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COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

MIKE HAMILTON; HAMILTON CORNER I, LLC,

Appellant,

v.

POLLUTION CONTROL HEARINGS BOARD; STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY; CITY OF
NAPAVINE,

Respondents.

CITY OF NAPAVINE'S RESPONSE BRIEF

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I. INTRODUCTION

In 1954 the State of Washington granted Water Rights Certificate 1726 to Frank and Edith Hamilton to supply agricultural and domestic water for the Hamilton's farm north of the City of Napavine ("Napavine"). A few years later Interstate 5 was constructed through the middle of the Hamilton's farm, dividing it into easterly and westerly portions. Construction of county-owned frontage roads on either side of the freeway further separated the two parcels.

The westerly portion, which contained the farm's wells, was inherited by Betty Hamilton who continued to operate it as a farm for the next fifty years. The easterly portion was inherited by Mike Hamilton, Betty Hamilton's nephew, and was long ago annexed into Napavine, zoned Commercial-Industrial, and used for a variety of commercial/retail purposes ever since.

In 2003 Betty Hamilton offered to sell her agricultural water rights to Napavine and have them converted to municipal use. Over the next several years Ms. Hamilton proved to the Department of Ecology's ("Ecology") satisfaction that she had put these rights to beneficial use on her farm. Once beneficial use was proven, Napavine was allowed to drill an exploratory well (Well 6).

Once Well 6 was found suitable for public use, Ecology approved the transfer of Betty Hamilton's proven water rights to Napavine by Water Right Change Authorization on April 17, 2012.

The Appellants did not appeal the Water Right Change Authorization issued April 17, 2012.

Four years later, a paralegal employed by the Appellant's legal counsel sent an email to Ecology questioning the water rights transfer. Ecology responded on February 5, 2016, explaining that all issues relating to this transfer had long been settled. The Appellants then challenged Ecology's response as a "decision" and appealed it to the Pollution Control Hearings Board. PCHB dismissed the appeal.

II. RESTATEMENT OF THE ISSUES

Napavine accepts Ecology's restatement of the issues as set forth in Ecology's Response Brief.

III. COUNTER-STATEMENT OF FACTS

Napavine accepts Ecology's counter-statement of facts but provides the following additional facts.

In January 1954 Ecology issued Certificate of Groundwater Right No. 1726 to Frank and Edith Hamilton, allowing the withdrawal of up to 114 acre feet of groundwater per year for irrigation, stock watering and domestic use. AR at 000052.

A few years later the chosen location for the construction of Interstate 5 went roughly through the middle of the Hamilton farm in a north/south direction, dividing the farm into an easterly and westerly portion. The subsequent construction of county-owned frontage roads (Hamilton Road and Rush Road) on either side of Interstate 5 further widened the distance between the two portions.

The westerly portion was eventually inherited by Betty Hamilton. This portion contained the farm's operating wells. Betty Hamilton continued its use as a farm into the early 2000s. Meanwhile, the easterly portion was eventually inherited by Mike Hamilton, Betty's nephew. Long ago this portion was converted from farm land into commercial uses. It was annexed into the City of Napavine, given a zoning designation of Commercial-Industrial and remains a busy commercial area today.

In 2003, or fifty years after the groundwater right had been issued, Betty Hamilton entered into a Letter of Intent expressing her willingness to transfer Certificate 1726 to Napavine. AR at 000005. On November 23, 2004, Napavine filed an application for change of this water right with Ecology. As part of this application Betty Hamilton declared that she was the owner of the water certificate and that she had put the water to beneficial use on her property. AR at 000056-89.

The holder of a water right may be allowed to transfer it to another party, and to another location, if the transfer is in compliance with the requirements of the Water Code, Chapter 90.03 RCW. The transfer of a water right to any other land or place is allowed if such change can be made without detriment or injury to existing rights.

"The point of diversion of water for beneficial use or the purpose of use may be changed, if such change can be made without detriment or injury to existing rights. A change in the place of use, point of diversion, and/or purpose of use . . . may be permitted if such change results in no increase in the annual consumptive quantity of water used under the water right. For purpose of this section, 'annual consumptive quantity' means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five year period of continuous beneficial use of the water right. . . ." RCW 90.03.380

Thus, Betty Hamilton could transfer her water right to Napavine provided that the transfer did not cause harm to other water rights, and provided that she could only transfer that much of her water right proven to have been put to beneficial use during the previous five years.

