COA No. 31394-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR GRESH,

Petitioner,

v.

MAZAMA PROPERTIES, LLC, and
OKANOGAN COUNTY

Respondent.

RESPONSE BRIEF OF MAZAMA PROPERTIES, LLC and OKANOGAN COUNTY

ALEXANDER W. MACKIE, WSBA #6404
JOHN T. COOKE, WSBA #35699
ATTORNEYS FOR MAZAMA PROPERTIES

PERKINS COIE LLP
1201 THIRD AVENUE, SUITE 4800
SEATTLE, WA 98101-3099
TELEPHONE: 206.359.8000
FACSIMILE: 206.359.9000
AMACKIE@PERKINSCOIE.COM
JCOOKE@PERKINSCOIE.COM

STEPHEN M. BOZARTH, WSBA# 29931
DEPUTY PROSECUTING ATTORNEY FOR
OKANOGAN COUNTY
PO BOX 1130
237 FOURTH AVENUE NORTH
OKANOGAN, WA 988440 TELEPHONE
509.422.7280
FACSIMILE: 509.422.7290
SBOZARTH@CO.OKANOGAN.WA.US

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 17, 2012, 4:29 pm
BY RONALD R. CARPENTER
CLERK

COA No. 31394-8

RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR GRESH,

Petitioner,

v.

MAZAMA PROPERTIES, LLC, and
OKANOGAN COUNTY

Respondent.

RESPONSE BRIEF OF MAZAMA PROPERTIES, LLC and OKANOGAN COUNTY

ALEXANDER W. MACKIE, WSBA #6404
JOHN T. COOKE, WSBA #35699
ATTORNEYS FOR MAZAMA PROPERTIES

PERKINS COIE LLP
1201 THIRD AVENUE, SUITE 4800
SEATTLE, WA 98101-3099
TELEPHONE: 206.359.8000
FACSIMILE: 206.359.9000
AMACKIE@PERKINSCOIE.COM
JCOOKE@PERKINSCOIE.COM

STEPHEN M. BOZARTH, WSBA# 29931
DEPUTY PROSECUTING ATTORNEY FOR
OKANOGAN COUNTY
PO BOX 1130
237 FOURTH AVENUE NORTH
OKANOGAN, WA 988440 TELEPHONE
509.422.7280
FACSIMILE: 509.422.7290
SBOZARTH@CO.OKANOGAN.WA.US

ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

I. Introduction

Petitioner Arthur Gresh ("Petitioner Gresh" or "Petitioner") asks this Court to consider his collateral attack on the conditions of approval of the plat of Nordic Village in Mazama, Washington—conditions which he did not appeal at the time the plat was approved. The issue raised is whether Okanogan County erred when it concluded that there was adequate water available to service the plat of Nordic Village, which created six residential and six commercial lots. Okanogan County approved the preliminary plat of Nordic Village on March 12, 2011. The final plat of Nordic Village, meeting the conditions of approval, was approved March 14, 2011. No appeal was filed from approval of the preliminary or final plat (collectively referred to as the "Nordic Village Long Plat") within 21 days as required by the Land Use Petition Act ("LUPA"), RCW 36.70C.040.

After final plat approval, Respondent Mazama Properties, LLC ("Mazama") applied to rezone the six commercial lots to accommodate a wider variety of uses on the approved Nordic Village Long Plat. Petitioner Gresh appealed the determination of nonsignificance ("DNS") for the rezone (which he admits has no significant environmental impact) because of alleged "misrepresentations" about water rights made during the Nordic Village Long Plat approval. This is precisely the type of

delayed collateral attack on a final land use decision that the Legislature intended to prevent when it adopted LUPA. This Court should deny the appeal.

II. Counterstatement of the Issues

A. Does This Court Have Jurisdiction to Hear a Collateral Attack on the Nordic Village Long Plat?

This case presents the following jurisdictional issues:

1. May Petitioner challenge the allocation of water approved in the Nordic Village Long Plat in an appeal of a subsequent rezone when that plat approval was not appealed within 21 days as required by LUPA?

2. May Petitioner challenge an environmental determination for the Nordic Village Long Plat in this Court when Petitioner has not exhausted available administrative remedies, and where Petitioner has not appealed the decision to approve of the Nordic Village Long Plat?

3. May Petitioner use an appeal of a State Environmental Policy Act ("SEPA") threshold determination for a rezone to reach back and challenge the environmental determination made in support of an unappealed plat approval?

