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 REPLY BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DEVON SHANNON, WSBA #34534
Senior Deputy Prosecuting Attorney
Attorneys for Appellant King County

King County Prosecuting Attorney
King County Courthouse
516 Third Avenue, Suite W400
Seattle, Washington 98104
(206) 477-1120

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I. INTRODUCTION

King County's interest in this litigation is a practical one. When a property owner who has submitted a complete development permit application asks King County staff which regulations will govern their project, the County needs to provide a clear answer and have solid legal support for their response. Similarly, the County needs to be able to describe vesting rules to project opponents. The problem with the Board's October 2, 2013 Order on Summary Judgment is two-fold: it conflicts with well-established vesting law and, more important to the County, the Board's ruling is unclear as to how it is to work in practice. Because the Board's decision conflicts with state statutes, case law, and basic due process principles, King County seeks clarity in this appeal as to whether stormwater regulations are within the bundle of rights that vest upon submission of a complete permit application.[1]

Approved and pending applications for building permits, plats and development agreements generally carry with them assurances that, per state vesting statutes, the land use regulations in effect at the time the

[1] King County's briefing has focused on three types of permits that irrefutably vest under state law: building permits, plat applications and development agreements. RCW 58.17.033; RCW 19.27.095; RCW 36.70B.170. References to "permits" or complete "permit applications" throughout the brief generally refer to these three permit categories. This removes any controversy over the "type" of permit at issue and allows the Court to focus on the regulations applicable within those permit types. *See infra* at 11.

applicant submits a complete application will govern the project. *See Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997). The Board's decision appears to carve out an exception from this well-established rule by exempting development regulations with environmental objectives from the purview of the vesting doctrine. CP 191. The Board's decision sets aside state vesting laws as applied to stormwater regulations on the basis that these regulations are "environmental" and therefore not "land use controls." CP 218-220.

King County disagrees with this reasoning, arguing that because stormwater regulations have a "'restraining or directing influence' over land use" they are "land use controls" regardless of environmental objectives. *Westside Business Park, LLC v. Pierce County.*, 100 Wn. App. 599, 607, 5 P.3d 713, 718 (2000); *quoting New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 232, 989 P.2d 569 (1999). As land use controls, stormwater regulations are part of the bundle of regulations that vest when a complete development permit application is submitted.

The Board's Order is based solely on the applicability of the vesting doctrine to stormwater regulations, specifically not reaching the issue of preemption. Nor did the Board tackle the relevance of local police power authority. King County limits its appeal accordingly.

II. LEGAL ANALYSIS

A. Stormwater Regulations are Land Use Controls.

All parties seem to agree that the crux of this appeal is the characterization of stormwater regulations as "land use controls." The test adopted by this Court is straightforward: regulations are land use controls if they "exert a restraining or directing influence over land use." *Graham Neighborhood Ass'n v. F.G. Associates*, 162 Wn. App. 98, 115, 252 P.3d 898, 907 (2011); *citing Westside*, 100 Wn. App. at 607. As our courts have already held, "[s]torm water drainage ordinances are land use control ordinances." *Westside v. Pierce Cnty.*, 100 Wn. App. at 607; *see also Phillips v. King County*, 136 Wn.2d 946, 963, 968 P.2d 871 (1998).

Respondents argue that *Westside* is irrelevant here, stating that it does not inform whether storm water regulations are subject to state vesting laws. Ecology's Response Brief at 17. But the characterization of stormwater regulations as "land use controls" is fundamental to the court's decision in *Westside*. The issue presented in *Westside* was "whether the land use vesting statute, RCW 58.17.033, vests a developer's right to have the storm water drainage ordinance in effect at the time of its 'bare bones' application" apply to its project. *Westside*, 100 Wn. App. at 602. Part of that issue is necessarily whether the vesting statute applies to stormwater regulations. If the stormwater regulations were not subject to state vesting

laws, there would have been no need to consider whether the application was complete for purposes of the vesting doctrine.

The *Westside* court specifically addressed the issue, recognizing that subdivision approval is premised on written findings that "appropriate provisions are made for…drainage ways." *Id.* at 607, *citing* RCW 58.17.110(1). The court concluded that "storm water drainage ordinances do exert a 'restraining or directing influence' over land use and are therefore land use control ordinances." *Id., citing Phillips*, 136 Wn.2d at 963. This is not only informative in this case, but definitively answers the question now before the Court.