Between 2004 and 2007 Ecology undertook an examination of Betty Hamilton's water use and concluded that she had continuously put to beneficial use 105 acre feet annually (out of the 114 acre feet allowed). Betty Hamilton was therefore approved to transfer 105 acre feet to Napavine.

Once Ecology determined the amount of the water right eligible for transfer (105 acre feet), Napavine was required to publish notice of the application once a week for two weeks in a local newspaper of record. RCW 90.03.280. Napavine satisfied this requirement by publishing notice in The Chronicle on December 14, 2007 and again on December 21, 2007. AR at 000006 to 000060. Ecology received five letters in response to these notices including several from Mr. Hamilton's neighbors, but none from the Appellants.

The next required step was for Napavine to drill a test well ("Well 6") to confirm that the change in location would not impair other water rights. RCW 90.44.100(2)(1) On April 2, 2008 Ecology issued a "Preliminary Permit" to drill and test Well 6. AR 000273 to 277. Two years later, on April 14, 2010, Napavine's consulting engineers notified Ecology that all preliminary testing was completed. AR at 000285 to 294. After another two years elapsed, on April 17, 2012, Ecology issued its Report of Examination approving Water Right Change Authorization CG2-GWC1726 (the "Ecology Order") authorizing Napavine the use of up to 105 acre feet of groundwater per year from Well 6 for municipal water supply purposes. AR at 000055.

The Appellants did not appeal the Ecology Order.

While Napavine was awaiting Ecology's formal approval of Well 6 it had already begun a Local Improvement District (LID) to fund the cost of connecting Well 6 to the City's existing water system, and extending the water supply system to the "Rush Road Interchange" including the Appellants' property. By separate lawsuit the Appellants challenged their final LID assessment. When their challenge was denied by the Lewis County Superior Court, Appellants appealed to this Court. *Hamilton Corner 1, LLC v. City of Napavine*, 200 Wn. App. 258 (2017). This Court affirmed the Superior Court's denial of the Appellant's challenge. This Court's Opinion provides a useful history of events surrounding the LID including the notices given to the Appellants. As noted at page 263, in February 2012, Napavine mailed notice to the Appellants of the LID formation hearing and the Appellant's preliminary LID assessment (approximately \$170,000). This notice reminded Appellants that one of the purposes of the LID was to put Well 6 to beneficial use. Appellants did not respond to this notice. They did not challenge their preliminary assessment or otherwise protest the City's use of waters from Well 6. (In 2015 Appellants unsuccessfully challenged their final LID assessment as explained above.)

In late 2015, Doreen Milward, a paralegal in the law firm representing the Appellants, first contacted Ecology concerning Napavine's

water certificate. AR at 000011. Over the next several months several emails were exchanged between Ms. Milward and Ecology, including a message from Ms. Milward on January 5, 2016, questioning the propriety of the water rights transfer. AR at 000008. Ecology responded by a letter sent February 5, 2016, (the "Ecology Letter") advising Ms. Milward that the agency was not going to take any action in response to her inquiries.

On March 4, 2016, or more than four years after the Ecology Order was issued, Appellants filed an appeal of the Ecology Letter to the Pollution Control Hearings Board (PCHB). PCHB dismissed the Appellants' challenge on summary judgment. On August 17, 2016, Appellants petitioned for judicial review to the Lewis County Superior Court. On April 6, 2017, the Superior Court affirmed the PCHB's Order of Dismissal, and denied Appellants' additional claims. The Appellants then appealed the Superior Court's Order to this Court.

IV. ARGUMENT

A. Napavine Concurs with the Arguments Presented by Ecology in its Response Brief

Napavine concurs with all of the arguments presented by Ecology, but adds the following supplemental arguments.

B. Appellants have not Established any Interest in Certificate 1726

The Appellants' claim that they have an interest in the original Certificate 1726, and that this interest has somehow been injured. But Appellants have never offered any evidence of such an interest, nor have they provided any legal authority in support of this argument.

The only evidence the Appellants have presented is that they are the successors in interest to the most easterly fractional interest of Frank and Edith Hamilton's property. This fractional interest is only one of several ownerships of the property once owned by Frank and Edith Hamilton. Other fractional owners include: Napavine (owner of the Rush Road right of way); the State of Washington (owner of the Interstate 5 right of way); Lewis County (owner of the Hamilton Road right of way); and, finally, Betty Hamilton.

