

COURT OF APPEALS  
DIVISION II

No. 41833-9-II

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

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CLARK COUNTY AND BUILDING INDUSTRY ASSOCIATION OF  
CLARK COUNTY,

Petitioners,

v.

ROSEMERE NEIGHBORHOOD ASSOCIATION, COLUMBIA  
RIVERKEEPER, AND NORTHWEST ENVIRONMENTAL DEFENSE  
CENTER,

Respondents,

and

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent Below.

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REPLY BRIEF OF PETITIONER BUILDING INDUSTRY  
ASSOCIATION OF CLARK COUNTY

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Attorney for Petitioner:

James D. Howsley, P.C.  
MILLER NASH LLP  
500 E. Broadway, Suite 400  
Post Office Box 694  
Vancouver, Washington 98666-0694

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The Building Industry Association of Clark County ("BIA") submits this reply brief in its appeal of the Pollution Control Hearing Board's ("PCHB") decision on the Agreed Order between Clark County and the Washington Department of Ecology ("Ecology").

## **I. ARGUMENT**

### **A. THE PCHB FAILED TO CONSIDER THE CONSTITUTIONAL AND STATUTORY ISSUES ASSOCIATED WITH THE DEFAULT STANDARD.**

#### **1. BIA Is Not Collaterally Attacking the Phase I Permit.**

BIA believes that the PCHB's ruling on the Agreed Order violates the state and federal Constitutions by effectively returning the County to the default permit standard. Rosemere and Ecology allege that BIA should not be able to collaterally attack the Phase I permit by bringing constitutional or statutory challenges through this appeal.

Both Rosemere and Ecology acknowledge that the BIA was not a party to the Phase I permit appeal. And yet they seek to preclude BIA from raising issues that impact the development and building industry in Clark County by attempting to hide behind collateral estoppel. But this fails for several reasons.

a. This Court Maintains Authority Over Constitutional Questions.

First, this Court may invalidate an agency rule, order or statute if it finds that there is a violation of a statute or Constitutional provisions.<sup>1</sup> In other words, this Court maintains jurisdiction to invalidate an agency action if it violates the Constitution or statute on its face or as applied.<sup>2</sup> Ecology and Rosemere fail to recognize this standard. Their argument would forever preclude a party from challenging issues under this standard because no party raised an issue in some proceeding in the distant past. But this argument fumbles because it is not in the interests of justice, as BIA was not a party to the original proceeding and could not have known how the Phase I permit program would affect property owners in Clark County.

b. The Administrative Procedure Act Allows A Party to Raise New Issues.

Second, the Administrative Procedure Act speaks directly to the limitations on raising new issues and most importantly the exceptions to

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<sup>1</sup> RCW 34.05.570(3)(a) and (b).

<sup>2</sup> *Id.*

those rules. RCW 34.05.554(1) states a general rule that new issues may not be raised on appeal. But it also contains several exceptions.

First, a party may raise a new issue if it did not know, had no duty to discover or could not have reasonably discovered facts giving rise to an issue.<sup>3</sup> At the time Ecology developed the Phase I permit program it was impossible to know what effect the program would have on individual jurisdictions. Clark County engaged in a rigorous review process after Ecology issued the Phase I rules and after the Phase I permit appeal period closed to determine the impact of the Ecology rule on the Clark County community.<sup>4</sup> During this process the County discovered that the approach of the default permit created practical problems for development in the County.<sup>5</sup> This directly led to the County and Ecology developing the approach under the Agreed Order, requiring development sites to treat their existing stormwater impacts rather than reaching back to recreate historical forested conditions.<sup>6</sup>

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<sup>3</sup> RCW 34.05.554(1)(a).

<sup>4</sup> Testimony of Kevin Gray RP 265-267: 4-25 and Exs. R-9, R-10, and R-16.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; Agreed Order 7273, Ex. J-1.

BIA did not or could not have known the factual issues associated with the default Phase I permit as applied in Clark County without this analysis. BIA attempted to raise this issue in its motion to intervene to ascertain what impact returning to the default permit would have on property owners in Clark County.<sup>7</sup> And yet the PCHB denied the BIA the opportunity to raise Constitutional and statutory issues.

Second, a party can raise a new issue if it is a judicial review of "...a rule and [that] person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue."<sup>8</sup> BIA did not have an opportunity to raise the Constitutional or statutory challenges under RCW 82.02.20 at the Phase I permit rule proceedings because it was not a party. Simply put, BIA can raise these issues and the PCHB's failure to allow these issues to proceed is an error.

c. Respondent Rosemere Raised Vesting.

