GROWTH MANAGEMENT ACT CLE: 25 YEARS AND COUNTING

RECENT CASES RELATED TO WATER RESOURCES IN THE CONTEXT OF LAND USE PLANNING AND PERMITTING

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In providing these materials, Mr. Reichman is not representing or speaking on behalf of the Attorney General or the Department of Ecology.

I. INTRODUCTION

The interrelationship between land use planning and permitting laws and the laws governing water rights and the management of water resources in Washington is becoming increasingly important and challenging. The availability of water supply has always been a factor in both land use planning and permitting activities. However, as new water supplies have become less readily available to serve new development throughout the state, the tension between these two areas of law and policy has increased.

The increasing interrelationship, and often tension, between land use law and water law is demonstrated by a recent increase in cases related to these two areas of law before courts and administrative tribunals. The following provides summaries of several recent Washington cases that involve water resources disputes and issues related to land use planning and permitting activities by local governments.

II. WASHINGTON SUPREME COURT CASES

***Kittitas County v. Eastern Washington Growth Management Hearings Board,* 172 Wn.2d 144, 256 P.3d 1193 (2011)**

This case involved a challenge to development regulations issued by Kittitas County pursuant to the Growth Management Act (GMA). Futurewise and two local conservation organizations appealed the County's development regulations before the Eastern Washington Growth Management Hearings Board (Board). The Board, among other things, ruled that the regulations violated the GMA because they allowed the filing of multiple applications for separate subdivision projects with common ownership or a common scheme of development. The Board reasoned that the GMA was violated because the County failed to require either that a single application for land division be filed for a common development, or that multiple applications include sufficient information, to better enable the County to determine whether a project could qualify for a groundwater permit exemption for group domestic use under the Groundwater Code, RCW 90.44.050, and the Washington Supreme Court's decision in *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002). In *Campbell & Gwinn*, the Supreme Court held that a common residential project involving division of land can only qualify for one group domestic permit-exempt use of groundwater not exceeding 5,000 gallons per day. The Board concluded that these omissions in the County's subdivision regulations violated the GMA's requirement for the protection of water resources under RCW 36.70A.020(10) and RCW 36.70A.070(5)(c)(iv).

The County and several other parties sought judicial review of the Board's decision, and the case was accepted for direct review by the Court of Appeals. Ecology filed an amicus curiae brief supporting the Board's decision on grounds that the Board's water ruling requiring revision of the regulations was necessary for the County to meet requirements under the GMA, which requires the protection of groundwater resources, and RCW 58.17.110(2), which requires findings that "[a]ppropriate provisions are made for . . . potable water supplies" for subdivision application approvals by local governments. Ecology maintained that the Board correctly applied the law on the water issue, and correctly articulated the County's obligations and

authority when reviewing a proposed development that seeks to supply water to homes through permit-exempt groundwater wells under RCW 90.44.050.

Subsequent to the filing of Ecology's amicus curiae brief, the Court of Appeals consolidated the case with a separate case involving a challenge to the County's Comprehensive Plan under the GMA, and certified the matter to the Supreme Court, which accepted it for review. The Supreme Court affirmed the Board's decision on the water issue and held that local governments have responsibilities and obligations under the GMA and other land use laws to protect water resources, and that they are not preempted from taking actions that affect the use of water by Ecology's authority under the water resources statutes. The Court concluded that "the County is not precluded and, in fact, is required to plan for the protection of water resources in its land use planning." *Kittitas Cty.*, 172 Wn.2d at 179.

The Court affirmed the Board's ruling that the County's Development Regulations failed to comply with the GMA because they do not adequately protect water resources:

> Without a requirement that multiple subdivision applications of commonly owned property be considered together, the County cannot meet the statutory requirement that it assure appropriate provisions are made for potable water supplies. Instead, nondisclosure of common ownership information allows subdivision applicants to submit that appropriate provisions are made for potable water through exempt wells that are in fact inappropriate under *Campbell & Gwinn* when considered as part of a development, absent a permit.

Kittitas Cty., 172 Wn.2d at 180.

Further, in a holding that has major water management ramifications throughout the state, the Court concluded that in implementing RCW 58.17.110 and RCW 19.27.097, counties must ascertain that water is *legally* available, and not just *physically or factually* available, before they can approve applications for subdivisions and building permits. The Court rejected the County's position that it was only required to ascertain that water is physically available, e.g., through hydrogeological data showing that a well could successfully yield water, to determine that there is an appropriate provision for potable water supply to approve a subdivision under RCW 58.17.110:

> To interpret the County's role under RCW 58.17.110 to only require the County to assure water is physically underground effectively allows the County to condone the evasion of our state's water permitting laws. This could come at a great cost to the existing water rights of nearby property owners, even those in adjoining counties, if subdivisions and developments overuse the well permit exemption, contrary to the law.

