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NO. 92805-3

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, PUGET
SOUNDKEEPER ALLIANCE, WASHINGTON ENVIRONMENTAL
COUNCIL, ROSEMERE NEIGHBORHOOD ASSOCIATION

Petitioners,

and

POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

BRIEF OF AMICUS CURIAE MASTER BUILDERS OF KING
AND SNOHOMISH COUNTIES

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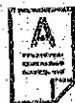


TABLE OF CONTENTS

| | Page |
|---|------|
| I. INTRODUCTION | 1 |
| II. IDENTITY AND INTEREST OF AMICUS CURIAE..... | 1 |
| III. STATEMENT OF THE CASE | 2 |
| IV. ARGUMENT..... | 2 |
| A. Washington’s vested rights laws strike an important balance between the interests of regulators and private property owners, which results in the consistent and predictable application of land use regulations to development projects. | 2 |
| B. Applying stormwater regulations retroactively to vested projects undermines the certainty and predictability provided by vesting laws. | 5 |
| C. Ecology’s goals can be achieved in harmony with vested rights and without creating significant environmental impacts because even vested projects must comply with stormwater regulations previously approved by Ecology. | 6 |
| D. The Court of Appeals decided correctly that stormwater regulations are “land use controls” subject to state vesting statutes and that the Clean Water Act does not preempt state vesting statutes where the Act’s “maximum extent practicable” requirement can be applied in harmony with both state and federal law. | 9 |
| V. CONCLUSION..... | 14 |

TABLE OF AUTHORITIES

Cases

Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 93 P.3d 108
(2004)13

New Castle Investments v. City of LaCenter, 98 Wn. App. 224, 989
P.2d 569 (1999)10, 11

Noble Manor Co. v. Pierce County, 133 Wn.2d 269, 943 P.2d 1378
(1997)3

Snohomish County v. Pollution Control Hearings Board,
No. 46378-4-II (Wash. Ct. App. Jan. 19, 2016).....1, 8

Town of Woodway v. Snohomish County, 180 Wn.2d 165, 322 P.3d
1219 (2014)4

West Main Associates v. City of Bellevue, 106 Wn.2d 47, 720 P.2d
782 (1986)14

Westside Business Park v. Pierce County, 100 Wn. App. 599, 5
P.3d 713 (2000)10, 11

Statutes

33 U.S.C. § 1342(p)(3)(B)(iii)13

RCW 19.27.0954

RCW 36.70B.170.....4

RCW 58.17.0334, 10, 11

RCW 58.17.170(2).....4

I. INTRODUCTION

The Master Builders Association of King and Snohomish Counties (“MBA”) submits the following Amicus Curie Brief. The issue in this case is whether stormwater regulations imposed on land use permit applicants through local permit review are “land use control ordinances” that are subject to state vesting statutes.

In its decision below, the Court of Appeals held that stormwater regulations are “land use control ordinances” that are subject to state vesting statutes and the Department of Ecology (“Ecology”) cannot require local jurisdictions to impose stormwater regulations in a manner that conflicts with Washington’s vested rights laws.¹ The decision is in accordance with established case law, complies with the plain language of federal law and state vesting statutes, and makes sense in the real world given the practical realities of private property development.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

MBA is a trade organization comprised of professional home builders, architects, remodelers, suppliers, manufacturers and sales and marketing professionals. Because of its active approach to the region’s housing needs, MBA has become the largest local home builders association in the United States. With nearly 3,000 member companies, representing all facets of housing construction, the MBA is the authoritative voice on housing issues in the greater Seattle metropolitan

¹ *Snohomish County v. Pollution Control Hearings Board*, No. 46378-4-II (Wash. Ct. App. Jan. 19, 2016).

area. The MBA is familiar with the issues and the parties' arguments and submits this Amicus Curiae Brief in order to address the importance and practical effect of the Court of Appeals decision.

III. STATEMENT OF THE CASE

MBA adopts the statement of the case from Snohomish County's Answer to Petitioner's Petitions for Review.

IV. ARGUMENT

A. Washington's vested rights laws strike an important balance between the interests of regulators and private property owners, which results in the consistent and predictable application of land use regulations to development projects.

