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 REPLY BRIEF

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I. INTRODUCTION

The Washington Department of Ecology ("Ecology") and Puget Soundkeeper Alliance, Washington Environmental Council and Rosemere Neighborhood Association ("PSA") paint a picture right over the vested rights doctrine attempting to shroud its application in the stormwater context. But by understanding how the land use regulations derived under the permit and Clean Water Act get implemented in the real world, this Court will recognize that Respondents merely masquerade the weakness of their argument.

The Clean Water Act envisions an iterative process to address water pollution.[1] This means that the regulatory environment and techniques used to reduce pollutants evolve over time. And yet Respondents cling to the idea that this Court must choose protecting the environment over the vested rights doctrine by creating some hard and fast artificial deadline.[2] While Respondent's motive may be well intended, it ignores the reality that one cannot simply disassociate the stormwater management component of a real estate development without creating a

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

cascade of other changes and costs, such as those to the road network, the size, location and numbers of lots, and thus the need to review the entire application again just to illustrate a few examples. These are the very things that the vested rights doctrine protects against.

II. ARGUMENT

A. Special Condition S5.C5 Compels Local Governments to Adopt Development Regulations.

The Phase I permit requires local governments to adopt land use ordinances to comply with the permit.[3] Ecology proclaims:

> "the fact that the environmental requirements are **implemented by local government and impact development at the local level**, does not make the requirements product of local government, and therefore subject to vesting, because the state retains control over the final content and approval of the regulations."[Emphasis Added][4]

BIA finds this statement disingenuous on many levels. First, Ecology clearly concedes that as applied these regulations only impact development at the local level through implementation by local government. Again Ecology is using the land use approval process to regulate real property for stormwater purposes. Fundamentally, Ecology concedes with this statement that it needs the land use system in order to extend its reach to individual properties.

[3]Phase I Permit Special Condition S5.C.5 – CP, Joint EX List, Doc. #J-1.
[4]Ecology Response Brief at 16.

1. Exaction Cases Do Not Relate to Vesting.

But even more interesting is Ecology's attempted analogy to the Shoreline Management Act and *Citizens for Rationale Shoreline Planning v. Whatcom County*[5], to illustrate its point in the second part of the statement above.[6] Ecology urges that because it maintains control over the final land use ordinance product of local jurisdictions *Citizens* must apply. BIA believes Ecology masks its argument through this analogy because of its weakness. *Citizens* is not a vesting case. Rather this case deals with whether a challenge can be brought against a local jurisdiction under RCW 82.02.020 for updates to Shoreline Master Programs. RCW 82.02.020 is a statute designed to protect against unlawful exactions. Exactions and vesting are completely separate land use concepts that have their own case law lineage. Again the *Citizens* analogy misses the mark.

A much better analogy exists that contradicts Ecology's position. Wetlands were first protected under the Clean Water Act.[7] And yet

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[5] *Citizens for Rationale Shoreline Planning v. Whatcom County*, 172 Wn.2d 384 (2011).
[6] Ecology Response Brief at 16-18.
[7] 33 USC § 1362(7) defines "navigable waters" as "Waters of the US". Under CFR 40.232 "Waters of the US" include waters subject to the ebb and flow of tide, interstate waters (including interstate wetlands), intrastate waters (including wetlands), the use destruction, or degradation of which could affect interstate commerce, tributaries of the above, and wetland adjacent to the above waters. 40 CFR 232.2(r) states that "wetlands means those areas that are inundated or saturated by surface ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."

Washington courts recognize vesting for wetland regulations.[8] Ecology posits that vesting for stormwater does not exist because the regulations derive from the Clean Water Act.

In 1990 when the legislature adopted the Growth Management Act (GMA)[9] it contained significant changes in Washington's land use laws, including the requirement that local governments adopt critical area ordinances, including wetlands ordinances, which comport with "best available science".[10] Wetlands must be delineated in accordance with Ecology's manual.[11] This manual must be "...consistent with the 1987 manual in use on January 1, 1995 by the United States army corps of engineers (Corps) and United States Environmental Protection Agency (EPA)."[12] Furthermore, if the Corps or EPA updated the manual those changes may be adopted through rules.[13] This process is analogous to the stormwater regulatory regime.

Wetlands regulations are a much better analogy because they originated from the Clean Water Act. And the regulatory framework around wetlands mirrors the stormwater regime. For instance, The Corps

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[8] *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 895 (1999).
[9] RCW 36.70A.
[10] RCW 36.70A.172.
[11] RCW 36.70A.175.
[12] RCW 90.58.380.
[13] Id.

404(b)(1) program does not require wetland buffers.[14] Washington decided through GMA's "best available science" to regulate beyond the Corps' creating buffers around wetlands to protect them.[15] Similarly in stormwater, Washington through the Water Pollution Control Act decided to amplify the Clean Water Act's requirements of meeting "maximum extent practicable"[16] by also requiring the use of "all known available and reasonable methods of prevention, treatment and control" (AKART).[17] And finally both stormwater and wetland regulations get adopted as local land use ordinances to evaluate development proposals.

Similar to stormwater, knowledge about wetlands also develops over time and new regulatory requirements evolve from new science. Ecology is updating the wetland delineation system as of 2014.[18] But Washington courts understand that vesting still applies despite these updates.

