COA No. 31394-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR GRESH,
PETITIONER,
V.
OKANOGAN COUNTY
AND MAZAMA PROPERTIES LLC,
RESPONDENTS.

REPLY BRIEF

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I. ARGUMENT

The Response Brief (Resp. Br.) of the developer and Okanogan County asserts that this case is a prohibited second bite-at-the-apple barred by LUPA's 21-day statute of limitations, or barred by a public policy favoring finality in land use decisions, or by both.

To make LUPA's appeal deadline appear applicable, the developer and Okanogan County portray this case as about something other than the county-level SEPA appeal of a rezoning decision that Mr. Gresh laid out in his July 22, 2011 written appeal submission, CP 205-53, for the Board of Okanogan County Commissioners hearing three days later. Only stripped of that context can this case seemingly appear to be an orphan SEPA appeal barred by LUPA that was filed without exhausting administrative remedies.

On the merits, the developer and Okanogan County assert that an unwritten public policy favoring finality in land use decisions nullifies the SEPA regulations that for the past 28 years have protected the integrity of the environmental review process against misrepresentation, failures to disclose material facts, and the unanticipated emergence of actual adverse effects. This non-textual pro-development policy is said to reside somewhere within three statutory provisions, all of which actually do have clear policy statements written by the Legislature that unambiguously favor the

enforcement of land use conditions of approval in lawsuits like this one, even if filed years after the decision in question.

The developer's and Okanogan County's only argument that the Nordic Village has a right to serve its twelve mixed-use parcels under the exempt-well statute is that "established precedent," consisting of a 2009 attorney general opinion and the 2003 court of appeals decision it cites, undermines this Court's literal construction of RCW 90.44.050. Resp. Br. 38. But the reasoning of this "established precedent" was specifically considered and rejected last year in *Five Corners Family Farmers v. State of Washington*, 173 Wn.2d 296, 268 P.3d 892 (Wash. 2011).

A. THE RECORD ON REVIEW IN THIS APPEAL CENTERS ON THE FACTS AND LAW RAISED IN MR. GRESH'S JULY 22, 2011 APPEAL SUBMISSION

This is an appeal of an Okanogan County rezoning decision and its underlying State Environmental Policy Act (SEPA) Determination of Non-significance (DNS).

It is undisputed that the environmental impacts of the Nordic Village's six commercial parcels are the same under either their old 'Urban Residential' zoning classification or their new 'Neighborhood Use' classification. In the usual case, a DNS for such a rezoning would follow as a matter of course. *See* R. Settle, The Washington State Environmental Policy Act: A legal and Policy Analysis ("R. Settle, SEPA") §13.01[1] at 13-11

("Where there is no significant difference in potential for environmental harm between uses permitted by existing and proposed zoning classifications, the rezone itself is not considered an environmentally significant event.").

But the determination that the rezone is without environmental significance only follows from a comparison of the old and new impacts if the original SEPA Determination of Non-significance remains final and binding on Okanogan County for rezoning purposes. *See* WAC 197-11-390(1) ("subject to WAC 197-11-340" a DNS is "final and binding on all agencies" except "when withdrawn by the responsible official under WAC 197-11-340" or "when reversed on appeal"). According to Professor Settle, if "a zoning change would permit uses with a reasonably high potential, in relative or absolute terms, for having 'more than a moderate effect on the environment,' EIS preparation is required at the rezone stage." R. Settle, SEPA, at 13-12 to 13-13 (quoting *Norway Hill Preservation Ass'n v. King County Council*, 87 Wn.2d 267, 278, 552 P.2d 674 (1976)).

Because any commercial use by the Nordic Village's well would appropriate a statutorily-protected natural resource without the right to do so under RCW 90.44.050, the rezone allows uses with significant adverse environmental effects 'in absolute terms.' Brief of Petitioner (Br. Pet.) 23-24. And once the DNS for the long plat is withdrawn there is no longer any

legal, logical, or factual basis for the county's SEPA determination that the rezone has no adverse impacts relative to the original zoning.

This is why Mr. Gresh's July 22, 2012 written submission for his county-level SEPA appeal, CP 205-253, argued that the DNS for the long plat had to be withdrawn under WAC 197-11-340 because otherwise there could be no appeal of the rezoning decision on exempt-well statute grounds, or as he summarized the facts and the law to the County Commissioners:

> The Determination of Non-significance ("DNS") must be withdrawn for two reasons:
>
> 1. **The developer has no water rights for the commercial lots C1-C6**; and
>
> 2. **The developer procured the DNS through misrepresentation**.
>
> CP 205.

