NO. 313948

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

ARTHUR GRESH,
APPELLANT,
V.
OKANOGAN COUNTY
AND MAZAMA PROPERTIES LLC,
APPELLEES.

AMENDED ANSWER TO BRIEF OF AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutory Citations

Attorney General Opinion

County Ordinances

I. INTRODUCTION

This Answer addresses the water law argument of the State of Washington, Department of Ecology, in its Amicus Curiae Brief before turning to the additional authority submitted by the Attorney General.

Ecology interprets RCW 90.44.050 as freely allowing unpermitted and unrestrained use of an exempt well for any or all of the listed categories of use. Amicus Curiae Brief 16-17 ("in providing four distinct categories of permit-exempt uses, the Legislature authorized each category of use, and did not restrict them so that water can only be used under just one of the categories"); *id.* at 17 ("no permit is required if prospective water uses fall within the four categories of permit-exempt uses provided under RCW 90.44.050, as they do here.").

Ecology's construction of RCW 90.44.050 is contrary to controlling precedent, which restricts developers and their subsequent purchasers to water use under a single statutory exemption. It is contrary to this Court's construction of the statute in *Department of Ecology v. City of Spokane Valley*, 167 Wn.App. 952, 275 P.3d 367 (Wash. App. Div. III 2012).

And it is alien to the Legislature's comprehensive code of water-use laws that not merely link, but which lock in every permit and right to use water to a specific purpose of use until changed under one of two change-of-use statutes, RCW 90.03.380 or RCW 90.44.100.

II. CONTROLLING PRECEDENT LINKS EACH EXEMPT WELL TO A SINGLE RCW 90.44.050 EXEMPTION

Ecology's brief is largely bereft of legal analysis or argument supporting its proposed construction. The principal legal authorities cited for Ecology's proposed construction, *Kim v. Pollution Control Hearings Board*, 115 Wn. App. 157, 61 P.3d 1211 (2003) and Op. Att'y Gen. 6 (2009), are neither precedential, *see* Reply Br. 11-12, nor entitled to special weight.

The Supreme Court discussed the weight to be given the Attorney General opinions on the exempt-well statute in *Five Corners Family Farmers v. State of Washington*, 173 Wn.2d 296, 308, 268 P.3d 892 (Wash. 2011). Under the Supreme Court's three-part test, the Attorney General's opinions here, either as *amicus curiae* or in Op. Att'y Gen. 6 (2009), should be given no weight at all because they issued so long after the exempt-well statute was enacted; because the Legislature has left RCW 90.44.050 intact since *Department of Ecology v. Campbell & Gwinn*, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (Wash. 2002), and *Five Corners Family Farmers*; and because the opinions lack the inherent persuasiveness sufficient to supersede the Supreme Court's precedential construction of RCW 90.44.050 in *Campbell & Gwinn* and *Five Corners Family Farmers*.

Ecology is correct, however, that the proper construction of RCW 90.44.050 cannot be derived solely from that provision's text in isolation.

Amicus Curiae Brief 14 ("RCW 90.44.050 does not limit use of a well in the manner that Gresh suggest."). Rather, as the Supreme Court held in *Campbell & Gwinn*, the plain meaning of RCW 90.44.050 as limiting a developer to a single exemption is apparent only when RCW 90.44.050 is read in the context of Washington's Water Code.

Campbell & Gwinn redefined the paradigm for judicially reaching a "plain-meaning" statutory construction. The plain meaning of RCW 90.44.050 is to be "derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* 146 Wn.2d at 11. The "related statutes which disclose legislative intent" about RCW 90.44.050 generally include the surface and groundwater codes, chapters 90.03 and 90.44 of the Revised Code of Washington, *id.* at 16, and specifically include the Groundwater Code's change-of-use provision, RCW 90.44.110, *id.* at 15.

