

Court of Appeals 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,

v.

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

Respondents/Respondents Below.

**APPELLANT BUILDING INDUSTRY ASSOCIATION OF CLARK
COUNTY'S OPENING BRIEF**

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I. INTRODUCTION

Petitioner Building Industry Association of Clark County (“BIA”) is a trade organization of more than 500 businesses with more than 12,000 employees in the land development and construction industry. Members come from all sectors of the building trades including bankers, plumbers, electricians, engineers, planners, attorneys, excavators, developers and home builders. BIA challenges an erroneous order issued by the Pollution Control Hearings Board on October 2, 2013 affirming the vesting limitation provision of the Phase I Municipal Stormwater Permit.

II. ASSIGNMENT OF ERROR

The Pollution Control Hearings Board (PCHB) erred in entering the Order on Summary Judgment containing findings of fact and conclusions of law on October 2, 2013.

III. ISSUE PRESENTED

The Phase I NPDES Municipal Stormwater Permit sets an arbitrary time limit to comply with local land use ordinances derived under the permit. But Washington’s vesting doctrine protects development applications against changes to land use regulations. Did Ecology and the PCHB pulverize decades of court decisions and eclipse express legislative intent by ignoring vesting in the permit?

IV. STATEMENT OF THE CASE

The federal Clean Water Act (“CWA”) contains the National Pollutant Discharge Elimination System (“NPDES”) permit program that regulates point sources that discharge pollutants in the waters of the

United States. The NPDES permit requires states to implement stormwater management programs. In Washington, the regulated jurisdictions are split between Phase I communities, those with over 100,000 and Phase II communities, those with more than 10,000 people that also meet other conditions. Clark, Pierce, King and Snohomish counties and the cities of Seattle and Tacoma are Phase I communities.

The Washington Department of Ecology (“Ecology”) issued a new NPDES permit for the Phase I communities on August 1, 2012 with an effective date of August 1, 2013.¹ The biggest change to the Phase I permit requires local jurisdictions implement low impact development (LID) techniques into their land use development codes.²

BIA being the industry regulated by the local land use ordinances derived under the Phase I permit appealed the permit because of the costs associated with employing LID in all areas. But BIA also joined Snohomish County and Clark County in a motion for summary judgment challenging Ecology’s vesting rule as defined in the Phase I permit.³ This permit condition states that “[t]he local program adopted to meet the requirements of S5.C.5.a.i through ii shall apply to all applications

¹ Petitioner’s Joint CP, Thurston Co. Case #14-2-00710-5, Joint EX List, Document #J-1.

² Phase I Permit Special Condition S5.C.5a-b, CP, Joint EX List, Doc. #J-1.

³ Phase I Permit Special Condition S5.C.5.a.iii, CP, Joint EX List, Doc. #J-1.

submitted after July 1, 2015 and shall apply to projects approved prior to July 1, 2015, which have not started construction by June 30, 2020.”⁴

Prior to issuing its Final Order the PCHB issued an order denying Snohomish County’s summary judgment motion and affirming Ecology’s cross motion that the vested rights doctrine is not applicable to stormwater control ordinances because they are environmental regulations not land use controls.⁵

V. ARGUMENT

A. STANDARD OF REVIEW.

Appellate courts review PCHB orders under Washington’s Administrative Procedures Act. This court must limit its review to the record before the PCHB. The petitioning party bears the burden of demonstrating that the PCHB’s action is erroneous.

This case presents a question of pure law and therefore is *de novo*. Where statutory construction is necessary, courts will interpret statutes *de novo*.⁶ Appellate courts may grant relief if the PCHB “erroneously interpreted or applied the law” or if a decision is beyond the statutory

⁴ *Id.*

⁵ PCHB Nos. 12-093c and 12-097c Order on Summary Judgment October 2, 2013 p. 28-29 - Petitioner’s Joint Designation of CP, Thurston Co. Case #14-2-00710-5, From PCHB #12-093c, Bates #003971-004015.