Id. The Court further pronounced that, while counties are responsible to make land use decisions, including determinations of whether adequate water supply is legally available to support proposed subdivisions and building permits, and to comply with GMA provisions

requiring the protection of water resources through land use planning, Ecology has a role to assist counties in such activities:

> While Ecology is responsible for appropriation of groundwater by permit under RCW 90.44.050, the County is responsible for land use decisions that affect groundwater resources, including subdivision, at least to the extent required by law. In recognizing the role of counties to plan for land use in a manner that is consistent with the laws regarding protection of water resources and establishing a permitting process, we do not intend to minimize the role of Ecology. Ecology maintains its role, as provided by statute, and ought to assist counties in their land use planning to adequately protect water resources.

Id.

Knight v. City of Yelm,
173 Wn.2d 325, 267 P.3d 973 (2011)

JZ Knight filed a petition in Thurston County Superior Court under the Land Use Petition Act (LUPA) to challenge the City of Yelm's approval of five preliminary plat applications. The homes in the subdivisions would obtain their water from the City, in its capacity as a municipal water supplier. Knight contended that the approvals were unlawful under the City of Yelm's code, and RCW 58.17.110(2), which provides that subdivisions shall not be approved unless "[a]ppropriate provisions are made for . . . potable water supplies . . . ." Knight asserted that this requirement was violated based on her contention that the City did not hold adequate water rights to supply water to all the proposed new homes. The parties differed on the quantities of water that were authorized under the City's water rights, and the City had applications pending before Ecology to secure additional water rights to serve some of the homes. Ecology filed an amicus curiae brief in support of Knight's position.

The Superior Court ruled that, under RCW 58.17.110, the City must find proof of potable water supplies to serve the developments *before* final plat approvals can be issued, and that the City therefore erred in specifying in the preliminary plat approvals that such proof could be required either before issuance of final plat approvals or, later, before issuance of building permits. Further, the Superior Court stated in its opinion that when the City considers final plat approvals it "would have to require a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions." Thus, the Superior Court ruled that it would not be sufficient to merely show that applications for changes of existing water rights, or for new water permits, were pending before Ecology, to demonstrate that provisions are made for adequate water supply to support final plat approvals.

The City and the development proponents appealed the Superior Court's decision to the Court of Appeals, Division II. The Court of Appeals issued an unpublished decision that reversed the Superior Court's decision and ruled in favor of the City on the grounds that Knight failed to establish standing to bring the lawsuit.

Knight's petition for discretionary review of the Court of Appeals' decision was granted by the Supreme Court. The Supreme Court reversed the Court of Appeals' decision, and held that Knight had standing to challenge the City's decisions to approve the subdivision applications based on her concerns over potential impairment of her water rights:

> Knight has shown sufficient prejudice to satisfy RCW 36.70C.060(2) [LUPA's standing provision]. Her interest is not abstract. Knight owns land 1,300 feet away from the proposed subdivisions, and she has senior water rights within the same aquifer as Tahoma Terra's proposed sources of water for the new development. She presented allegations that the City is overdrawing its water rights and that it has insufficient water supplies to serve the proposed developments, allegations bolstered by [Ecology] in an amicus brief filed in support of Knight's LUPA petition in the superior court.

Knight, 173 Wn.2d at 342.

As a result of its reversal of the Court of Appeals' decision, the Supreme Court reinstated the Superior Court's decision in favor of Knight. Since the City had earlier conceded that appropriate provisions for potable water supplies for the subdivisions would have to be shown before final plat approvals could be granted, the Supreme Court's opinion does not include any holding pertaining to the Superior Court's earlier ruling that, under RCW 58.17.110, adequate water supply must be confirmed at the final subdivision approval stage. However, the Court's holding on standing is significant in establishing that concerns over water availability and potential impacts from water use can be grounds for standing to challenge a land use decision under LUPA.