Then as now, the surface and groundwater codes "generally require protection of existing rights and water resources," *id.* at 16, just as it remains true that the textual limitations on the exemption establish that "the Legislature did not intend unlimited use the exemption for domestic uses and did not intent that water appropriation for such uses be wholly unregulated." *Id.* RCW 90.44.050 thus limits the exemptions to one per developer in part

because the Legislature did "not contemplate use of the exemption as a device to circumvent statutory review of permit applications" generally required by the surface and groundwater codes. *Id.*

Given this statutory context, the Supreme Court squarely held in *Campbell & Gwinn* that the developer claims the statutory exemption when drilling a well for a development, and that the developer is entitled to claim only a single exemption on behalf of the future homeowners under RCW 90.44.050. 146 Wn.2d at 14 ("In this case, it is the developer, not the homeowner, who is seeking the exemption in order to drill wells . . . . The developer may not claim multiple exemptions for the homeowners."). That only a single statutory exemption is available was confirmed by the Supreme Court's textual and grammatical analysis of "the parallel structure" of the exemption clause in *Five Corners Family Farmers*, 173 Wn.2d at 312 ("There is simply no basis in the text of the statute to assume that the first three purposes were intended to be considered a single bundle of uses.").

This Court has explicitly acknowledged this holding. In *Department of Ecology v. City of Spokane Valley*, 167 Wn.2d 952, 275 P.3d 367 (Wash. App. Div. III 2012), this Court contrasted *Campbell & Gwinn*'s construction of RCW 90.44.050 with the statute at issue in that case (which exempted certain docks from shoreline management regulations), recognizing that under *Campbell & Gwinn* the developer is entitled to claim only a single exemption:

> A majority of the court concluded that the eligibility of a developer for the exemption must be tested by its own purpose and use rather than as a proxy for future home purchasers . . . . It reasoned that the two concepts of constructing a well and withdrawing water must "be linked" for purposes of the exemption . . . . It concluded that "[t]he developer may not claim multiple exemptions for the homeowners."

Id., 167 Wn.App. at 967.

III. THE STATUTORY CONTEXT OF RCW 90.44.050 CONFIRMS THAT EACH EXEMPT WELL IS ALLOWED ONLY ONE EXEMPTION

The statutory context of RCW 90.44.050 confirms that the one-well/one-exemption construction of *Campbell & Gwinn* and *Five Corners Family Farmers* applies to the question presented here.

In particular, the exempt-well statute states that to the extent that an exempt use is regularly used beneficially, RCW 90.44.050 confers "a right equal to that established by a permit issued under the provisions of this chapter," and all such rights are locked into specific uses until changed. Chapter 90.44 of the Revised Code of Washington, the Groundwater Code, incorporates the provisions of the surface Water Code (RCW chapter 90.03) requiring permits to be applied for with respect to a specific purpose of use.[1]

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[1] RCW 90.44.020 ("This chapter regulating and controlling groundwaters of the state of Washington shall be supplemental to chapter 90.03 RCW, which regulates the surface waters of the state, and is enacted for the purpose of extending the application of such surface water statutes to the appropriation and beneficial use of groundwaters within the state."); *see also* RCW 90.44.060 ("Applications for permits for appropriation of underground water shall be made in the same form and manner

After application, investigation, and approval for a specific use, an issued permit may be amended to change either the purpose of water use or the manner of its use under one of two change-of-use statutes.

An application for a permit must specify "the nature and amount of the proposed use" of the water, as well as the amount of time required to complete "application of the water to the proposed use." RCW 90.03.260(1). Once "on record with the department," *id.*, Ecology investigates the application with respect to the appropriation of water "as proposed in the application." RCW 90.03.290(3). If that proposed use will not impair existing rights or be detrimental to the public welfare, Ecology "shall issue a permit stating the amount to water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied." *Id.* Unambiguously, RCW 90.03.320 speaks of the use "prescribed in the permit" when allowing the permit holder adequate time to apply the water to that use.

Two statutes, RCW 90.03.380 in the surface Water Code and RCW 90.44.100 in the Groundwater Code, allow a permit holder to change how the water may be used. RCW 90.03.380(1) states in part "The point of diversion of water for beneficial use or the purpose of use may be changed, if

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provided in RCW 90.03.250 through 90.03.340, as amended, the provisions of which sections are hereby extended to govern and to apply to groundwater, or groundwater right certificates and to all permits that shall be issued pursuant to such applications, and the rights to the withdrawal of groundwater acquired thereby shall be governed by RCW 90.03.250 through 90.03.340, inclusive.").

such change can be made without detriment or injury to existing rights."