Developing real property is expensive and often takes years to plan, permit, and construct. Because development regulations dictate what can be developed and how much it will cost, when governments adopt new regulations those regulations often fundamentally change the feasibility of development projects, thereby frustrating the reasonable expectations of property owners in the process of redeveloping their land. That is why the practical reality of developing real property requires that land use regulations be fixed at a certain point in time.

Both the government and property owners have important interests at stake that need to be balanced. On the one hand, due process requires that at some fixed point in time property owners should know which regulations will apply to their development projects in order to plan and implement those projects in a predictable manner. On the other hand, governments need to be able to adopt and enforce new regulations on

potential development projects when those projects have not advanced to a point where due process concerns are triggered.

Washington law strikes a balance between these competing interests by drawing a bright line between the time an early-stage project can be subject to new regulations and the time that a project is sufficiently defined so that the property owner's development rights "vest" to the regulations then in effect. Washington's bright line rule is known as the "date of application" vested rights rule. Generally, the rule provides that once a complete application has been filed, the application must be considered under the statutes and ordinances in effect at the time of application submittal. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 275, 943 P.2d 1378 (1997).

In *Noble Manor*, this Court explained: "The purpose of the vested rights doctrine is to provide a measure of certainty to developers and to protect their expectations against fluctuating land use policy." *Id.* at 278.

More recently, this Court explained:

Washington adopted this rule because we recognize that development rights are valuable property interests, and our doctrine ensures 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 County, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014) (internal citations omitted). The vested rights doctrine

developed through case law, and has been codified for building permits, subdivisions, and development agreements.²

The application of vested rights is vitally important to MBA members and other land owners in the State of Washington. MBA members rely on vested rights when deciding whether to invest substantial sums of money to purchase property for development, subdivide the property into smaller individual lots, and construct homes on those lots for sale to citizens of King and Snohomish Counties. MBA members are dedicated to building quality homes that are affordable to the residents of King and Snohomish Counties.

The transparency and predictability of land use regulations play an important role in the ability to buy land and construct quality homes at reasonable prices. As regulations change to become more restrictive or require additional processing, development costs increase. As a result, vesting laws are essential to the ability of MBA members and other land owners to predict with certainty the land use regulations that will apply to their projects and the corresponding costs they will incur. Ultimately, those costs are reflected in the price of the finished product.

² RCW 19.27.095 (building permits); RCW 58.17.033 (subdivision applications); RCW 36.70B.170 (development agreements); and RCW 58.17.170(2) (lots within a subdivision). MBA does not address in this amicus filing whether or not the vesting doctrine is somehow now limited to these statutes, as appears to be assumed by some parties.

B. Applying stormwater regulations retroactively to vested projects undermines the certainty and predictability provided by vesting laws.

Petitioners ask the Court to reverse the Court of Appeals and hold that vesting laws do not apply to land use regulations imposed by Ecology's Phase I Permit requirements. In addition to being contrary to established law and the plain terms of the vesting statutes, if stormwater regulations are not subject to vesting, then much of the certainty that vesting statutes are meant to provide would be lost.

Stormwater regulations drive the physical layout of development sites. For example, stormwater regulations dictate the size of stormwater detention vaults and require land to be reserved for specific uses, such as for dispersion or infiltration of stormwater. Applying stormwater regulations retroactively would mean that projects that are otherwise vested to all other land use regulations would need to be redesigned potentially years after the project's vesting date to comply with updated stormwater regulations. Those changes to the project would likely require corresponding adjustments to other aspects of the project that are otherwise unrelated to stormwater, such as the number of lots available for building homes or the size of common area recreation tracts. If stormwater regulations are not subject to the vesting statutes, then what remains of vested rights is illusory, since changes to land uses required by stormwater regulations will have a cascading effect on the physical layout and

corresponding uses available for the remainder of the applicable development site.

Under many local codes, if the changes to a project are significant enough, then the project will need to be reviewed as a new application, thereby extinguishing the vested status for the entire project. That would mean that those projects literally would be sent back to the drawing board. This is exactly the type of fluctuating land use policy that the vested rights doctrine and vesting statutes are meant to guard against. Under state vesting statutes, property owners are protected from such disastrous real world consequences.

C. Ecology's goals can be achieved in harmony with vested rights and without creating significant environmental impacts because even vested projects must comply with stormwater regulations previously approved by Ecology.

