No. 89948-7

SUPREME COURT
OF THE STATE OF WASHINGTON

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

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# PETITION FOR REVIEW

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ATTORNEY FOR APPELLANT,
ARTHUR GRESH

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES
### Cases

**Statutes**



**Opinions of the Washington State Attorney General**



**Court Rules**

**SEPA Rules**



**Okanogan County Ordinances**



**Other Authorities**

## I. INTRODUCTION

This case presents a question "of fundamental importance to the state-wide management of water,"[1] according to Attorney General Ferguson on behalf of the Washington State Department of Ecology, and more specifically, "of statewide importance for counties evaluating the adequacy of potable water supplies for new developments."[2]

The exempt-well statute, RCW 90.44.050 (appendix C), prohibits drilling or using a well without a permit unless an exemption applies to use the well for specific purposes. The question in this case is whether an unpermitted well may freely be used for any or all of the statutorily exempt uses, or conversely, whether RCW 90.44.050 restricts use of an unpermitted well to the single exemption for use claimed when it was drilled?

This Court's answer to the question is required to resolve a conflict between the Attorney General's present view that an unpermitted well may be used for all of the statutory uses and a 1997 opinion of Attorney General Gregoire that a permit is needed to change the use of an exempt well. *Compare* DOE Amicus Brief at 15 ("no water right permit from Ecology is needed to modify the permit-exempt uses which may be supplied from a well, so long as the uses fall within the categories of exempt use authorized

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[1] Dep't of Ecology's Amicus Curiae Brief ("DOE Amicus Brief") (Ct. App. Div. III No. 313948 (July 26, 2013)) at 3.
[2] Dep't of Ecology's Motion for Leave to File Amicus Curiae Brief (Ct. App. Div. III, No. 3139948 (July 26, 2013)) at 5.

by RCW. 90.44.050") *with* 1997 AGO No. 6 (question "3C. May a right to use water established through an exempt withdrawal be transferred to a different place and/or a different use pursuant to RCW 90.03.380?") at n.10:

> We will not attempt here to define the precise nature of the water right obtained through an exempt withdrawal. . . . As noted elsewhere, we conclude that an 'exempt' right may not be transferred to another use or different land.

*and with* Office of Attorney General (C. Gregoire, J. Pharris, P. McDonald), An Introduction to Washington Water Law (Jan.2000) V:22 (citing 1997 AGO No. 6): "Washington law does not allow the owner of an exempt well to transfer or change the withdrawal of water to a different location or for a different purpose, such as changing the use of water from domestic-home use to industrial; . . ."[3]

Under these circumstances it is not surprising that "counties have inconsistently applied" the exempt-well statute.[4] Review of this question of substantial public interest is fully justified under RAP 13.4(b)(4) because definitive judicial "resolution of this case on the merits would provide much-needed clarity to counties . . . where subdivision applicants propose to obtain a water supply through the groundwater permit exemptions provided under RCW 90.44.050." *Id.*

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[3] This publication is available on both the Attorney General's website, http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Divisions/Ecology/Intro%20WA%20Water%20Law.pdf, and the Department of Ecology's website, https://fortress.wa.gov/ecy/publications/summarypages/0011012.html (both accessed February 2, 2014).

[4] *Id.* at 3.

## II. IDENTITY OF THE PETITIONER

The Petitioner is Arthur Gresh, the appellant below.

## III. CITATION TO COURT OF APPEALS' DECISION

Mr. Gresh seeks review of the decision of Division III of the Washington State Court of Appeals filed on December 5, 2013, in *Gresh v. Okanogan County et al.*, No. 31394-8-III, a copy of which is Appendix A. The Court of Appeals denied a timely motion for reconsideration on January 14, 2014, in its decision that is Appendix B.

## IV. ISSUES PRESENTED FOR REVIEW

1. Does the exempt-well statute, RCW 90.44.050, restrict use of an unpermitted well to the single statutory use exemption claimed when it was drilled—or conversely, does the statute freely allow an unpermitted well to be used for all of the statutorily exempt purposes, collectively or serially, provided no more than 5,000 gallons of water a day is withdrawn?

2. The integrity of the State Environmental Policy Act ("SEPA") review process is protected by rules requiring the withdrawal of any earlier decision exempting a project from preparing an environmental impact statement (a "Determination of Non-significance" or "DNS"), if it is later discovered that the DNS's prediction of no significant impacts was wrong, or that the DNS was obtained by misrepresentation. *See, e.g.*, WAC 197-11-600(3)(b) (requiring new DNS or environmental impact statement

upon "New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.)"); *see also* WAC 197-11-340(3)(a) (DNS must be withdrawn under same facts). There are no time limits on these provisions.

Okanogan County approved the Nordic Village long plat only after testimony that its SEPA mitigating condition of approval had been satisfied by the Department of Ecology—namely, that the developer have the legal right under RCW 90.44.050 to use the existing well drilled for single residential use to supply the plat's six commercial and six residential parcels.