Similarly, RCW 90.44.100(1) states

> After an application to, and upon the issuance by the department of an amendment to the appropriate permit or certificate of groundwater right, the holder of a valid right to withdraw public groundwaters may, without losing the holder's priority of right, construct wells or other means of withdrawal at a new location in substitution for or in addition to those at the original location, or the holder may change the manner or the place of use of the water.

The Supreme Court described the scope of RCW 90.03.380 as well as the critical importance of investigating a change application with respect to specific purposes of water use in *R.D. Merrill Company v. Pollution Control Hearings Board*, 137 Wash. 118, 128-29, 969 P.2d 458 (Wash. 1999):

> The statute expressly allows, for example, a change in purpose of use. Purpose of use is often tied to time of use. For example, if the purpose of use is irrigation, the right will almost always be used seasonally. Domestic water use often is year-round use. Thus, a change in purpose of use may require that time of use be changed as well in order to put the water right to the proposed new use.
>
> However, as with other changes under RCW 90.03.380, a change in time of use may not be made which is detrimental to other appropriators' rights. If a change from seasonal to year-round use would cause injury, approval of a change in time of use should be denied or conditioned to protect other water rights holders by, for example, limiting the use for new purposes to the same season as the historical use.

The two change-of-use statutes differ in that RCW 90.44.100 allows a change of use if water had not previously been used, while RCW 90.03.380

requires that the water actually had been beneficially used before its purpose of use may change, *id.* at 130:

> By expressly allowing amendment of a permit, RCW 90.44.100 plainly contemplates that an unperfected water right may be involved. It follows that water may not actually have been beneficially used. Thus, unlike RCW 90.03.380, which requires beneficial use of water before a change may be approved, RCW 90.44.100 expressly allows for amendment where water has not actually been applied to beneficial use.

A second difference between the two change-of-use statutes is that RCW 90.44.100 allows the "manner of use" of water to be changed, while RCW 90.03.380 allows the "purpose of use" to be changed. The Supreme Court explained that changing the "purpose of use" would change the nature of the land-use project, while merely changing the water's "manner of use" would not. *Id.* at 131 ("Changes in well location(s), or the manner or place of use of the water, i.e., changes permitted under RCW 90.44.100, do not alter the original project or the quantity of water needed.").

Because the right to use water by permit is tied to a specific use, and because the right to use water under the exempt-well statute is "equal to that established by a permit," RCW 90.44.050, it follows that an exempt well may be used only for the single exempt purpose for which it was drilled until that purpose of use is changed pursuant to RCW 90.44.100 or RCW 90.03.380.

III. AMICUS PRESENTS NO ADDITIONAL ARGUMENTS TO OVERCOME CONTROLLING PRECEDENT

Ecology brings *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011) and RCW 58.17.110(2) to the attention of this Court. Both recognize that a county must determine that water is legally available for a subdivision before the subdivision may be approved.

Both authorities highlight the legal significance for this case of the Water Adequacy Certificate, CP 279-81, which the current developer's predecessor applied for and obtained from Okanogan County Public Health. By this certificate, Okanogan County Public Health fulfilled the parallel requirements of both Okanogan County Code §16.20.101(C)(5) and RCW 58.17.150(2) on the one hand, *see* Opening Brief at 6-7, 20-23, and of RCW 58.17.110 on the other, all of which required certification by Okanogan County Public Health that the Mazama Bridge short plat was served by a legally "adequate" water supply.

The Water Adequacy Certificate represents Okanogan County Public Health's determination that Lot 1 of the Mazama Bridge short plat had a legal water supply only for a single residence. *See* Opening Brief 5-7, 20-21. This certification issued prior to the county's formal approval of the short plat, and thus locked in Lot 1's well to single domestic use. The well log report, CP 281, which is attached to the certificate, confirms that the well

was drilled for a single residence. But it is the application for and approval of the Water Adequacy Certificate as a condition precedent to approval of the Mazama Bridge short plat that locks the well into single residential use under the facts of this case, not the well log report by itself. The second Water Adequacy Certificate signed by Okanogan County Public Health as a condition precedent to the approval of the Nordic Village long plat represented a purely bureaucratic application of policy, not an independent legal determination, of water adequacy. *See* Opening Brief 5-9, 20-23.

IV. CONCLUSION

The decision by Okanogan County to approve the rezoning of the Nordic Village Long Plat should be reversed.

Respectfully submitted on August 15, 2013,

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