WASHINGTON'S GROWTH MANAGEMENT HEARINGS BOARD WADES INTO WATER LAW

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Opponents of Washington's groundwater permit exemption have opened up a new front in their war on exempt wells. In *Hirst v. Whatcom County*, the Growth Management Hearings Board, a statewide administrative appeals board with jurisdiction to review local land use plans and development regulations, ruled that the state Growth Management Act requires a county to restrict the use of exempt wells for rural residences. The case is now before the state court of appeals, which must decide whether the Growth Management Act directive to "protect rural character" effectively overrides explicit groundwater permit exemptions in the Water Code and "single domestic" exemptions from minimum instream flows promulgated by the Department of Ecology.

Washington's Growth Management Act

In 1990, the Washington Legislature enacted the Growth Management Act, RCW chapter 36.70A, requiring many of Washington's 39 counties to adopt comprehensive plans and development regulations to implement those plans. The Act was originally conceived as a framework of state requirements and deadlines to guide a "bottom up" local planning process. The statute requires local governments to apply a set of disparate and broadly-worded planning goals (e.g., to "[p]rotect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water") in devising plans and regulations appropriate to local circumstances. *See* RCW 36.70A.020. Local governments are required to review and revise their comprehensive plans and development regulations every seven years.

Predictably, the Growth Management Act has spawned a significant amount of litigation. The Legislature established the Growth Management Hearings Board ("GMHB") to review claims that local comprehensive plans or development regulations are not consistent with the state statute. *See* RCW 36.70A.280 *et seq.* Local plans and regulations are presumed valid upon adoption, and the challenger has the burden of demonstrating lack of compliance with the Growth Management Act. *See* RCW 36.70A.320.

The Legislature has explicitly directed the GMHB to grant deference to counties in how they plan for growth, consistent with the requirements and goals of the Act:

> Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community. (RCW 36.70A.3201.)

Notwithstanding the statutory presumption of validity, burden of proof, and required deference to local planning, in practice the GMHB readily finds local governments out of compliance with the Growth Management Act by determining that local plans are "clearly erroneous" in light of the Act's goals and requirements.

"Rural" Planning Requirements

The original focus of the Growth Management Act was on urban lands, resource lands, and critical areas. Before 1997, the Act did not define "rural" lands, which the GMHB once characterized as "the leftover meatloaf in the GMA refrigerator." *Achen v. Clark*, WWGMHB No. 95-2-0067 (1995). In 1997, the Legislature amended the statute to require counties to provide a "rural element" in their comprehensive plans, including "measures that apply to rural development and protect the rural character of the area, as established by the county," by (among other things) "protecting . . . surface water and groundwater resources." RCW 36.70A.070(5).

The Legislature also amended the GMA to include definitions for "rural development" and "rural character":

> "Rural development" refers to development outside the urban growth area and outside agricultural, forest, and mineral resource lands . . . . Rural development can consist of a variety of uses and residential densities, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas. (RCW 36.70A.030(16)).
>
> "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan: (a) In which open space, the natural landscape, and vegetation predominate over the built environment; (b) That foster traditional rural lifestyles, . . . and opportunities to both live and work in rural areas; (c) That provide visual landscapes . . . traditionally found in rural areas and communities; (d) That are compatible with the use of the land . . . for fish and wildlife habitat; (e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development; (f) That generally do not require the extension of urban governmental services; and (g) That are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas. (RCW 36.70A.030(15)).

In 2002, the Legislature further amended the GMA to provide that "in defining its rural element under RCW 36.70A.070(5), a county should foster land use patterns and develop a local vision of rural character that will: Help preserve rural-based economies and traditional rural lifestyles; encourage the economic prosperity of rural residents; foster opportunities for small-scale, rural-based employment and self-employment; permit the operation of rural-based agricultural, commercial, recreational, and tourist businesses that are consistent with existing and planned land use patterns; be compatible with the use of the land by wildlife and for fish and wildlife habitat; foster the private stewardship of the land and preservation of open space; and enhance the rural sense of community and quality of life." RCW 36.70A.011.

