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No. 84187-0

SUPREME COURT
OF THE STATE OF WASHINGTON

KITTITAS COUNTY, a political subdivision of the State of Washington,
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW),
CENTRAL WASHINGTON HOME BUILDERS (CWHBA),
MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO.,
TEANAWAY RIDGE, LLC, KITTITAS COUNTY FARM BUREAU,
and SON VIDA II,
Petitioners,

v.

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE,
EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, and DEPARTMENT OF COMMERCE

Respondents.

**KITTITAS COUNTY'S RESPONSE
TO AMICUS BRIEF OF
DEPARTMENT OF ECOLOGY**

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March 4, 2010

RESPONSE TO DOE
AMICUS BRIEF

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I. INTRODUCTION

Appellant Kittitas County (“County”), respondent before the Growth Management Hearings Board for Eastern Washington (“Hearings Board”), submits this response to the “Department of Ecology’s Amicus Curiae Brief” (DOE Amicus Brief) filed herein by the DOE dated January 15, 2010. The DOE Amicus brief misstates the issue in this case, the position of Kittitas County, misconstrues the responsibilities under Chapters 90.44 and 58.17 RCW, and cites to no authority for its assertion that water rights, specifically exempt wells, are subject to a county’s development regulations.

II. ARGUMENT

A. The Issue In This Case.

The issue on appeal in this case is “Does Kittitas County’s failure to require that all land within common ownership or scheme of development be included within one application for a division of land (KCC 16.04) violate RCW 36.70A.020(6, 8, 10, 120, 36.70a.040, 36.70a.060, 36.70a.070, 36.70a.130, and 36.70a.177?” The issue is not whether a county can regulate land use in a manner that collaterally affects the use of water. DOE Amicus brief pages 2, 3.

1 permit-exempt wells even if the County receives information showing an
2 effort to skirt *Campbell & Gwinn*.” What the County actually said was
3 “Even if both criteria from *Campbell & Gwinn* are met, nothing keeps lot
4 owners, otherwise served by water systems, from also drilling exempt
5 wells.” The County’s point is that lots served by a water system that is in
6 conformance with *Campbell & Gwinn*, can subsequently drill exempt
7 wells for permitted purposes such as lawn and garden watering, stock
8 watering or perhaps even domestic use. The DOE cites to no authority
9 that would prevent this because none exists. AGO 2009-6 at pages 6-12
10 explains why the DOE lacks authority to make certain limitation upon
11 exempt wells.¹ Hence, the fact that a development’s water system
12 comports with the law does not prevent these lot owners drilling
13 subsequent exempt wells.
14

15 ///

16 ///

17 ///

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20 ¹ It is difficult to understand how a “friend of the court,” despite the clear language of
21 RCW 90.44.050 and the explanation in AGO 2009-6 that the DOE has no authority to
22 place certain limitation upon exempt wells, has actually done just that. *see* WAC 173-
23 505, 173-517, 173-527, 173-532, and 173-545.

1 **C. Department Of Ecology Misstates The Law.**

2 On several occasions, the Department of Ecology misstates the
3 law. On page 3, the DOE states that the County’s Development
4 Regulations must properly manage water resources, while it is the DOE
5 and its regulation under Ch. 90.44 RCW that manages water resources. At
6 pages 3 and 4 the DOE states it has an interest in the County correctly
7 applying *Campbell & Gwinn*’s holding regarding exempt wells under
8 RCW 90.44.050, yet the enforcement/application authority in chapter
9 90.44 RCW is uniquely with the Superior Court, not with a county.

10 It is disturbing that a “friend of the Court” insists upon quoting
11 errors of law such as at the bottom of page 5 and top of page 6 where they
12 quote the hearings board as saying “Although DOE is the ultimate
13 authority on just how a permit for an exempt well is obtained, the County
14 still controls its own ground/surface water...” Permitting by the DOE is
15 precisely what an exempt well is exempt from. RCW 90.44.050. The
16 surface and ground waters of the state are declared to be regulated by the
17 Superior Court and DOE as described in Chapters 90.03 and 90.44 “and
18 not otherwise.” RCW 90.03.010, 90.44.040. There is no authority in
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1 these chapters or elsewhere for the notion that a county controls its own
2 ground/surface water.