Ecology states that if development projects are vested to stormwater regulations in effect at the time of application, then those projects with applications filed prior to the effective date of the new regulations would be "exempt from the required pollution controls." Ecology Brief at 2. Ecology later argues that the consequence of allowing projects to vest to existing stormwater regulations "would be to allow development projects to pollute waters of the state in violation of federal and state water pollution laws with adverse consequences to public health and the environment." Ecology Brief at 15.

It is important to understand that despite Ecology's dire statements, vested projects are not exempt from stormwater regulations. To the

contrary, vesting means only that the project must be considered under the stormwater regulations in effect at the time a complete application is filed. This means that all applications filed after new regulations are adopted and made effective must comply with those new regulations. Conversely, applications for projects filed before the new regulations have come into effect are subject to the regulations that were in effect when the application was filed. In either case, the project will need to comply with the applicable stormwater regulations.

Stormwater regulations are updated regularly (typically every ten years or so), and as new regulations are adopted, new projects are built to the standards required by the new regulations. This iterative process allows Ecology to impose new standards in accordance with the best available science at the time. The science, of course, is constantly changing. Stormwater regulations, however, cannot be in a similar state of constant change because it would create a wholly unpredictable and unworkable regulatory regime given the massive amount of time, money and effort that goes into preparing and processing applications for development projects. To account for the practical reality of real property development, regulations need to be adopted and implemented in a predictable manner. Over time, the built environment will continue to develop and redevelop under the evolving stormwater standards and in that process it will continually bend toward achieving the goals of the Clean Water Act.

Ecology argues that it can direct municipalities to use their police power to eliminate vesting through Permit Condition S5.C.5.a.iii. Ecology Brief at pp. 15 – 17.³ Ecology states that the use of police power is necessary “to protect the public health and welfare from the significant adverse impacts of poorly managed stormwater.” Ecology Brief at p. 17. There is no reason to exercise police power under these circumstances because the public health and welfare already is protected.

As explained above, even vested projects need to comply with Ecology’s stormwater regulations. Vested projects must comply with the stormwater regulations that were in effect when a complete permit application was filed. When new regulations are adopted, projects with existing applications are reviewed under the stormwater regulations previously in effect. As time passes, that list of vested projects quickly diminishes and all new projects are subject to the new regulations. This transition from the prior standards to the new standards—in addition to being in harmony with the vested rights doctrine—makes compliance predictable and fair.

The limited benefit of imposing the challenged Condition S.5.C.5.a.iii (i.e., vesting is lost if construction has not started by June 30, 2020) is further diminished by the fact that even those projects that are

³ As noted by the Court of Appeals, Ecology did not argue and the Pollution Control Hearings Board did not address in its decision whether Condition S5.C.5.a.iii was a valid use of police power. *Snohomish County v. Pollution Control Hearings Board*, No. 46378-4-II (Wash. Ct. App, Jan. 19, 2016) at p. 17. Accordingly, the only issue to be addressed by the Court in this appeal is the application of the vested rights doctrine.

vested and developed under prior stormwater regulations will be redeveloped in the future under stormwater standards then in effect, which will be based on updated science. The question in this case, therefore, is whether the well-established bright line vested rights rule should be eliminated with respect to stormwater regulations in order to achieve a small incremental reduction in stormwater discharges over the near term? Case law stretching back 60 years and clear and unambiguous vesting statutes in existence for decades counsel against eliminating vesting in this case, which otherwise would result in only a small benefit while injecting regulatory uncertainty and increasing the costs of development at a time when housing affordability is a critical issue across the state.

D. The Court of Appeals decided correctly that stormwater regulations are “land use controls” subject to state vesting statutes and that the Clean Water Act does not preempt state vesting statutes where the Act’s “maximum extent practicable” requirement can be applied in harmony with both state and federal law.

The Court of Appeals correctly concluded that Permit Condition S5.C.5.a.iii⁴ conflicts with the State’s vested rights statutes. In fact, the state subdivision statutes specifically require subdivisions to be evaluated under the stormwater regulations to which the project is vested. For example, RCW 58.17.110 specifically requires that prior to approving a subdivision application the local legislative body must first determine that

⁴ Permit Condition S5.C.5.a.iii requires Phase I municipal permittees, including King and Snohomish Counties, to apply new stormwater regulations to local permit “applications submitted prior [to] July 1, 2015, which have not started construction by June 30, 2020.”

