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Legal Alerts

Stormwater Regulations Impair Vested Rights

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On December 29, 2016, the Washington State Supreme Court issued a vesting decision that will immediately impact development projects across the state. The unanimous decision in *Snohomish County v. Pollution Control Hearings Board* held that stormwater regulations adopted pursuant to the Washington State's National Pollutant Discharge Elimination System ("NPDES") Municipal Stormwater Permit are not "land use control ordinances" that are subject to the state's statutory vested rights doctrine. The State's Municipal Stormwater Permit is issued under the federal and state Clean Water Acts. In short, the court held that Municipal Stormwater Permit requirements may be retroactively applied to previously vested projects.

Generally, the decision requires vested projects to comply with updated stormwater regulations, which may require costly and lengthy project revisions.1 The required revisions may be inconsistent with the project's underlying land use entitlements, thereby creating a need to consider project-specific strategies to obtain new project entitlements or revise existing entitlements.

Washington's Vested Right Doctrine

Washington's statutory vested rights doctrine entitles developers to vest to "land use control ordinances" at a date certain. For example, that date certain can be connected to the date a developer submits a complete application for a building permit, although some municipalities allow a project to vest when an applicant submits a complete application for the underlying land use permit for the project or obtains the land use permit.2 Vesting to "land use control ordinances" is intended to provide developers with certainty that regulations will not change as the project proceeds through the often lengthy (and costly) entitlement process.

Vested To What?
The Court Redefines "Land Use Control Ordinance"

In *Snohomish County v. Pollution Control Hearings Board*, the Court addressed the issue of whether a NPDES stormwater permit was a "land use control ordinance" that is subject to the vested rights doctrine. Previously, case law defined a "land use control ordinance" as restraining or directing influence over the land. Stormwater regulations unquestionably satisfy this case law definition. The recent Supreme Court decision did not apply this definition. Instead, the Court concluded that any vested rights analysis must begin with identifying *source of authority* for a requirement because a "land use control ordinance" is intended to protect developers against the abuses of *local government* discretion, not state or federal regulations.

As a basis for its holding, the Court stated that the vested rights doctrine does not apply to SEPA, a state law that is adopted and enacted at the local level. The holding is also based on the Court's deference to the Department of Ecology's determination that vested rights do not apply to laws that originate from the state or federal level. Curiously, however, the Court's analysis did not include any reference to WAC 197-11-660(1)(a), an Ecology-issued vesting rule that applies to SEPA.3 Thus, the decision is based on tenuous legal grounds. The decision raises many questions regarding Washington's vested rights doctrine, and it creates immediate practical implications.

The Future Of Washington's Vested Rights Doctrine

By focusing its vesting analysis on the *source of authority*, the Court's decision may create further uncertainty regarding the scope of the vested rights doctrine. For example:

- Can a project vest to the Shoreline Master Program when state law requires local governments to adopt a plan that is subsequently approved by the Department of Ecology
- Can a project vest to critical area regulations when the state's Growth Management Act mandates its adoption at the local level?
- Can a project vest to commonplace zoning regulations when state law (e.g. the Planning Enabling Act and the Growth Management Act) provides the source of authority for local government to adopt zoning regulations?

Parties to this decision have filed a motion for reconsideration and a motion for clarification. It is unclear whether the Court will grant either motion.

Immediate Practical Implications

In the near term, vested projects are now subject to the retroactive application of updated stormwater regulations. The decision impacts every jurisdiction that is subject to Washington State's Municipal Stormwater Permit (identified in this footnote).4 The Municipal Stormwater Permits provide some flexibility in implementation of the stormwater requirements, such as adjustments, exceptions and variances. These provisions are contained in Appendix I of the Permits and, if local governments have incorporated these provisions into their stormwater ordinances, may provide opportunities to employ alternative approaches to stormwater management.

Questions?

Please contact Lori Terry Gregory at lori.terry@foster.com or 206.447.8902 if you have any questions regarding the recent Court decision. Lori leads the firm's Environmental group and helps clients comply with stormwater and other environmental regulations.

1 The decision upheld the Phase I permit condition stating: "The [updated stormwater regulations] ... shall apply to all applications submitted after July 1, 2015 and **shall apply to projects approved prior [to] July 1, 2015, which have not started construction by June 30, 2020**." (emphasis added). For most Phase II

permit jurisdictions, the applicable application deadline is January 1, 2017.
2 Vesting may also occur through other vehicles, such as subdivisions or development agreements.
3 WAC 197-11-660(1) provides "Any governmental action on public or private proposals that are not exempt may be conditioned or denied under SEPA to mitigate the environmental impact subject to the following limitations: (a) Mitigation measures or denials shall be based on policies, plans, rules, or regulations formally designated by the agency (or appropriate legislative body, in the case of local government) as a basis for the exercise of substantive authority and **in effect when the DNS or DEIS is issued**." Thus, a local government is prohibited from imposing mitigation on a proposal based upon a policy or regulation that is adopted after the DNS or DEIS is issued.
4 **Western Washington**:
Phase I Cities and Counties: Seattle, Tacoma, Snohomish County, King County, Pierce County, Clark County
Phase II Cities: Aberdeen, Algona, Anacortes, Arlington, Auburn, Bainbridge Island, Battle Ground, Bellevue, Bellingham, Black Diamond, Bonney Lake, Bothell, Bremerton, Brier, Buckley, Burien, Burlington, Camas, Centralia, Clyde Hill, Covington, Des Moines, DuPont, Duvall, Edgewood, Edmonds, Enumclaw, Everett, Federal Way, Ferndale, Fife, Fircrest, Gig Harbor, Granite Falls, Issaquah, Kelso, Kenmore, Kent, Kirkland, Lacey, Lake Forest Park, Lake Stevens, Lakewood, Longview, Lynden, Lynnwood, Maple Valley, Marysville, Medina, Mercer Island, Mill Creek, Milton, Monroe, Mountlake Terrace, Mount Vernon, Mukilteo, Newcastle, Normandy Park, Oak Harbor, Olympia, Orting, Pacific, Port Angeles, Port Orchard, Poulsbo, Puyallup, Redmond, Renton, Sammamish, SeaTac, Sedro-Woolley, Shoreline, Snohomish, Snoqualmie, Steilacoom, Sumner, Tukwila, Tumwater, University Place, Vancouver, Washougal, Woodinville
Phase II Counties (Phase II county permits apply to urban areas around permitted cities): Cowlitz County, Kitsap County, Skagit County, Thurston County, Whatcom County
Eastern Washington:
Phase II Cites: Asotin, Clarkston, East Wenatchee, Ellensburg, Kennewick, Moses Lake
Phase II Counties (Phase II county permits apply to urban areas around permitted cities): Asotin County, Chelan County, Douglas County, Spokane County, Walla Walla County, Yakima County

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