3 On pages 10 and 16 of its brief, the DOE states that permit-exempt
4 groundwater appropriations are not exempt from regulation under the
5 GMA or a county's development regulations, yet cites to no authority for
6 such regulation or authority. This is because no authority for a county
7 regulating exempt wells exists. On page 17 of its brief, the DOE states
8 that "The County is wrong in arguing that common land ownership
9 information is already available through the recording statutes," despite
10 the fact that this is precisely what a recording statute does by giving notice
11 to all the world of what is recorded. RCW 65.08.030, 65.08.070.

12 **D. Hearings Boards Cannot Issue Bright Line Policy Rules.**

13
14 If the GMA is violated by not requiring disclosure of all land in
15 common ownership in a development application, then every municipality
16 planning under the GMA must have such a requirement or they are also
17 violating the GMA. At page 3 of DOE's brief it references what it
18 perceives as the statewide importance of this issue. To require everyone
19 to require such disclosure, there seemingly should be an RCW or at least a
20 WAC requiring such, but none exists. For the hearings board to require
21
22

1 such a disclosure, or violate the GMA, the hearings board is making a
2 bright-line policy decision of statewide importance that case law has made
3 clear they have no authority to make. *Thurston County v. WWGMHB*, 164
4 Wn.2d 329, 358, 359, 190 P.3d 38 (2008).

5 **E. The Requirement Will Not Stop The Proliferation of**
6 **Exempt Wells.**

7 As argued in the County's briefing, common ownership is only one
8 element used to determine a withdrawal under *Campbell & Gwinn*, the
9 other is indicia of development. *DOE v. Campbell & Gwinn*, 146 Wn.2d
10 1, 4, 43 P.3d 4 (2002). One is only limited to an exempt 5,000 gpd
11 withdrawal for those lands that are in common ownership and meet the
12 indicia of development. Therefore, land in common ownership without
13 the indicia of common development could also at some future time obtain
14 rights in an exempt withdrawal.
15

16 Footnote 4 in *Campbell & Gwinn* appears to leave open the
17 possibility that adequate provision for water would be satisfied by a
18 developer merely creating lots and leaving acquisition of water to
19 subsequent lot owners. 146 Wn2d at 11. So if the developer merely
20
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1 created lots, the lot purchasers would still be free to obtain rights in
2 exempt wells.

3 Landowners served by water systems can still put in exempt wells
4 for allowed purposes or further subdivision. Chapter 173-539A WAC's
5 definition of "group use" provides for precisely that. Hence, the
6 disclosure of land in common ownership alone does not necessarily halt
7 the proliferation of exempt wells, and so not having such a provision can
8 not constitute a violation of the GMA's mandate to protect ground and
9 surface water.

10 **F. Other Means Of Accomplishing This Goal.**

11 There are other means of accomplishing the goal of protecting
12 ground and surface water and so not requiring this disclosure does not
13 necessarily mean the County violates the GMA. The County requires
14 disclosure of property ownership as part of its SEPA process which
15 accompanies development applications. KCC 15A.03.030(4) provides
16 that "The applicant shall furnish a list of the names and addresses of all
17 persons owning real property located within 500 feet from and parallel to
18 the boundaries of the proposed activities and such contiguous area under
19

1 the legal control of the applicant.”² A true and correct copy of KCC
2 15A.03.030 is attached hereto as Exhibit “A.” This is the device Kittitas
3 County has been using for cumulative review.