Even the respondents acknowledge that the stormwater regulations will "impact development at a local level" and will place "limits on what a developer can do with a site." Ecology's Response Br. at 16; *and see* PSA Opening Br. at 15. And they are correct that this is "unremarkable." *Id.* It should come as no surprise that regulations which aim to "prevent and control the impacts of runoff" from development would direct the use of property. ABR 26. The Board acknowledges that the new regulations will "minimize impervious surfaces, native vegetation loss and stormwater runoff in all types of development situations." CP 276. Stormwater regulations undoubtedly include physical restrictions on development and are, therefore, land use controls subject to the vested rights doctrine.

This result in no way "expands" the vested rights doctrine as argued by respondents. Washington courts have recently highlighted the boundaries of the vested rights doctrine, making clear that it will not be applied to types of permits other than those authorized by the legislature. *See Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 334 P.3d 1143 (2014). The issue here is not including new *types* of permits under the umbrella of vested rights, but rather mirrors the analysis articulated in *Noble Manor*: When you have a vested permit, "what development rights vest" within that permit at the time a complete permit application is submitted? 133 Wn.2d at 283.

The Court in *Noble Manor* concluded that an applicant vests to "the uses disclosed in their application." *Id.* This protects "the expectations of the developer against fluctuating land use laws." *Id.* Thus, where an applicant discloses stormwater drainage plans in their permit application, the concepts of fundamental fairness and due process mandate that the applicant vest to the local stormwater regulations governing the project.

1. "Environmental Regulations" Can Simultaneously Be "Land Use Controls" Subject to the Vested Rights Doctrine.

Respondents argue that because stormwater regulations have environmental objectives, they cannot be land use controls. *See* Ecology's

Response Br. at 21. But there is no authority supporting their conclusion that land use controls and environmental regulations are mutually exclusive. On the contrary, many environmental regulations "vest" under state law when a complete permit application is submitted.

Critical area regulations are an excellent illustration of "environmental" regulations, rooted in state law, that vest when applied through a local development permit application. *See Town of Woodway v. Snohomish Cnty.*, 180 Wn.2d 165, 173, 322 P.3d 1219, 1223 (2014) ("regulations to which development rights vest are a product of the GMA."); RCW 36.70A.060; RCW 36.70A.172. For example, a permit applicant is required to certify any wetlands or other environmentally critical areas on the property at the time of application. *See* KCC 20.20.040(A)(8). In review of that application, a municipality would then apply the wetland regulations in effect at the time a complete application was submitted by the applicant. "Without vesting as to the wetland regulations, there would be no 'date certain' by which [to fix] rights to develop the land in an efficient manner." *Weyerhaeuser v. Pierce Cnty.*, 95 Wn. App. 883, 895, 976 P.2d 1279, 1286 (1999), *citing Erickson & Associates, Inc. v. McLerran,* 123 Wn.2d at 870, 874-75, 872 P.2d 1090.

Another example of critical area regulations that vest upon submission of a complete application are aquatic area regulations. KCC

21A.24.045. Under King County's code, an accessory structure in an aquatic area may be expanded up to a total of 1000 square feet. KCC 21A.24.045(D)(6)(b)(1). Upon submission of a complete permit application, the applicant vests to that regulation. Any later code amendment restricting accessory expansions to less than 1000 square feet would not apply to the vested applicant. An applicant vests to these critical area regulations upon filing a complete application because they restrict development, regardless of their environmental objectives.

The same holds true for stormwater regulations. *See Westside v. Pierce Cnty.*, 100 Wn. App. at 607; KCC 20.20.040(A)(14); KCC Title 9. Stormwater regulations include construction of drainage facilities to minimize erosion and sediment, requirements for surface water conveyance systems on project sites, maintenance and operation of drainage facilities, as well as other project specific requirements. *See* Ch. 9.04 KCC. These are clearly requirements that would physically restrain and direct a proposed development. They should be treated as land use controls for purposes of applying state vesting laws.