The Appellants do not claim, and cannot prove, any beneficial use of Certificate 1726. The only wells approved for the withdrawal of groundwater under this certificate are found on Betty Hamilton's property, not the Appellants. Meanwhile the Appellants are withdrawing groundwater from wells on their property under separate, unrelated water certificates.¹

¹ Water Rights G2-26648, G2-266356, and G2-24573

The original Certificate 1726 was expressly limited to the withdrawal of groundwater "for irrigation, stock water and domestic supply." For several decades the Appellants' property has been devoted to commercial/retail activities. It includes several restaurants, gas station, truck station, convenience store and various other retail activities. It was long ago annexed into the City of Napavine and enjoys a zoning designation of Commercial-Industrial. These commercial activities, and the property's zoning, preclude use of groundwater rights restricted to "irrigation, stock water, and domestic supply."

Before Betty Hamilton could transfer her water right she was required to prove to Ecology's satisfaction that she had put it to beneficial use, as she could only transfer that portion of the water right as had been put to beneficial use. RCW 90.03.380. After lengthy investigation Ecology concluded that Ms. Hamilton had put 105 acre feet to beneficial use *on her property*. All that Napavine purchased from Ms. Hamilton was the 105 acre feet she had personally used. Napavine did not purchase any water rights from Ms. Hamilton not proven to have been continuously used on her property.

Our courts have long held that water rights are considered real property and are appurtenant to and pass with a conveyance of land which receives their beneficial use. *Foster v. Sunnyside Valley Irrigation District*,

102 Wn.2d 395, 300, 687 P.2d 841 (1984); citing to *Drake v. Smith*, 54 Wn.2d 57, 337 P.2d 1059 (1959). This concept is codified at RCW 90.03.380(1).

But there is no Washington authority for the proposition that the conveyance of a *fractional* interest in property also conveys some undefined fractional interest in a water right, especially where the property being conveyed does not enjoy beneficial use of the water right. Stated slightly differently, simply because Appellants are the successors in interest to a fractional interest in the original property, but are disconnected from the water source and disqualified from utilizing it (as commercial property), does not give the Appellants a basis for claiming an interest.

The acquisition, ownership and transfer of water rights is regulated by the Water Code, Chapter 90.03 RCW. There are no provisions in the Water Code recognizing a fractional ownership interest in a water right. The Water Code only speaks of whole water rights, and does not recognize the concept of a fractional water right. The Water Code allows for the possible *division* of a water right into more than one right, but only through the regulatory process of application, notice and proof of beneficial use. Further, this process results in the approval of new water certificates, not fractional interests in the original certificate.

Just as the Water Code does not speak to fractional interests in water rights, there is no caselaw which approves this concept.

An example may prove useful:

Mr. Jones owns an 80-acre farm together with Water Certificate 1234 for agricultural use. Mr. Jones decides to develop half of his farm, or 40 acres, into 80 1/2-acre residential lots. Mr. Jones retains the remaining forty acres, which includes the authorized well, as a farm. The deeds to the 80 residential lots do not mention the water certificate and Mr. Jones does not provide water to these lots from the well, requiring them instead to obtain their own water. Fifty years later Mr. Jones decides to sell his water right to the adjoining city.

Under the Appellants' theory this hypothetical Water Certificate 1234 is now owned by 81 individuals, even though for the past fifty years only one individual has used it and the remaining 80 have not and cannot make use of it. This is an illogical and, arguably, nonsensical claim but yet the only difference from the present facts is the number of potential claimants.

This example illustrates why the Water Code does not recognize fractional interests in water rights, and why caselaw does not support the concept. Instead, the Water Code declares that the water right is appurtenant to the land *on which it is used*, which, in this case, was Betty Hamilton's. RCW 90.03.380(1)

C. Appellants' Untimely Challenge is Contrary to Public Policy

The transfer of Water Right Certificate 1726 to Napavine was completed on April 17, 2012 by means of the Ecology Order. The deadline to appeal the Ecology Order was thirty days after April 17, 2012. RCW 43.21B.230(1); WAC 371-08-335(2). This deadline expired four years before Appellants commenced this action.

The Appellants attempt to circumvent this problem by trying to create a new appealable "decision", thus giving them a new appeal period. Appellants attempt this by writing to Ecology and asking it to respond and, when it responds, claiming the response to be a "decision". The PCHB was unpersuaded by this argument, and the Superior Court agreed. Ecology's Response Brief provides a thorough discussion of why its response letter is not a "decision" subject to appeal. In addition to those arguments Napavine respectfully submits this supplemental argument:

1. Allowing Agency Correspondence to be Considered as "Decisions" Would Simply Discourage Agencies from Responding

In early 2016 the Appellants' legal counsel corresponded with Ecology and asked for certain information. Ecology was not under any obligation to respond but did so as a courtesy. The Appellants then seized upon Ecology's courtesy response as a decision capable of being appealed.