“Appropriate provisions are made for...drainage ways.” The local legislative body determines that appropriate provisions are made for drainage ways by confirming that the proposed plat complies with the stormwater regulations in effect at the time the complete preliminary plat application was filed. *See* RCW 58.17.033. Contrary to Petitioners arguments that stormwater regulations are not subject to vesting, the state subdivision statutes expressly require that subdivisions are to be evaluated under the stormwater regulations to which the project is vested.

The Court of Appeals decision also is supported by existing case law that addresses when a regulation is a land use control ordinance subject to vesting. *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999); *Westside Business Park v. Pierce County*, 100 Wn. App. 599, 5 P.3d 713 (2000). In *New Castle*, the issue before the Court was whether the vesting provisions of RCW 58.17.033 applied to transportation impact fees (“TIFs”) assessed on new developments. The Court held that a “land use control ordinance” under RCW 58.17.033 is one that exerts “a restraining or directing influence over land use.” *New Castle*, 98 Wn. App. at 229. The Court then explained that the requirement to pay a fee did not exert a restraining or directing influence on the use of land:

TIFs do not affect the physical aspects of development (i.e., building height, setbacks, or sidewalk widths) or the type of uses allowed (i.e., residential, commercial, or industrial). If they did, then TIFs would be subject to the vested rights doctrine....[But b]ecause TIFs do not “control” land use, do not affect the developer’s rights with regard to the physical

use of his or her land, and are best characterized as revenue raising devices rather than land use regulation, we hold that the definition of “land use control ordinances” does not include TIFs.

Id. at 237-38.

In *Westside*, the Court relied on its holding in *New Castle* and concluded expressly that “storm water drainage ordinances do exert a ‘restraining or directing influence’ over land use and are therefore land use control ordinances.” *Westside*, 100 Wn. App. at 607. Stormwater regulations do affect the physical aspects of development. Thus, the Court held: “Storm water drainage ordinances are land use control ordinances” that are subject to the vesting provisions of RCW 58.17.033. *Id.* (emphasis added).

Here, the Permit unquestionably exerts a restraining and directing influence over land use. As explained by the Court of Appeals:

The 2013-2018 Permit requirements by their very design are intended to exert a restraining and directing influence over the development and redevelopment of land to effectuate Ecology’s regulation of stormwater discharges into Washington’s waters. Certain project developers must comply with local ordinances enacted under the 2013-2018 Permit requiring, for example, that they utilize source control best management practices, implement on-site stormwater best management practices, and implement flow control standards to reduce the impacts of stormwater runoff. These and other 2013-2018 Permit requirements would significantly curtail how developers use their land.

Slip Op. at 13.

Contrary to Petitioners' arguments, the Court of Appeals decision does not expand the vesting doctrine, but rather applies it consistently with established case law and in accordance with the plain language of the vesting statutes. Even Petitioners do not dispute that the effect of stormwater regulations is to regulate and control the use of land. Instead, Petitioners argue that because stormwater regulations are aimed at achieving an environmental objective, they cannot be land use controls. In essence, Petitioners argue that a regulation can either be an environmental regulation or a land use control regulation, but not both. This argument is not supported by a number of cases cited by the Court of Appeals in which courts have found several environmental regulations to be subject to vested rights. Slip op., at 14 (citing examples of regulations addressing water course buffers, water drainage, riparian buffers, and storm drainage—all of which were subject to vesting).

The Court of Appeals' decision is well reasoned and supported by prior decisions and the text of the vesting statutes. Stormwater regulations are land use control ordinances subject to state vesting statutes and local jurisdictions cannot apply newly adopted stormwater regulations to vested permit applicants. Petitioners arguments to the contrary fail.

Petitioners preemption arguments also fail. In Washington, there is a strong presumption against finding preemption. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 864, 93 P.3d 108 (2004). "Preemption may be found only if federal law clearly evinces a congressional intent to preempt state law, or there is such a direct and positive conflict that the

two acts cannot be reconciled or consistently stand together.” *Id.* (citing *Dept. of Labor Indus. v. Common Carriers, Inc.*, 111 Wn.2d 586, 588, 762 P.2d 348 (1988)). The Court of Appeals correctly found no such congressional intent or an irreconcilable conflict between the federal requirements and state vesting laws. Slip Op. at 21-25.