B. Has Petitioner Met His Burden of Demonstrating that the SEPA Threshold Determinations are Clearly Erroneous

1. Whether an exempt withdrawal, limited to 2,880 gpd for domestic and commercial purposes, may be drawn from a single well or are multiple wells required?

2. Whether Petitioner Gresh has met his burden of demonstrating that the SEPA threshold determinations are clearly erroneous?

III. Counterstatement of the Case[1]

A. Petitioner Did Not Appeal County Approval of the Mazama Short Plat Which Allocated an Exempt Groundwater Withdrawal Among Four Lots

This dispute involves approximately 6.8 acres of real property owned by Respondent Mazama Properties, LLC ("Mazama Property"). (E-2, Staff Report at 2). The Mazama Property is generally located at the corner of Lost River Road and Goat Creek Road in unincorporated Okanogan County, Washington. *Id.* The Mazama Property at issue in this appeal consists of Lot 1 of the Mazama Bridge Short Plat, which the County approved in June of 2007.[2] (Clerk's Papers ("CP") 263-264).

[1] The Clerk's Papers, where marked, are cited to as "CP" with the applicable page number. A portion of the Administrative Record in the Court's file consists of tabbed documents numbered E1 through E17. Citation to these documents is made by reference to the tab and, if applicable, the relevant attachment.

[2] Respondent Mazama did not own the property at the time of the short plat.

Under the Okanogan County Code ("OCC"), an applicant for a short plat must demonstrate that adequate potable water exists to service the proposed short plat, and the Okanogan County health district must certify "that the proposed short subdivision is served by adequate water supply." OCC § 16.12.040(B); *see also* OCC § 16.12.080(A).[3] State law requires that an application to appropriate groundwater be obtained before a well is constructed unless the proposed withdrawal provides water for the following exempt uses: (1) stock watering; (2) watering of a lawn or noncommercial garden less than 1/2 acre in area; (3) single or group domestic uses not to exceed 5,000 gallons per day ("gpd"); or (4) an industrial purpose not to exceed 5,000 gpd. RCW 90.44.050.

The proponents of the Mazama Bridge Short Plat opted to rely on the exempt well authority of RCW 90.44.050 to provide potable water. The proponents constructed four groundwater wells and allocated a specific amount of water for each of the new lots. The total allocated withdrawal did not exceed 5,000 gpd. (CP 265). To further ensure that the exempt limits would not be exceeded, protective covenants reflecting

[3] "The administrator shall complete written findings of fact, in the form of a preliminary approval letter, pursuant to RCW 58.17.060 for the approval of any short plat meeting all of the requirements of OCC 16.12.070. In the findings of fact, the administrator shall determine:
A. If appropriate provisions are made for, but not limited to, the public health, safety and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies . . ."
OCC § 16.12.080.

the allocation the exempt water among the four new lots were recorded. The protective covenants assigned well #APG 665 with 2,880 gpd for commercial and/or residential uses to Lot 1 of the Mazama Bridge Short Plat. (CP 268-272).

The County approved the Mazama Bridge Short Plat in 2007. No appeals of the County approval of the Mazama Short Plat were filed.

B. Petitioner did not Appeal County Approval of the Nordic Village Long Plat, Which Further Divided Lot 1 of the Mazama Short Plat and Further Allocated the 2,880 gpd of Water Among the New Lots

In 2010, Mazama applied to further subdivide Lot 1 of the Mazama Bridge Short Plat into 12 lots ("Nordic Village Long Plat"). Notably, at the time the time the application was made, the property was zoned urban residential, which permitted residential uses as well as a variety of commercial uses such as restaurants, inns and lodges, and marinas. OCC § 17.21.010. Mazama submitted a complete State Environmental Policy Act ("SEPA") checklist with its application for subdivision approval. The SEPA checklist described the proposal as "[a] long plat of twelve lots, containing six lots of residential use and six lots of commercial use with onsite water and septic." (E-2 (Staff Report at 1); Exhibit L (emphasis added)).

Like applications for short plats, the OCC requires that a long plat proponent demonstrate that adequate water exists to service the proposed lots. OCC §§ 16.20.010(C)(5), 16.20.080(B). Mazama stated in its checklist that groundwater would be provided to service the proposed Nordic Village Long Plat. (E-2 (Staff Report at 1); Exhibit L (paragraph 3.b)). Mazama further clarified that it was relying upon the 2,880 gpd allocated to Lot 1 during the Mazama Bridge Short Plat approval to provide water to the new lots created by the Nordic Village Long Plat. (E-2, Attachment E & O).