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[14]33 USC § 1344.
[15]RCW 36.70A.172.
[16]33 USC § 1342(p)(3)(B)(iii).
[17]RCW 90.48.010.
[18]We ask the Court to take judicial notice of this update.
http://www.ecy.wa.gov/programs/sea/wetlands/ratingsystems/2014Updates.html

2. Vesting Exists to Protect Changes to the Physical Attributes of Development.

Curiously Ecology also raises the *New Castle*[19] case and attempts to ensnare the issue of traffic impact fees (TIFs) with land use regulations.[20] The BIA believes this only underscores Ecology's naïve understanding of the development process.

TIFs do not impact the built environment component of development. While it is true that a change in TIF may cause a financial impact to a project that puts it in jeopardy, a change in the TIF will not force a developer to change the physical attributes of a project.[21] This Court took careful note that TIFs exist to raise revenue, not to modify some physical attribute to a development project.[22]

Special Condition S5.C.5 compels local government to adopt development regulations that regulate the physical attributes of land developments. Local stormwater regulations integrate into the fabric of the development code similar to that of critical area ordinances as explained above because they directly affect site plans. This Court in *Westside Business Park v. Pierce County* concluded that "storm water

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[19]*New Castle Investments v. City of La Center*, 98 Wn.App. 244 (1999).
[20]Ecology response brief at. 18-22.
[21]*New Castle* at 237.
[22]Id at 236.

drainage ordinances are land use control ordinances"[23] because they exert a "restraining or directing influence" over the land.[24] This Court must reject Ecology's misrepresentation of *New Castle* and uphold *Westside*.

B. Vesting Isn't Usurped by Police Power.

Respondents also clutch at the argument that even if vesting applied that somehow the police powers to protect against water pollution drown the vested rights doctrine.[25] Again Ecology cites a case, *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, to becloud an issue.[26] *Rhod-A-Zalea* is a non-conforming use case that has no bearing on whether a development application meets the vested rights doctrine. The Court in *Westside* actually points this out.[27] Just like Ecology's attempt to bring in an exaction case into the mix, *Rhod-A-Zalea* withers.

C. Vesting Harmonizes With the Clean Water Act.

Respondents would have this Court believe that the Clean Water Act requires states and local governments to create hard deadlines for new stormwater requirements that come along. But they are wrong.

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[23] *Westside Business Park v. Pierce County*, 100 Wn. App. 599, 609 (2000).
[24] Id. at 607.
[25] Ecology response brief at 22-26. PSA response brief at 19-21.
[26] *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1 (1998).
[27] *Westside* at 608.

Congress amended the Clean Water Act in 1987 specifically to authorize the regulation of stormwater discharges.[28] Congress also assigned primacy to the states for the adoption of water quality standards and requires the criteria to be adopted by the states in accordance with federal and state laws.[29] And EPA in interpreting this mandate developed an iterative process in regulating municipal stormwater systems.[30] This allows each state to understand how effective its program is given the geographic, climatic and other unique conditions.

The fact remains that the Clean Water Act does not define "maximum extent practicable" instead relying upon the judgment of those overseeing the permits to ascertain what it means. Washington can choose to move beyond the "maximum extent practicable" which it has done through AKART and other requirements of the Water Pollution Control Act. But Ecology does not need to disavow Washington's land use system in the process.

Nothing in the Clean Water Act suggests that prior approved developments should be required to adapt to meet new requirements that develop through this process. The Clean Water Act remains hushed on this point. Congress expected the states to work in partnership with the

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[28]33 USC § 1342(p).
[29]33 USC § 1313.
[30]40 CFR 122.26(d)(2)(v) and 122.34(g).

federal government to address water quality issues.[31] But it also expected the states to retain their traditional roles in implementing their land use regimes.[32] 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.[33] Ecology could easily draft a rule recognizing Washington's vested rights. Instead we got a rule that broadsides the vested rights doctrine to meet some mythical obligation.

III. CONCLUSION

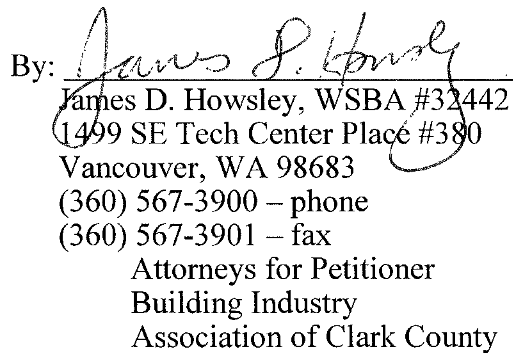
Simply put, the Respondents don't understand land development and the land development review process. A change to the stormwater plan and the site plan of an approved land use project isn't the same as raising a fee, because it is a physical change that can snowball impacting not only the financial viability of a project, but also change the very nature of the approval itself, the number and location of lots in a plat, the location and nature of the internal roads and other essential infrastructure. If the layout of an approved plan changes, local governments would certainly

[31]*National Association of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007).
[32]33 USC § 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..."
[33]33 USC § 1313(c)(1).

require additional review, public notice and hearings, expending valuable public and private money and time. Vested rights exist to guard against the waste of private and public resources. This Court should overturn the PCHB Summary Judgment Order and direct Ecology to redraft the permit so that it does not interfere with existing Washington vesting law.

RESPECTFULLY SUBMITTED this 21 day of January, 2015.

JORDAN RAMIS PC



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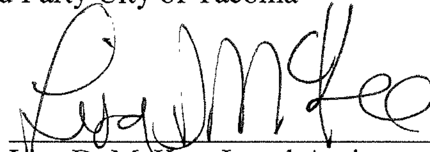

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