COA No. 31394-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

BRIEF OF APPELLANT

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ATTORNEY FOR PETITIONER,
ARTHUR GRESH

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I. INTRODUCTION

Okanogan County approved the Nordic Village long plat in Mazama, Washington, on March 14, 2011, after finding that its six commercial and six residential parcels had a "legal water supply" under the exempt-well statute, RCW 90.44.050. The County had required this as a mitigating condition of approval under its State Environmental Policy Act (SEPA) authority to prevent an illegal appropriation of a protected natural resource, an adverse environmental effect by definition. This condition was satisfied with Okanogan County Planning Department testimony that the Department of Ecology (DOE) and the Department of Health (DOH) had each confirmed the developer's groundwater rights.[1]

When the developer later sought to rezone the commercial parcels, however, the County first learned that neither DOE nor DOH had, in fact, taken any position on Nordic Village groundwater rights. Instead, DOH had issued the Nordic Village's water system permit, the critical document for Okanogan County's approval of the plat, based on the developer's lay assurances that he possessed the necessary groundwater rights.

The County also learned that this condition of approval was not and could not be satisfied because the exempt-well statute prohibits all

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[1] The term "groundwater right," as defined in WAC Chapter 173-150 ("Protection of withdrawal facilities associated with groundwater rights") "means an authorization to use groundwater established pursuant to chapter 90.44 RCW . . . ." WAC 173-150-030(2).

commercial and all multi-residence use of the Nordic Village's well. Because the well had been drilled under the statutory exemption for single residential use, it only provides a legal water supply for a single residence.

Okanogan County erred by not withdrawing its "Determination of Non-significance" (DNS) for the commercial rezone as required by WAC 197-11-340(3)(a)(ii) when shown that an illegal appropriation of groundwater by any commercial use at the Nordic Village is inevitable as a matter of law.

For the same reason, Okanogan County was also required to withdraw its DNS for the long plat, which determined that—as mitigated—the Nordic Village lacked any such adverse environmental effects. Okanogan County also erred because WAC 197-11-340(3)(a)(iii) requires the withdrawal of any DNS "procured by misrepresentation" and the County's final approval of the Nordic Village was directly procured by the demonstrably false testimony that all of its conditions of approval had been satisfied.

The statute of limitations that would otherwise bar any SEPA challenge to the Nordic Village long plat DNS after more than 21 days does not apply here. The relevant statutes and regulations distinguish between "appeals" that are extinguished and the remedies of WAC 197-11-340, which are preserved to enforce conditions of approval and claims relating to actual adverse effects that arise even years later.

II. ASSIGNMENTS OF ERROR

First Assignment of Error: Okanogan County failed to withdraw its SEPA Determination of Non-Significance for rezoning the Nordic Village's commercial parcels as required by WAC 197-11-340(3)(a)(ii) after receiving significant new information showing that adverse environmental effects are inevitable as a matter of law.

Second Assignment of Error: Okanogan County failed to withdraw its final SEPA mitigated Determination of Non-Significance for the Nordic Village long plat as required by WAC 197-11-340(3)(a)(ii) & (iii) after receiving significant new information showing that the Nordic Village's adverse environmental effects are inevitable as a matter of law, that its conditions of approval are not satisfied, and that the Nordic Village DNS had been directly procured by misrepresentation.

The principal substantive issue relating to these errors is whether or not the six commercial and six residential parcels of the Nordic Village development are served by a "legal water supply" under the exempt-well statute, RCW 90.44.050. Specifically, does the exempt-well statute require that a single exemption apply both to the drilling of, and to withdrawals from, a well? That is, must a well drilled for an exempt purpose only be used for that purpose unless a permit is first obtained to use it for other RCW 90.44.050 purposes?

On appeal under the Land Use Petition Act (LUPA), Chapter 36.70C RCW, the superior court held that this action is barred because it was not filed within 21 days of the County's approval of the Nordic Village long plat. Although this Court is not reviewing the superior court's decision, the same issue has been raised in Respondents' Consolidated Opposition to Direct Review. The application of LUPA's statute of limitations to WAC 197-11-340 is an issue of first impression, the answer to which depends upon legislative intent: What did the Legislature intend with respect to the application of a statute of limitations to the remedies of WAC 197-11-340(3)(a)(ii) & (iii)?

III. STATEMENT OF THE CASE

This Court's review is limited to the record before Okanogan County, as may be supplemented by "[m]atters that were improperly excluded from the record after being offered by a party to the" County proceeding. RCW 36.70C.120(2)(b).

Petitioner's August 22, 2011 comments, CP 255-310, were improperly excluded from the County Record because the County' public hearing notice for the rezone required that "Project comments must be submitted in writing" for the public hearing. CP 310.

A. The Nordic Village's Well was Drilled for Single Residential Use in 2006.

This case has its genesis in the June 22, 2007 Mazama Bridge short plat, in which a single 10-acre parcel was subdivided into four residential parcels. CP 265-66. By covenants first recorded on the day the short plat was approved in 2007 and later restated in 2009, 5,000 gallons per day for withdrawal was allocated among the four parcels, with 2,880 gallons per day apportioned to the largest, 6.47-acre Lot 1. CP 268-72. These covenants restrict Lots 2, 3, and 4 to residential uses, *id.*, but provide that Lot 1 and its well may be used "for commercial and residential units," or as restated, "for commercial and/or residential uses."