The developer and Okanogan County ignore the facts and law in Mr. Gresh's two written submissions to the County Commissioners (CP 205-53 (July 22, 2011) and CP 255-310 (August 22, 2011)) and his arguments at the first hearing, which are at the center of this appeal. They portray Mr. Gresh's county-level "appeal" as concerned only with water overuse by the twelve Nordic Village lots, pointing to his "appeal" of May 20, 2011 (exhibit E7 to the County's certified record), where he last raised that issue. They cite those portions of the record where the ambiguity of water 'adequacy' (a term of art meaning either or both enough potable water and/or the legal right to

use it, *see* Br. Pet. 21-23) is exploited to make it appear that the county-level proceeding was only concerned with the question of how much water would be used, rather than the legality of any commercial and multiple-residential use. *See, e.g.*, Resp. Br. 12-15, 19-20, 22, 30-31, 35, 36-37. All of this, together with all of Respondents' narrative and argument relating to the water users' agreement, or to water overuse, *id.* at 10, 12-15, 35-36, is a red herring, an irrelevant distraction.

The May 20 "appeal" is only a notice of a SEPA appeal, required by Okanogan County Code §14.04.220(A)(1) ("An appeal from a final threshold determination by the responsible official must be filed, in writing, with the clerk of the board of county commissioners."). It is what triggered the county-level SEPA appeal that created the record for this judicial appeal. *See* RCW 43.21C.075(3)(c) (county-level SEPA appeal "shall provide for the preparation of a record for use in any subsequent appeal proceedings . . . . An adequate record consists of findings and conclusions, testimony under oath, and taped or written transcript"). Mr. Gresh's May 20 "appeal" contains no elements of an adequate record for judicial review.

Because the water overuse argument raised in the May 20, 2011 "appeal" presumes that all twelve Nordic Village parcels would use its single

well, that argument was dropped (as meritorious as it was[1]) because it is inconsistent with the RCW 90.44.050 single-residence-use-only argument he was able to raise in his July 22, 2011 submission by virtue of WAC 197-11-340.

Mr. Gresh's May 20 notice of appeal raised "the developer's failure to implement effective mitigation for water use in the Nordic Village" as the basic reason for denying the rezone, *id.* at 2, and used the water users' agreement for specifics. Mr. Gresh's July 22 submission also focused exclusively on the developer's failure to implement effective mitigation, but with very different specifics. At the hearing on July 25, 2011, the County Planning Director tried to exclude Mr. Gresh's July 22 submission from the record as off-topic, *see* Tr. (Board of County Commissioners, July 25, 2011) at 6, 8-11, 12-15, but he ultimately withdrew that objection, *id.* at 62-63 ("Mr. Brady has referenced a lot of documents contained in the packet he

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[1] On its face, the Water Users' Agreement does not effectively mitigate against the risks of using more water than allocated because it does not enforce the prohibitions of the exempt-well statute. Most deficiently, it contains an entire "Prohibited Practices" section, *see* Resp. Br. appendix B at 3, but water overuse is not among the proscribed. Instead, the Agreement allows the property owners to impose a monetary penalty for "excessive" water use, but "excessive" is nowhere defined as exceeding one's daily allocation, whereas RCW 90.44.050 absolutely prohibits excessive daily water use whether or not it is penalized. Finally, the metering requirement is, oddly, one of the "Prohibited Practices" but neither requires daily monitoring nor an automatic shut-off when the daily allocation is exceeded, whereas RCW 90.44.050 is restricted to actual daily withdrawals, not to an average of daily withdrawals.

submitted, I believe last Friday. So go ahead and look at it."). The Findings of Fact and Conclusions of Law reflect the Commissioners' actual consideration of Mr. Gresh's July 22 submission. County Record E16 at 3 (Findings of Fact ¶ 7) ("During the hearing the Commissioners reviewed written materials and heard testimony under oath by . . . appellant's counsel"); *id.* at 5 (Conclusions of Law ¶5) ("The Board of County Commissioners considered all testimony and exhibits presented by all parties").

