

Public Land & Resources Law Review

Volume 0 *Case Summaries 2017-2018*

Article 3

September 2017

Whatcom County v. Hirst, et al

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Recommended Citation

George, Stephanie A. (2017) "Whatcom County v. Hirst, et al," *Public Land & Resources Law Review*: Vol. 0 , Article 3.

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***Whatcom County v. Hirst*, 186 Wash.2d 648, 381 P.3d 1 (Wash. 2016)**

Stephanie A. George

Upending decades of common practice in water management and building in the state of Washington, the Washington Supreme Court found Whatcom County violated the state’s Growth Management Act. Whatcom County used the Department of Ecology’s Nooksack Rule in evaluating permits for buildings and subdivisions that rely on permit-exempt wells. This decision affects families across the state of Washington.

I. INTRODUCTION

Seeking to cure ailments in its land use regulations, Whatcom County (“County”) revised its comprehensive land use plan to conform with Washington’s Growth Management Act (“GMA”).¹ Insufficiencies in the County’s water availability and water quality regulations led it to adopt the Department of Ecology’s (“Ecology”) Nooksack Rule.² The County used the rule to determine water availability when evaluating building permit applications relying on permit-exempt wells.³ County residents challenged this, arguing this method of permitting did not adequately protect surface and groundwater resources.⁴ The Washington Growth Management Board (“Board”) agreed and concluded that Whatcom County failed to comply with the GMA. The Washington Court of Appeals disagreed, finding that the County’s plan did comply with the GMA.⁵ The Washington Supreme Court reversed the Court of Appeals, holding that the County could not rely on the Ecology’s Nooksack Rule to determine water availability.⁶

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1997, the County adopted a comprehensive land use plan and development regulations that complied with the original language of the GMA. The regulations provided: “The rural element [of a comprehensive plan] shall permit land uses that are compatible with the rural character of such lands and provide for a variety of rural densities.”⁷ However, two months after the plan’s adoption, the GMA was amended, giving rise to a series of challenges to the County’s comprehensive plan.⁸ The Board heard

1. *Whatcom Cnty. v. Hirst*, 381 P.3d 1, 4 (Wash. 2016).
2. *Id.*
3. *Id.*
4. *Id.* at 4–5.
5. *Id.* at 6.
6. *Id.* at 7.
7. *Gold Star Resorts, Inc. v. Futurewise*, 222 P.3d 791, 793 (Wash. 2009).
8. *Id.*

the challenges and directed the County to revise its comprehensive plan to conform with the 1997 amendments. The Washington Supreme Court upheld the Board's order.⁹

In response, the County amended its comprehensive plan and zoning code.¹⁰ It adopted Ecology's regulations regarding water availability to comply with the GMA requirement that counties include measures to protect surface and groundwater availability and quality in their comprehensive land use plans.¹¹ These regulations allowed "[A] subdivision or building permit applicant to rely on a private well only when the well site 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."¹² This regulation, adopted in 1985, is known as the Nooksack Rule. It established minimum instream flows for water resource inventory area 1 ("WRIA 1"), which covers most of the County.¹³

Petitioners challenged the ordinance's adequacy to protect surface and groundwater resources and sought a declaration of invalidity.¹⁴ The Board interpreted the GMA's planning requirements and goals to specify that "a County's Comprehensive Plan rural lands provision must include measures governing rural development to protect water resources."¹⁵ This included protections of "instream flows, groundwater recharge, and fish and wildlife habitat."¹⁶ Petitioners argued that the County's comprehensive plan failed to protect instream flows because the plan did not require the County to determine whether water was legally available before issuing building permits for structures relying on permit exempt wells.¹⁷ The County argued that its comprehensive plan did protect instream flows because it followed the Nooksack Rule, only approving building permits that relied on permit-exempt wells when they did not fall within an area that "[Ecology had] determined that water for development did not exist."¹⁸

The Board concluded that the County failed to comply with the GMA's requirement to protect surface and groundwater resources.¹⁹ It determined that the County's comprehensive plan did not protect water availability or water quality.²⁰ It remanded the ordinance to the County to revise.²¹ Both parties appealed. The County challenged the Board's determination of noncompliance with the GMA, and Petitioners