And from the perspective of the applicant, whether a regulation is grounded in environmental objectives is irrelevant to the security sought under the vesting statutes. Vesting protects an applicant's "due process right to expect that its project would be subject to fixed rules, as opposed

to fluctuating legislative policy, so it [can] plan its project with reasonable certainty." *Weyerhaeuser v. Pierce Cnty.*, 95 Wn. App. 883, 895, 976 P.2d 1279, 1286 (1999), *see also Friends of the Law v. King County*, 123 Wn.2d 518, 867-68, 522, 869 P.2d 1056 (1994); *West Main Assocs.*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986). This protection is just as relevant in the stormwater context as it is for environmentally critical areas.

Respondents take issue with the perceived lack of "balance" where applicant's vested rights are prioritized before important environmental objectives. PSA Opening Br. at 10. But whether a regulation vests is not subject to a balancing test. The terms of the vesting statutes already reflect the balance struck by the legislature in limiting the scope of vested rights. *See Potala Vill. Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 334 P.3d 1143, 1148 (2014), *citing Erickson*, 123 Wn.2d at 870. If a regulation is a land use control, it is subject to vesting. In the face of case law and factual evidence that shows the directing and restrictive effect stormwater regulations will have on development, respondents fail to characterize stormwater regulations as anything but "land use controls."

2. A Stormwater Regulation is Not a Development Impact Fee.

Respondents strain to align stormwater regulations with development impact fees, which our courts have concluded are not land use controls subject to state vesting laws. *See* Ecology Response Br. at

19; PSA Opening Br. at 16. The fallacy in this argument is readily apparent upon review of the distinction our courts have drawn between financial impacts and physical impacts to development.

An impact fee "does not limit the use of land, nor does it resemble a zoning law. Instead, [it] merely affects the ultimate cost of the development. Thus, it is not the type of right that vests under the vested rights doctrine." *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 232, 989 P.2d 569, 573 (1999). "[I]t is inappropriate to apply the vesting doctrine to fees." *Id.*, quoting *Lincoln Shiloh Assocs. v. Mukilteo Water Dist.*, 45 Wn. App. 123, 128, 724 P.2d 1083, 742 P.2d 177, *review denied*, 107 Wn.2d 1014 (1986).

Stormwater regulations are not fees. As discussed above, they directly restrict the use of land. *Supra*, at 7-8. The respondents' attempt to correlate impact fees and regulatory limitations on the physical elements of development is without merit.

3. Vested Rights Apply to Local Land Use Regulations Even Where Those Regulations Are State Mandated.

Ecology argues that vested rights do not apply to stormwater regulations because those regulations are state controlled. Ecology Response Br. at 16. There is no support for Ecology's argument that local legislation required by state law is not subject to state vesting laws.

Even if we accept Ecology's conclusory and suspect opinion that local stormwater regulations stemming from NPDES permit requirements are "state controlled," there is nothing in the vesting doctrine that would preclude it from applying to state controlled regulations. Ecology's only authority for this argument is *Citizens for Rational Shoreline Planning v. Whatcom County*, a case that does not deal with vesting, but instead looks at RCW 82.02.020, a statute precluding indirect taxes on development through local regulations. 172 Wn.2d 384, 389, 258 P.2d 36 (2011).

Ecology attempts to draw a parallel between the vesting doctrine and RCW 82.02.020. But RCW 82.02.020 has explicit language that it applies only to local regulations. There is no parallel language in the relevant vesting statutes that would limit vesting to regulations that are a product of local government. RCW 58.17.033 applies to all "zoning and other land use control ordinances, in effect" regardless of the authority mandating those ordinances.

Moreover, the "state controlled" regulations at issue in *Citizens* were shoreline regulations adopted under the Shoreline Management Act. 172 Wn.2d 384. Under Ecology's logic, shoreline regulations would not be subject to state vesting laws because the regulations were not the product of local government. But this Court has found that the vesting doctrine would apply to shoreline regulations where those regulations are

applied to a vested application. *Potala*, 334 P.3d 1143 at 1150-51, *citing Talbot v. Gray*, 11 Wn. App. 807, 811, 525 P.2d 801 (1974). Ecology's argument here is wholly unsubstantiated.