The developer agreed and Okanogan County did not object to the consideration of the improperly excluded July 22, 2011 submission as part of the record in this LUPA appeal. Tr. (Okanogan County Superior Court, Dec. 9, 2011) 10 (Mr. Mackie: "So my view is that it was there, it's status was indistinct but it does appear to have been part of the decision process and I have no objection to the Court considering that as part of the overall review."); *see also* RCW 36.70C.120(2)(b) ("the record may be supplemented by . . . Matters that were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding").

B. THE LEGISLATURE HAS CLEARLY EXPRESSED ITS INTENTION THAT CONDITIONS OF APPROVAL BE ENFORCED

To believe the developer and Okanogan County, the Legislature so favors the finality of land use decisions that even those procured by lies and

fraud vest development rights forever if not caught before the 21-day appeal period expires—or as they put it only somewhat more discreetly, this Court must nullify WAC 197-11-340 because it is inconsistent with overriding "pronouncements of legislative policy favoring finality of land use decisions." Resp. Br. 27.

Previously, this Court has not favorably viewed the vesting of development rights procured by misrepresentation:

> By way of comparison, this court has previously required governments to act in good faith and not subvert the legitimate efforts of a developer to vest his or her rights. The requirement that a building application be "valid" assures that the good faith requirement is not only one way. Accordingly, under RCW 19.27.095, the Garrisons' rights did not vest because their building application, which contained knowing misrepresentations of material fact, was not valid.

Lauer v. Pierce County, 173 Wn.2d 242, 262, 267 P.3d 988 (Wash. 2011) (citations omitted).

There is no mention anywhere in *Lauer* of a countervailing policy favoring the finality of land use decisions. And the requirement that governments not subvert developers' "legitimate" efforts would appear to be a reason to uphold WAC 197-11-340 as a means of protecting against efforts to obtain vested development rights by misrepresentation.

The Legislature has not textually expressed a policy favoring finality in land use decisions in so many words anywhere. The developer and

Okanogan County locate that policy for the purposes of this case within LUPA's 21-day appeal deadline and two SEPA provisions. Resp. Br. 27.

The first SEPA provision, RCW 43.21C.075(1), conjoins the appeal of an environmental determination to the appeal of the final land use decision relying on it. The second, RCW 43.21C.075(4), requires the exhaustion of administrative appeals before bringing a judicial appeal. These two provisions were originally adopted as part of the Legislature's comprehensive overhaul of SEPA in 1983, *see* R. Settle, SEPA §4.01 at 4-5 (RCW 43.21C.075 was section 4 of the 1983 amendments). And the Legislature very clearly expressed its intentions and the policies behind those provisions both in writing and at considerable length in the Washington State Commission on Environmental Policy's report Ten Years' Experience with SEPA: Final Report (June 1983). It is undisputed that this legislative history expresses the Legislature's intent to preserve the right to challenge the enforcement of mitigating conditions even for claim arising years later, *see* Br. Pet. 33-36, and that WAC 197-11-340 is a means of doing so that has remained in place since 1984.

The developer and Okanogan County also discern a policy favoring finality within LUPA's 21-day appeal deadline, RCW 36.70C.040(2) & (3). And again, the Legislature did not express such a policy in words, explaining only in RCW 36.70C.010 that LUPA's purpose was "uniform, expedited

appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review."

But within the legislation containing LUPA that passed in 1995 is the Legislature's directive now codified at RCW 36.70B.160(3) that "Each local government shall adopt procedures to monitor and enforce permit decisions and conditions."[2] There are no provisions of the Okanogan County Code other than section 14.04.090 (adopting WAC 197-11-340 by reference) relating to procedures to enforce land use decisions and their conditions of approval after that approval was granted.

The present suit is entirely consistent with those policies actually stated in words by the Legislature when it passed the 1983 SEPA amendments and LUPA in 1995. Divining contrary, unwritten policies lurking somewhere within the same legislation is a basis only for unprincipled judicial activism unrestrained by separation of powers concerns.