More than nine months before the Mazama Bridge covenants were recorded, however, the developer drilled a new well to serve what would become Lot 1. A copy of the original construction log for the well with unique Department of Ecology (DOE) well tag no. APG 655 is attached to that developer's application for a Water Adequacy Certificate that was submitted to Okanogan County Public Health in December 2006. CP 279-81. Construction of the well began and was completed on October 9, 2006. CP 281. The well log, prepared by the driller, includes a "PROPOSED USE" heading with possible choices of "Domestic," "Industrial," "Municipal," "DeWater" "Irrigation," "Test Well," and "Other." Only the "Domestic" proposed use box is checked. *Id.* (A more legible copy of the

current iteration of DOE's Water Well Report form with the same choices is available at DOE's website, http://apps.ecy.wa.gov/welllog/forms.asp.)

On December 1, 2006, the Okanogan County Public Health District approved the Water Adequacy Certificate for Mazama Bridge Lot 1 (then, the 'Trailhead at Mazama' short plat), by which the developer sought for "Land Use Application" purposes. CP 279-80. The Water Adequacy Certificate states that Lot 1's well "appears adequate in quantity to meet needs of its intended use," which the developer's application identified as an "Individual System," as opposed to a "Public/Community" water system. *Id.*

B. Okanogan County Approved the Nordic Village Long Plat On the Condition that It Have a "Legal Water Supply" to Mitigate an Adverse Environmental Effect.

In 2010, Mazama Properties LLC applied to further subdivide Mazama Bridge Lot 1 and apportion its 2,880 gallon per day allotment among new six commercial and six residential parcels into what would become the Nordic Village long plat but was originally called the 'Village at Mazama' long plat. CP 157-58 Exhibit A (certified copy of County record, hereinafter "County Record"), E2 (Staff Report (Sept. 13, 2010)) at 11-12.[2]

At the time, both Okanogan County Code §16.20.101(C)(5) and RCW 58.17.150(2) required certification by Okanogan County Public Health

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[2] The Clerk's Papers includes the County Record as "unattached Exhibit A" to the Declaration of Lalena Johns, which certified the copy. *See* RCW 36.70C.110(1) (requiring "a certified copy of record for judicial review").

District that the proposed subdivision is served by an "adequate" water supply.

The Public Health District submitted formal agency comments to the County planning department denying that the Nordic Village well could be used for anything other than a single residence: "The water adequacy done for this lot during the original short plat was good for only one residential connection. Water adequacy must be established for the other 11 lots before final approval may be given" for the plat. CP 237. Informally, the Public Health District bluntly told the Planning Department that the developer had "not established a legal right to use the well to serve 12 lots." CP 235.

During its environmental review of the proposed Nordic Village long plat proposal required by SEPA, the Okanogan County Office of Planning and Development identified the project's "potential for probable, significant, adverse environmental impacts which may be mitigated to the point of non-significance" by specific mitigation measures, including the following:

> All lots shall be served by an adequate and legal water supply prior to final approval. The Village at Mazama long plat is granted use of its proportionate and legal share of the exempt withdrawal established for the Mazama Bridge short plat. Withdrawal is limited to permit exemption limitations identified in RCW 90.44.050.
> (CP 233)

The planning department imposed this mitigation condition of approval when it made the 'threshold determination' whether or not to

require an environmental impact statement (EIS). *See* WAC 197-11-330 ("The lead agency decides whether an EIS is required in the threshold determination process"). Threshold determinations are made upon an environmental checklist of possible adverse effects prepared by the applicant, WAC 197-11-330(1), and "shall be documented in" either a "determination of nonsignificance (DNS) (WAC 197-11-340)" or a determination of significance requiring an EIS. WAC 197-11-310. Where a lead agency "specifies mitigation measures on an applicant's proposal that would allow it to issue a DNS, and the proposal is . . . conditioned to include those measures, the lead agency shall issue a DNS." WAC 197-11-350(3). This condition of approval was included in the final mitigated DNS for the Nordic Village long plat. County Record, Ex. 4 (March 2011 Staff Report), Attachment G at 3 ("All mitigation measures from the final SEPA determination, listed below, are conditions of approval for this project.").

C. Water "Adequacy" for the Nordic Village Long Plat was Satisfied by the State Department of Health's Water System Permit

County policy, CP 274-77, allowed the Public Health District to rely on a DOH water system permit as satisfying the water adequacy requirement for the plat. CP 276 ("When the applicant establishes a new water system, approved by the DOH, to ser the subdivision it is not necessary for the applicant to apply for a determination of water adequacy by the Health

District in order for the plat to be granted."). The Okanogan County Public Health District had given notice of its intention to rely on a state DOH water system permit as satisfying the water adequacy requirement for the plat in its agency comments: "Approval of the source and design for the proposed Group B system by the jurisdictional public health authority will be considered to fulfill the requirement for water adequacy for the proposed plat." CP 237.

After the developer recorded covenants restricting each of the six residential parcels to 350 gallons a day and the commercial parcels to 130 gallons a day (a total of 2,880 gallons per day), CP 271-72, DOH approved the Nordic Village water system permit on October 27, 2010. CP 250. In January 2011, Okanogan County Public Health District's Jacqueline Bellinger duly signed a second water adequacy determination, citing DOH water system permit no. AC536Q. CP 208.

D. Okanogan County Approved the Nordic Village Based on Planning Department Testimony that DOE and DOH Confirmed the Developer's Groundwater Rights.

The Okanogan County Board of Commissioners gave final approval to the Nordic Village long plat on March 14, 2011. County Record, E3 (Board of County Commissioners Record of Proceedings, March 14, 2011) at 2. According to the minutes of that meeting, the vote immediately followed planning department testimony that the Department of Ecology had

determined that the developer had a legal water supply, thus satisfying the County's remaining mitigation requirement. The relevant portion of the minutes is reproduced in full:

> **Nordic Village – Planning Ben Rough**
> Ben Rough
>
> Ben gave the staff report for Final review of the Nordic Village Long Plat. The Long Plat was changed from Village at Mazama to its current name.
>
> This subdivision has an ownership in the shared common area. There are water restrictions within the short plat and the near by long plat. 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. An interim road is being built and has been bonded. All conditions of approval have been met. The landowner would like to seek a rezone at a later date.
>
> Commissioner Hover asked whether there were significant changes since pre-approval. Ben stated, no.
>
> **Motion – Approval Nordic Village LP 2010-1**
> Commissioner Hover moved to approve the Nordic Village Long Plat 2010-1. All conditions of approval have been met. Motion was seconded and carried. Commissioners signed the mylar.
> *Id.*

No appeal of the Nordic Village approval was filed.

