

Environmental Law Update

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Washington State Court of Appeals Holds Vested Permit Applications Are Not Subject to New Municipal Stormwater Requirements

The development community won a victory in Division Two of the Washington State Court of Appeals in a ruling that excludes pending permit applications from the new low-impact development stormwater regulations that large Washington cities and counties were to have adopted last summer. In overruling a decision by the Pollution Control Hearings Board, a divided panel of the Court of Appeals said the new regulations cannot be imposed on building projects where permit applications were submitted while the old rules were still in effect. Thus, the Municipal Phase I Stormwater Permit in effect from 2013 to 2018 (2013 Permit) applies only to those completed building applications submitted after July 1, 2015.

The 2013 Permit requires cities and counties to implement and enforce programs to prevent and control stormwater runoff. A key feature of the 2013 Permit is the requirement to adopt low-impact development methods, which rely on the natural properties of soil and vegetation to remove water pollutants and include features such as rain gardens and pervious paving. The legal challenge before the court focused on the 2013 Permit requirement that King, Pierce, Snohomish and Clark Counties, and the cities of Seattle and Tacoma apply new stormwater regulations adopted in the summer of 2015 to property development applications filed before July 1, 2015, if construction on those projects has not started before June 30, 2020.

Snohomish and King County and the Building Industry Association of Clark County challenged this requirement on the grounds that it conflicts with the vested rights doctrine, which holds that certain land development applications must be processed under the land use regulations in effect at the time the applicant files for a permit, even if the regulations change before work begins. The purpose of the doctrine is to give developers certainty and provide protection against fluctuating land use policy.

On appeal, the primary question was whether the 2013 Permit is subject to the vested rights doctrine as a “land use control ordinance.” The Washington Department of Ecology (Ecology) argued that the permit was an environmental regulation, not a land use control ordinance, because the intent is to control pollution discharges and not the use of land. The court rejected that argument and said that a regulation can be designated as both an environmental regulation and a land use control ordinance. Furthermore, the court stated that the mere characterization of a regulation as environmental does not preclude the vested rights doctrine. The court also did

not accept Ecology's arguments that the doctrine applies only to zoning laws or that it limits only municipal discretion, but not state-directed environmental conditions to comply with water pollution laws.

The court invalidated the 2013 Permit provision, finding that local regulations enacting the permit requirements constitute development regulations and standards, and the application of those regulations and standards to permits already applied for would violate the vested rights doctrine. The court remanded the case back to the Pollution Control Hearings Board to direct Ecology to revise the condition in the 2013 Permit to specify that it applies only to those completed building applications submitted after July 1, 2015, which have not yet started construction.

The Washington Supreme Court may accept review of the case in light of the widespread effect of these issues on the development community and the dissent that argued the federal Clean Water Act and state water-quality law preempt the vested rights doctrine. In the meantime, developers with permit applications filed before June 30, 2015, on projects that have not yet started construction do not have to alter their projects to include new low-impact development methods.

**For more information, please contact the Environmental Practice Group at
Lane Powell: lanepowellpc@lanepowell.com**

1.800.426.5801

lanepowell.com

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