C. RCW 90.44.050 ALLOWS EXEMPT WELLS TO BE USED ONLY FOR THEIR ORIGINAL PURPOSE

Okanogan County approved the Nordic Village Long Plat after determining for SEPA purposes that it had a "legal water supply" under

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[2] LUPA passed in 1995 as part VII of a comprehensive regulatory reform statute, chapter 347 of the laws of 1995. *See* R. Settle, SEPA Appendix E at E-5. Sections 701-719 chapter 347 became the Land Use Petition Act, now codified as RCW Chapter 21.36C, LUPA. *Id.* Section 420(3) of the same bill is now RCW 36.70B.160(3). *Id.* §20.01 at 20-8 n.18a

RCW 90.44.050—a condition of approval stated as a pure proposition of law—without seeking or receiving a competent legal opinion to justify it. Instead, the record shows that final approval of the long plat and its DNS were directly procured by the misrepresentation "The water that has been allocated has been approved by the DOE and Public Health as well as State Health due to so many connections." County Record E3 at 2 (minutes of March 14, 2011 Board of County Commissioners meeting).

The developer and Okanogan County now argue that both "the plain language of the statute" and "established precedent" undermine the literal construction of the exempt-well statute the Court gave in *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.1, 43 P.3d 4 (Wash. 2002). Resp. Br. 38 (citing *Kim v. Pollution Control Hearings Board*, 115 Wn.App. 157, 61 P.3d 1211 (Wash. App. Div. II 2003), and AGO 2009 No. 6). Indeed, *Kim* can be read as suggesting that RCW 90.44.050 allows "small withdrawals" for all of the statutory exempt uses from any exempt well:

> The overall scheme of this statute is to require a permit except for certain "small withdrawals." The 1945 legislature defined a "small withdrawal" as (1) any amount of water for livestock; (2) any amount of water for a lawn or for a noncommercial garden of a half acre or less; (3) not more than five thousand gallons per day for domestic use; and (4) not more than five thousand gallons per day "for an industrial purpose."

115 Wn. App. 160, 61 P.3d 1212.

The statement is *obiter dicta* because the *Kim* court did not determine whether or not one or more uses were permissible. The Attorney General opinion agrees, AGO 2009 No. 6 at 8 ("the quoted passage from that case is not the court's holding"), but asserts nonetheless that the passage does "correctly reflect the ordinary language of the statute." *Id.*

This Court most recently analyzed the ordinary language of the exempt-well statute in *Five Corners Family Farmers*, which reaffirmed a literal reading of RCW 90.44.050 as disjunctively providing four separate, non-bundled exemptions. 173 Wn.2d 309-11. The majority held that the same "small withdrawals" clause cited by *Kim* and AGO 2009 No. 6 did not compel a different, non-literal construction of the preceding exemption clauses:

> Appellants first point to the first proviso of RCW 90.44.050, which states that "the department from time to time may require the person or agency making any such small withdrawal to furnish information as to the means for and the quantity of that withdrawal." Seizing upon the term "any such small withdrawal," which refers to the four exemptions, Appellants argue that this is evidence that the legislature intended to limit withdrawal to some defined quantity. This is not necessarily so.
> *Id.* at 309.

The developer and Okanogan County offer no other reason why the Nordic Village long plat might have a "legal water supply . . . limited to

permit exemption limitations identified in RCW 90.44.050," as required by its condition of approval, CP 233.

Okanogan County erred by denying Mr. Gresh's SEPA appeal of the rezoning DNS and by approving the rezoning after being shown that this condition of approval was not satisfied.

D. RESPONDENTS' REMAINING ARGUMENTS ARE MERITLESS

This case is easily distinguishable from all of those cases cited by the developer and Okanogan County that raise LUPA's 21-day appeal deadline because this case relies on WAC 197-11-340 to withdraw the earlier land use decision that would otherwise bar this later challenge. *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (Wash. 2000), is their strongest case. There, as here, a second land use decision was challenged on the same legal grounds that were raised and decided in an earlier decision. But while that earlier, unappealed land use decision remained intact, valid, and in effect in *Wenatchee Sportsmen*, here the original decision must be withdrawn under WAC 197-11-340, invalidated, and rendered of no effect because it was procured by misrepresentation.

Respondents assert that Mr. Gresh failed to exhaust his administrative remedies and that this is a prohibited "orphan appeal." Resp. Br. 22-26. Both assertions fail to recognize that this case originated as an

administrative SEPA rezoning appeal before Okanogan County. It is undisputed that Mr. Gresh's administrative appeal of the rezoning decision exhausted his county-level remedies prior to his judicial LUPA petition. This is not an "orphan" appeal of the long plat DNS, but an appeal of the County's rezoning decision and its SEPA DNS.