The federal Clean Water Act (“CWA”) delegates authority to the states to implement “controls to reduce the discharge of pollutants to the maximum extent practicable.” 33 U.S.C. § 1342(p)(3)(B)(iii). The phrase “maximum extent *practicable*” provides the necessary flexibility for state agencies to achieve the CWA’s pollutant reduction goals without creating unnecessary conflicts with state laws. The federal delegation grants Ecology and other state agencies significant discretion to determine the methods and timing for meeting discharge limitation goals.

The CWA does not provide a specific compliance date. Those timing issues are within the reasonable discretion of the state agency. Here, Ecology argues that state vesting laws are preempted by CWA requirements, but the CWA provides Ecology the flexibility to implement CWA standards in harmony with state vesting laws, and the Court of Appeals correctly ruled that it must do so.

The Court of Appeals decision does not prevent Ecology from developing and implementing stringent water quality standards as required by the CWA. Rather, the decision requires that Ecology implement those standards in a manner that does not violate important protections in state law for private property owners—protections rooted in the Washington

State Constitution and federal Due Process requirements. *See West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 50-52, 720 P.2d 782 (1986).

Even Ecology recognizes that “[t]he only issue in this appeal is the timing requirement for implementation of the stormwater controls.” Ecology Petition at 13. The Permit’s requirements will be implemented for all development projects that have not already reached a point in the development process where they have vested to prior stormwater requirements. State vesting laws do not prevent implementation of federal law, they simply establish the point in time when applying new regulations to established projects is no longer *practicable*.

V. CONCLUSION

The Court of Appeals’ decision is in accordance with established case law, complies with the plain language of federal law and state vesting statutes, and makes sense in the real world given the practical realities of private property development. MBA asks that the Court affirm the Court of Appeals’ decision and that this matter be remanded to the Pollution Control Hearings Board to revise condition S5.C.5.a.iii in the 2013-2018 Phase I Municipal Stormwater Permit to specify that the 2013-2018 Permit applies only to those completed applications submitted after July 1, 2015.

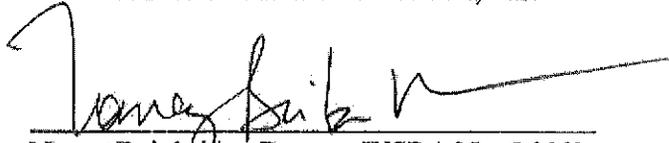
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DATED this 20th day of August, 2016.

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Respondent Below.

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DECLARATION OF SERVICE

I, Rachel T. Wang, certify under penalty of perjury of the laws of the State of Washington that on August 29, 2016, I caused to be filed with the Washington State Supreme Court this NOTICE OF APPEARANCE, MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTY'S MOTION TO FILE AMICUS CURIAE BRIEF, BRIEF OF AMICUS CURIAE MASTER BUILDERS OF KING AND SNOHOMISH COUNTIES and this DECLARATION OF SERVICE; as well as a copy of the same to be served on the following parties in the manner noted below:

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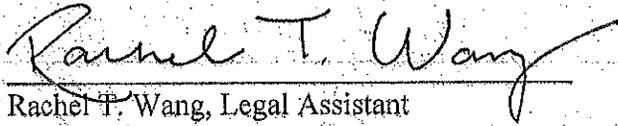
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DATED this 29th day of August, 2016, at Seattle, Washington.



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Cc: 'alethea.hart@co.snohomish.wa.us'; 'Laura.Kisielius@co.snohomish.wa.us'; 'darren.carnell@kingcounty.gov'; 'devon.shannon@kingcounty.gov'; 'Jamie.howsley@jordanramis.com'; 'lisa.mckee@jordanramis.com'; 'joseph.schaefer@jordanramis.com'; 'patricia.repp@jordanramis.com'; 'kristin.french@jordanramis.com'; 'RonaldL@atg.wa.gov'; 'phyllisb@atg.wa.gov'; 'jbrimmer@earthjustice.org'; 'ttrue@earthjustice.org'; 'jhasselman@earthjustice.org'; Padilla-Huddleston, Dionne (ATG) (DionneP@ATG.WA.GOV); 'terrl@foster.com'; 'nelsj@foster.com'; 'christine.cook@clark.wa.gov'; 'chris.horne@clark.wa.gov'; 'theresa.wagner@seattle.gov'; 'epauli@ci.tacoma.wa.us'; 'jon.walker@ci.tacoma.wa.us'; 'AdamF@biaw.com'; 'cohee@tmw-law.com'; 'tupper@tmw-law.com'; 'bth@pacifical.org'; 'ewb@pacifical.org'; Randall Olsen; Nancy Rogers
Subject: RE: Snohomish County et. al v. WA State Dept. of Ecology, et. al - Supreme Court Case No. 92805-3