E. Arthur Gresh Appeals the County's DNS for Rezoning the Nordic Village's Six Commercial Lots and the County's Failure to Withdraw the Long Plat DNS

Less than two weeks after the County approved the long plat, the developer filed another land use application to rezone the six commercial

parcels from "Urban Residential" to "Neighborhood Use." County Record, E17 (Staff Report (Aug. 23, 2011)) 10-12. Because there was (and is) no dispute that the Nordic Village's water impacts are essentially the same under either zoning classification, the County summarily issued a DNS for the rezone. *Id.* at 74-75.

The Petitioner, Arthur Gresh, an adjacent landowner, challenged the County's rezoning DNS pursuant to the county's SEPA appeal procedures and filed a written submission with Okanogan County on July 22, 2011. CP 205-253. Both that written submission, CP 206, 210-12, and testimony on his behalf at a Board of County Commissioners hearing on July 25, 2011, CP 85-86, 88-89, 105-08, 109-121, 130-34, 142-43, argued that both the rezoning DNS and the long plat DNS must be withdrawn under both subsections of WAC 197-11-340(3)(a):

> The lead agency shall withdraw a DNS if: . . . (ii) There is significant new information indicating, or on, a proposal's probably significant adverse environmental impacts; or (iii) The DNS was procured by misrepresentation or lack of material disclosure. . . .

In his written submission, Mr. Gresh presented the County with new information showing that, contrary to the Office of Planning and Development's representation to the Board of Okanogan County Commissioners, neither the DOE nor DOH had verified the developer's groundwater rights. CP 252-53. The submission included a September 2,

2010 letter from DOH to the developer confirming that the Nordic Village's water system permit was issued solely on the developer's personal assurances that he held the necessary groundwater rights, *id.*:

> At the time that this letter was written, I had not received any comments from Department of Ecology regarding your water rights. I am basing my review on your assurances that adequate water rights are secured by the system to cover all existing and proposed water uses. Any comments that I may receive from Department of Ecology for this project will be forwarded to you for you to address.

Mr. Gresh's SEPA appeal also showed that to induce DOH to issue the Nordic Village water system permit, the developer falsely promised DOH that "The commercial connections will be restricted on the face of the plat to retail and professional businesses. High water usages such as food service will be prohibited." CP 241. In fact the plat was never amended as promised, County Record E4 (March 14, 2011 Staff Report) at 13, despite DOH reliance on that developer's assurance that he possessed the necessary groundwater rights to cover all "existing and proposed uses." CP 253 (emphasis added).

To the contrary, as soon as the plat was approved the developer immediately began marketing the commercial parcels for "restaurants and lodges." CP 209, 245-48. While the advertising included a newspaper article referring to the water limitations imposed on the parcels, the article suggested they were unenforceable window-dressing because it also quoted

the DOH official who issued the Nordic Village water system permit as stating "There is no metering requirement." CP 246.

Finally, Mr. Gresh showed that the adverse environmental effect of withdrawing groundwater without a right to do so is inevitable as a matter of law under this Court's analysis of the domestic exemption of RCW 90.44.050 in *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.1, 43 P.3d 4 (Wash. 2002). CP 210-12.

On August 23, 2011, the Board of Okanogan County Commissioners denied the SEPA appeal, County Record E16 (Okanogan County resolution no. 200-2011), upheld the rezoning DNS, *id.*, and approved the rezone. CP 74-75.

Mr. Gresh filed a petition in Okanogan County Superior Court for judicial review of that decision under the Land Use Petition Act (LUPA), Chapter 36.70C RCW. CP 182-310.

The superior court (Burchard, J.) denied the LUPA petition on December 20, 2011. CP 36-42. A motion for reconsideration was denied on February 10, 2012. CP 9-12.

This appeal followed.

IV. ARGUMENT

The regulations implementing the State Environmental Policy Act protect the integrity of the Act by mandating the withdrawal of any determination that a land use project will not have any adverse effects when new information shows that, in fact, it will result in adverse environmental effects or that the determination was procured by misrepresentation.

A. Standards of Review

Judicial review of land use decisions is governed by LUPA. *Lauer v. Pierce Cy.*, 173 Wn.2d 242, 252, 267 P.3d 988 (Wash. 2011). A local land use decision may be reversed if the party seeking relief carries the burden of establishing one of the six statutory standards in RCW 36.70C.130, *id.*, of which the first four are asserted here:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts. . . .

Standards (a) and (b) present questions of law, which this Court reviews de novo. *Abbey Rd. Grp., v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (Wash. 2009). The substantial evidence standard of review in standard (c) requires a court to determine whether a fair-minded person would be persuaded by the evidence of the truth of the challenged findings. *Lauer*, 173 Wn.2d at 252-53 (quoting *Abbey Road*, 167 Wn.2d at 250). Under this standard, the Court considers all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum exercising fact-finding authority, *id.* 253, which in this case is the developer and Okanogan County.