B. Vested Rights Apply to Regulations Imposed on Local Permits.

As discussed in King County's Opening Brief, the NPDES Permit is not "the permit" to which the vesting doctrine applies. King County's Opening Br. at 21. Where convenient, however, respondents revert to reliance on the NPDES Permit as support for their argument that "the permit" does not limit the use of land. Ecology's Response Br. at 19; PSA's Opening Br. at 23. This avoids the real question, which is whether the Ecology mandated stormwater regulations direct or restrict the use of land *when applied to a vested local permit applicant*. It is Condition S5.C.5.a.iii of the NPDES Permit that mandates imposition of new stormwater regulations on vested local permits. This requirement runs afoul of state vesting laws and fundamental due process protections afforded by those laws. At a practical level, the County cannot simultaneously recognize the vested rights of local permit applicants and impose stormwater regulations required by the NPDES Permit.

Respondents also revert to the NPDES Permit process to distort the relevant timeframe here. PSA argues that because developers and municipalities have been "on notice since 2008" that more stringent

stormwater standards would be coming, they have somehow lost their ability to vest. PSA Opening Br. at 23. This completely ignores the vesting rule, which vests an applicant to the laws in effect at the time a local development permit application is submitted. Until a local jurisdiction adopts new stormwater regulations, a complete application will vest the applicant to the existing regulations. An applicant is not expected to design a development around speculative future changes in regulations.

Moreover, because of the technical nature of stormwater regulations, it doesn't do a project proponent much good simply to know that the rules might change at some point in the future. For something as fundamental and nuanced as drainage design, an applicant needs to know the specifics of the actual rules that will apply to a proposed development in order to incorporate those requirements into initial project design. Changing regulations midstream could require partially completed projects to be entirely redesigned.

Washington adopted the "date certain standard" for vesting to emphasize that "development rights are valuable property interests" and to ensure that "'new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law.'" *Town of Woodway v. Snohomish Cnty.*, 180 Wn.2d 165, 173, 322

P.3d 1219, 1223 (2014); *quoting Valley View Indus. Park v. Redmond,* 107 Wn.2d 621, 638, 733 P.2d 182 (1987). This "constitutional minimum" date certain vesting point is "rooted in constitutional principles of fundamental fairness," giving developers the assurance they need that the rules directing their development will not be changed after they have made significant investment on design and implementation of project plans. *Erickson,* 123 Wn.2d at 870.

It is Ecology's requirement in Condition S5.C.5.a.iii that new stormwater regulations reach back in time to direct and restrain development by vested applicants that compels this appeal.

C. The Ability to Use Preemption or Local Police Power to Supersede Vested Rights was Not the Basis for the Board's Decision.

In this case, the appellants ask the Court to review the Board's decision that stormwater regulations are not land use controls subject to the vested rights doctrine. Arguments under the legal principles of local police power authority or preemption are premature without an answer to this threshold question. If, for example, this Court affirms the Board and concludes that stormwater regulations are not land use controls and therefore do not vest, Condition S5.C.5.a.iii can be applied to applicants without employing preemption or police power authority.

On the other hand, if the Court agrees with the appellants that stormwater regulations are part of the bundle of vested rights obtained upon an applicant's submission of a complete permit application, Ecology and local jurisdictions may consider preemption or police power authority as a means to extinguish those vested rights.

The Board's decision upholding the Permit was based solely on the vesting doctrine and therefore this is the only issue King County challenges on appeal.[2] CP 226.

D. SEPA Does Not Avoid Applicability of State Vesting Laws.

The respondents use SEPA as an example of a regulatory mechanism that they argue would allow local jurisdictions to impose new stormwater regulations through SEPA conditions of approval. There are two major flaws with this proposition. First, just as with preemption and local police power, whether SEPA's tools facilitate imposition of the new stormwater regulations is not the question before the Court. This Court is not being asked "how do we impose the new stormwater regulations" but rather, "are the applicant rights to be modified by the new regulations

[2] The Board determined it was unnecessary to reach the parties' police power or preemption arguments because it concluded that stormwater regulations were not land use controls and therefore did not fall within the scope of the vested rights doctrine.

vested rights?"[3] Whether SEPA is an available tool to accomplish Ecology's goals will depend on the answer to the threshold question currently before the Court.

Second, respondents skim over the fact that SEPA is also subject to vesting. Any SEPA conditions must also be based on "SEPA policies adopted prior to the application or submittal date, because vesting applies to those policies as well." *Adams v. Thurston Cnty.*, 70 Wn. App. 471, 481, 855 P.2d 284, 291 (1993). SEPA does not afford a municipality the ability to add conditions to a project at any time. Once an application is complete, the regulations in effect at that time will govern review of the project, including SEPA review. *See* WAC 197-11-660(1)(a).