Finally, BIA finds it amusing that Rosemere alleges that the doctrine of collateral estoppel bars BIA from raising new issues after the Phase I permit appeals when Rosemere challenged the doctrine of vesting

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<sup>7</sup> BIA Motion to Intervene at 7.

<sup>8</sup> RCW 34.05.540(1)(b).

and Ecology's application of vesting in this case. If Rosemere's proposition of collateral estoppel is correct, then the PCHB should never have discussed and ruled on the vesting issue in the summary judgment proceedings. Rosemere's position is even more tenuous than given the fact that they were a party to the Phase I permit proceedings. BIA believes that Rosemere does not meet any of the exceptions set forth under RCW 34.05.554(1)(a-d). And therefore finds Rosemere's arguments regarding collateral estoppel blustery.

2. The PCHB's Ruling Violates the Washington and Federal Constitutions.

BIA firmly believes that the PCHB's ruling which would require Ecology to implement the Phase I permit program in Clark County violates the state and federal Constitutions. Mr. O'Brien stated that Ecology, under the default permit approach, requires developers to mitigate beyond existing impacts.<sup>9</sup> This fails the "rough proportionality" test under the Washington and U.S. Constitutions.<sup>10</sup>

Ecology attempts to becloud this by characterizing Mr. O'Brien's testimony as something different arguing that Ecology is merely

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<sup>9</sup> BIA Opening Brief at 14 and Testimony of Ed O'Brien, RP 738:11-15.

<sup>10</sup> BIA Opening Brief at 13-17.

addressing "extremely high flows".<sup>11</sup> But Ecology fails to understand the testimony of its own witness. Mr. O'Brien did not state that Ecology was requiring new developments to just meet "extremely high flows." He stated that Ecology was trying to match the "extremely high flow" of a forested site.<sup>12</sup> And that they are "...asking sites to control high flows that would have **occurred naturally** one percent of the time or less."<sup>13</sup> In other words, Ecology is still requiring developers to mitigate for conditions that may not exist. The default permit approach does not meet the "rough proportionality" test because it asks property owners do something more by mitigating to a historic rather than existing conditions.

3. RCW 82.02.020 Application in This Case.

Ecology noted in their brief that a new case from the Washington Supreme Court may add clarity as to whether the Phase I default permit may violate RCW 82.02.020 as applied to local governments.<sup>14</sup> In the *Rational Shoreline Planning* case the Court held that local governments

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<sup>11</sup> Ecology Response Brief at 11.

<sup>12</sup> Testimony of Ed O'Brien, RP 733-6-9.

<sup>13</sup> *Id* at -22-35.

<sup>14</sup> Ecology Response Brief at 9 citing *Citizens for Rational Shoreline Planning v. Whatcom County*, No. 84675-8, 2011 WL 3612312 (Wash. Aug. 18, 2011).

are effectively immune from challenges under RCW 82.02.020 if the state directs and requires an action of a local government.<sup>15</sup>

BIA acknowledges that the case provides guidance to this Court as to whether the Phase I permit program is a product of an Ecology action, therefore a state action that must be adopted by a local government. Ecology admits that they are requiring local government to adopt a permit program consistent with their permit.<sup>16</sup> And therefore this Court must determine whether Clark County is exempt under RCW 82.02.020 challenges for rules and ordinance promulgated under the Phase I permit based on this case.

**B. THE PCHB PURGED WASHINGTON'S VESTING DOCTRINE:**

1. PCHB Ignored Vesting Doctrine.

The PCHB eclipsed the doctrine of vesting as applied to stormwater regulations because it deemed them environmental controls.<sup>17</sup> But the failure to recognize the vesting doctrine as applied to stormwater regulations is a fatal error. As this Court well knows,

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<sup>15</sup> *Citizens for Rational Planning* at 6.

<sup>16</sup> Ecology Response Brief at 10.

<sup>17</sup> Pollution Control Hearings Board Order Denying Summary Judgment, p. 15:12-14.

[t]he purpose of the vesting doctrine is to allow developers to determine, or “fix”, the rules that will govern their land development...The doctrine is supported by the notions of fundamental fairness. As James Madison stressed citizens should be protected from the “fluctuating policy” of the legislature.<sup>18</sup>

Again our legislature deemed the vesting doctrine such an important issue that they codified it in the state subdivision and building permit statutes.<sup>19</sup> Washington courts extended the vesting doctrine to a wide range of ordinances.<sup>20</sup> The doctrine has also been applied to conditional use permits,<sup>21</sup> shoreline permits,<sup>22</sup> grading permits,<sup>23</sup> septic tank permits<sup>24</sup> and binding site plan developments.<sup>25</sup>

And the legislature and Courts have already extended vesting protection to stormwater regulations. The state platting statute requires

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<sup>18</sup> *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 51 (1986) citing *Washington's Zoning Vested Rights Doctrine*, 57 Wash. L. Rev. 139, 147-50 (1981) and *The Federalist No. 44*, at 301 (J. Madison) (J. Cooke ed. 1961).