Under standard (d), a decision is clearly erroneous if, even with evidence to support it, the court reviewing the record is left with the definite and firm conviction that a mistake was made. *Id.* (quoting *Phoenix Dev., Inc. v. City of Woodinville,* 171 Wash.2d 820, 829, 256 P.3d 1150 (Wash. 2011)). The approval of a project that will, in fact, "significantly affect the environment" without requiring an EIS is "clearly erroneous." *King Cy. v. Washington State Boundary Rev. Bd.*, 122 Wn.2d 648, 664-65, 860 P.2d 1024 (Wash. 1993); accord, *Norway Hill Pres. & Protect. Ass'n v. King Cy.*, 87 Wash.2d 267, 278, 552 P.2d 674 (Wash. 1976) (a "determination that an environmental impact statement was not required was 'clearly erroneous'" for a project that "will significantly affect the environment").

In determining whether these standards have been satisfied this Court "stands in the shoes of the superior court" and "reviews administrative decisions on the record of the administrative tribunal, not of the superior court." *HJS Dev., Inc. v. Pierce Cy.*, 148 Wn.2d 451, 468, 61 P.3d 1141 (Wash. 2003) (citations omitted).

B. Commercial or Multi-Residential Use of the Nordic Village's Well Inevitably Will Result in the Adverse Environmental Effect of an Illegal Appropriation of a Protected Natural Resource

This Court has already determined that the exempt-well statute, RCW 90.44.050, requires that the exemption under which a well is drilled is the only exemption under which the well can be used without a permit. *Campbell & Gwinn* addressed the scope of the exemption for "any withdrawal of public ground waters . . . for single or group domestic uses in an amount not exceeding five thousand gallons a day," 146 Wn.2d at 9, in the context of the entire statute, a copy of which is appended to this brief.

Like the Mazama Bridge short plat, the development in *Campbell & Gwinn* also involved a proposed subdivision with a well drilled for each parcel. *Id.* at 4 ("a developer of a residential subdivision proposes multiple wells that will individually serve each lot in the development"); *but see also id.* at 5-6 (only four of twenty proposed wells completed).

In deciding that the 5,000 gallon a day limit for an exempt domestic well applies collectively and not individually to a subdivision's new parcels,

this Court held that when a developer drills a well under one exemption, the statute restricts all withdrawals without a permit to that exempt use:

> Thus, two concepts, construction of works, or digging of wells in order to withdraw water, and the withdrawal of water and putting it to beneficial use are linked in the permitting process. Neither can occur absent a permit. The same two concepts must be linked for purposes of the exemption from the permitting process because that is precisely what the exemption is--an exemption excusing the applicant from permit requirements. The one seeking an exemption from permit requirements is necessarily the one planning the construction of wells or other works necessary for withdrawal of water and is the one who would otherwise have to have a permit before any construction commences or wells are dug. Thus, under RCW 90.44.050, and related statutes, qualification for the exemption does not depend, as respondents claim, solely on who ultimately withdraws the water and puts it to beneficial use. It also concerns the person planning the wells or other works, before any water is ever withdrawn.
> *Id.* 13-14.

To the extent—if at all—it might have been arguable that *Campbell & Gwinn* left open the question whether or not all of the statutory exempt uses are collectively available to an exempt well so long as no more than 5,000 gallons a day is used, that construction of the exempt-well statute has been foreclosed by *Five Corners Family Farmers v. State of Washington*, 173 Wn.2d 296, 268 P.3d 892 (Wash. 2011).

Five Corners considered and contrasted three possible constructions of RCW 90.44.050. Under the first, the word "or" is used disjunctively to create four categories of exempt uses, 173 Wn.2d at 308 ("consistent use of the

term 'or for,' which appears three times in the proviso, naturally suggesting four categories."). Under this construction, the statute exempts withdrawals for the "four distinct categories" of (1) unlimited stock watering, or (2) unlimited watering for a lawn or commercial garden not to exceed one-half acre, or (3) single or group residential use of up to 5,000 gallons a day, or (4) up to 5,000 gallons a day for an industrial purpose. *Id.* at 307.

Under the second construction "or" is used both conjunctively and disjunctively to create two categories of exempt uses, the first (1) "a bundle of uses" for up to 5,000 gallons a day for "stock-watering . . . the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses," and the second of which is (2) up to 5,000 gallons a day for an industrial purpose. *Id.*

Finally, this Court considered a third possibility based on related statutory provisions purportedly evidencing a legislative intent to divide water uses "into two categories: (1) uses of 5,000 gallons of water per day or less, which are exempt from permits, and (2) uses of more than 5,000 gallons of water per day, which are not exempt from permits." *Id.* at 310.

The Court adopted the "four distinct categories" construction of the statute as the one most consistent with its text, *id.* at 308:

> The interpretation dividing the clause into four distinct exemptions accounts for each word used by the legislature. The categories are logically divided by the legislature's

consistent use of the term "or for," which appears three times in the proviso, naturally suggesting four categories.

The "bundle of uses" construction was rejected because "[t]here 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." *Id.* at 312. The third possibility was rejected for the same reason. *Id.* at 310 ("the language plainly does something very different").

Five Corners did not directly address the question whether the three different uses identified within the domestic use exemption and the two within the lawn-or-commercial-garden exemption may be used collectively or are only available individually, but it answered that question nonetheless: each is available only individually, not collectively. This is compelled by the consistent, disjunctive use of the word "or" within the exemption clause.

This Court found that the term "or for" both naturally and logically suggested distinct categories, which respects the parallel grammatical structure of the statute. *Id.* at 308. But only the word "or" in the term "or for" divides into separate categories; the preposition "for," used in the sense of "for the purpose or object of," *see* Webster's Third New Int'l Dictionary (1986) at 886, unites the "withdrawals" at the beginning of the exemption clause with each of the categories of uses that the word "or" separates. Because the word "or" is used consistently between categories to separate

them, it must be consistently disjunctive *within* each of the categories as well by identifying distinct alternatives, not collective possibilities.