9. *Whatcom Cnty.*, 381 P.3d at 4.
10. *Id.*
11. *Id.*
12. *Id.* (citing Chapter 173-501 WAC)
13. *Id.* at 7.
14. *Id.* at 4-5.
15. *Id.* at 5.
16. *Id.*
17. *Id.* at 7.
18. *Id.*
19. *Id.* at 6.
20. *Id.*
21. *Id.*

challenged the Board's decision to not declare the ordinance invalid.²² The Court of Appeals reversed the Board, holding that the County's ordinance did comply with the GMA, and affirmed the Board's decision not to declare the ordinance invalid.²³ The Washington Supreme Court granted review.²⁴

III. ANALYSIS

A. *The County Failed to Comply with the GMA's Requirement to Protect Water Availability*

The Court concluded that the County's comprehensive plan violated the GMA and failed to protect the availability of surface and groundwater resources, because it allowed permit-exempt appropriations to inhibit minimum flows.²⁵ Minimum flows are "flows or levels to protect instream flows necessary for fish and other wildlife, recreation and aesthetic purposes, and water quality."²⁶ Withdrawals exempt from permit requirements include any withdrawal that does not exceed 5,000 gallons a day.²⁷ Established in 1945, this encouraged the development and settlement of family farms that drew between 200 and 1,500 gallons of water per day.²⁸ The legislature enacted the GMA in 1991 to address growing concerns about rapid growth and development across the state and its impact on minimum flows.²⁹ Because the GMA requires counties to "protect the rural character of the area" through their land use planning, the Court concluded that the GMA required the County to make determinations of water availability before issuing permits.³⁰

Furthermore, the Court held that the plain language of the GMA explicitly placed the burden on the counties, not Ecology, to address water availability in land use planning.³¹ The County's comprehensive plan did not require a showing of water availability when the building permit applicant relied on a permit-exempt water appropriation, but instead relied on Ecology's Nooksack Rule to determine availability.³² The Court concluded that the County erred in doing this because the GMA placed the burden on counties to ensure water is legally and actually available before issuing building permits.³³

22. *Id.*

23. *Id.*

24. *Id.* at 7.

25. *Id.* at 8-9.

26. *Id.* (quoting *Swinomish Indian Tribal Cmty. v. Washington State Dep't. of Ecology*, 311 P.3d 6, 16 (Wash. 2013).

27. *Whatcom Cnty.*, 381 P.3d at 9.

28. *Id.*

29. *Id.* at 10.

30. *Id.* at 11.

31. *Id.*

32. *Id.*

33. *Id.* at 12.

Additionally, the Court held that the County failed to comply with the GMA and protect the availability of water resources by using Ecology's Nooksack Rule.³⁴ According to Ecology, the Nooksack Rule presumes water availability "based on the scientific understanding [in 1985, when] Ecology determined that only limited instances would occur in which groundwater withdrawals might impair instream flows."³⁵ This understanding evolved over time with the advancement of science. The Board found that as early as 1999, the County had recognized that permit exempt wells were creating "difficulties for effective water resource management."³⁶ By relying on the Nooksack Rule, the County contradicted the GMA's requirement that counties protect water resources by determining that water was legally and actually available before issuing permits.³⁷

The Court further found that the County's plan was inconsistent with past decisions protecting basins and minimum flows from groundwater appropriations.³⁸ In past decisions, the Court held that a permit-exempt well may not infringe on an earlier established right to water, which included minimum flows.³⁹ Once Ecology established a minimum flow, it was considered an existing water right that may not be compromised by later water withdrawals.⁴⁰ Therefore, if a building permit relying on a permit-exempt well impaired a minimum instream flow, it must be denied.⁴¹ By relying on the Nooksack Rule in evaluating building permits, the County did not review each permit application for impairment of existing rights, so it did not comply with the Court's past decisions.⁴²

B. The County Failed to Comply with the GMA's Requirement to Protect Water Quality.

The Court interpreted the GMA to require counties to protect the quality of the water used for public purposes.⁴³ The goal of the GMA is to "protect the environment and enhance the state's high quality of life, including air and water quality."⁴⁴ Petitioners argued that this means the County must not only protect water quality, but must also enhance the quality of the water through their comprehensive plans.⁴⁵ However, the

34. *Id.* at 14.