After the developer sought to rezone the commercial parcels 13 days after the plat was approved, it was disclosed in a SEPA appeal of the rezone DNS that, in fact, the Department of Ecology had not approved the developer's water rights and that the Department of Health issued the permit for the plat's water system based on the developer's lay assurances that he had the water rights because the Department of Ecology had commented.

Did the Court of Appeals err in shielding the plat's mitigated DNS ("MDNS") from withdrawal in the rezoning SEPA appeal because the evidence that it was procured by misrepresentation and the new information of the plat's adverse impacts—its violation of RCW 90.44.050—were brought to Okanogan County's attention in a different land use proposal more than 21 days after the county approved the plat?

3. Because statutes that award attorneys' fees in contravention to the 'American rule' must be narrowly construed, where RCW 4.84.370 allows a fee award to the prevailing party on appeal "of a decision by a county" in a land use case, did the court of appeals err in awarding fees in an appeal affirming a trial court's decision to dismiss for lack of jurisdiction?

## V. STATEMENT OF THE CASE

This case began as an adjoining property owner's administrative SEPA appeal of a DNS issued for a rezone of the commercial parcels in the six commercial, six residential-parcel Nordic Village development in Mazama, Washington. The appeal challenged any commercial or multi-residential use of the Nordic Village's well as violating the exempt-well statute, which was drilled for, and is thus limited to, single residential use.

The exempt-well issue is tied to the SEPA rezoning appeal in two ways. First, the legal right to use the well under RCW 90.44.050 was a SEPA mitigating condition of approval for the Nordic Village long plat—which the appeal showed was satisfied by demonstrably false testimony. The validity of the rezoning DNS is completely dependent upon the continuing validity of the MDNS for the long plat, so the rezone DNS falls with the MDNS.

Second, any use of the well allowed by the rezone (or the long plat) that violates RCW 90.44.050 is a significant, adverse environmental impact as a matter of law and violates the SEPA mitigating condition of plat approval.

A. Okanogan County Approved the Nordic Village Believing that The Department of Ecology Approved the Water Rights.

The Board of Okanogan County Commissioners gave final approval to the Nordic Village long plat at their March 14, 2011, meeting based on the testimony of the planning department's Ben Rough that the Departments of Ecology and of Health had both approved the developer's water rights:

> **Nordic Village – Planning Ben Rough**
> Ben Rough
> Ben gave the staff report for Final review of the Nordic Village 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.[5]

The Department of Ecology's blessing of the Nordic Village's water rights was critical because it satisfied the county's SEPA condition of approval that the developer have the legal right under the exempt-well statute to supply the Nordic Village's twelve parcels using a well drilled for an earlier, four-parcel short plat subdivision call the "Mazama Bridge."

[5] The Clerk's Papers includes the county administrative appeal record ("County Record") as "unattached Exhibit A" to the Declaration of Lalena Johns, CP 157-58, who certified the copy. The March 14, 2011 record of proceedings is exhibit E3, quoting page 2.

The Nordic Village was originally Lot 1 of the Mazama Bridge short plat, where each parcel had its own well.[6] On December 1, 2006, Okanogan County Public Health ("OCPH") issued a Water Adequacy Certificate for Lot 1 certifying its well as legally adequate "to meet the needs of its intended use," which the certificate and attached well drilling log identified as an individual residential system.[7] Restrictive covenants allocating 5,000 gallons a day among the four parcel gave 2,880 gallons a day to Lot 1 as restated.[8]

Whether or not this well could legally supply the Nordic Village's twelve parcels was identified in the county's SEPA review of the long plat as having the "potential for probable, significant, adverse environmental impacts which may be mitigated to the point of non-significance."[9] To mitigate that risk, the planning department imposed a carefully-worded condition of approval, which according to its final report had been satisfied:

> **Final SEPA Determination**
>
> All mitigation measures from the final SEPA determination, listed below, are conditions of approval for this project.
> **Water Use and Establishment**
> 1. All lots shall be served by an adequate and legal water supply prior to final approval. 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 the permit exemption limitations identified in RCW 90.44.050.
> . . .

[6] CP 265-66.
[7] CP 279-81.
[8] CP 268-72.
[9] County Record, ex. 2, attachment K ("Final SEPA Determination").

**Analysis: This condition has been met.**[10]

B. Arthur Gresh's SEPA appeal of a Rezoning DNS Revealed that the County's SEPA Determination of Non-Significance for the Long Plat had been Procured by Demonstrably False Testimony.