4 Limitations on the amount of smaller lot zoning is a land use
5 decision that protects quantity and quality of water as it places limits on
6 number of properties that typically use exempt wells. Kittitas County does
7 this with KCC 17.04.060 which provides that the County’s three and five
8 acre zones can respectively only account for 3% and 5% of lands in the
9 “Rural” comprehensive plan designation. This places limits on the
10 number of lots that typically rely upon exempt wells and thereby satisfies
11 the GMA mandate to protect ground and surface water.

12 The County also limits development in areas identified with fragile
13 aquifers or easily susceptible to pollution when it is informed of such
14 circumstances by agencies with jurisdiction during the SEPA comment
15 period. This is a land use decision, based upon SEPA comments, that has
16 the effect of protecting water resources. Additionally, RCW 19.27.097
17 provides that counties planning under the GMA must protect water
18 resources by requiring evidence of an adequate potable water supply prior
19

20 ² This was pointed out to the hearings board at oral argument, the transcript of which has
21 been destroyed. This code section has not been amended since the institution of this
22 appeal.

1 to issuing building permits. The statute specifically provides the means
2 that GMA counties employ to protect water resources and comply with the
3 GMA mandate to protect quality and quantity of water. The possibility of
4 other methods of satisfying GMA's requirement to protect ground and
5 surface water, coupled with the fact the County is already doing them,
6 logically means that the County is not violating the GMA's mandate to
7 protect water resources by not requiring the disclosure of land in common
8 ownership. This is particularly true when, as demonstrated above, the
9 disclosure of land in common ownership will not necessarily protect
10 ground and surface water by thwarting the proliferation of exempt wells.

11 **G. DOE Misstates Who Has Responsibility And Authority To**
12 **Make Decisions Under *Campbell & Gwinn*.**

13
14 The central error made by DOE in its Amicus Brief is the
15 misconception that it is a county that makes a determination whether a
16 development application's provision for water comports with Ch. 90.44
17 RCW and *Campbell & Gwinn* or even that the county's Ch. 58.17 RCW
18 determination of adequacy is equivalent to a Ch 90.44 RCW
19 determination. The DOE's brief is replete with assertions that it is a
20 county's task to determine if proposed provisions for water comport with
21
22

1 Ch. 90.44 RCW and *Campbell & Gwinn*.³ RCW 90.44.220 actually
2 provides that the determination of whether one has rights in an exempt
3 well or whether one's use of an exempt well violates the limitations upon
4 exempt wells is a determination made by the Superior Court in an action
5 filed by the Department of Ecology. *See also Rettkowski v. DOE*, 122
6 Wn.2d 219, 234, 858 P.2d 232 (1993). That kind of action is precisely
7 what *Campbell & Gwinn* was. 146 Wn.2d at 8. Not only does a county
8 not make a determination as to whether a use of water comports with Ch.
9 90.44 RCW and *Campbell & Gwinn*, but counties do not even appear to be
10 necessary or proper parties to the litigation that does make that
11 determination.⁴ Insuring that uses of water comport with CH 90.44 RCW
12 and *Campbell & Gwinn* is uniquely the role of a Superior Court in an
13 action brought by the DOE rather than a task involving a county. Simply
14

15
16 ³ DOE's Amicus Brief pages 3, 4 (a county applies *Campbell & Gwinn*), 7 (by not having
17 the disclosure, the county cannot determine if an application contravenes *Campbell &*
18 *Gwinn*), 9, 11, 12, 16 ("single application enables the County to determine whether
19 applications for land division...contravene 90.44.050 as interpreted in *Campbell &*
20 *Gwinn*"), 17 (DOE states that the county has a responsibility to comply with *Campbell &*
21 *Gwinn* and that the county is "to prevent the violation of *Campbell & Gwinn*"), 18 (states
22 that it is the County's responsibility to make sure development applications comply with
23 *Campbell & Gwinn*), 19 (County determines if a development is part of a larger
24 subdivision and states that *Campbell & Gwinn* "informs" our understanding of RCW
25 58.17.110(2) despite the fact that that case never cited to that statute and did not stem
from the approval of a subdivision).