Okanogan County notified the public of the application and threshold SEPA determination in accordance with the County Code. (E-2 (Staff Report at 4 (process timeline), Attachment J)). Petitioner Gresh received notification as evidenced by comments he submitted by email dated May 26, 2010. Importantly, Petitioner Gresh's comments expressed the same claims he raises in this appeal: that Mazama had not established "possession of domestic water rights" to support the Nordic Village Long Plat. (E-2, Attachment H).

The Washington Department of Ecology ("WDOE"), the agency charged with enforcing the state groundwater code, also submitted comments. WDOE commented that it would not require a groundwater permit so long as the withdrawal did not exceed the 5,000 gpd per RCW

90.44.050. (E-2 (Staff Report, Attachment E)). The Okanogan County Public Health Department commented on potential impacts from on-site sewage disposal on May 12, 2010, but did not comment about the adequacy of water. Later, in a letter dated June 9, 2010, the Okanogan County Public Health Department commented that water adequacy for the proposed plat would be satisfied by obtaining approval of a Group B water system from the Washington Department of Health ("WDOH"). The County health official expressed her view that Respondent Mazama may have difficulty securing a Group B system approval for the proposed subdivision from the WDOH because the 2,880 gpd of water allocated to Lot 1 from Mazama Bridge short plat may not be adequate to serve development of the Nordic Village Long Plat. (E-2 (Staff Report, Attachment I)). The County Public Health Department ultimately concluded that the adequate water was available for the proposed plat by signing off on the Nordic Village Long Plat of March 3, 2011.[4]

On July 1, 2010 the County issued a SEPA Mitigated Determination of Nonsignificance ("MDNS") for the Nordic Village Long Plat. The SEPA MDNS reflects that Mazama fully disclosed its intent to

[4] The copy of the Nordic Village Long Plat in the record is reduced in size, making it difficult to read. (E-4, Staff Report (Attachment B)). Mazama provides a more legible copy of the Nordic Village Long Plat with this brief at Appendix A.

use the allocated portion of the exempt water right for Lot 1 to provide water to the proposed subdivision:

> 1. All lots shall be served by an adequate and legal water supply prior to approval. The Village at Mazama long plat is granted use of it's [sic] proportionate and legal share of the exempt withdrawal established for the Mazama Bridge short plat. Withdrawal is limited to permit exemption limitations identified in RCW 90.44.050.
>
> 2. Water supply for each lot shall be served by an approved community water system. The water system(s) design shall be approved by either Okanogan County Health or Washington State Department of Health and shall be constructed prior to final approval. Water withdrawal is limited to the water system guidelines as approved by the permitting agency.

(E-2 (Staff Report, Attachment K (Mitigation Measures 1 & 2)). Okanogan County provided notice of the SEPA MDNS and further notified the public of its right to appeal the SEPA MDNS. No appeals were filed by the administrative deadline (July 27, 2010).

On August 5, 2010, County Staff prepared its staff report for the Board of Okanogan County Commissioners regarding the Nordic Village Long Plat application. With respect to the adequacy of water to service the proposed subdivision, the report reiterated that the proposal "will utilize its rightful portion of an exempt withdrawal which was established

with the Mazama Bridge short plat." *Id.* The Board of County Commissioners granted preliminary plat approval on September 13, 2010. (E-4, (Staff Report at 1)). With respect to water usage, Okanogan County's decision to preliminarily approve the subdivision application incorporated the mitigation measures outlined in the SEPA MDNS pertaining to water availability:

> 1. All lots shall be served by an adequate and legal water supply prior to final approval. The Village at Mazama long plat is granted use of it's [sic] proportionate and legal share of the exempt withdrawal established for the Mazama Bridge short plat. Withdrawal is limited to permit exemption limitations identified in RCW 90.40.050.
>
> 2. Water supply for each lot shall be served by an approved community water system. The water system(s) design shall be approved by either Okanogan County Public Health or Washington State Department of Health and shall be constructed prior to final approval. Water withdrawal is limited to the water system guidelines as approved by the permitting agency.