Less than two weeks after the county approved the Nordic Village long plat, the developer filed a new application to rezone the six commercial parcels from one slate of uses called "Urban Residential" to another called "Neighborhood Use."[11] The developer's environmental checklist for the rezone identified only the relative impact from the change in zoning, not the actual impacts of the new uses—repeatedly stating for example, "A rezone of the area will not cause any change to the area that would be different from the current zoning."[12] Because the county had just determined that the long plat had no adverse impacts, it summarily issued a DNS for the rezone.[13]

Arthur Gresh, an adjacent landowner, filed a timely administrative SEPA appeal of the rezoning DNS with the Board of Okanogan County Commissioners.[14] The centerpiece of Mr. Gresh's appeal was a September 2, 2010 letter from the Department of Health to the developer confirming that it issued the permit for the Nordic Village's 12-connection water system based on his lay assurance that he possessed the necessary water rights because the Department of Ecology had not commented on the subject

[10] County Record, ex. E2 (Planning Dep't Staff Report Mar. 14, 2011), attachment F at 13.
[11] County Record, ex. E17 (Planning Comm'n Rezone Report, Aug. 23. 2011), attachment A.
[12] *Id.*, attachment I (SEPA checklist) at 11-12.
[13] *Id.*, attachment H.
[14] CP 205-253.

> 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.[15]

Mr. Gresh also showed that the developer failed to keep promises made to the Department of Health in its permit application cover letter, including the "commercial connections will be restricted on the face of the plat to retail and professional businesses," and "food service will be prohibited."[16] In fact, once the plat was approved without those restrictions, the developer's agent marketed Nordic Village parcels as "zoned for inns, cabins, restaurants & lodges. . . . Get it while it's hot!!!"[17]

The Department of Health's water system permit for the Nordic Village was all that Okanogan County Public Health would need to verify the legality of the plat's water supply, according to its project 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. At twelve lots, the Washington State Dept. of Health will be the jurisdictional agency for system approval.[18]

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[15] CP 252-53.
[16] CP 241.
[17] CP 245-48.
[18] County Record E4 (Planning Dep't Final Report March 14, 2011) Attachment I (Agency Comments) at 9 (June 9, 2010 Comment Sheet from Okanogan County Public Health).

C. The SEPA Rules, Adopted as Okanogan County Ordinances Required Okanogan County to Withdraw the Long Plat's MDNS and Reverse or Withdraw the DNS for the Rezone.

With no valid legal basis for the county's SEPA determination that the Nordic Village has a legal water supply, Mr. Gresh's appeal also showed that any commercial use or multi-residential use of the Nordic Village's well violates RCW 90.44.050 under this Court's construction of RCW 90.44.050 in *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3 4 (2002) (*see* pp. 13-15, *infra*). Thus, the SEPA mitigating condition of approval for the Nordic Village long plat was not satisfied and cannot be satisfied.

The substantive law for Mr. Gresh's administrative appeal was Chapter 14.04 of the Okanogan County Code ("O.C.C."), which adopts as county ordinances the Department of Ecology's SEPA regulations in Chapter 197-11 of the Washington Administrative Code. In particular, Mr. Gresh argued that WAC 197-11-600 "precludes the use of a previously prepared environmental document" if there is significant new information showing adverse impacts "or the discovery of misrepresentation."[19] He also argued that WAC 197-11-340(3)(a)(ii) & (iii) (adopted by O.C.C. §14.04.090) required the county to withdraw the long plat's MDNS for the same reason:

> (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

[19] RP (Board of Okanogan County Commissioners, July 25, 2011) 8.

material disclosure . . . .

Once the MDNS for the long plat is withdrawn, the rezone DNS cannot stand because it relied entirely upon the long plat's MDNS to demonstrate its lack of impacts. And because the commercial use of the well allowed by the rezone would violate RCW 90.44.050, the rezone DNS also has to be withdrawn under WCA 197-11-340(3)(a)(ii) because of such use constitutes significant, adverse environmental impacts (as determined by Okanogan County when it imposed the mitigating condition of approval.)

D. Okanogan County Denied the Administrative Appeal, the Superior Court Dismissed Mr. Gresh's LUPA Petition and the Court of Appeals Affirmed.

The Board of Okanogan County Commissioners denied Mr. Gresh's appeal of the rezoning DNS at its meeting on August 23, 2011, by adopting Resolution 200-2011, which denied his appeal, upheld the DNS for the rezone, and contained findings of fact and conclusions of law.[20] Mr. Gresh sought judicial review of the county-level SEPA appeal by filing a timely petition in the Okanogan County Superior Court under the Land Use Petition Act ("LUPA"), RCW chapter 36.70C. The Superior Court (Burchard, J.) dismissed the LUPA petition, holding on reconsideration that because there had been no appeal of the Nordic Village long plat's approval or its environmental determination, Mr. Gresh's SEPA claims had been

[20] County Record, ex. E16 at 5.

extinguished. RP (Feb. 10, 2012) at 38 ("the Court will accept that argument and find that the SEPA does not allow a challenge under 197-11-340 SEPA and LUPA don't allow a challenge after the twenty-one day period.").