35. *Id.*

36. *Id.* at 6. (quoting EX. C—671—D at 49 (1999 *Whatcom County Water Resource Plan*)).

37. *Id.* at 16.

38. *Id.* at 16.

39. *Id.* at 16.

40. *Id.* at 17.

41. *Id.* at 17.

42. *Id.* at 18.

43. *Id.*

44. *Id.*

45. *Id.*

Court saw nothing in the language of the statute imposing a duty on counties to enhance water, though it did require counties to protect it.⁴⁶

The Court found that the Board was correct in its determination that the County's policies did not adequately protect water quality.⁴⁷ The Board found that the County's plan did not contain any measures to limit development for protection of water resources.⁴⁸ The County's plan also did not ensure that land use and development patterns were consistent with surface and groundwater protection throughout its rural area.⁴⁹ Therefore, the Court found that the County's plan violated its duty under the GMA to protect water resources.⁵⁰ The Court also held that the Board did not abuse its discretion in declining to make a determination of invalidity regarding the County's plan.⁵¹

IV. DISSENT

Justice Stephens dissented from the majority's holding. He disagreed with the majority's assumption that by requiring counties to determine water availability before granting building permits, the GMA prohibits counties from relying on Ecology's determination of water availability for withdrawal.⁵² The dissent argued that this holding will require individual building permit applicants to commission hydrogeological studies to determine the impact of their very small withdrawal on senior water rights.⁵³ Then, the local building department would have to evaluate the sufficiency of the studies.⁵⁴ Justice Stephens argued that the practical result of this would be to impose impossible burdens on landowners, potentially put counties at odds with Ecology, and stop counties from granting building permits that rely on permit-exempt wells.⁵⁵ According to the dissent, this is not what the legislature intended when it enacted the GMA.⁵⁶

RCW 19.27.097, part of the GMA, provides in part that "each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building."⁵⁷ According to Justice Stephens, the use of the term "adequate" instead of "available" was important. The dissent reasoned that this meant applicants were not required to show that water was legally

46. *Id.* at 19.
47. *Id.* at 20.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 22.
52. *Id.* at 24 (Stephens, J., dissenting).
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*

available, just that it was there.⁵⁸ Therefore, by deferring to Ecology's determination of water availability, the County's comprehensive plan was not in violation of the GMA.⁵⁹

The dissent commented that allowing counties to rely on Ecology's water determinations would promote the "integrated, comprehensive management the legislature envisioned."⁶⁰ Additionally, it would promote consistency in water management and protection throughout a basin.⁶¹ Basins can cross county lines, and allowing counties to rely on one overarching determination promotes consistency.⁶² According to the dissent, the majority's holding would require each county to determine their own approach to permit applications, and this county-by-county approach would perpetuate the tragedy of fragmentation in resource management.⁶³ The dissent contended that counties lack Ecology's expertise and statewide perspective, and are not adequately equipped to thoroughly vet information provided by permit applicants.⁶⁴ Therefore, according to the dissent, prohibiting counties from relying on Ecology's water determinations would only further harm water resources. Thus, counties should be allowed to rely on Ecology's Nooksack Rule when granting building permits that rely on permit-exempt wells.⁶⁵

V. CONCLUSION

The Washington Supreme Court invalidated the County's comprehensive land use plan because by relying on Ecology's Nooksack Rule when granting building permits that rely on permit-exempt wells, it violated GMA protections of minimum flows. This holding imposed a duty on Washington counties to determine not only the availability of water, but also the water's legal availability for each building permit applicant who relies on a permit-exempt well. This decision will cause a county-by-county approach to water management in the state, and cause counties to rely on their own expertise and resources in evaluating permit applications, which may impact their ability to approve applications. This decision will have a great impact on water management and Washington landowners, but, as the majority hopes, may help to protect water resources within the state.

58. *Id.* at 25.

59. *Id.*

60. *Id.* at 27.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 31.