Whatcom County v. Western Washington Growth Management Hearings Board,
Supreme Court No. 91475-3
186 Wn. App. 32, 344 P.3d 1256 (2015)

This case involves a challenge to Whatcom County's Comprehensive Plan under the GMA. Futurewise and several area citizens (collectively referred to as Futurewise) filed an appeal with the Growth Management Hearings Board (Board) to contest Whatcom County's enactment of an ordinance that updated its Comprehensive Plan, Zoning Code, and zoning maps. Futurewise contends that the Comprehensive Plan's rural element violates the GMA because it does not include adequate measures limiting rural development to protect rural character by protecting surface water and groundwater resources and water quality.

The GMA provides that "[t]he rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by: . . . (iv) [p]rotecting . . . surface water and groundwater resources . . . ." RCW 36.70A.070(5)(c). The Board ruled in favor of Futurewise and held that the ordinance does not adequately protect groundwater and surface water in the rural area because it fails to ensure that rural development will not further impair water availability and degrade water quality.

The Board reached its conclusion that the plan does not adequately protect water resources based on its understanding that under WAC 173-501, Ecology's instream flow rule for the Nooksack River Basin, water is no longer available for new uses in the rural areas of Whatcom County. The Board determined that the minimum instream flows and closures established by WAC 173-501 directly apply to permit-exempt groundwater use in the Basin: "[i]f Ecology has closed a stream to additional withdrawals, it is unlawful to initiate a permit-exempt groundwater withdrawal that would impact the stream." With respect to water quality, the Board concluded that stormwater runoff and malfunctioning septic systems are causing pollution problems in the rural area of the County: "evidence in the record of continued water quality degradation resulting from land use and development activities underscores the need for protective measures for water resources."

With respect to water management, this case tests the range of the Supreme Court's decision in *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011). In that case, the Supreme Court held that Kittitas County's development regulations failed to comply with the GMA because they did not include provisions to prevent the filing of multiple subdivision applications for a common development project to attempt to sidestep the requirement that a development is eligible for only one group domestic permit-exempt groundwater withdrawal. Here, the Board found that Whatcom County has adequate provisions to prevent the daisy-chaining of permit-exempt wells by filing multiple subdivision applications related to one common development because its subdivision regulations require applicants to provide evidence of an adequate water supply prior to approval and require that "contiguous parcels of land in the same ownership shall be included within the boundaries of any proposed . . . subdivision." However, it concluded that the Rural Element violates GMA provisions requiring protection of surface and groundwater by allowing any development whatsoever that would rely on a permit-exempt well for water supply without mitigation to ensure there would be no impact on stream flows.

The Board remanded the ordinance to Whatcom County with directions to take necessary actions to achieve compliance with the GMA. However, while the Board ruled that portions of the Comprehensive Plan's Rural Element fail to comply with the GMA, it denied Futurewise's request for a declaration that the noncompliant provisions are invalid.

Whatcom County filed a petition for review of the Board's decision in Skagit County Superior Court, and Futurewise filed a petition for review in Thurston County Superior Court to challenge the Board's denial of its request for a "declaration of invalidity." After the cases were consolidated in Skagit County Superior Court, Whatcom County and Futurewise both filed motions to the Court of Appeals, Division I seeking direct appellate review, which were granted. As a result, this case bypassed the Superior Court and went directly to the Court of Appeals. Ecology filed an amicus curiae brief in support of the County, which argued, among other things, that the Board erred in ruling that the County failed to comply with the GMA because the Board misread the Nooksack Rule by concluding that the instream flows and stream closures under that rule apply to permit-exempt uses of groundwater.

The Court of Appeals ruled in favor of the County and reversed the Board's decision on the water resources issues. The Court closely followed Ecology's amicus brief and held that the

County complied with the GMA by including a provision that would help prevent the "daisy-chaining" of permit-exempt wells, and a regulation providing that land use applications will not be approved if water use is disallowed under an Ecology water management rule. The Court further held that the County did not violate the GMA by not requiring that land use applications be denied when applicants propose to obtain water through a permit-exempt well in an area that is closed to new appropriations, or where instream flows are not met, under Ecology's Nooksack Rule. The Court agreed with Ecology's interpretation that permit-exempt groundwater use is not governed under the Nooksack Rule. And, perhaps most significantly, the Court held that to comply with the GMA's requirements to protect water resources, counties must act consistently with Ecology's rules—and that counties are not required to be more restrictive of water use than Ecology is under its rules.

Futurewise filed a petition requesting the Supreme Court to accept review of the Court of Appeals' decision, which was granted. Oral argument before the Supreme Court was held on October 20, 2015, and a decision is pending.

