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COURT OF APPEALS NO. 46378-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY, KING COUNTY, AND BUILDING
INDUSTRY ASSOCIATION OF CLARK COUNTY,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Petitioner,

and

POLLUTION CONTROL HEARINGS BOARD; PUGET
SOUNDKEEPER ALLIANCE; WASHINGTON ENVIRONMENT
COUNCIL, and ROSEMERE NEIGHBORHOOD ASSOCIATION,

Respondents Below.

SUPPLEMENTAL BRIEF OF RESPONDENT KING COUNTY

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I. INTRODUCTION

The issue before the Court is whether state vesting laws govern local stormwater regulations that are applied in preparation and review of a land use permit application.¹ Petitioners seek to avoid application of state vesting statutes to local stormwater regulations mandated by the Washington State Department of Ecology (“Ecology”) pursuant to a National Pollutant Discharge Elimination System (NPDES) Permit. They argue that because the regulations are required as a condition of an NPDES Permit, the vesting doctrine is either (1) inapplicable because the regulations are intended to be environmental and therefore cannot be “land use controls,” or (2) preempted because Ecology imposed the requirement pursuant to its delegated authority under the Federal Water Pollution Control Act (Clean Water Act, or CWA).

As held by the Court of Appeals, and as discussed below, stormwater regulations are “land use controls” subject to state vesting statutes and are not preempted by the CWA. Stormwater regulations restrain and direct the use of land, and environmental objectives of those regulations do not alter their land use impact. Moreover, there is no

¹ Recognizing the statutory limitations of the vesting doctrine, King County restricts its briefing to refer only to those land use applications that are subject to vesting in the relevant statutes. *See* RCW 58.17.033 (plats); RCW 19.27.095 (building permits); RCW 36.70B.170 (development agreements); *Potala Vill. Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 203-214, 334 P.3d 1143 (2014).

preemptive effect where the federal delegation of authority to Ecology facilitates Ecology's "maximum extent practicable" mandate without running afoul of state vesting laws.

II. STATEMENT OF ISSUES

1. Are stormwater regulations imposed on land use permit applicants through local permit review subject to state vesting statutes?
2. Do stormwater regulations adopted by local jurisdiction to comply with NPDES permit conditions preempt Washington's vesting statutes?

III. STATEMENT OF FACTS

The NPDES permit program was created under the CWA as a framework for regulating water quality and pollutant discharges, 33 U.S.C. § 1251, *et seq.* Authority for administration of the program in Washington is delegated to Ecology. Ecology requires local jurisdictions to obtain an NPDES permit, the conditions of which govern stormwater management within each jurisdiction. RCW 90.48.260, King County, a Phase I permittee, effectuates its permit requirements through its stormwater management program (SWMP), codified in King County Code Title 9. Appeal Board Record (ABR) at 16.

On August 1, 2012, Ecology adopted the 2013-2018 NPDES Phase I Municipal Stormwater and State Waste Discharge Permit ("the Permit").

CP 247, ABR 12. The Permit requires municipal permittees to adopt and implement new regulations to control stormwater consistent with the “conditions” in the Permit. ABR 22-23. The substantive conditions, including “site planning” and “subdivision scale” requirements, are not in dispute. ABR 26 (municipalities must adopt “minimum requirements, thresholds and definitions...for new development, redevelopment and construction sites....”); CP 276 (low impact development principles are “land use management strategies... integrated into a project design”).

Special Condition S5.C.5.a.iii of the permit (or, “the Condition”) contains a timing requirement that is the subject of this appeal. The Condition requires municipal permittees to apply new substantive stormwater regulations to local permit applications submitted “prior to July 1, 2015, which have not started construction by June 30, 2020.” ABR 26. This timing requirement will necessitate application of new stormwater regulations to land use permit applications that are vested under state vesting laws. *See* RCW 58.17.033; RCW 19.27.095.

Ecology’s statutory authority for requiring municipalities to update substantive stormwater regulations is not in question. 33 U.S.C. §1342; Ch. 90.48 RCW. However, the requirement that municipalities impose those regulations on vested permit applicants puts King County and other

municipalities in the untenable position of complying with two conflicting statutory directives.

On appeal to the Pollution Control Hearings Board (“the Board”), the Board upheld Ecology’s requirement that local jurisdictions apply the new stormwater regulations to projects that may already have vested rights. CP 191; CP 232. Its rationale was that the Permit is not a “land use control ordinance governed by the state’s vested rights doctrine.” CP 218. Instead, the Board characterized the stormwater conditions as “environmental regulations” that did not direct or restrict land use. *Id.*

Several parties appealed the Board’s decision to the Court of Appeals. The court reversed the Board, holding that because the Permit’s required stormwater regulations exert a restraining or directing influence over land use, they constitute “land use control ordinances” under the relevant vesting statutes. *Snohomish County et al., v. Pollution Control Hearings Board, et al.*, 192 Wn. App. 316, 333, 368 P.3d 194 (2016), citing *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 228, 989 P.2d 569 (1999); *Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 599, 607, 5 P.3d 713 (2000). The court therefore invalidated the timing Condition in the Permit because it is in conflict with application of the state vested rights statutes.