Campbell & Gwinn adopted the same reading of the domestic use exemption, albeit by a different analysis, but applied the statute to prohibit developers from treating each new domestic parcel of a subdivision as individually qualifying for a separate 5,000 gallon a day single domestic use exemption. *Id.* at 46 Wn.2d at 12 ("The developer of a subdivision is, necessarily, planning for group uses, rather than a single use, and accordingly is entitled to only one 5,000 gallon exemption for the project.").

1. The Nordic Village has a "Legal Water Supply" under the Exempt-Well Statute Only for a Single Residence.

The Nordic Village's "legal share" of the exempt withdrawal established for the Mazama Bridge short plat is up to 2,880 gallon per day, CP 271-72; but the "exempt withdrawal" established for the Mazama Bridge short plat is restricted to single residential use only.

As discussed above, the original well log documenting the construction of the Nordic Village's well shows that it was drilled in October 2006 for "domestic" use, not for commercial use. In conjunction with drilling the well, the developer applied for a Water Adequacy Certificate to use the well for an "Individual System," that is, for a single residence: an "individual" water system is defined by WAC 246-296-020(21) as "any water system . . .that . . . provides water to either one single-family residence, or to

a system with four or fewer connections, all of which serve residences on the same farm."

Furthermore, the applicant declined the choice on the application to seek certification for a "Public/Community Water System," which is broadly defined to include any drinking water system other than for a single residence. RCW 70.116.030(3) ("'Public water system' means any system providing water intended for, or used for, human consumption or other domestic uses. . . . but excluding water systems serving one single-family residence"). A "community" water system includes at least fifteen service connections. WAC 246-296-020(19)(a) (definition of "community" Group A public water system).

Because contemporaneous documentation confirms Nordic Village's well was drilled for a single residence, it is only exempt for use by a single residence, not by a group of six residences, and certainly not by a bundle of twelve commercial and residential uses.

The legality of use by a single residence was confirmed when Okanogan County Public Health's Jacqueline Bellinger signed the water adequacy certificate on December 1, 2006. *See* RCW 58.17.150(2) (requiring that preliminary plats submitted for final approval include "Local health department or other agency furnishing sewage disposal and supplying water as to the adequacy of the proposed means of sewage disposal and water

supply"). In this context, a water supply is "adequate" only if there is a legal right to withdraw the water.

The definition of "adequate" water under Washington's water laws was the subject of AGO 1992 No. 17 at 5/10[3] ("We cannot answer Question 2 without first analyzing what is meant by an 'adequate' water supply."). To be "adequate," a water supply must be potable and available in a sufficient amount to serve its expected needs. *Id.* But for non-public water supplies, including single domestic use, a water supply is "adequate" only if a statutory right exists to withdraw or appropriate the water: "the criteria adopted by the local health department must require that the water supply be potable, and must recognize the effect of the water rights statutes, chapters 90.03 and 90.44 RCW." *Id.* at 7/10; accord, *id.* at 8/10 ("any applicant for a building permit who claims that the building's water will come from surface or ground waters of the state, other than from a public water system, must prove that he has a right to take such water").

The Okanogan County Public Health District affirmed that the well may only be used without a permit by a single residence in formal agency comments on the Nordic Village long plat: "The water adequacy done for this lot during the original short plat was good for only one residential

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[3] The pagination is from a copy of what printed as a ten-page opinion, downloaded from http://www.atg.wa.gov/AGOOpinions on August 1, 2011.

connection. Water adequacy must be established for the other 11 lots before final approval may be given to the plat." CP 237.

On this record, Jacqueline Bellinger's signature on Mazama Bridge Lot 1's Water Adequacy Certificate represents the only governmental analysis actually made of the legal groundwater rights available to the Nordic Village's well in this record.[4]

2. Withdrawal of Groundwater Without a Groundwater Right is, by Definition, an Adverse Environmental Effect

Because the Nordic Village's well was drilled for single residential use, any commercial use of the Nordic Village's water system and any use by more than one residence inevitably will result in an illegal appropriation of groundwater in violation of RCW 90.44.050. This is an adverse environmental effect by definition.

WAC 197-11-330(3) identifies potentially adverse environmental effects that the responsible official "shall take into account" when deciding whether or not to required an EIS, including any "[c]onflict with local, state, or federal laws or requirements for the protection of the environment."

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[4] Ms. Bellinger's signature on the second Water Adequacy Certificate issued in January 2011 did not represent any legal analysis of groundwater rights; to the contrary, it represented nothing but administrative acquiescence by Okanogan County, compelled by formal policy, CP 274-77, to the State Department of Health's decision to issue the Nordic Village's water system permit on the developer's personal assurance that he possessed the necessary groundwater rights.

WAC 197-11-330(3)(e)(iii). A violation of the exempt-well statute conflicts with a state environmental protection statute.

A conflict with the exempt-well statute, RCW 90.44.050, is thus by definition an adverse environmental impact because "the surface and groundwater codes generally require protection of existing rights and water resources" and "the overall goal of regulation [is] to assure protection of existing rights and the public interest." *Campbell & Gwinn*, 146 Wn.2d at 16; see also *Munns v. Martin*, 131 Wn.2d 192, 205, 930 P.2d 318 (Wash. 1997) (WAC 197-11-330(3)(e) identifies potentially adverse "environmental impacts of a project" that it "is necessary to assess the significance of").