Nooksack River Basin Regulations

Rural areas within Whatcom County are located within the Nooksack River Basin, which is the subject of an instream resources protection program promulgated in 1985 by the Department of Ecology ("Ecology") that established minimum instream flows for numerous stream segments and closed some streams to further appropriation. *See* WAC chapter 173-501.

The Nooksack basin rule includes explicit exemptions for single domestic uses, as follows:

> "Single domestic, (including up to 1/2 acre lawn and garden irrigation and associated noncommercial stockwatering) shall be exempt from the provisions established in this chapter, except that Whatcom Creek is closed to any further appropriation, including otherwise exempted single domestic use. For all other streams, when the cumulative impact of single domestic diversions begins to significantly affect the quantity of water available for instream uses, then any water rights issued after that time shall be issued for in-house use only, if no alternative source is available." (WAC 173-501-070(2).)

The Groundwater Permit Exemption

Washington's groundwater code, RCW chapter 90.44, provides a permit exemption for any withdrawal of groundwater for single or group domestic uses in an amount not exceeding 5,000 gallons per day. RCW 90.44.050. This exemption allows appropriation of groundwater and acquisition of a groundwater right without going through the permit process under the Water Code, i.e., without having to satisfy the four-part test (water availability, beneficial use, no impairment of existing rights, no detriment to the public welfare). *Id.*; *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 8-9, 43 P.3d 4 (2002). Once the appropriator perfects the right by actual application of the water to beneficial use, the right is otherwise treated in the same way as other perfected water rights. *Campbell & Gwinn*, 146 Wn.2d at 9.

In *Campbell & Gwinn*, the Washington Supreme Court held that a developer who drilled individual wells on 16 lots in a development would be entitled to only one

permit exemption for "group domestic" use, and that a water right permit would be required if the collective withdrawal from all 16 wells would exceed 5,000 gallons per day.

Campbell & Gwinn set the stage for *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011). At issue in *Kittitas County* was the practice of "daisy chaining" or dividing a single subdivision application into multiple projects in order to exploit the groundwater permit exemption for group domestic use and circumvent the rule announced in *Campbell & Gwinn*. Kittitas County's subdivision ordinance did nothing to inhibit this practice, for example by requiring subdivision applicants to disclose common ownership of adjoining land.

Opponents appealed Kittitas County's plan and subdivision regulations under the Growth Management Act, successfully arguing to the GMHB that by not requiring subdivision applicants to disclose common ownership of "daisy chained" subdivision projects, the County had failed to protect water resources as required under the Act. The Washington Supreme Court agreed, emphasizing counties' responsibility "to plan for land use in a manner that is consistent with the laws providing protection of water resources and establishing a permitting process." *Kittitas County*, 172 Wn.2d at 180.

Kittitas County stands for the rather unremarkable proposition that a county should not turn a blind eye to developers' attempts to circumvent the requirements of the Water Code and the subdivision laws. Notwithstanding the narrow issue decided by the Court, some of the language in *Kittitas County* (e.g., "the County must regulate to some extent to assure that land use is not inconsistent with available water resources") set the stage for a more comprehensive attack on exempt well use in *Hirst v. Whatcom County*.

Whatcom County's Rural Development Plans and Regulations

In 2012, Whatcom County adopted Ordinance No. 2012-032, consisting of amendments to the rural element of its Comprehensive Plan and its development regulations, including specific policy measures to protect the quantity and quality of surface water and groundwater. These measures include determination of

water availability in the context of subdivision and building permit applications, as required by state law.