Petitioners timely petitioned this Court for review, asking that the well-reasoned appellate court decision be reversed.

IV. ARGUMENT

A. Stormwater Regulations are “Land Use Control Ordinances” Subject to State Vesting Statutes.

State vesting statutes identify the types of land use applications which are subject to the vested rights doctrine. *See* RCW 58.17.033 (plats); RCW 19.27.095 (building permits); RCW 36.70B.170 (development agreements). Under these statutes and established case law, vested applications are to be reviewed under the “land use control ordinances” in effect at the time a complete application is submitted. *See Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 172-73, 322 P.3d 1219 (2014). Petitioners contend that stormwater regulations are not “land use control ordinances.” This argument fails to comport with the practical application of stormwater regulations during permit review and is contrary to established case law.

1. The Permit’s substantive conditions require adoption of local regulations that directly impact an applicant’s land use proposal.

It is important to clarify what the Court is being asked to classify as a “land use control ordinance.” Petitioners broadly argue that “requirements imposed by a state agency on local governments pursuant to federal and state clean water protection law” should not be considered

“land use” regulations, Puget Soundkeeper Alliance (PSA), PFR at 1. This is not precisely what is at issue.

The NPDES Permit conditions require local jurisdictions to adopt various regulations that will then be applied to all development applications. ABR 27. The relevant question is, therefore, whether the specific types of regulations required by the NPDES conditions are land use control ordinances that should be subject to state vesting laws. The characterization of these local regulations as stemming from federal and state clean water protection laws is irrelevant. The relevant consideration is the practical effect of the required local regulations on an applicant’s land use permit application.

2. Establishing compliance with local stormwater regulations is an early and essential part of the land use permit application and review process.

In King County, stormwater regulation is inexorably tied to the land use permit process at the application and permit review stages. *See* KCC 19A.04.140; KCC 19A.08.060 (review for consistency with KCC Title 9 surface water management). For many land use permits, a complete application must demonstrate how the proposed development will comply with surface water and drainage regulations in the SWDM. KCC 20.20.040; KCC 9.04.095 (explicitly vesting the development of a lot

within a recorded short plat to Chapter 9.04 for five years after recording of the short plat).

In the subdivision context, a local jurisdiction necessarily reviews the plat application for consistency with stormwater regulations. *See* KCC 19A.08.060. Planning for compliance with the SWMP at the outset of the application process is essential to determine impervious surface limits, flow control, stormwater conveyance, necessary drainage facilities, and, consequently, what areas remain available for development. Ch. 9.04 KCC As the relevant case law has determined, because stormwater plans are required at the front-end of the permitting process, an applicant would reasonably expect that those regulations vest through submission of a complete permit application. *See Noble Manor v. Pierce County*, 133 Wn.2d 269, 278, 943 P.2d 1378 (1997).

3. Stormwater regulations are land use control ordinances because they restrain and direct land use.

As has been established in prior cases, stormwater regulations are “land use controls” because they have a “restraining or directing influence over land use.” *See New Castle*, 98 Wn. App. at 232; *Westside*, 100 Wn. App. at 606-7; *Phillips v. King County*, 136 Wn.2d 946, 951, 963, 968 P.2d 871 (1998). In *Westside*, the court concluded that “[s]torm water drainage ordinances are land use control ordinances.” *Id.* at 607. This

conclusion was based on the recognition that stormwater regulations are part of the project review process and, through permit review, the agency may limit or condition the use of land in order to achieve compliance with those regulations. *Id.*; *see also Phillips*, 136 Wn.2d at 963 (plat application vested to the surface water drainage code that was in effect upon submission of a complete plat application).

This is certainly true of the stormwater regulations at issue here. The NPDES Permit requires adoption of regulations that specifically limit the scope and scale of development on a project site. *See* ABR 26 (“minimum requirements, thresholds and definitions...for new development, redevelopment and construction sites....”); CP 276 (low impact development principles are “land use management strategies... integrated into a project design”). Undeniably, the intention of the regulations is to restrain or direct development on property where there may be adverse drainage impacts.

The reviewing department applies stormwater regulations during permit review and, where necessary, conditions a land use permit to assure compliance with those regulations. The logical conclusion is that these regulations “exert a ‘restraining or directing influence’ over land use” and are therefore subject to state vesting laws. *Westside*, 100 Wn. App. at 607, *quoting New Castle*, 98 Wn. App. at 232.

4. Stormwater regulations can have environmental objectives and be land use control ordinances for purposes of state vesting statutes.

Petitioners' emphasis on the environmental purpose of the NPDES requirements is misplaced. The environmental purposes and objectives of the CWA and the NPDES program do not diminish the land use control component of *applying* stormwater regulations to local land use permits.