⁴ Yakima County was not a party to *Campbell & Gwinn* and Lincoln County was not a party to *Rettkowski*.

1 speaking, this determination is not a county's job and is something over
2 which a county has no jurisdiction. There is no authority for the
3 proposition (which appears to be advance by DOE at pages 18 and 19 of
4 its Amicus brief) that the determination of adequacy under Ch. 58.17
5 RCW is coequal with the Superior Court's determination under an action
6 brought under RCW 90.44.220 or that the legislature desired to impart the
7 authority for determinations under RCW 90.44.220 to counties via the
8 determination of adequacy required under Ch. 58.17 RCW. There is no
9 legal authority for this notion whatsoever. If the Legislature wished these
10 determinations to be the same or for a county to have such authority along
11 with a Superior Court, it could have drafted a statute that said so, but it did
12 not. The Ch. 90.44 RCW decision is a decision that counties do not make
13 and in which they do not participate.

14
15 The fact that the County does not require disclosure of land in
16 common ownership cannot be a violation of the GMA. The county does
17 not violate the GMA by failing to take information required for a decision
18 it does not make in an action in which it does not participate. It makes no
19 sense to assert that by not requiring information that could be used by a
20 different entity to make a decision in an action to which a county is not

1 even a proper party, that the county has violated the GMA's mandate that
2 it protect water resources. A county receiving such information it will not
3 use is not protecting water because it will not be making decisions that use
4 that information. It is the DOE's responsibility, as the filing entity under
5 RCW 90.44.220, to amass the information for its case, not a county's.⁵
6 The fact that a county does not amass information that is useless to any
7 decision it has authority to make does not mean that the county is shirking
8 its responsibility under the GMA to protect water resources.

9 **H. What A Ch. 58.17 RCW Determination Of Adequacy**

10 **Means.**

11 It may be clearest to first repeat what a determination of adequacy
12 obviously cannot be. It cannot be a determination that an applicant's
13 ability to use water is legal as not contravening Ch. 90.44 RCW and
14 *Campbell & Gwinn*. This, under RCW 90.44.220 is reserved for the
15 Superior Court in an action between the applicant and the DOE.⁶ It could
16

17
18 ⁵ While Kittitas County is sympathetic to this current era of budget cuts, it appears that
19 the DOE is attempting to foist tasks and responsibilities upon counties that counties have
20 no responsibility or jurisdiction over such as ensuring that Ch. 90.44 RCW and *Campbell*
21 & *Gwinn* are not contravened. Additionally, in trying to force counties to amass
22 information that is only useful to the DOE in prosecuting an action under RCW
23 90.44.220, it also appears that the DOE is trying to get counties to do its discovery for it.

24 ⁶ As an illustration of this point, imagine a county determining that an applicant's
25 proposed water use violated Ch.90.44 RCW and *Campbell & Gwinn* and so was not an
adequate provision for water. The developer could appeal that determination to the

1 not prohibit exempt withdrawals to service future development on parcels
2 not showing indicia of common development with the current
3 development application. It could not prohibit exempt withdrawals by lot
4 owners if the developer merely created lots and left water procurement to
5 future lot owners as is contemplated in footnote 4 of *Campbell & Gwinn*.
6 It could not prohibit lot owners from drilling other exempt wells for
7 permitted uses or future subdivision, even if currently served by some
8 other water system.

9 A determination of adequacy under Ch. 58.17 RCW is what
10 Kittitas County currently does. Kittitas County requires evidence from
11 surrounding well logs that demonstrate that an adequate amount of water
12 exists or is available in the area. KCC 16.24.210 requires a well log and a
13 four hour draw down to determine sufficient water supply.⁷ Additionally,
14 Kittitas County requires evidence that the water is potable. KCC
15 16.24.210 also requires a successful bacteriological test. This comports
16 with Chapters 246-290 and 246-291 WAC which define adequacy and
17

18
19 Superior Court under Ch. 36.70C RCW and litigate the issue with the county. No matter
20 the result or subsequent level of appeal, the DOE would not be bound by the result and
21 could still bring an enforcement action under RCW 90.44.220. Hence, it is clear a county
22 cannot make such a determination as neither that determination nor any appellate
23 affirmation of it renders it final or binding.