<sup>19</sup> RCW 19.27.095(1) (building permits); RCW 58.17.033 (land divisions).

<sup>20</sup> BIA Opening Brief at 21.

<sup>21</sup> *Beach v. Board of Adjustment*, 73 Wn.2d 343 (1968).

<sup>22</sup> *Talbot v. Gray*, 11 Wn. App. 807 (1974), *rev. denied*, 85 Wn.2d 1001 (1975).

<sup>23</sup> *Juanita Bay Vly. Comm'ty Ass'n v. Kirkland*, 9 Wn. App. 59, *rev. denied*, 83 Wn.2d 1002(1973).

<sup>24</sup> *Id.*

<sup>25</sup> *Mercer Enterprises v. Bremerton*, 93 Wn.2d 624 (1980).

that new plats make “[a]ppropriate provisions ...for the public health, safety, and general welfare and for such open spaces, **drainage ways**, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation.”<sup>26</sup> “Drainage ways” is land use speak for controlling and moving stormwater, whether by a ditch, pipe, bioswale or some other method. And therefore protections to changes in stormwater design are protected under RCW 58.17.033.

Furthermore this Court in *Westside Bus. Park v. Pierce County* held that stormwater ordinances are “land use controls” that are subject to vesting.<sup>27</sup> In the present case, Marty Snell, the Community Development Director for Clark County, testified extensively about how Clark County regulates stormwater solely through development regulations and how they are subject to vesting.<sup>28</sup>

And yet Rosemere attempts to dismiss *Westside’s* applicability in this present case by shrouding it with the veil that we are dealing with an

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<sup>26</sup> RCW 58.17.110(2)(a).

<sup>27</sup> *Westside Bus. Park v. Pierce County*, 100 Wn. App.599, 607 (2000).

<sup>28</sup> Testimony of Marty Snell, RP 401-402 1-25 and Exs. R-17 and R-73.

environmental regulation.<sup>29</sup> But Rosemere fundamentally misunderstands the nature of land development. Stormwater facilities are so intertwined with the other aspects of land development such as the transportation system, layout of the lots, utilities, density of the project that requiring changes to one aspect, the stormwater system, would create the need to change and then review the project again.<sup>30</sup> Local government also fears the added costs of having to continually review development proposals based on a shifting regulatory climate.<sup>31</sup> In particular, Mr. Snell noted that changes or new requirements could be expensive not only for the applicant, but also the County.<sup>32</sup>

And yet in the present case, the PCHB ignored existing case law and dismissed these notions of fundamental fairness by masquerading stormwater controls as environmental regulations.<sup>33</sup> The PCHB, Ecology and Rosemere continue to obfuscate the vesting issue by attempting to elevate stormwater ordinances to somewhere beyond the reach of the

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<sup>29</sup> Rosemere Response Brief at 27.

<sup>30</sup> Testimony of Eric Golemo, RP 943 2-12.

<sup>31</sup> Testimony of Marty Snell, RP 403-407 1-8.

<sup>32</sup> Testimony of Marty Snell, RP 406 22-23.

<sup>33</sup> Pollution Control Hearings Board Order Denying Summary Judgment, p. 15:12-14.

vesting doctrine. But they fail to recognize how stormwater regulations are implemented.

Implementation of stormwater regulations only ensnares property through the land use entitlement process. This is unlike environmental regulations which do not distinguish between new development projects and existing development. A good example of this would be how CERCLA could apply a polluted property. No development application is necessary. There is no subtle nuance here. Stormwater controls are implemented as land use controls solely through development applications.

“Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.”<sup>34</sup> To hold that the vesting doctrine does not apply to stormwater controls would throw the whole system of property development in Washington into disarray. Not only would the development community suffer, but local government and taxpayers would suffer by continually having to revisit and revise prior approved projects to keep up with shifting

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<sup>34</sup> *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 51 (1986).

regulations. And as explained above, you cannot simply remove one aspect of land development and place it on a separate pedestal.

Stormwater facilities are too intertwined with the design and layout of development projects.

**C. STATE VESTING DOCTRINE DOES NOT INTERFERE WITH ECOLOGY'S ABILITY TO ISSUE NEW STORMWATER RULES.**

Ecology can comply with the mandates derived under the Clean Water Act while complying with Washington vesting doctrine. This Court already held as much under *Westside*.<sup>35</sup> Nothing in the present case suggests that a conflict has arisen between the mandates of the CWA and state vesting law. New regulations derived under the CWA's NPDES program get implemented and applied when they are adopted by the local jurisdiction. Until that time, applications may vest to existing rules. Ecology is not thwarted in any manner in implementing new regulations as it sets forth the timing of new regulations and maintains enforcement powers over jurisdictions that do not comply.

