001)

complete application is submitted.¹⁰ Neither section allows local jurisdictions to ignore vesting to protect the public health, safety, and welfare, except for SEPA which is explicitly exempt from the statute¹¹ and not relevant to this case.

State statutes do not define “land use control ordinance.” But Washington courts have held that a wide range of ordinances are subject to vesting including those regulating wetlands,¹² geologic hazards,¹³ and steep slopes.¹⁴ These subjects, just like zoning, lot standards, utility standards, road standards, and stormwater have something in common; they are individual components, under their own ordinances, that intertwine to fully regulate a complete application for the development of land, such as a plat. One cannot disassociate, remove, alter or change one aspect of an approved project without necessitating additional work from both the public and private sector. If some aspects of development applications vest while other components require redesign and new regulatory approvals, then no aspects are truly vested because a change in one area cascades to compel redesign of other areas. If the stormwater

¹⁰RCW 19.27.095(1)(building permits); RCW 58.17.033(land divisions). [Emphasis added].

¹¹RCW 19.27.095(3); RCW 58.17.033(6).

¹²*Weyerhaeuser v. Pierce County*, 95 Wn.App. 883, 895 (1999).

¹³*Audubon Soc’y v. Partners*, 128 Wn.App. 671, 679 n.4 (2005).

¹⁴*Girton v. City of Seattle*, 97 Wn.App. 360, 362 (1999).

pond must be increased in size, then other features of the project must be decreased or altered to accommodate the change.

This brings us to the present case. Special Condition S5.C.5 of the Phase I NPDES permit compels local government to adopt development regulations that proscribe the physical attributes of land developments. Local stormwater regulations operate in the development code like critical area ordinances, road standards and other zoning requirements. In practical terms rain falls from the sky onto a development where it becomes stormwater, which is shunted to an onsite facility for treatment, detention and disposal.

In *Westside Business Park v. Pierce County* the court examined this question and concluded that “storm water drainage ordinances are land use control ordinances”¹⁵ because they exert a “restraining or directing influence” over the land.¹⁶ In the present case the Court of Appeals reconsidered this question and again correctly concluded that stormwater regulations are “land use control ordinances” subject to Washington’s vested rights doctrine. The record established that the regulations forced owners to modify the site plans of existing, complete applications, to meet Ecology’s new requirements for stormwater,

¹⁵*Westside Business Park v. Pierce County*, 100 Wn. App. 599, 609 (2000).

¹⁶*Id.* at 607.

including maintenance of natural drainage patterns, construction of larger or different stormwater treatment facilities, and implementation of stricter flow control standards.

The decision by the Court of Appeals cannot be characterized as an expansion of the vested rights doctrine in light of well-established case law interpreting statutory provisions; rather, it is consistent with the established precedent which Ecology seeks now to reverse.

And finally, while the due process purpose of vesting is “to provide a measure of certainty to developers and to protect their interests against fluctuating land use policy”¹⁷, the public also benefits greatly by not continually dedicating scarce public resources, staff time and public dollars, to constantly re-reviewing approved development applications. The legislature expressly found this was important to control the cost of housing, among other benefits.¹⁸ Both the public and private sector know the rules, adhere to them and have a due process right to rely upon them when developing their communities.

¹⁷*Noble* at 278.

¹⁸ See RCW 36.70B.170 Findings—Intent—1995 c 347 §§502-506 “The legislature finds that the lack of certainty in the approval of development projects can result in a waste of public and private resources, escalate the housing costs for consumers and discourage the commitment to comprehensive planning which would make maximum efficient use of resources at the least economic cost to the public....”

B. THERE IS NO FRUSTRATION OR IMPAIRMENT OF CONGRESSIONAL OBJECTIVES AND NO PREEMPTION CONFLICT

Washington State's vested rights doctrine can coexist with the Clean Water Act. Petitioners argue that the Clean Water Act requires states and local governments to create hard deadlines for new stormwater requirements. Petitioners are wrong.