C. Okanogan County Erred by Failing to Withdraw the Rezone DNS and the Long Plat DNS as Required by WAC 197-11-340(3)

The same administrative regulations that create SEPA Determinations of Non-significance, Part Three of chapter 197-11 WAC, require their withdrawal upon receipt of new information showing that the project actually will have adverse effects and, in addition, require the withdrawal of any DNS procured by misrepresentation. WAC 197-11-340 states:

> (3)(a) The lead agency shall withdraw a DNS if:
>
> . . .
>
> (ii) There is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; or

> (iii) The DNS was procured by misrepresentation or lack of material disclosure; if such DNS resulted from the actions of an applicant, any subsequent environmental checklist on the proposal shall be prepared directly by the lead agency or its consultant at the expense of the applicant.

Okanogan County erred by not withdrawing its DNS for the Nordic Village rezone as required by WAC 197-11-340(3)(a)(ii) because the new information presented in the rezoning appeal showed that the rezoned commercial parcels would inevitably result in a probable, significant adverse environmental impacts, namely, the appropriation of a statutorily protected natural resource—groundwater—without a right to do so under RCW 90.44.050.

Okanogan County erred by relying upon, and by not withdrawing, its DNS for the long plat when it learned in the rezoning appeal that all of the commercial parcels and five of the six residential parcels in the Nordic Village will inevitably lead to the adverse environmental effect of a conflict with the exempt-well statute.

In addition, Okanogan County erred by not withdrawing the Nordic Village long plat DNS once it learned of the demonstrable falsity of the County planning department testimony assuring that the "water that has been allocated has been approved by DOE and Public Health as well as State Health." That testimony procured final approval of the long plat, because

with the satisfaction of that condition of approval, "All conditions of approval have been met."

WAC 197-11-340(3)(a)(iii) does not require that the misrepresentation be made with an intent to mislead, or even that it be a knowing misrepresentation. All that the provision requires is that the misrepresentation procure the DNS, that is, that there be a direct, material, causal relationship between the misrepresentation and the issuance of the DNS because of that misrepresentation.

There is nothing in the record (or outside of the record, for that matter) suggesting that Mr. Rough's testimony to the Board of County Commissioners was knowingly false, or that it was made with an intent to mislead. At the same time, however, his testimony that "all conditions of approval have been met" directly procured final approval of the long plat because Commissioner Hover repeated the statement, "All conditions of approval have been met," immediately before moving to approve the long plat. County Record, E3 at 2.

The County also erred by failing to withdraw the long plat DNS when it received information about the developer's misrepresentation to DOH that "The commercial connections will be restricted on the face of the plat to retail and professional" and that "High water usages food service will be prohibited." This representation was a condition of approval: "All

representation made by the applicant verbally, written, and during public testimony shall be deemed conditions of approval." County Record E2 Attachment O ("Conditions of Approval"). Both the planning department's testimony on March 14, 2011, and its Staff Report to the Board of County Commissioners misrepresented the satisfaction of this condition of approval:

> 2. All representations made by the applicant verbally, written, and during public testimony shall be deemed conditions of approval. **Analysis: This condition has been met.**

County Record, E4, Attachment G ("Conditions of Approval with Analysis).

In addition, DOH demonstrably relied on this representation because in its approval letter to the developer, DOH accepted the developer's assurance "that adequate water rights are secured by the system to cover all existing and proposed water uses." On the record before the County, the only proposed water uses DOH knew about was the developer's promise to restrict the commercial parcels to retail and professional and to prohibit food service and other water-intensive uses.

D. LUPA's 21-Day Statute of Limitations Does Not Apply to the DNS for the Nordic Village Long Plat Because of its Inevitable Adverse Effects and Because it was Directly Procured by Misrepresentation.

This action is not barred by LUPA's statute of limitations as a belated appeal of the County's original SEPA determination for the Nordic Village long plat.

In the superior court, the LUPA petition was filed on September 9, 2011, seeking judicial review of Okanogan County's final DNS for the rezoning of the Nordic Village's commercial parcels on the seventeenth day following the County's approval of the rezone on August 23, 2011. Thus, the statute of limitations does not bar substantive judicial review of the rezone or its underlying DNS.

Rather, the question is whether or not the LUPA petition, filed 179 days after the County's March 14, 2011 approval of the long plat, is barred from relying on WAC 197-11-340(3) to require Okanogan County to withdraw its Nordic Village DNS. The answer is "no," because the LUPA petition did not seek substantive judicial review of the County's approval of the long plat.

1. The LUPA Petition Does Not Appeal Okanogan County's Determination that the Nordic Village Had a Legal Water Supply When Approved

Okanogan County approved the Nordic Village subdivision once it determined that it had satisfied the following condition of approval:

> All lots shall be served by an adequate and legal water supply prior to final approval. The Village at Mazama [later, the Nordic Village] long plat is granted use of its proportionate and legal share of the exempt withdrawal established for the Mazama Bridge short plat. Withdrawal is limited to permit exemption limitations identified in RCW 90.44.050. (CP 221)

Although the first sentence references a legal water supply "prior to final approval," this condition is a continuing requirement of the Nordic Village because every withdrawal from its well is also "limited to the permit exemption limitations identified in RCW 90.44.050."

Thus, the exempt-well question in this case does not look backwards to whether Okanogan County was right or wrong when it determined that the Nordic Village had a legal water supply at final approval. Rather, the forward-looking question is whether any withdrawal from the well for commercial or multi-residential use can possibly comply with the "permit exemption limitations identified in RCW 90.44.050."

As noted above, the answer is no.

2. There is No Conflict Between WAC 197-11-340 and LUPA's Statute of Limitations If the Statutory and Regulatory Distinctions Between "Appeals" and WAC 197-11-340 Are Respected.

Whether or not the statute of limitations applicable to SEPA appeals bars later reliance on WAC 197-11-340 with respect to a tainted DNS is a question of first impression. This Court's role is to harmonize any such apparent conflicts if possible, *Waste Mgmt. of Seattle, Inc. v. Utilities and Trans. Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (Wash. 1994), so that a harmonious statutory scheme evolves that maintains the integrity of each.