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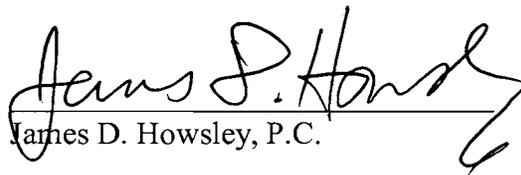
<sup>35</sup> *Westside* at 608-609.

## **II. CONCLUSION**

BIA and the County attempted to raise both the Constitutional and statutory issues under RCW 82.02.020 in the Rosemere challenge, but the PCHB failed to allow these challenges to proceed. This is a clear error. The PCHB should have allowed these issues to proceed so that the BIA could present additional evidence of how the default permit would require new development to mitigate to historic conditions.

BIA further believes that this Court must reaffirm its decision in the *Westside* case extending vesting to stormwater control ordinances. The PCHB muddied the issue by attempting to cloak stormwater ordinances with the shroud of being environmental regulations. But they simply failed to recognize how stormwater regulations are implemented through the land use process. For all of the reasons stated above and contained within BIA's opening brief, the PCHB should be reversed.

Dated this 16<sup>th</sup> day of September, 2011.

  
James D. Howsley, P.C.

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CERTIFICATE OF SERVICE

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Attorney for Petitioner:

James D. Howsley, P.C.  
MILLER NASH LLP  
500 E. Broadway, Suite 400  
Post Office Box 694  
Vancouver, Washington 98666-0694

I, James D. Howsley, hereby certify and state the following: I am a citizen of the United States of America and a resident of the State of Washington; I am over the age of eighteen years; I am not a party to this action; and I am competent to be a witness herein.

On this 16<sup>th</sup> day of September, 2011, I filed the *Reply Brief of Petitioner Building Industry Association of Clark County and Certificate of Service* with the Court of Appeals of the State of Washington, Division II, by United States Postal Mail as specified below:

Court Clerk  
Washington State Court of Appeals, Division Two  
950 Broadway, Suite 300  
Tacoma, Washington 98402-4454

On this 16<sup>th</sup> day of September, 2011, I caused true and correct copies of *Reply Brief of Petitioner Building Industry Association of Clark County and Certificate of Service* to be served on the parties below by mailing and e-mailing as specified below:

Jan Hasselman, WSBA No. 29107  
Janette Brimmer, WSBA No. 41271  
Earthjustice  
705 Second Avenue #203  
Seattle, WA 98104  
Email: [jhasselman@earthjustice.org](mailto:jhasselman@earthjustice.org);  
[jbrimmer@earthjustice.org](mailto:jbrimmer@earthjustice.org)  
[chamborg@earthjustice.org](mailto:chamborg@earthjustice.org)

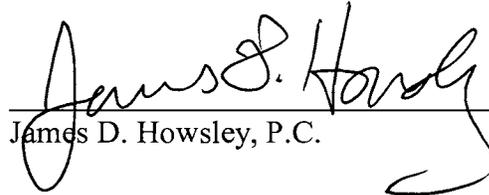
Ronald L. Lavigne, WSBA No. 18550  
2425 Bristol Court SW, 2nd Floor  
P.O. Box 40117  
Olympia, WA 98504-0117  
Email: [ronaldl@atg.wa.gov](mailto:ronaldl@atg.wa.gov)  
[ecyolyef@atg.wa.gov](mailto:ecyolyef@atg.wa.gov)  
[trishd@atg.wa.gov](mailto:trishd@atg.wa.gov)

E. Bronson Potter, WSBA No. 9201  
Christine M. Cook, WSBA No. 15250  
Clark County Prosecuting Attorney's Office  
Civil Division  
P.O. Box 5000  
Vancouver, WA 98666-5000  
Email: [bronson.potter@clark.wa.gov](mailto:bronson.potter@clark.wa.gov)  
[christine.cook@clark.wa.gov](mailto:christine.cook@clark.wa.gov)

Marc Worthy, WSBA No. 29750  
Assistant Attorney General  
Attorney General of Washington  
Licensing and Administrative Law Division  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
Email: [marcw@atg.wa.gov](mailto:marcw@atg.wa.gov)  
[LALseaEF@atg.wa.gov](mailto:LALseaEF@atg.wa.gov)  
[shirlel@atg.wa.gov](mailto:shirlel@atg.wa.gov)

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

Dated this 16<sup>th</sup> day of September, 2011.

  
James D. Howsley, P.C.