⁶ *Klein v. Wash. Mut. Bank*, 176 Wn.2d 771, 782 (2013).

authority and jurisdiction of the PCHB.⁷ Or the court may also grant relief if the PCHB decision violates constitutional provision on its face or as applied.⁸

B. DISCUSSION

The Phase I NPDES Municipal Stormwater Permit sets an arbitrary time limit to comply with local land use ordinances derived under the permit. But Washington’s vesting doctrine protects development applications against changes to land use regulations. Did Ecology and the PCHB pulverize decades of court decisions and eclipse express legislative intent by ignoring vesting in the permit?

1. The PCHB Razed Washington’s Vesting Doctrine.

Vesting refers to the concept that local government must evaluate land use applications under the statutes and ordinances in effect at the time of application submittal.⁹ The purpose of vesting is “to provide a measure of certainty to developers and to protect their interests against fluctuating land use policy.”¹⁰ But the public also benefits greatly by not continually dedicating scarce public resources, staff time and public dollars, to constantly re-reviewing approved development applications.¹¹

⁷ RCW 34.05.570 (3)(b),(d).

⁸ RCW 34.05.570(a).

⁹ *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 275 (1997).

¹⁰ *Id.* at 278.

¹¹ 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....”

Vesting in Washington developed first through the courts. In *Ogden v. City of Bellevue*, one of the first land use vesting cases, the court sought to protect a property owner who filed a timely building permit from changes in the zoning regulations.¹² Another early leading case on vesting, *Hull v. Hunt*, recognized the right of a developer to finish a twelve story apartment building under a validly issued building permit one day before a thirty-five foot height limitation took effect in Seattle.¹³ Washington courts adopted this rule recognizing that development rights are valuable property interests entitled to protection against new land use ordinances that could impact a property owner's due process.¹⁴

Land development continues to evolve in Washington into an extremely complex process, far removed from those early cases. And the added complexity compelled the Legislature to codify this common law doctrine for building permits and expand it to include land divisions in 1987.¹⁵ The statute requires that permits be considered under the “zoning or **other land use control ordinances**” in effect on the date a fully complete application is submitted.¹⁶ Neither section contains a provision

¹² *Ogden v. City of Bellevue*, 45 Wash. 2d 492 (1954).

¹³ *Hull v. Hunt*, 53 Wash. 2d 125, 126-127 (1958).

¹⁴ *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251 (2009).

¹⁵ *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)

¹⁶ RCW 19.27.095(1)(building permits); RCW 58.17.033(land divisions). [Emphasis added].

allowing local jurisdictions to ignore vesting to protect the public health, safety, and welfare except to the extent they may do so under the SEPA which is explicitly exempt from the statute.¹⁷

State statutes fail to define “land use control ordinance.” But Washington courts have held that a wide range of ordinances are subject to the vesting doctrine including those regulating wetlands,¹⁸ geologic hazards,¹⁹ and steep slopes.²⁰ All of 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 development application, such as a plat. Allowing some aspects of a development application to vest while others would not would render vesting superfluous because a change in one area snowballs to impact other areas.

And yet, the PCHB believes that stormwater regulations gallop beyond the realm of land use into their own unique category despite the incontrovertible fact they only come into play when someone seeks a land use permit.

¹⁷ RCW 19.27.095(3); RCW 58.17.033(6).

¹⁸ *Weyerhaeuser v. Pierce County*, 95 Wn.App. 883, 895 (1999).

¹⁹ *Audubon Soc’y v. Partners*, 128 Wn.App. 671, 679 n.4 (2005).

²⁰ *Girton v. City of Seattle*, 97 Wn.App. 360, 362 (1999).

a. Special Condition S5.C.5 Compels Local Governments to Adopt Development Regulations.

The Phase I permit requires local governments to adopt ordinances to comply with the permit.²¹ Ecology cannot dance around this point. In fact, Ecology provides that they even get to review and approve these local ordinances and manuals.²² Local stormwater regulations integrate into the fabric of the development code just as critical area ordinances do.²³ The critical question in this case therefore becomes whether stormwater regulations are somehow stand alone regulations that Ecology and the local government implement through enforcement or do they only materialize when one seeks a land use permit?