III. WASHINGTON COURT OF APPEALS CASES

Gresh v. Okanogan County & Mazama Properties, LLC,
Court of Appeals No. 31394-8-III (unpublished opinion)

Gresh challenged Okanogan County's approval of Mazama Properties' (Mazama) application for a rezone to authorize development of a residential and commercial project. Gresh asserted that the County violated the State Environmental Policy Act (SEPA) by issuing a determination of non-significance (DNS) and not requiring preparation of an environmental impact statement (EIS) based on its finding that the proposal would not likely cause significant environmental impacts. Gresh contended that the project's use of groundwater will cause significant environmental impacts because such use would violate RCW 90.44.050, the statute exempting certain groundwater uses from permitting requirements.

In 2007, the County approved Mazama's application for the Mazama Bridge Short Plat, a 4-lot residential development located in Mazama. Under RCW 58.17.110(2), a local government cannot approve an application for a subdivision unless it determines that "[a]ppropriate provisions are made for . . . potable water supplies" to serve the proposed development. Under that statute, the County determined there was adequate water supply to support the proposed development under the groundwater permit exemption for group domestic use because the four lots would require no more than 5,000 gallons per day (gpd) of water. A total of 5,000 gpd of water was apportioned among the four lots, and 2,880 gpd was allocated to Lot 1.

In 2010, Mazama applied to the County to further subdivide Lot 1 into twelve lots (six residential, and six commercial) through an application for approval of the Nordic Village Long Plat. Under RCW 58.17.110(2), the County determined there was adequate water supply under the group domestic and industrial groundwater permit exemptions because water service to the twelve lots would not exceed the 2,880 gpd apportioned to Lot 1 through the prior Mazama Bridge Short Plat approval. In 2010, the County issued a DNS for this proposal based on its finding that preparation of an EIS was not required because the proposal would not likely cause

significant environmental impacts. Later, in 2011, the County approved the application for the Nordic Village Long Plat. Gresh did not appeal that subdivision approval.

Later in 2011, Mazama applied to the County to rezone the six lots designated for commercial use from "urban residential" to "neighborhood commercial" to gain more flexibility in the types of businesses that could be operated on the commercial lots. The County determined that the proposed rezone would not result in any need for additional water supply, or cause any different environmental impacts, issued a DNS, and approved Mazama's rezone application. Gresh filed a petition for review of the County's rezone approval in Okanogan County Superior Court, which affirmed the County's decision. Gresh appealed the Superior Court's decision to the Court of Appeals, Division III, where Ecology filed an amicus curiae brief in support of the County.

This case presented the issue of whether, under RCW 58.17.110, the County correctly ascertained that there is adequate legal water supply under the groundwater permit exemptions to serve the six commercial and six residential parcels in Mazama's proposed subdivision. However, the Court of Appeals ruled in favor of the County based on Gresh's failure to timely appeal the County's subdivision approval, and did not reach the water right issue. The Court did note in a footnote in its unpublished opinion that "[l]ike Mr. Gresh, this court has a hard time understanding how the twelve lots hope to subsist on only 2,880 gallons of water per day . . . ."

Gresh filed a petition to the Supreme Court requesting discretionary review of the Court of Appeals' decision, which was denied on September 1, 2015.

***Fox v. Skagit County*,**
Court of Appeals No. 73315-0-I

The Foxes filed a Petition for Writ of Mandamus against Skagit County which requested the Skagit County Superior Court to issue an order requiring the County to approve the Foxes' building permit application. Ecology and the Swinomish Indian Tribal Community were granted intervention as parties in this case and opposed the Foxes' request for a writ of mandamus.

This dispute arose after the Supreme Court's decision in *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013), where the Court invalidated the 2006 Amendment to the Skagit River Basin Instream Flow Rule, WAC 173-503. The 2006 Amendment had provided reservations of water that would allow some new water uses in the Skagit Basin notwithstanding their impacts on minimum instream flows established by the Rule. As a result of the *Swinomish* decision, the Rule reverted back to its original version, which does not include the water reservation that would have provided a source of water for the Foxes' proposed new house.

The Foxes have a building permit application pending before the County, which, under the *Swinomish* decision, the County has deemed to be "incomplete" because the Foxes have not demonstrated that they have an adequate supply of water for their proposed house under RCW 19.27.097. Under the Supreme Court's decision in *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011), counties are

required under RCW 19.27.097 to determine that an adequate supply of water is legally (and not just physically) available before a building permit can be issued. The Foxes would obtain their water supply from a permit-exempt well in the Skagit River Basin. Based on information provided by Ecology to the County, the County has determined that adequate water supply is not legally available because the Foxes' domestic water use would be subject to interruption when minimum instream flows under the Skagit River Basin Instream Flow Rule are not met.

