Countryman, Ryan

From: Tom McCormick <tommccormick@mac.com>
Sent: Thursday, December 29, 2016 1:38 PM
To: MacCready, Paul
Cc: Countryman, Ryan; Gretchen Brunner; Tom Mailhot; Tom McCormick; Bill Willard; Jerry Patterson; John John
Subject: More support that the post-OSO 2015 regulations on landslide hazard areas should apply to BSRE's application

Paul and Ryan,

Today, the Washington Supreme Court issued another decision involving vesting and Snohomish County. Dec. 29, 2016 - 92805-3 - Snohomish County v. Pollution Control Hr'gs Bd.
http://www.courts.wa.gov/opinions/?fa=opinions.disp&filename=928053MAJ

It provides further support for our position that safety trumps vesting, and that the post-OSO 2015 regulations on landslide hazard areas should apply to BSRE's application.

One of many passages that caught my attention is this: The decision said that the Pollution Control Hearing Board correctly noted with respect to the vested rights doctrine and the doctrine of finality of land use decisions, that a developer does "not have a legitimate expectation that pollution control measures will be frozen in time to outdated or ineffective measures."

Thank you.

Tom McCormick

Begin forwarded message:

From: Tom McCormick <tommccormick@mac.com>
Subject: Public safety trumps vesting, so the post-OSO 2015 regulations apply to Point Wells
Date: April 19, 2016 at 11:16:04 AM HST
To: Ryan Countryman <ryan.countryman@snoco.org>
Cc: Gretchen Brunner <gbrunner@eaest.com>, Tom Mailhot <tmailhot@frontier.com>

Ryan,

At last week's RBCA meeting, an attendee asked, "what changes as a result of the OSO landslide would be reflected in this project?" You responded, by saying:

> "No, we are not going to make any changes based on OSO, because our position is that [the developer's application] is vested to the 2011 regulations. ... There is a lot of case law about what kind of regulations you get vested to and what you don't. The changes that Snohomish County made as a result of OSO were to increase the area where you have to have special studies at the base of the slope, I think it tripled, and at the top of the slope I think it doubled. So don't quote me on those figures, but the basic point here with the Point Wells proposal is that any

> second route, at least part of that route, in fact probably most of that route, would require extra geotechnical engineering because it's [in] a landslide [hazard area]. But what they are calling the upper plaza phase, which is between the railroad tracks and the Town of Woodway, is partly also in that landslide hazard area, so there's additional work that would be required for the design of retaining walls, and getting surface water out of the site so that the hillside stays more stable. If, for some reason, and this is something that a lot of people have commented on, today's versions were required to be reviewed, then you'd still have those same issues plus you would have more of the site, in this case some of the site west of the railroad tracks would also be considered a landslide hazard area because it is within that distance between the toe of the slope. That doesn't mean that it can't be built, it just means more engineering work would need to be done. So you get the 2011 version with a lot of engineering, or the 2015 version with even more engineering, is kind of what it would come down to."

I disagree with your conclusion that the 2011 regulations on landslide hazard areas are the regulations that apply. Even though the developer's (BSRE's) applications may have been submitted in 2011, I believe that the post-OSO 2015 regulations on landslide hazard areas should apply— not the 2011 version of the regulations.

Public safety trumps vesting. "`There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community.'" *Hass v. Kirkland*, 78 Wn.2d 929, 931-32, 481 P.2d 9 (1971) (quoting City of *Seattle v. Hinckley*, 40 Wn. 468, 471, 82 P. 747 (1905)).

Governments have the right to take, destroy, or limit the use of property without compensation if necessary to address public safety issues. Governments can destroy homes to create a fire break, destroy trees or animals to stop the spread of a disease, or prohibit construction of homes within a floodway. See, for example, *Maple Leaf Investors, Inc. v. Department of Ecology*, 88 Wn.2d 726, 565 P.2d 1162 (1977), and the following summary of the case as contained in Washington Attorney General Advisory Memorandum, "Avoiding Unconstitutional Takings of Private Property" (December 2006):

> "A prohibition on construction for human habitation within a floodway is a valid exercise of the state police power, not a taking or damaging of private property. … Maple Leaf Investors owned property along the Cedar River in an area subject to flood control regulations, which prohibited construction for human habitation within the floodway channel. Seventy percent of the property lay within the floodway channel. Considering a claim that the flood control regulations effected a taking, the Washington Supreme Court examined the balance between the public interest in the regulations and the private interest in using the property without restriction. The court found the primary purpose of the regulations was not to put the property to public use, but to protect the public health and safety: the regulations prevented harm to persons who might otherwise live in the floodway, and barred the construction of structures that might break loose during a flood and endanger life and property downstream. Further, since 30 percent of the property was still usable, there was no indication that the regulations prevented profitable use of the property. Finally, the court noted that it was nature, not the government, that placed Maple Leaf's property in the path of floods. The court rejected the taking claim."

Public safety not only trumps the right to possess property (e.g., the government can destroy a house to create a fire break), but **public safety also trumps the right to develop property in the future under regulations that are no longer in effect**. Here, public safety trumps BSRE's supposed vesting to the 2011 regulations on geologically hazardous areas—a version of the regulations that is no longer in effect. Public safety dictates that the post-OSO 2015 version of the regulations pertaining to geologically hazardous areas is the operative version that applies to BSRE's proposed development of Point Wells.

It is clear that the post-OSO 2015 regulations were designed to protect public health and safety. The purpose of Snohomish County Code Chapter 30.62B, GEOLOGICALLY HAZARDOUS AREAS, as amended in 2015, is declared in 30.62B.010 to be as follows:

> "to provide regulations for the protection of public safety, health and welfare pursuant to the Growth Management Act (chapter 36.70A RCW), in geologically hazardous areas, including: erosion hazard, landslide hazard, seismic hazard, mine hazard, volcanic hazard, and tsunami hazard areas."

Since public safety trumps vesting, the post-OSO 2015 regulations apply to BSRE's applications to develop the Point Wells site.

I respectfully request that, in processing BSRE's applications to develop the Point Wells site, PDS follow the post-OSO 2015 regulations (not the 2011 version) pertaining to geologically hazardous areas. And I respectfully request that PDS fully explain in the DEIS that PDS is using the post-OSO 2015 regulations (not the 2011 version) pertaining to geologically hazardous areas in processing BSRE's applications.

Thank you.

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