SEPA's statute of limitations is RCW 43.21C.075(2)(b), which adopts and gives effect to the statute of limitations in the statute governing appeals

of the underlying land use decision. *Id.* ("Appeals of environmental determinations made (or lacking) under this chapter shall be commenced within the time required to appeal the governmental action which is subject to environmental review"). Since the 1995 adoption of the Land Use Petition Act (LUPA), RCW chapter 36.70C, LUPA has been the exclusive procedural vehicle for judicial appeals of SEPA determinations and can only be invoked within three weeks of the decision being appealed. RCW 36.70C.040(3) ("The petition is timely if it is filed and served . . . within twenty-one days of the issuance of the land use decision").

Here, the specific question is whether proceedings under WAC 197-11-340 constitute "Appeals of environmental determinations made (or lacking) under this chapter" within the scope of RCW 43.21C.075(2). In construing any provision of SEPA, this Court must give substantial deference to the SEPA rules. RCW 43.21C.095 ("The rules promulgated under RCW 43.21C.110 shall be accorded substantial deference in the interpretation of this chapter"). Because these rules carefully and consistently distinguish between "appeals" of land use decisions on the one hand, and the remedy of the withdrawal of a DNS because of misrepresentation or actual adverse effects on the other hand, the apparent conflict can best be resolved by respecting the distinction already made in the SEPA rules between the two.

A Determination of Non-significance is only a prediction of the absence of a project's adverse environmental effects, but unless one of the specified exceptions applies it is nonetheless "final and binding" on all agencies pursuant to WAC 197-11-390. Each of that provision's three subsections explicitly distinguish between the appeal of a DNS and its withdrawal pursuant to WAC 197-11-340:

> (1) When the responsible official makes a threshold determination, it is final and binding on all agencies, subject to the provisions of this section and WAC 197-11-340, 197-11-360, and Part Six.
> (2) The responsible official's threshold determination
> . . .
> (c) Shall not apply when withdrawn by the responsible official under WAC 197-11-340 or 197-11-360.
> (d) Shall not apply when reversed on appeal.
> (3) Regardless of any appeals, a DS or DNS issued by the responsible official may be considered final for purposes of other agencies' planning and decision making unless subsequently changed, reversed, or withdrawn.

Subsection (1) subjects the finality of a DNS to Part Six of the SEPA Rules, "Using Existing Environmental Documents." WAC 197-11-600(3), in turn, obligates an agency to use a DNS unchanged for the same proposal, except that "preparation of a new threshold determination or supplemental EIS is required if" there are significant changes to the proposal or if there is "New information indicating a proposal's probable significant environmental impacts. (This includes discovery of misrepresentation or a lack of material disclosure.)" WAC 197-11-600(3)(b)(ii). Similarly, when using existing

environmental documents for other projects agencies must prepare a supplemental EIS whenever there is "New information indicating a proposal's probable significant adverse environmental impacts," WAC 197-11-600(4)(d)(ii), which as defined in that rule includes discovery of misrepresentation.

Subsection (2) of WAC 197-11-390 provides that a DNS shall no longer be final and binding if it is either reversed on appeal or withdrawn under WAC 197-11-340.

This same distinction is twice reflected in subsection (3), where the two are identified as specific alternatives: "Regardless of any appeals" a DNS is final for other agencies "unless subsequently changed, reversed, or withdrawn." As in the exemption clause of the exempt-well statute, the word "or" here is "used as a function word to indicate (1) an alternative between different or unlike things, states or actions . . . (2) choice between alternative things, states, or courses." Webster's Third New Int'l Dictionary (1986) at 1585.

3. Allowing SEPA Claims Whenever They Arise for Misrepresentations or Actual Adverse Environmental Effects is Essential to the Integrity of the State Environmental Policy Act.

The exception to DNS finality for new information showing adverse effects or misrepresentation is essential to the integrity of the environmental review process. Without those exceptions to SEPA's statute of limitations, a

land use applicant would obtain vested rights in a project procured by fraud and irrespective of the later emergence of environmental threats or actual damage. It is the antithesis of the values reflected in the State Environmental Policy Act to allow a landowner to fudge an answer on a checklist and get away with it because the fraudulently-obtained DNS is nonetheless "final and binding on all agencies" despite the discovery of the deception and actual, continuing environmental destruction.

The legislative history of SEPA's statute of limitations provision confirms that the Legislature never intended that it would bar relief if a project actually does give rise to adverse environmental effects despite a DNS predicting none. RCW 43.21C.075(2)(b) was originally adopted by the Legislature in 1983 as part of a comprehensive overhaul of SEPA. As Professor Richard L. Settle explains in The Washington State Environmental Policy Act: A Legal and Policy Analysis (2011), in 1981 the Legislature established the Environmental Policy Commission to address the shortcomings revealed in SEPA's first decade and report its conclusions during the 1983 regular session of the Legislature together with proposed amendments and administrative rules interpreting and implementing it. *Id.* 2-1—2-1. The Commission's initial report to the Legislature in January 1983 contained a draft bill that the Legislature adopted essentially unchanged, and which became law April 23, 1983. *Id.* Section four of the draft bill first

imposed the statute of limitations on SEPA claims by requiring all challenges to SEPA environmental determinations to be made and appealed as a challenge to the land use decision relying on it. *Id.* B-8.