When adopted in 1972, the Clean Water Act did not regulate stormwater. Stormwater regulations emerged in 1987 when Congress amended the Clean Water Act and authorized the regulation of stormwater discharges by adding section 402(p) and creating the NPDES permit system.¹⁹ And while Congress decided to regulate stormwater the adoption of water quality standards was delegated to the states.²⁰ EPA maintains an iterative process in regulating municipal stormwater systems.²¹ For example, in Oregon these are known as MS4 permits, a term that is unknown in Washington. This allows each state to understand how effective its program is given the geographic, climatic and other unique conditions in order to adjust or amplify where needed.

Nothing in the Clean Water Act suggests that prior approved developments should be required to adapt to meet new requirements that

¹⁹33 U.S.C. §1342(p).

²⁰33 U.S.C. §1313.

²¹40 CFR 122.26(d)(2)(v) and 122.34(g).

develop through this process. Petitioners cite no provisions to the contrary. The Clean Water Act remains willfully hushed on this point. Congress expected the states to work in partnership with the federal government to address water quality issues.²² But it also expected the states to retain their traditional roles in implementing their land use regimes.²³ And therefore Washington's land use system can easily be harmonized with the Clean Water Act because it is the state that reviews its program and determines where appropriate to adopt and modify standards.²⁴

Petitioners assert that Congress intended preemption through the use of the magic words "maximum extent practicable". And yet the Clean Water Act does not define "maximum extent practicable", rather it relies upon the judgment of those overseeing the permits to ascertain the meaning. Washington can choose to move beyond the "maximum extent practicable" which it has done through AKART and other requirements of Washington's Water Pollution Control Act. But on preemption, the Court of Appeals correctly distinguished between the terms "maximum extent

²²*National Association of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007).

²³33 U.S.C. §1251(b) which reads in pertinent part: "It is the policy of Congress to recognize, preserve and protect the primary responsibilities of States to prevent, reduce and eliminate pollution, to plan the development and use of land..."

²⁴33 U.S.C. §1313 (c)(1)

practicable” as contrasted with “maximum extent **possible**,” and correctly concluded that 33 U.S.C. §1342(p)(3)(B) provides flexibility to states adopting stormwater control regulations.²⁵ Additionally, the Court noted the absence of any federal directive requiring the adoption of Ecology’s new regulations within specific timeframes. No other state in EPA Region 10 has this problem.

Petitioners assert a preemption conflict where none exists. State law is preempted to the extent of any conflict with a federal statute, that is, when compliance with both federal and state regulations is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hillman v. Maretta*, __ U.S. __, 133 S. Ct. 1943, 186 L. Ed. 2d 43 (2013); citing U.S.C.A. Const. Art. 6, cl. 2. In applying the Supremacy Clause to subjects regulated by Congress, the Court must ascertain whether a challenged state law is compatible with the policy of the federal statute.

Washington’s vested rights doctrine does not impede the accomplishment and execution of the full purposes and objectives of Congress; those in effect at the time vested submittals are completed. The vested rights doctrine comports with Congressional purposes and

²⁵33 U.S.C. §1342(p)(3)(B) (emphasis added).

objectives and provides a date certain for all participants to rely on, including owners, regulators, lenders, tenants and buyers.

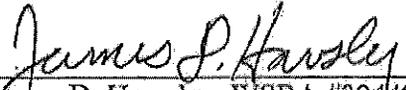
IV. CONCLUSION

Simply put, Congress never required the NPDES program to trump state law where no preemption conflict exists. Fairness and efficiency in permitting are legitimate goals that do not frustrate or impair Congressional goals and objectives. Redesigning the stormwater infrastructure of an approved land use project would change the very nature of the approval itself, such as the number and location of lots in a plat or size of buildings in a site plan, or the location and nature of the internal roads and other essential infrastructure. Local governments would certainly require additional review, public notice and hearings, expending valuable public and private money and time to review the necessary changes which would exacerbate the already skyrocketing price of housing and rents in Washington. Vested rights exist to guard against the waste of private and

public resources and to ensure the protections of due process principles long maintained by this Court. We therefore request this court affirm the Court of Appeals decision.

RESPECTFULLY SUBMITTED this 1st day of August, 2016.

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Please find the attached Supplemental Brief that contains the correct case no. 92805-3.

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Please find the attached Building Industry Association of Clark County's Supplemental Brief for filing with the court.

Case Name:

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

Case Number:

Supreme Court Case Number 92805-3, COA, Div. II Case No. 46378-4-II

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