The Foxes are advancing several legal theories to support their position that they qualify for a building permit. Among other things, they contend that the groundwater permit exemptions shield a prospective water user from all regulation, that all landowners have a form of riparian or "correlative" right that is an "irreducible right" to water beneath their land, and that the Skagit Rule does actually not govern permit-exempt groundwater use.

In December 2014, after hearing oral argument, the Superior Court ruled in favor of Ecology and the Tribe and denied the Foxes' petition. The Court concluded that the Foxes did not demonstrate that they have an adequate legal water supply to support approval of their building permit application because the Skagit Rule governs groundwater use and an interruptible water supply is not adequate to support a home. The Foxes' appealed the Superior Court's decision to the Court of Appeals, Division I, where the parties have completed briefing, but oral argument has not yet been scheduled.

IV. WASHINGTON SUPERIOR COURT CASES

Methow Valley Citizens' Council & Futurewise v. Okanogan County,
Okanogan County Superior Court No. 15-2-00005-7

The Methow Valley Citizens Council and Futurewise (MVCC) filed a lawsuit in Okanogan County Superior Court to challenge Okanogan County's recent update of its comprehensive land use plan. MVCC is contesting the County's adoption of its 2014 Comprehensive Plan and associated planning maps and documents, which include an Interim Zone Code and Interim Zone Map.

MVCC contends that the Comprehensive Plan violates the Planning Enabling Act, RCW 36.70, because it fails to adequately protect water resources and water quality. As a consequence of its population, Okanagon County is not required to fully engage in land use planning activities under the Growth Management Act (GMA). As a result, the County has opted to engage in planning under the requirements of the Planning Enabling Act. The Planning Enabling Act requires that the land use element of a comprehensive plan shall "provide for protection of the quality and quantity of groundwater used for public water supplies." RCW 36.70.330(1). Thus, an issue has been raised in this case as to whether counties that plan under the Planning Enabling Act must meet the same requirement for the protection of water resources in their comprehensive plans that is provided under the GMA and was at issue in *Whatcom County v. Western Washington Growth Management Hearings Board*, 186 Wn. App. 32, 344 P.3d 1256 (2015), discussed above.

MVCC asserts that the County violated the Planning Enabling Act's requirement for protection of groundwater because the Interim Zoning Code allows the development of many more homes than can be supported by available water supply in the County as a result of, among other things, Ecology's instream flow rules for the Methow River Basin, WAC 173-548, and the Okanogan River Basin, WAC 173-549.

Additionally, MVCC contends that the County violated the State Environmental Policy Act by issuing a determination of non-significance and not preparing an environmental impact statement that would, among other things, fully consider impacts on water resources that would be caused by implementation of the Plan. Ecology has filed an amicus curiae brief supporting the MVCC's positions on the Planning Enabling Act and SEPA issues in this case. Oral argument is scheduled on November 23, 2015.

V. POLLUTION CONTROL HEARINGS BOARD CASES

Steensma v. Department of Ecology,
PCHB No. 11-053

This case involved a dispute related to a preliminary subdivision application filed in Whatcom County. The Steensmas attempted to appeal to the PCHB a letter sent by Ecology to Whatcom County, which contained Ecology's comments relating to the proposed water supply associated with the residential project proposed through the preliminary subdivision application. The Steensmas own land near the subdivision, which will obtain its water supply from a well under the group domestic exemption from permitting requirements for the use of groundwater provided in RCW 90.44.050.

Ecology's letter provided information to assist Whatcom County in making its determination of whether there were appropriate provisions for water supply under RCW 58.17.110 during the County's processing of the preliminary subdivision application. Based in part on the information contained in Ecology's letter, Whatcom County approved the subdivision through its finding that there was appropriate provision for potable water supply to support the proposed project through the group domestic exemption under RCW 90.44.050.

Ecology filed a motion to dismiss the case on the grounds that Ecology's letter was not an appealable decision, and that the PCHB therefore lacked jurisdiction over the purported appeal. The PCHB granted Ecology's motion, and agreed with Ecology's position that the actual decision that could be appealed in this dispute was the County's decision on the subdivision application—and not Ecology's letter offering information for the County to consider in making its water supply determination under RCW 58.17.110 as part of its land use application decision.