The Commission's final report to the Legislature, Washington State Commission on Environmental Policy, Ten Years' Experience with SEPA: Final Report (June 1983), confirms that this statute of limitations does not apply to actions seeking to enforce mitigating conditions of approval:

> The first part of this section makes clear that SEPA provides a basis for challenging whether governmental action is in compliance with substantive and procedural provisions of the Act, and that any appeals brought under SEPA must be linked to a specific governmental action. . . . This section would not restrict courts from requiring agencies to enforce their substantive SEPA determinations, including permit conditions or mitigation measures for public or private proposals.
>
> As noted above, the bill expressly provides for the right to challenge substantive and procedural compliance with the act. The existing right to a healthful environment is not amended. Conditions to mitigate environmental impacts are government actions under section 3 of the bill, and lawsuits may be brought under section 4 to ensure that they are enforced.
>
> (*Id.* B-8 – B-9.)

Elsewhere the Commission's Final Report repeatedly emphasized that later actions relating to compliance with mitigation measures are not barred by the statute of limitations applicable to initial challenges to the land use decision imposing those conditions of approval. For example, a

question-and-answer dialogue from the floor of the House of Representatives was reproduced at page 53 of the Final Report:

ENFORCEMENT OF MITIGATION MEASURES

> Q: Does the bill continue the right of private citizens to bring SEPA lawsuits and seek judicial enforcement of mitigating conditions?
>
> A: Yes. The bill expressly provides for the right to challenge substantive and procedural compliance with the act. The existing right to a healthful environment is not amended in this bill. Conditions to mitigate environmental impacts are governmental actions under Section 3 of the bill, and lawsuits may be brought under Section 4 to ensure that they are enforced.

In addition, an April 11, 1983 memorandum from the chairman of the Commission, Senator Alan Bluechel, was included in the Final Report at 55- 63 and specifically addresses the new statute of limitations for actions seeking to enforce mitigation measures or with respect to adverse environmental effects arising years later:

> Concern has been voiced about whether the request for an appeal to be linked to a governmental action precludes a citizen lawsuit to enforce mitigation commitments. It would not.
>
> . . .
>
> [T]he requirement to have SEPA challenges linked to governmental actions does not eliminate a citizen's right to challenge an agency's . . . enforcement of the mitigation measure as a condition. This intent is unequivocally stated in the section-by-section summary of SSB (page 8). . . .
>
> You previously asked about the ability to bring a lawsuit to enforce mitigation measures. As you know, mitigation measures may take several years to implement, and any environmental damage from noncompliance may occur

> years later. A flat 30 day limit for any type of SEPA appeal, if that is what was suggested, would be too short and inflexible and would undermine substantive protection. . . . SSB 3006 intentionally does not establish a mandatory statute of limitations for all SEPA challenges, because this could undermine SEPA's purposes and policies.

This Court recognizes the Commission's Final Report as authoritative with respect to the intent of the 1983 amendments: "The most obvious indicator of legislative intent, other than the words of the statute itself, is the Commission's own report and explanation of its proposals." *Dioxin/Organochlorine Center v. P.C.H.B.*, 131 Wn.2d 345, 358, 932 P.2d 158 (Wash. 1997) (quoting Final Report at 19).

D. The Statutory Standards for LUPA Relief are Satisfied

1. The Rezoning DNS Should be Withdrawn and the Rezoning Decision Reversed

The LUPA petition should be granted with respect to Okanogan County's August 23, 2011 resolution denying Mr. Gresh's SEPA appeal of the rezoning DNS.

LUPA's standard for relief under RCW 36.70C.130(a) is satisfied because Okanogan County "failed to follow a prescribed process" in withdrawing the rezoning DNS as required by the non-discretionary requirements of WAC 197-11-340. The standard for relief under RCW 36.70C.130(b) is satisfied because Okanogan County's failure to withdraw the rezoning DNS was based on an erroneous interpretation of law. LUPA's

standard for relief under RCW 36.70C.130(c) is satisfied because the decision to approve the rezoning DNS is not supported by substantial evidence when viewed in light of the whole record before the court. The requirement of RCW 36.70C.130(d) is satisfied because the County's decision to approve the rezoning DNS is a clearly erroneous application of the law to the facts.

Okanogan County's August 23, 2011 decision to approve the rezoning of the Nordic Village commercial parcels should be reversed because approval of the rezone without a valid threshold determination is "unlawful procedure or [a failure] to follow a prescribed process;" because the decision is an erroneous interpretation of the law; because the decision is not supported by the evidence when viewed in light of the entire record; and because the decision is a clearly erroneous application of the law to the facts pursuant to RCW 36.70C.130(a)-(d).

2. The Nordic Village Long Plat DNS Should Be Withdrawn

The LUPA petition should be granted with respect to Okanogan County's August 23, 2011 resolution denying Mr. Gresh's SEPA appeal and its failure to withdraw the Nordic Village long plat DNS.

LUPA's standard for relief under RCW 36.70C.130(a) is satisfied because Okanogan County "failed to follow a prescribed process" to withdraw the long plat DNS pursuant to WAC 197-11-340(3). The standard for relief under RCW 36.70C.130(b) is satisfied because Okanogan County's

failure to withdraw the long plat DNS was based on an erroneous interpretation of law. RCW 36.70C.130(c) is satisfied because the County's decision to rely on the long plat DNS for rezoning purposes and not to withdraw it is not supported by substantial evidence when viewed in light of the whole record before the court. The requirement of RCW 36.70C.130(d) is satisfied because the County's decision not to withdraw the long plat DNS is a clearly erroneous application of the law to the facts.

V. CONCLUSION

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 pursuant to WAC 197-11-340(3)(c) ("If the lead agency withdraws a DNS, the agency shall make a new threshold determination and notify other agencies with jurisdiction of the withdrawal").

Respectfully submitted July 20, 2012,

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APPENDIX
Text of RCW 90.44.050

After June 6, 1945, no withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: EXCEPT, HOWEVER, That any withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter: PROVIDED, HOWEVER, 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: PROVIDED, FURTHER, That at the option of the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.