After this Court declined direct review on December 5, 2012, the Washington State Court of Appeals (Division III) affirmed the superior court's dismissal of the LUPA petition, and awarded attorneys' fees against Mr. Gresh under RCW 4.84.370 in an unpublished decision on December 5, 2013 (app. A). A timely motion for reconsideration was denied on January 14, 2014 (app. B), and this Petition for Discretionary Review followed.

## VI. ARGUMENT

Review is justified under RAP 13.4(b)(2) and especially under RAP 13.4(b)(4) to reach a question of "fundamental importance to the state-wide management of water."

### A. This Appeal is a Review of Okanogan County's Administrative Rezoning SEPA Appeal on the County's Administrative Record.

LUPA requires that the county's denial of Mr. Gresh's administrative appeal be reversed if it was "a clearly erroneous application of the law to the facts." RCW 36.70C.130(1)(d). To determine if this standard is 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). Questions of law are reviewed de novo. *Id.*

B. The County Clearly Erred by Failing to Withdraw the Nordic Village's Mitigated DNS and by Failing to Reverse the Rezone DNS Because of Inevitable Violation of the Exempt-Well Statute.

The county's determination in the MDNS that there is no violation of RCW 90.44.050 by commercial use of the Nordic Village's well is invalid because the county's approval of the long plat and its MDNS was procured by misrepresentation. The county clearly erred by failing to withdraw the MDNS for the long plat as required by WAC 197-11-340(3)(a)(iii).

With the MDNS withdrawn, the RAP 13.4(b)(4) "question of fundamental importance to the state-wide management of water" arises as the SEPA rezoning question whether commercial and multi-residential use of the Nordic Village's requires Okanogan County to withdraw both the DNS for the rezone and the MDNS for the long plat under WAC 197-11-340(3)(a)(ii) because of inevitable, significant adverse environmental impacts?

As Mr. Gresh argued in his SEPA appeal, the answer is 'yes' because *Campbell & Gwinn* construed the exempt-well statute to limit use of an exempt well to the single exempt purpose claimed when it was drilled:

> 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.

*Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 3.

Future property owners are bound by the single exemption claimed by the developer who drilled their exempt well because "The developer may not claim multiple exemptions for the homeowners." *Id.* at 14.

More recently this Court confirmed this construction of the exempt well statute by a grammatical analysis in *Five Corners Family Farmers v. State of Washington*, 173 Wn.2d 296, 268 P.3d 892 (Wash. 2011). *Five Corners* considered three possible constructions of RCW 90.44.050. Under the first, the text creates "four distinct categories" of exempt uses, 173 Wn.2d at 308, of (1) unlimited stock watering, or (2) unlimited watering for a lawn or commercial garden of a half-acre or less, 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 commercial or 'industrial' use. *Id.* at 307. Under the second possibility, there is "a bundle of uses" for up to 5,000 gallons a day for all uses except industrial, which has its own 5,000 gallons a day limit. *Id.* The third possibility divides 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." *Id.* at 310.

The "four distinct categories" construction of the statute was adopted as most consistent with its text. *Id.* at 308. The two "bundle of

uses" constructions were rejected because because "the language plainly does something very different," *id.* at 310, and "[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.

Review of this SEPA issue is strongly warranted under RAP 13.4(b)(4) because it allows this Court to resolve the Attorney General's conflicting opinions on the subject. Attorney General Gregoire's view, p.2 *supra*, are consistent with *Campbell & Gwinn* and *Five Corners*. Attorney General Ferguson's present view that an exempt well can be used for all of the statutorily exempt purposes lacks any link whatsoever between the exemption for drilling the well and for using the well, contrary to *Campbell & Gwinn*. It also appears indistinguishable from the 'bundle of uses' interpretations of RCW 90.44.050 considered and rejected in *Five Corners*.

C. Neither LUPA nor a Policy Favoring Finality in Land-Use Decisions Nullifies WAC 197-11-340 or Otherwise Prevents this Court from Reaching the Exempt-Well Question.

Both courts below erred by holding that Okanogan County's MDNS, which determines that the Nordic Village's twelve parcels can legally use the well, cannot be collaterally attacked later because it was not appealed at the time. Both erred by failing to apply SEPA as written and by misapplying a judicially-recognized policy favoring finality in land-use decisions to a SEPA rezoning threshold determination.

By its own terms, there are no deadline or statute of limitations applicable to operation of WAC 197-11-340 or -600—they mandate the withdrawal of a DNS and preparation of a new one *if* a project is changed in ways that are likely to have significant adverse effects; *if* the DNS was procured by misrepresentation, or *if* there is "significant, new information" indicating actual adverse impacts. No expiration date was clearly intended because the same legislation enacting SEPA's present statute of limitations for appealing a DNS in 1984 also required the counties to adopt the SEPA rules at issue here. *See generally*, R. Settle, *The Washington State Environmental Policy Act* (2011) at §4.01 & §5.01[2] (1983 SEPA amendments were proposed and passed together with amendments replacing SEPA's implementing guidelines with present rules).[21]

Moreover, the Groundwater Code, chapter 90.44 RCW, expressly precludes illegal well withdrawals to be created by anything except strict statutory compliance: all groundwater is "subject to appropriate for beneficial use under the terms of this chapter and not otherwise." RCW 90.44.040.

