



CASE REPORT

LAND USE CONTROLS - VESTED RIGHTS - NO WAIVER - SEPA - PHASED REVIEW. A development permit applicant may not selectively waive vested rights. Phased SEPA review is not appropriate for a final environmental impact statement. **East County Reclamation Co. v. Bjornsen**, ___ Wn.App. ___, 2005 WL 148769.

I. Facts. In 1989 and 1991, East County Reclamation (“East”) applied for a permit to construct a landfill. When East filed its application, the 1985 Solid Waste Management Plan, as amended in 1988 (“1985/88 SWMP”) was in effect. Additional amendments were made to the 1985/88 SWMP in 1994. East submitted its final environmental impact statement (“FEIS”) in June of 2001. Bjornsen challenged the adequacy of the FEIS. The hearing examiner ruled that East could waive its vested right to have its proposal reviewed under the 1985/88 SWMP, and further ruled East could waived its vested rights selectively to avoid compliance with later enacted requirements. Applying the regulations in accordance with East’s selective waivers, the hearing examiner found the FEIS inadequate and denied the permit. The Board of County Commissioners for Clark County affirmed the hearing examiner’s decision. On East’s appeal, the Clark County Superior Court reversed the hearing examiner’s decision, finding that the hearing examiner’s ruling regarding the adequacy of the FEIS was based on speculative reasoning and requirements not provided under SEPA. Bjornsen appealed.

II. Applicable Law and Analysis. Division II of the Court of Appeals held that the hearing examiner erred in allowing East to selectively waive its vested rights and by failing to review the application under the regulations and law in effect at the time East filed its initial application. The court said it was well settled that a land use application will be considered only under the land use statutes and ordinances in effect at the time of the application’s submission. The court cited case law stating that one purpose of the vesting rule is to establish a date certain so that a court is not required to search through the moves and countermoves of the parties.

With regard to SEPA review, the court said that phased review is appropriate when an environmental document is at an early stage, such as preliminary need or site selection. The court found that phased review under SEPA was inappropriate for East’s final environmental document which was intended to provide information for issuance of construction and operation permits.

III. Conclusion. This case clarifies that a development permit applicant cannot selectively waive vested rights in favor of later enacted laws or regulations. If an applicant wishes to have its project reviewed under a later enacted law or regulation, the applicant may withdraw and resubmit its permit application, which would then be subject to all laws and regulations in effect at that time.