If the Appellants' theory is accepted it will encourage other parties to attempt to resurrect stale claims by corresponding with State agencies and asking them to respond. The agencies' recourse will be to simply not respond in order to avoid unintended "decisions." This remedy will result in fewer and less detailed responses from State agencies to public inquiries. There is no public benefit to this result, and a good deal of public harm.

2. The Appellants' Untimely Challenge Interferes with Critical Water Planning

The Appellants' claim is based upon a series of correspondence between Appellants and Ecology in early 2016, four years after the permit was issued. But this correspondence could just as easily have been exchanged in 2026, or even 2036. According to the Appellants they would be just as entitled to make this appeal fourteen years after the permit was issued, or twenty-four years, or at any time. The Appellants do not recognize any limit to when they can challenge Napavine's water permit.

The Appellants' theory runs counter to all public policy relating to the delivery of water by public water systems. Municipalities must have a dependable water supply to ensure safe drinking water, provide adequate fire protection and be available for future development. None of these basic functions can be assured if municipal water rights are never free from challenge. If municipal water rights can be challenged years, even decades,

after having been granted and implemented, then no city or its citizens can feel certain about the municipal water supply.

The State of Washington expects its cities to assure their citizens that the quality and quantity of municipal water will always be guaranteed. The State demands of its cities that they plan for orderly growth based upon their water rights. None of these assurances, or any of this planning, is possible if municipal water rights are challengeable many years after having been granted.

The following are a few of the State-imposed mandates on cities for assuring an adequate water supply, and for planning for future growth based upon municipal water rights:

(1) The Growth Management Act requires cities to assure the long term availability of water through proper planning. RCW 36.70A.020 mandates that city comprehensive plans and development regulations "*ensure* that those public facilities and services necessary to support development *shall be adequate* to serve the development at the time the development is available for occupancy and use without decreasing certain service levels below locally established minimum standards."

2. The GMA also requires that each city's comprehensive plan include: "(4) A utilities element consisting of the general location, proposed location, *and capacity* of all existing and proposed utilities. . . .

3. Each city must adopt a water system plan in accordance with Chapter 43.20 RCW, subject to approval by the Department of Health. Pursuant to RCW 43.20.260 "a municipal water supplier . . . *has a duty* to provide retail water service within its retail service area if: . . . (2) the municipal water supplier *has sufficient water rights* to provide the service. . . ."

4. The Municipal Code, Chapter 35 RCW, empowers each city to "construct, condemn and purchase, purchase, acquire, add to, alter, maintain and operate water works, including fire hydrants, as an integral utility service incorporated within general rates, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, *with an ample supply of water for all purposes, public and private. . . .*" RCW 35.92.010

5. RCW 70.116.010 declares:

"The legislature hereby finds that an adequate supply of potable water for domestic, commercial, and industrial use is vital to the health and wellbeing of the people of the State. Readily available water for use in public water systems is limited and should be developed and used efficiently with a minimum of loss or waste."

These statutes and others impose a duty upon each city to ensure the quality and quantity of its available water, both for present needs and future planning. This duty cannot be satisfied if cities can never feel confident in their water rights. The Appellants' claim that it can challenge a municipal

water right years later is in conflict with the public policies reflected in these statutes.

V. CONCLUSION

As is noted in Ecology's Response Brief, the Appellants true grievance, if one exists, is with Betty Hamilton. It does not appear that the Appellants have a legally recognizable grievance but, if they do, it would be against Ms. Hamilton and pursued through a separate action. Their dispute is not with Ecology or Napavine.

Napavine was awarded its water certificate on April 17, 2012 and the deadline to appeal expired thirty days later. The Appellants' attempt to resurrect the appeal period in 2016 was denied by the PCHB and the Lewis County Superior Court. Napavine respectfully requests this Court to affirm those rulings.

RESPECTFULLY SUBMITTED this 20 day of November, 2017.

HILLIER, SCHEIBMEIR & KELLY, P.S.

By _____

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on November 21, 2017, I caused to be served a copy of the City of Napavine's Response Brief in the above-captioned matter upon the parties herein via the Appellate Court Portal Filing system, which will send electronic notifications of such filing to the following:

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DATED this 21st day of November, 2017, in Chehalis, Washington.



Kristin L. Friend, Legal Secretary

HILLIER, SCHEIBMEIR & KELLY, P.S.

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