A policy favoring finality in land use decisions has no place because Mr. Gresh in not challenging any land-use decision except Okanogan County's approval of the rezone. Mr. Gresh's argument that the long plat's

[21] Appendix B to the Commission on Environmental Policy's final report, Ten Years' Experience with SEPA (1983), contains the proposed rules. WAC 197-11-340(3)(a) is worded the same as proposed WAC 197-11-350(4)(a) (App. B to final report at 16, available at the Department of Ecology's website, http://www.ecy.wa.gov/programs/sea/sepa/ten_years_experience.html (accessed February 9, 2014).

MDNS must be withdrawn is a SEPA claim, grounded on the substantive and procedural requirements in Okanogan County's SEPA ordinances. He is does not seek reversal of the county's approval of the long plat.[22]

This Court was careful to distinguish between stale land use claims that are extinguished by LUPA's 21-day statute of limitations and SEPA claims that remain live for adjudication when it recognized a policy favoring finality in land use decisions in *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000). The plaintiff there both "challenges Chelan County's approval of [a] residential development project called the Highlands" and "also challenged under SEPA the County's issuance of an MDNS for the Highlands." *Id.* at 172, 182. This Court held that the land-use challenge to plat approval was extinguished by LUPA's statute of limitations when the plaintiff failed to appeal an earlier rezone allowing such developments. But the plaintiff's separate SEPA claims survived: "we remand to the trial court to determine whether the County's decision to issue an MDNS was clearly erroneous." *Id.* at 182.

Finally, Mr. Gresh's SEPA claims are enforcing compliance with the Nordic Village's condition of approval, as SEPA's statute of limitations expressly recognizes: "The State Environmental Policy Act provides a basis for challenging whether governmental action is in compliance with the

[22] The court of appeals misapprehended this case as arising in the first instance as a LUPA challenge to the long plat, *see, e.g.*, App. A at at 5 n.3 ("Mr. Gresh brought his cause of action under LUPA").

substantive and procedural provisions of this chapter," RCW 43.21C.075(1), as does O.C.C. § 14.04.130(G) ("Mitigation measures . . . may be enforced in the same manner as any term or condition of the permit, or enforced in any manner specifically prescribed by the county").

D. This Court Should Resolve a Conflict Among the Courts of Appeals by Reversing the Award of Attorneys' Fees Under RCW 4.84.370 and Construing the Statute Narrowly.

The court of appeals made an award of attorneys' fees against Mr. Gresh under RCW 4.84.370, which provides

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town . . . and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
>
> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

In general, the courts of Washington State follow the common law "American rule," in which each party to a lawsuit is responsible for its attorneys' fees. *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159

Wn.2d 292, 303, 149 P.3d 666, (Wash. 2006). Attorneys' fees statutes in derogation of this common law "must be construed narrowly" with a "clear expression of intent from the legislature" to alter the American rule. *Id.*

Here, the court of appeals merely affirmed the superior court's dismissal of Mr. Gresh's LUPA petition, App. A at 6 (question was "whether to award attorneys fees when the appellate court affirms a trial court's determination that the LUPA action was untimely")—a procedural affirmance in which the court of appeals neither stood "in the shoes of the superior court" nor reviewed "administrative decisions on the record of the administrative tribunal, not of the superior court," as required here. *HJS Dev., Inc.*, 148 Wn.2d at 468. But RCW 4.84.370 only authorizes fees to the prevailing party in "appeals of a decision by a county, city, or town to issue, condition, or deny a development permit" and fees cannot be awarded where the court of appeals avoided deciding the merits "of a decision by a county."

The courts of appeals are divided on this question,[23] with Division III declining to follow in the unpublished decision below its precedential decision in *Richards v. City of Pullman*, 134 Wn. App. 876, 884, 142 P.3d 1121 (2006)("'Dismissal for want of jurisdiction is not the same as a final decision

[23] *Compare Witt v. Port of Olympia*, 126 Wn. App. 752, 759, 109 P.3d 489 (Div. II, 2005)(no fees to party who prevails on procedural grounds but does not prevail "on the merits"); *Quality Rock Prods., Inc. v. Thurston County*, 126 Wn. App. 250, 275, 108 P.3d 805 (Div. II, 2005) (same); *Northshore Investors, LLC v. City of Tacoma*, 174 Wn. App. 678, 701, 301 P.3d 1049, *rev. denied*, 178 Wn.2d 1015 (Div. II, 2013)(same) *with Durland v. San Juan County*, 175 Wn. App. 316, 305 P.3d 246 (Div. I, 2013) ("RCW 4.84.370 'does not require that the party must have prevailed on the merits'"); *Presbeges v. King County*, 98 Wn. App. 275, 990 P.2d 405 (1999)(same).

on the merits. Consequently, Pullman is not entitled to attorney fees and costs pursuant to RCW 4.84.370(2)." (citing *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wash.App. 593, 601, 972 P.2d 470 (1999) (Div. II)).