E. THE EXEMPT-WELL QUESTION URGENTLY REQUIRES CLEAR GUIDANCE FROM THIS COURT

This Court's guidance is needed to resolve continuing uncertainty over what exempt wells can and cannot be used for under RCW 90.44.050.

As the Department of Ecology warns in its publication Water Smart, Not Water Short: 5 Ways to Secure Water for Washington's Future (DOE pub. No. 09-11-008) at 6, "Groundwater is a finite resource and the best available science suggests at current population growth rates, the proliferation of permit-exempt wells under current law is not sustainable."[3]

Whether a well can only be used for the purpose for which it was drilled, or whether any or all of the exempt uses allowed by RCW 90.44.050 are allowed is the question in this case with profound ramifications for the State. This Court's guidance is required in large part because the Department of Ecology gives inconsistent and confusing advice. For example, three water law documents available from DOE's website gives three different

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[3] https://fortress.wa.gov/ecy/publications/publications/0911008.pdf, accessed October 11, 2012.

pieces of advice about the individual or collective availability of the statutorily exempt uses. In State Water Laws: The Ground Water Permit Exemption, DOE uses the singular to refer to the exempt-well statute's available exemptions, and treats domestic and industrial exemptions as mutual alternatives:

> One groundwater exemption is allowed for any project regardless of size. It is important to note that all wells for a given project apply towards the limits of the exemption. If you wish to develop land and supply the industrial or domestic development with water from several wells, all the wells of the development together must pump 5,000 gallons a day or less to be covered under this exemption.[4]

On the other hand, in Frequently Asked Questions: Water Rights in Washington, DOE states that any combination of exempt uses is allowed if the total does not exceed 5,000 gallons a day:

> **Q: Are there any exceptions to the water right requirement?**
>
> **A:** You do not need to apply for a water right if you use a total of 5,000 gallons or less of ground water from a well each day for any of the following combinations of uses:
> - Single or group domestic purposes
> - Industrial purposes
> - Watering a lawn or noncommercial garden that is a half acre or less in size[5]

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[4] http://www.ecy.wa.gov/programs/wr/comp_enforce/gwpe.html, accessed on October 11, 2012.

[5] https://fortress.wa.gov/ecy/publications/summarypages/961804swr.html, accessed on October 11, 2012.

But in "seeking to clarify the existing exemption," DOE's Water Smart, Not Water Short at 6-7 proposes the same alternative for adoption as a new regulation:

> Ecology is seeking to clarify the existing exemption for both group domestic and stockwatering uses. This can be accomplished through legislation, rulemaking, or a combination of both.
>
> Regulations that may be considered include:
> . . .
> Restricting all domestic uses of an exempt well (household, stockwatering, and non-commercial gardens) to a combined 5,000 gallons per day.

As this Court has recognized, the Legislature wrote the exempt-well statute 67 years ago and this Court's role is to give effect to the literal words of the statute. Because the statute is awkwardly, perhaps ineptly, worded, construing the statute as written may result in unsatisfactory, potentially contradictory results or obvious deficiencies.

But it is the Legislature's duty to amend or rewrite the statute. Until then, fidelity to precedent requires that RCW 90.44.050 be applied as written and as construed.

II. CONCLUSION

For all of the reasons given in the Brief of Petitioner, the LUPA petition should be granted.

Okanogan County's August 23, 2011 resolution denying Mr. Gresh's appeal should be reversed, and the matter remanded to Okanogan County (1) with instructions for the County to withdraw the rezoning DNS for the commercial parcels of the Nordic Village and reverse its decision approving the rezone; (2) with instructions for the County to withdraw the long plat DNS for the Nordic Village; and (3) with instructions that the County prepare a new threshold determination with respect to both the rezoning DNS and the long plat DNS.

Respectfully submitted October 16, 2012,

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THE SUPREME COURT
OF THE STATE OF WASHINGTON

Arthur Gresh, Petitioner, v. Okanogan County and Mazama Properties LLC, Respondents	)))))))	CERTIFICATE OF SERVICE

I, Michael T. Brady, certify that on October 16, 2012, I mailed by Express Mail, overnight delivery, postage pre-paid a copy of Reply Brief of Petitioner to the following:

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