This Court already answered this question, concluding that stormwater regulations are land use controls subject to vesting. In *Westside Business Park v. Pierce County* the court held that vesting applies to “land use control” ordinances, and that a “land use control” ordinance is one that exerts a “restraining or directing influence” over land use.²⁴ Under this definition, the court stated that a stormwater ordinance is a “land use control” ordinance and subject to vesting. *Id.* Similarly, in

²¹ Phase I Permit Special Condition S5.C5 - CP, Joint EX List, Doc. #J-1.

²² *Id.*

²³ We ask the Court to take judicial notice of the attached EX “A”, excerpt from Critical Area Ordinance Handbook by Washington State Department of Community Trade and Economic Development (now Department of Commerce) p. 30 Updated January 2007.

²⁴ *Westside Business Park v. Pierce County*, 100 Wn. App. 599, 607 (2000).

Phillips v. King County the Supreme Court held that “absent some SEPA consideration, the County was bound by the vested rights rules to apply the requirements of the [surface water drainage code] in effect at the time of the project’s application.”²⁵ Development vested prior to the adoption of a new stormwater are subject to vesting, just like the stormwater drainage ordinances at issue in *Westside Business Park* and *Phillips*.

But the Pollution Control Hearings Board ignored the holding of *Westside Business Park* proclaiming that “[w]e find that case of limited assistance, as the facts that were before the appellate court are not the same as those presented by implementation of the Phase I and Phase II Permit.”²⁶ What the PCHB fails to understand is that the NPDES permit isn’t being enforced by Ecology as an environmental regulation at the individual permit level. Rather, local governments comply with Ecology’s NPDES permit by drafting local development code ordinances that exert a “restraining or directing influence” over land use.²⁷ That is the mandate of the permit.²⁸

²⁵ *Phillips v. King County*, 136 Wn.2d 946, 963 (1998).

²⁶ PCHB Nos. 12-093c and 12-097c Order on Summary Judgment October 2, 2013 p. 36 Petitioner’s Joint Designation of CP, Thurston Co. Case #14-2-00710-5, From PCHB #12-093c, Bates #003971-004015.

²⁷ *Westside* at 607.

²⁸ Phase I Permit Special Condition S5.C5 - CP, Joint EX List, Doc. #J-1.

b. Environmental Regulations Seek Adherence Through Enforcement.

Environmental regulations have general applicability and enforcement occurs without a permit being sought.²⁹ In enforcement incidents the environmental agency acts through notices of violations to compel compliance with regulations. Ecology maintains separate authority to regulate permits or other violations of Washington's Water Pollution Control Act.³⁰ The PCHB fails to understand that this regulatory authority is different than regulating under a land use ordinance.

Land use ordinances get enforced when a party seeks a development permit. In this context, the obligations under local land use ordinances derived from the Phase I permit only come into play when an applicant seeks permission from a local government to develop property. And as stated above, Ecology compels local governments to adopt regulations to address those property owners that seek development or redevelopment of their property. Since Ecology is subjecting the stormwater ordinances to the local land use process it seems rational that those ordinances be subjected to Washington's land use vesting.

²⁹ E.g. Model Control Toxics Act (MCTCA), RCW 70.105D.050, Comprehensive, Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. § 9609.

³⁰ RCW 90.48.144.

c. Ambiguity As to Whether Stormwater Regulations Are Land Use Controls Must Be Construed in Favor of Property Rights.

Washington maintains “the basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit.”³¹ Ordinances that are in derogation of this common law right to use private property should be strictly construed in favor of property owners.³² To the extent that there is ambiguity whether stormwater regulations are land use control ordinances and therefore subject to vesting, the ambiguity should be resolved in favor of property owners.

2. The Federal Clean Water Act Does Not Preempt State Vesting Doctrine.

BIA anticipates that Ecology and Puget Soundkeeper will argue that the CWA preempts state vesting law. But it does not. The state’s vesting doctrine protecting private development rights is distinct from Ecology’s and the permittees obligation under the CWA to adopt stormwater permits that comply with the CWA. Nothing about the vested rights doctrine supersedes Ecology’s ability to issue new NPDES permits and have new local regulations under those NPDES permits adopted on a going forward basis.

³¹ *Norco Construction, Inc. v. King County*, 97 Wn2d 680, 684 (1982).