## CONCLUSION

Review of a question of fundamental importance to the state-wide management of water is justified under RAP 13.4(b)(4); review is justified under RAP 13.4(b)(2) to resolve a conflict between the courts of appeals on an award of attorneys' fees under RCW 4.84.370.

Petitioner asks that the court of appeals decision be reversed and the case be remanded to Okanogan County with instructions to reverse the approval of the rezone, to withdraw the DNS for the rezone and the MDNS for the Nordic Village long plat, and for further proceedings.

Respectfully submitted this 13th day of February 2014,

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**FILED**
**DEC 5, 2013**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

| | | |
|---|---|---|
| ARTHUR GRESH,<br><br>Appellant,<br><br>v.<br><br>OKANOGAN COUNTY AND MAZAMA PROPERTIES, LLC,<br><br>Respondent. | ) | No. 31394-8-III<br><br>UNPUBLISHED OPINION |

KORSMO, C.J. — Appellant Arthur Gresh brought a LUPA[1] claim challenging an earlier nonappealed final land use decision concerning the same property. Because our Supreme Court has already determined that LUPA does not permit such untimely collateral attacks, we affirm. Respondent's request for attorney fees requires us to weigh in on a split in the divisions of this court regarding the availability of attorney fees under RCW 4.84.370 in this circumstance. We award the requested fees.

FACTS

Mazama Properties LLC (MP) is the developer of the Nordic Village subdivision in Okanogan County's unincorporated Mazama community. In 2007, the county

[1] Land Use Petition Act, chapter 36.70C RCW.

Appendix A

approved MP's plan for a four lot Nordic Village short plat. MP then sought permission to further divide lot 1 into a 12 lot long plat.

In July of 2010 the county issued a mitigated determination of nonsignificance (MDNS) for the long plat under the State Environmental Policy Act (SEPA), chapter 43.21C RCW. The MDNS conditioned approval on MP limiting Nordic Village's water use to the permit exemptions specified in RCW 90.44.050.[2] The county gave its final approval to the long plat on March 14, 2011. The final approval of the long plat went unchallenged.

Following approval of the long plat, MP applied to the county to rezone six of the twelve lots in the long plat. Using the MDNS that was developed during the long plat approval process, the county issued a determination of nonsignificance (DNS) for the proposed rezone. On August 23, 2011, the county gave final approval to the rezone.

On September 9, 2011, neighboring property owner Arthur Gresh filed a LUPA petition challenging the rezone. Mr. Gresh argued that the DNS should not have been issued and needed to be withdrawn because Nordic Village did not have an adequate and

[2] The adequacy of the Nordic Village's well water supply has been an issue throughout the property's development. Like Mr. Gresh, this court has a hard time understanding how the twelve lots hope to subsist on only 2,880 gallons of water per day combined, especially when the Okanogan County Health District requires each of the six residential lots to be allocated a minimum of 360 gallons per day. However, because the MDNS was not timely challenged the way to ensure proper water use at this stage is through an action to enforce the conditions specified in the MDNS in the event that those conditions are violated.



## Appendix A

legal water supply. Because the DNS was premised on the finding of an adequate and legal water supply in the MDNS, Mr. Gresh's petition necessarily challenged the MDNS.

In January of 2012, the superior court dismissed the petition. The court ruled that the MDNS was unreviewable due to LUPA's 21 day statute of limitations. Mr. Gresh thereafter timely appealed to this court.

ANALYSIS

Mr. Gresh's appeal takes issue with the court's ruling on his challenge to the long plat. MP in turn requests its attorney fees under RCW 4.84.370. We will address each claim in turn.

*LUPA*

"Under SEPA, before a local government processes a permit application for a private land use project, it must make a 'threshold determination' of whether the project is a 'major action significantly affecting the quality of the environment.'" *Anderson v. Pierce County*, 86 Wn. App. 290, 300-01, 936 P.2d 432 (1997) (quoting RCW 43.21C.030(2)(c)). The responsible official will usually issue either a determination of significance (DS) or a DNS. *Id.* "A DS mandates intensified environmental review through preparation of an EIS [Environmental Impact Statement]." *Id.* "Conversely, a DNS means that no EIS will be required." *Id.*

An alternative threshold determination is the MDNS, "which involves changing or conditioning a project to eliminate its significant adverse environmental impacts." *Id.*



Appendix A

(citing WAC 197-11-350); RCW 43.21C.060. With an MDNS "the governmental agency may specify mitigation measures and issue a MDNS only if the proposal is changed to incorporate those measures." *Id.* at 301-02 (citing WAC 197-11-350(3)).