The fields of environmental and land use regulation are not mutually exclusive. On the contrary, the two are necessarily and increasingly intertwined. *See* Title 21A KCC (zoning); Ch. 21A.24 (critical area regulations); Ch. 21A.25 (shoreline regulations). The inevitable overlap is also recognized in state law. *See e.g. Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 936 (9th Cir. 1988) (the Shoreline Management Act "is a mixed statute containing both land use and environmental regulations."); *Puget Soundkeeper Alliance, et al. v. State Dept. of Ecology*, PCHB Nos. 07-021, *et seq.*, (Order on Dispositive Motions Phase I Municipal Stormwater Permit) (there is necessarily "an area of interface and overlap between the GMA and the WPCA."); Characterizing regulations as "environmental" does not limit their ability to restrain or direct land use. Regulations can and often do serve dual functions of protecting the environment and controlling land use.

Moreover, this is not an issue of making vested projects completely exempt from environmental regulations. All land use applications that are subject to statutory vesting would still need to meet the requirements of all other regulations in effect when the permit application was deemed complete.

5. Application of state vesting laws to stormwater regulations is not an expansion of the vesting doctrine.

Petitioners attempt to draw a correlation between the importance of stormwater controls and the inapplicability of the vesting doctrine. Ecology PFR, at 14. King County is not disputing the significance of local water pollution and the need for stormwater regulation throughout the state. However, achieving these goals should not come at the cost of impairing existing rights under state law.

Inclusion of stormwater regulations in the scope of what an applicant vests to does not expand the vesting doctrine. If the underlying land use permit being sought is one that, by statute, is a “vested” application, then the doctrine covers all land use control ordinances that are relevant to review of that permit. And prior case law has declared stormwater regulations “land use control ordinances.” *Westside*, 100 Wn. App. at 607; *New Castle*, 98 Wn. App. at 232. As discussed above, compliance with stormwater regulations is required as part of a complete

permit application, is considered during permit review, and directs and restrains the use of land to achieve pollution reduction goals. These regulations are already within the scope of “land use controls” established by the state vesting statutes.

B. Stormwater Regulations Imposed by Ecology Through an NPDES Permit Do Not Preempt Washington’s Vesting Statutes.

Petitioners argue that even if stormwater regulations are land use control ordinances, the vesting doctrine is preempted because the stormwater regulations are being created pursuant to the NPDES Permit program. But there is no preemptive effect of the NPDES program over the state’s vesting laws.

Petitioners rely on the delegation of authority from the Environmental Protection Agency to Ecology to support their argument that Ecology can impose requirements that are inconsistent with state law, RCW 90.48.260(1)(a). However, there is nothing in this delegation that allows Ecology to establish timing for implementation of new stormwater regulations in conflict with state vesting statutes. There is no federal directive to adopt and apply new regulations within specific timeframes.

On the contrary, even Petitioners acknowledge that there is subjectivity and discretion in Ecology’s choice of a timeline for compliance with new regulations. *See* PSA PFR, at 19 (Ecology “defined

a more than fair timeline by which those standards need to be achieved.”). The unchallenged portion of Ecology’s timing condition recognizes vested rights for permits where construction begins by June 30, 2020. There is no legislative requirement that supports eliminating vested rights for those projects who are unable to begin construction within that specific five-year time frame. The subjective line drawn by Ecology between recognizing and eliminating vested rights is not a federal mandate.

Ecology’s directive is to reduce the discharge of pollutants to the “maximum extent practicable,” 28 U.S.C. § 1342(p)(3)(B)(iii). This is achieved by requiring substantive updates to local regulations. Timing for application of those new regulations is determined subjectively and becomes “impracticable” when application would conflict with existing state law. Nothing in the CWA reflects any intent to override the vesting provisions in state law.

Basic principles of statutory construction beg the same result. We start with the assumption that the relevant statutes are not inconsistent and can be read to achieve a harmonious result. *See State ex rel. Peninsula Neighborhood Ass’n v. Washington State Dept. of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000). “There is a strong presumption against preemption and ‘state laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.’” *Stevedoring Services of*

America, Inc., v Eggert, 129 Wn.2d 17, 24, 914 P.2d 737 (1996). The interpretation here that best reflects these principles is requiring compliance with substantive CWA based stormwater regulations in a timeframe that recognizes vested rights under state law. There is no indication that Congress intended any other result.

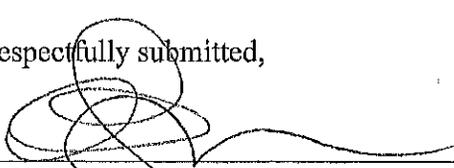
V. CONCLUSION

Based on the above argument and the record in this matter, King County respectfully requests that the Court affirm the Court of Appeals decision in this case, invalidating the timing requirement imposed by Ecology in NPDES Phase I Permit, Special Condition S.5.C.5.a.iii.

DATED this 1 day of August 2016.

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Respectfully submitted,



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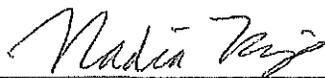
I, Nadia Rizk, declare that I caused to be filed with the SUPREME COURT, OF THE STATE OF WASHINGTON, RESPONDENT'S KING COUNTY'S SUPPLEMENTAL BRIEF and this CERTIFICATE OF SERVICE; as well as a copy of the same to be served on the following parties in the manner noted below.

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Please find attached for filing in the above noted case *Respondent King County's Supplemental Brief with attached Certificate of Service*.

Thank you.

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