Applicants for building permits and subdivisions are required to provide evidence of an adequate water supply prior to approval. County ordinances (Whatcom County Code chapters 21.04 and 24.11) set forth specific requirements where an applicant seeks to rely on water from an existing public water system, where an applicant proposes creation of a new public water system, and where an applicant proposes use of water from a private well. For a subdivision or building permit application relying on a private well, the County will approve the application only where the well "proposed by the applicant does not fall within the boundaries of an area where [Ecology] has determined by rule that water for development does not exist." Whatcom County Code 24.11.090, .160, .170.

Whatcom County specifically addressed the subdivision "daisy chain" problem at issue in the *Kittitas County* case by requiring that contiguous parcels of land in the same ownership be included within the boundaries of any proposed subdivision, and providing that "lots so situated shall be considered as one parcel." Whatcom County Code 21.01.040.

Hirst Appeal and GMHB Decision

Four citizens and a nonprofit organization filed an appeal with the Growth Management Hearings Board, alleging that Ordinance 2012-032 fails to contain measures to protect rural character by protecting surface water and groundwater resources. The petitioners argued that the *Kittitas County* decision requires Whatcom County to adopt specific measures to protect water resources, specifically to "solve the problem of proliferation of individual exempt wells" in the county. *See Hirst v. Whatcom County*, GMHB No. 12-2-0013 (Final Decision and Order, June 7, 2013) at 16.

The GMHB agreed, ruling that Whatcom County has failed to adopt "measures to protect rural character" in its comprehensive plan because it does not require building permit applicants to demonstrate that any proposed exempt well will not impair minimum instream flows set by rule in the Nooksack River basin. *Id*. at 42 ("ultimately, a building permit for a private single-residential well does not

require the applicant to demonstrate that groundwater withdrawal will not impair surface flows").

The GMHB based its ruling on *Kittitas County*, extending the Supreme Court's holding far beyond the subdivision/exempt well subterfuge issue in that case. Acknowledging that Whatcom County has in place subdivision regulations that preclude applicants from circumventing restrictions on exempt wells, the GMHB concluded that the Growth Management Act nevertheless imposes a much more expansive duty to regulate water use. *Id*. at 40-42.

The GMHB's ruling is noteworthy for its disregard of the "single domestic" use exemption in the applicable Ecology regulations. In the Nooksack River Basin, minimum instream flows and stream closures explicitly do not apply to single domestic uses, i.e., to the "private single-residential well" the GMHB determined should be restricted by the County. Acknowledging the County's ordinances prohibiting use of exempt wells "where [Ecology] has determined by rule that water for development does not exist," the GMHB stated: "However, this is not the standard to [sic] determining legal availability of water." *Id*. at 41.

As support for its notion of the appropriate "standard" for determining water availability, the GMHB cited a letter from Ecology's Director to the planning director of a different county, addressing a different basin regulation under which single domestic uses were *not* exempted (i.e., the exact opposite of the Nooksack basin regulation). Relying on that letter, the GMHB concluded that "the County must deny a permit for a new building . . . unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows." The county-level impairment analysis required by the GMHB effectively abrogates the single domestic use exemption from the Nooksack River basin regulations, as well as the groundwater permit exemption in Washington law.

Whatcom County appealed the GMHB decision and sought direct review by the state Court of Appeals. On August 15, 2013, the GMHB issued its Certificate of Appealability, agreeing that its decision is appropriate for direct appellate review because it raises fundamental and urgent issues of statewide applicability. On

November 22, 2013, Division One of the Court of Appeals accepted review of the appeal.

Conclusion and Implications

The GMHB's interpretation of Growth Management Act requirements to "protect water resources" suggests that counties throughout Washington may have an independent duty to evaluate impairment of water rights or instream flows when reviewing building permit applications, regardless of applicable state statutes and regulations. The appellate courts – or the Legislature – must ultimately decide whether Washington will have dual and potentially conflicting systems of water resource management, one administered by Ecology and one administered by local governments.

Note: The Board's decision can be viewed at http://www.gmhb.wa.gov/LoadDocument.aspx?did=3321.

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