In the present case, the county issued an MDNS that applied to the long plat approval. A few months later, the county, relying on the MDNS, issued a DNS with regard to the rezone. An agency's reliance on existing SEPA documents to justify later actions is expressly permitted to prevent needless duplication of efforts. WAC 197-11-600; *Thornton Creek Legal Def. Fund v. City of Seattle*, 113 Wn. App. 34, 50, 52 P.3d 522 (2002). Accordingly, the county did not err by relying on the long plat's MDNS to justify the rezone's DNS.

The question here is whether the timely appeal of the rezoning DNS opened up the non-appealed long plat MDNS for collateral attack. The Washington Supreme Court answered this question negatively in *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 182, 4 P.3d 123 (2000).

There the county had granted an application for a site-specific rezone, which constituted a final land use decision. No appeal was taken from that decision. Later, the county made another final land use decision when it approved a plat application for the same property. The Wenatchee Sportsmen Association timely appealed the plat approval. Through that challenge, the Association attempted to collaterally attack the rezone. *Id.* at 174-75. The Supreme Court held that LUPA plainly and unambiguously



## Appendix A

requires that any challenge to a final land use decision occur within 21 days of issuance. *Id.* at 181-82.

The court reaffirmed the holding of *Wenatchee Sportsmen* a few years later in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005). There, the court held that a LUPA challenge to a grading permit could not be used to collaterally attack a special use permit that had been issued earlier in the development process. The Supreme Court then went further, stating that "even illegal decisions must be challenged in a timely, appropriate manner." *Id.* at 407.

*Wenatchee Sportsmen* and *Habitat Watch* demonstrate the primacy that the doctrine of finality has over land use decisions. Because these cases hold that a previously unchallenged final land use decision cannot be collaterally attacked we affirm the superior court's dismissal of Mr. Gresh's LUPA petition.[3]

*Attorney Fees*

As the prevailing party throughout this action, MP requests attorney fees under RCW 4.84.370. In essence, that statute provides that "parties are entitled to attorney fees

[3] Recognizing the controlling effect of these cases, Mr. Gresh also appears to argue that his request for the county to withdraw the MDNS actually operates outside of LUPA because his request was brought under WAC 197-11-340. This argument fails because Mr. Gresh brought his cause of action under LUPA, meaning that he had to comply with LUPA's statute of limitations. If Mr. Gresh wanted to avoid LUPA he needed to have brought his challenge under a different statute, assuming such an alternative route even exists.



Appendix A

only if a county, city, or town's decision is rendered in their favor and at least two courts affirm that decision." *Habitat Watch*, 155 Wn.2d at 413. "The possibility of attorney fees does not arise until a land use decision has been appealed at least twice: before the superior court and before the Court of Appeals and/or the Supreme Court." *Id.* "Thus, parties challenging a land use decision get one opportunity to do so free of the risk of having to pay other parties' attorney fees and costs if they are unsuccessful before the superior court." *Id.* Although this standard seems straight forward in application, we note that the other two divisions of this court are split on whether to award attorney fees when the appellate court affirms a trial court's determination that the LUPA action was untimely.

Division Two was the first to address this issue. It held that a decision based solely on jurisdictional grounds such as the timeliness of a LUPA petition does not fall within the scope of RCW 4.84.370. *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 601, 972 P.2d 470 (1999). *Overhulse* concluded that the statute only applied to final decisions on the *merits*. *Id.* It reached this result by noting that a dismissal for want of jurisdiction does not have res judicata effect. *Id.* (citing *Peacock v. Piper*, 81 Wn.2d 731, 734, 504 P.2d 1124 (1973)).

Six months later, Division One disagreed with this limited reading of RCW 4.84.370. Division One noted that the statute says nothing about prevailing on the merits. *Prekeges v. King County*, 98 Wn. App. 275, 285-86, 990 P.2d 405 (1999).



## Appendix A

Since then, Division Two has held that the "legislature intended to allow attorney fees only to a party who prevails on the merits" and that a party does not "substantially prevail" under the statute when the appeal is decided on procedural grounds. *Witt v. Port of Olympia*, 126 Wn. App. 752, 759, 109 P.3d 489 (2005); *Quality Rock Prods., Inc. v. Thurston County*, 126 Wn. App. 250, 275, 108 P.3d 805 (2005); *Northshore Investors, LLC v. City of Tacoma*, 174 Wn. App. 678, 701, 301 P.3d 1049 , *review denied*, 178 Wn.2d 1015 (2013). Earlier this year, Division One noted the ongoing disagreement between the two divisions when it refused to back down from *Prekeges* in *Durland v. San Juan County*, 175 Wn. App. 316, 326, 305 P.3d 246 (2013).[4]

Division Three has not yet weighed in on this debate, but must do so now. We believe that attorney fees are available in this circumstance.