Respondents rely on RCW 58.17.033(3) and *Phillips*, 136 Wn.2d at 963, but neither authorize imposition of new regulations through SEPA after a complete application has been submitted. SEPA does not provide an end run around the vested rights doctrine for municipalities to apply new regulations through SEPA conditions after a complete permit application has been submitted.

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[3] PSA lists several ways it believes "Ecology could" impose the new stormwater regulations on applicants. PSA Opening Br. at 19-21(Ecology could require jurisdictions to use SEPA authority, to adopt new complete application regulations, or to amend codes to impose stricter time limits on permits). But none of these hypotheticals answers the preliminary question of whether the new regulations will be applied to vested permits.

III. CONCLUSION

Based on the above reply and prior briefing by the appellants, King County asks this Court to reverse the Board's decision that stormwater regulations are subject to state vested rights laws, and strike the second sentence of NPDES Permit Condition S5.C.5.a.iii.

DATED this 21 day of Jan, 2015.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

Respectfully submitted

DEVON SHANNON, WSBA # 34534
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney Office
516 Third Avenue, W400
Seattle, Washington 98104
(206) 477-1120

Certificate of Service

I, Monica Erickson, declare that I caused to be filed with the Court of Appeals, Division II, APPELLANT KING COUNTY'S REPLY 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.

***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 Office of Attorney General of Washington Ecology Division P.O. Box 40117 Olympia, WA 98504-0117	☒E-Service: ronald@atg.wa.gov ecyolvef@atg.wa.gov donnaf@atg.wa.gov ☐Facsimile: (360) 586-6760 ☐U.S. Mail ☐Hand Delivery ☐Messenger Service
Clark County: Christine M. Cook Christopher Horne Deputy Prosecuting Attorneys Clark County Prosecuting Attorney's Office Civil Division P.O. Box 5000 Vancouver, WA 98666-5000	☒E-Service: Christine.cook@clark.wa.gov chrishorne@clark.wa.gov Thelma.kremer@clark.wa.gov ☐Facsimile; ☒U.S. Mail ☐Hand Delivery ☐Messenger Service

BIA of Clark County: James D. Howsley Jordan Ramis, PC 1499 SE Tech Center Place, Suite 380 Vancouver, WA 98683-9575	☒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
Pierce County & Coalition of Gov't Entities: Lori Terry Gregory Foster Pepper PLLC 1111 Third Ave., Ste, 3400 Seattle, WA 98101-3922 John Ray Nelson Foster Pepper PLLC U.S. Bank Bldg. West 422 Riverside Ave., Ste. 1310 Spokane, WA 99201-0302	☒E-Service: terrl@foster.com ☐Facsimile: (206) 749-2002 ☒U.S. Mail ☐Hand Delivery ☐Messenger Service ☒E-Service: nelsj@foster.com mccap@foster.com ToveS@foster.com ☐Facsimile: (509) 777-1616 ☒U.S. Mail ☐Hand Delivery ☐Messenger Service
Snohomish County: Laura C. Kisielius Alethea M. Hart Deputy Prosecuting Attorneys Civil Division Robert Drewel Bldg., 8th Floor, M/S 504 3000 Rockefeller Avenue Everett, WA 98201-4060	☒E-Service: laura.kisielius@snoco.org ahart@snoco.org ☐Facsimile: ☐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 Avenue, 4th Floor 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 Tacoma City Attorney's Office 747 Market Street, Room 1120 Tacoma, WA 98402-3767	☒E-Service: jon.walker@ci.tacoma.wa.us thropelnicki@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@earthjustic.org jhasselman@earthjustice.org chamborg@earthjustice.org ☐Facsimile: (206) 343-1526 ☐U.S. Mail ☐Hand Delivery ☐Messenger Service

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

Monica Erickson, Legal Assistant
Done in Seattle, Washington

Date

KING COUNTY PROSECUTOR

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dianem@atg.wa.gov
ronaldl@atg.wa.gov
christine.cook@clark.wa.gov
jamie.howsley@jordanramis.com
terrl@foster.com
laurakisielius@snoco.org
theresa.wagner@seattle.gov

jon.walker@ci.tacoma.wa.us