24 ⁷ A true and correct copy of KCC 16.24.210 is attached hereto as Exhibit "B."
25

1 potability of water in group A and B systems. The certification of such
2 adequacy and potability is required under Kittitas County Code sections
3 16.12.150 and 16.24.150.⁸ Hence, the County makes a determination that
4 there is adequate potable water. This is because the County Health Officer
5 certifies that he/she has reviewed a successful well log that includes a four
6 hour draw down to determine adequate quantity of water, and a successful
7 bacteriological test to determine adequate water quality. How exactly that
8 water is acquired or brought to beneficial use by the applicant is between
9 the DOE and the applicant. This satisfies the requirement under Ch 58.17
10 RCW and does not violate the GMA.

11 CONCLUSION

12 The fact that Kittitas County does not require disclosure of land in
13 common ownership as part of a development application does not violate
14 the GMA.
15

16 Respectfully submitted this 4th day of March
17 2010.

18 

19 NEIL A. CAULKINS, WSBA #31759
20 Deputy Prosecuting Attorney
Attorney for Kittitas County

21 ⁸ True and correct copies of KCC sections 16.12.150 and 16.24.150 are attached hereto
22 respectively as Exhibits "C" and "D."

EXHIBIT

A

15A.03.030 Application and accompanying data.

1. Written application for the approval of the following project activities: zoning variance; zoning conditional use; short plat, long plat or subdivision; shorelines substantial development/conditional use, master planned resort; and site-specific rezone shall be filed in complete form in the Community Development Services office upon forms prescribed for that purpose by the administrator.
2. The written application shall be accompanied by a site plan showing the dimensions and arrangement of the proposed development or changes including all proposed land uses and structures; points of access, roads and parking areas; septic tank and drainfield and replacement areas; areas to be cut or filled; and natural features such as contours, streams, gullies, cliffs, etc. The administrator may require other drawings, topographic surveys, photographs, or other material essential to an understanding of the proposed use and its relationship to the surrounding properties.
3. Applications for project permits shall be signed by the owner(s) of the property.
4. The applicant shall furnish a list of the names and addresses of all persons owning real property located within 500 feet from and parallel to the boundaries of the proposed activities and such contiguous area under the legal control of the applicant.
5. Appropriate fee(s) paid in full. (Ord. 2007-22, 2007; Ord. 2000-07; Ord. 98-10, 1998)

EXHIBIT B

16.24.210 Certificate of county health officer.

A statement as to the suitability of soils for proposed on site sewage systems and public water supplies installed in the subdivision signed by the health officer.

(copy as follows)

Preliminary inspection indicated soil conditions may allow the use of on site sewage systems as a temporary means of sewage disposal for some but not necessarily all building sites within this short plat. Prospective purchasers are urged to make inquiries at the County Health Department about issuance of on site sewage disposal permits for lots. Well information consisting of a well log, satisfactory bacteriological test and a four hour draw down has been submitted and reviewed.

Dated this day of , A.D., 20 .
Kittitas County Health Officer

(Ord. 2005-31, 2005)

EXHIBIT C

16.12.150 Road, sewer, water and fire system recommendations.

The director, county public works director, and the county health officer, shall certify to the planning commission, prior to the hearing, their respective recommendations as to the adequacy of the proposed road system, the proposed sewage disposal and potable water supply systems and fire protection facilities within the subdivision. The recommendations of the director, county public works director, and the county health officer, shall be attached to the commission's report for transmittal to the board. (Ord. 2005-31, 2005)

EXHIBIT D

16.24.150 Certifications required.

The certification in Sections 16.24.160 through 16.24.260 shall appear on the dedication sheet unless not applicable. (Ord. 2005-31, 2005)