Our task is to construe a statute. RCW 4.84.370(1)[5] awards fees to the "prevailing" or "substantially prevailing" party in land use litigation. The term "prevail" does not connote either a merits decision or a procedural one, but suggests only that a party succeeded in the litigation. "Prevail" does not connote a particular type of success.

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[4] A petition for review is pending under cause no. 89293-8.

[5] In relevant part, RCW 4.84.370(1) states: "Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision."



Appendix A

In the context of attorney fees, the Supreme Court has held that "a party prevails when it succeeds on any significant issue which achieves some benefit the party sought in bringing suit." *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987) (addressing RCW 4.84.010). Under this definition, a party need only succeed in some manner to "prevail." The party need not succeed on the merits, although success on the merits is one way to obtain some benefit.

We believe the *Blair* approach is more useful here than the res judicata approach favored by Division Two. *Peacock* is inapposite because RCW 4.84.370 is not concerned with any benefits from res judicata that may accrue to a party. Instead, prevailing in a land use case is the only criterion for an award of attorney fees. The long-term or collateral benefits of success are not a consideration.

If, as *Habitat Watch* contends, the purpose of the fee award is to give a party one "free" appeal without risk of bearing the other party's costs, then the reason why a party wins or loses is simply not relevant.[6] Indeed, an argument can be made that pursuing a procedurally defective appeal through multiple layers of court is more like a frivolous case than is an appeal addressed to the merits of an argument. The public policy of RCW 4.84.370 is furthered by applying the statute to these facts, while that policy would be defeated by denying application of the statute to some subclass of LUPA appeals.

[6] *Habitat Watch*, 155 Wn.2d at 413.



## Appendix A

No. 31394-8-III
*Gresh v. Okanogan County, et al.*

MP has fended off a LUPA challenge to its development plans. It has substantially prevailed. Accordingly, we grant MP its reasonable attorney fees for this appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, C.J.

WE CONCUR:

Kulik, J.

Fearing, J.



Appendix A

**FILED**
**JAN 14, 2014**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
# DIVISION THREE

| | | |
|---|---|---|
| ARTHUR GRESH, | ) | |
| | ) | No. 31394-8-III |
| Appellant, | ) | |
| | ) | |
| v. | ) | |
| | ) | ORDER DENYING |
| OKANOGAN COUNTY AND MAZAMA PROPERTIES, LLC, | ) | MOTION FOR RECONSIDERATION |
| | ) | |
| Respondent. | ) | |

THE COURT has considered appellant's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's opinion of December 5, 2013, is denied.

DATED: January 14, 2014

PANEL: Judges Korsmo, Kulik, Fearing

FOR THE COURT:

KEVIN M. KORSMO
Chief Judge

## Appendix B

**RCW 90.44.050**
**Permit to withdraw.**

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.

# Appendix C

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Spokane, Washington 99201-1905

**BY FACSIMILE TRANSMISSION**

Re: *Gresh v. Okanogan County, et al.*
Court of Appeals case no. 313948

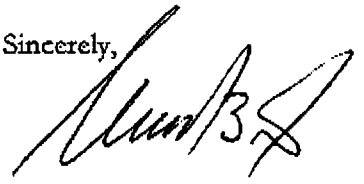
February 13, 2014

Dear Ms. Townsley:

Accompanying this letter is a replacement page 4 of the Petition for Review that I just faxed to you for filing and forwarding to the Supreme Court. As we discussed, I understand that you will substitute this page for the page 4 of the Petition just sent you.

Thank you,

Sincerely,



Michael T. Brady

cc: Messrs. Mackie, Bozarth, and Reichman

upon "New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.)"); *see also* WAC 197-11-340(3)(a) (DNS must be withdrawn under same facts). There are no time limits on these provisions.

Okanogan County approved the Nordic Village long plat only after testimony that its SEPA mitigating condition of approval had been satisfied by the Department of Ecology—namely, that the developer have the legal right under RCW 90.44.050 to use the existing well drilled for single residential use to supply the plat's six commercial and six residential parcels.

After the developer sought to rezone the commercial parcels 13 days after the plat was approved, it was disclosed in a SEPA appeal of the rezone DNS that, in fact, the Department of Ecology had not approved the developer's water rights and that the Department of Health issued the permit for the plat's water system based on the developer's lay assurances that he had the rights because the Department of Ecology had not commented.

Did the Court of Appeals err in shielding the plat's mitigated DNS ("MDNS") from withdrawal in the rezoning SEPA appeal because the evidence that it was procured by misrepresentation and the new information of the plat's adverse impacts—its violation of RCW 90.44.050—were brought to Okanogan County's attention in a different land use proposal more than 21 days after the county approved the plat?