³² *Morin v. Johnson*, 49 Wn.2d 275, 279 (1956).

Instead, we maintain that the CWA's direction to adopt compliant stormwater regulations has nothing to do with Washington's vested rights doctrine. Washington's vesting doctrine does not conflict with or prevent Ecology or the permittees from complying with the CWA through the adoption of new stormwater regulations. Although Washington courts have not reviewed directly whether the CWA preempts state vesting rules, this Court has indicated that the CWA does not preempt Washington's vested rights doctrine.³³ In *Westside*, this Court stated plainly that there is nothing to suggest that the state vested rights doctrine makes compliance with the CWA impossible, nor that it frustrates the CWA's purposes and objectives as those ordinances under the permit can still come into being.³⁴

VI. CONCLUSION

The PCHB erred when it ruled that Ecology's Phase I Permit requirements do not violate Washington's vesting doctrine. Simply put, local stormwater regulations derived from the obligations of the permit are so intertwined with the development process and design of projects, that by their very nature they are land use ordinances. And these regulations only arise when a property owner seeks a land use permit. This Court should respectfully overturn the PCHB Summary Judgment Order and

³³ *Westside* at 608-609.

³⁴ *Id.* at 609.

direct Ecology to redraft the permit so that it does not interfere with existing Washington vesting law.

RESPECTFULLY SUBMITTED this 20 day of November, 2014.

JORDAN RAMIS PC

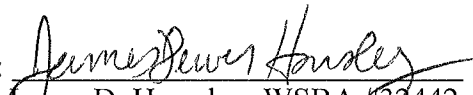
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Exhibit “A”

Excerpt from Critical Area Ordinance
Handbook

Critical Areas Assistance Handbook



Protecting Critical Areas Within the Framework of the Washington Growth Management Act



washington state department of
community, trade and economic development

Critical Areas Assistance Handbook:

Protecting Critical Areas Within the Framework of the Washington Growth Management Act

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VII. Protecting Critical Areas

Regulatory and Nonregulatory Options

Regulations are just one tool used in protecting the many functions of critical areas. Along with regulations, there are many nonregulatory tools important to critical areas protection, including voluntary stewardship actions taken by landowners, private groups, and the community. A complete critical areas program should educate and inform the public about the value of critical areas protection and assist them with understanding best management practices on their property.

Critical Areas Regulations

The GMA requires all counties and cities in Washington to adopt development regulations to protect designated critical areas.²⁸ The Western Washington Growth Management Hearings Board has described the GMA as imposing a duty on local governments to adopt development regulations that protect critical areas. Inherent in that duty is the requirement that the regulations contain appropriate and specific criteria and standards to ensure protection.²⁹ To meet this requirement, many communities have chosen to adopt stand-alone regulations to address critical areas. Often, such regulations are a “Critical Areas Chapter” within the code’s development regulations title. This handbook focuses on developing critical areas regulations. However, critical areas may also be protected using other development regulations, the State Environmental Policy Act (SEPA) environmental review process, and nonregulatory programs.

Other Development Regulations

Critical areas regulations should be complementary to other local regulations, ordinances, and plans. To provide appropriate protection to critical areas, all other local land use regulations should be reviewed and updated to be consistent with the goals of the local critical areas program. Consistency between policies and regulations should be reviewed for shoreline master programs; surface and ground water management regulations; clearing and grading regulations; zoning codes; subdivision codes; and locally adopted best management practices. It is also recommended that jurisdictions review and consider revising the following codes and standards to ensure consistency and critical area protection:

²⁸ See RCW 36.70A.060(2).

²⁹ See *Whatcom Environmental Council v. Whatcom County*, WWGMHB No. 95-2-0071 (Final Decision & Order, December 20, 1995); *Willapa Grays Harbor Oyster Growers Association v. Pacific County*, WWGMHB No. 99-2-0019 (Final Decision & Order, October 28, 1999).

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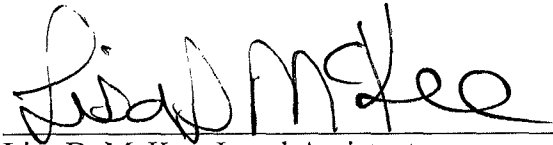
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