Received 8-29-2016

Supreme Court Clerk's Office

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From: Rachel Wang [mailto:RWang@Cairncross.com]

Sent: Monday, August 29, 2016 3:12 PM

To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>

Cc: 'alethea.hart@co.snohomish.wa.us' <alethea.hart@co.snohomish.wa.us>; 'Laura.Kisielius@co.snohomish.wa.us' <Laura.Kisielius@co.snohomish.wa.us>; 'darren.carnell@kingcounty.gov' <darren.carnell@kingcounty.gov>; 'devon.shannon@kingcounty.gov' <devon.shannon@kingcounty.gov>; 'Jamie.howsley@jordanramis.com' <Jamie.howsley@jordanramis.com>; 'lisa.mckee@jordanramis.com' <lisa.mckee@jordanramis.com>; 'joseph.schaefer@jordanramis.com' <joseph.schaefer@jordanramis.com>; 'patricia.repp@jordanramis.com' <patricia.repp@jordanramis.com>; 'kristin.french@jordanramis.com' <kristin.french@jordanramis.com>; 'RonaldL@atg.wa.gov' <RonaldL@atg.wa.gov>; 'phyllisb@atg.wa.gov' <phyllisb@atg.wa.gov>; 'jbrimmer@earthjustice.org' <jbrimmer@earthjustice.org>; 'ttrue@earthjustice.org' <ttrue@earthjustice.org>; 'jhasselman@earthjustice.org' <jhasselman@earthjustice.org>; Padilla-Huddleston, Dionne (ATG) (DionneP@ATG.WA.GOV) <DionneP@ATG.WA.GOV>; 'terrl@foster.com' <terrl@foster.com>; 'nelsj@foster.com' <nelsj@foster.com>; 'christine.cook@clark.wa.gov' <christine.cook@clark.wa.gov>; 'chris.horne@clark.wa.gov'; 'theresa.wagner@seattle.gov' <theresa.wagner@seattle.gov>; 'epauli@ci.tacoma.wa.us'; 'jon.walker@ci.tacoma.wa.us' <jon.walker@ci.tacoma.wa.us>; 'AdamF@biaw.com' <AdamF@biaw.com>; 'cohee@tmw-law.com' <cohee@tmw-law.com>; 'tupper@tmw-law.com' <tupper@tmw-law.com>; 'bth@pacifical.org' <bth@pacifical.org>; 'ewb@pacifical.org' <ewb@pacifical.org>; Randall Olsen <ROlsen@Cairncross.com>; Nancy Rogers

<NRogers@Cairncross.com>

Subject: Snohomish County et. al v. WA State Dept. of Ecology, et. al - Supreme Court Case No. 92805-3

Re: Snohomish County et. al v. WA State Dept. of Ecology, et. al - Supreme Court Case No. 92805-3

Dear Clerk of the Court,

Attached please find a Notice of Appearance; Master Builders Association of King and Snohomish County's Motion to File Amicus Curiae Brief; Brief of Amicus Curiae Master Builders of King and Snohomish Counties; and a Declaration of Service for filing in the above-referenced matter. These documents are respectfully submitted on behalf of:

Nancy Bainbridge Rogers, WSBA # 26662

Email: nrogers@cairncross.com

Randall P. Olsen, WSBA # 38488

Email: rolsen@cairncross.com

Telephone: (206) 587-0700

All other parties to this action will be served as indicated in the attached Declaration of Service as per their prior mutual agreements.

Sincerely,

CH& | Rachel Wang

Legal Assistant to Randall P. Olsen

Cairncross & Hempelmann

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