(E-2, Attachment O). Petitioner Gresh did not file an administrative appeal of the preliminary approval of the Nordic Village Long Plat. *See* OCC § 16.20.110 (providing for administrative appeal of preliminary subdivision decisions). Likewise, Petitioner Gresh did not file a land use

appeal of the County Commissioner's preliminary approval of the Nordic Village Long Plat pursuant to LUPA.

After receiving its preliminary approval, Mazama began the work to satisfy the conditions for final plat approval. On July 30, 2010, Mazama submitted its application for Group B water system approval to WDOH. (E-4, Attachment C). After considering the application, WDOH informed Mazama that additional information would be required to approve the application. Among other things, WDOH requested that Mazama submit a Water User's Agreement that specifies "each customer's exact share of the total amount of water available." (CP 252-253; *see also* CP 122 lns. 10-14). On October 21, 2010, Mazama recorded a Water User's Agreement that limited the amount of water that could be used by each lot.[5] After receiving the Water User's Agreement, WDOH approved the Group B Water System for the Nordic Village Long Plat. (E-4, Attachment C; CP 250). The water use limitations set forth in the Water User's Agreement are inscribed on the face of the Nordic Village Long Plat. The condition specifies that the six residential lots are limited to withdrawing 350 gpd per lot and that the six commercial lots are limited to

[5] The Okanogan County Superior Court determined that the Water User's Agreement was inadvertently excluded from the record and ordered that it be included as part of the administrative record. CP at 38, lns. 1-9. The Water User's Agreement is not provided in the designated list of clerk's papers and is included as Appendix B to this brief. Pursuant to Rule of Appellate Procedure 9.6(a), Mazama supplements the designation of clerk's papers with the Water User's Agreement.

withdrawing 120 gpd per lot. (E-4, Attachment B; *see also* Appendix A to this Brief). The water limitations imposed on the plat do not exceed the 2,880 gpd allocated to Lot 1 and thus remain within the 5,000 gpd limit originally approved for the Mazama Bridge Short Plat.

On March 14, 2011, the Okanogan County Board of Commissioners approved the final plat for the Nordic Village subdivision. The commissioners expressly found that all conditions of approval, including the condition that Mazama receive water system approval, had been met. (E-3.) Petitioner did not appeal the decision.

C. Nordic Village Rezone

One week after securing plat approval, on March 23, 2011, Mazama submitted a complete application to rezone the six lots designated for commercial use from urban residential to neighborhood use. (E-17, Attachment A). Both zones allow commercial uses such as laundromats and restaurants in addition to single-family residential uses. The zones allow a variety of similar uses, but the neighborhood commercial zone permits greater flexibility in the types of small retail commercial shops that do not require large amounts of water. (E-17, Attachment C (copy of the use provision of the County zoning code).

Mazama submitted a fully complete SEPA environmental checklist dated March 22, 2011 with its application for a rezone. (E-17, Attachment

I). On May 4, 2011, Okanogan County issued an independent SEPA DNS for the Mazama rezone. (E-6.) Okanogan County reviewed this checklist independently; it did not use the SEPA procedures to adopt the earlier MDNS for the Nordic Village Long Plat to satisfy its SEPA obligations for the Mazama rezone. *See* WAC 197-11-600(4); -630 (establishing procedures for adopting an earlier environmental determination).

D. Petitioner Appealed the SEPA Determination for the Mazama Rezone Alleging Errors Made During the Nordic Village Long Plat Approval

Petitioner appealed the May 4, 2011, SEPA DNS for the Mazama rezone to the Board of Okanogan County Commissioners. (E-7.) In his appeal, Petitioner did not argue that the DNS for the rezone was issued erroneously.[6] Instead, Petitioner raised issues that were decided when the County approved the Nordic Village Long Plat. (E-7) ("Mr. Gresh has been especially concerned with the Nordic Village Long Plat's proposed allocation of its limited water rights . . .").

Petitioner Gresh acknowledged that Mazama had recorded a Water Users Agreement on the property that limited the amount of water that could be withdrawn, but complained that WDOE would not enforce the limits:

[6] Petitioner admits ". . . there was (and is) no dispute that the Nordic Village's water impacts are essentially the same under either zoning classification . . ." Petitioner's Opening Brief at 11.

> The Department of Ecology may potentially be in charge, but the reality is their enforcement division is so under-funded it is not a realistic enforcement alternative.

(E-7 at 2). In sum, Petitioner argued that the rezone could conceivably result in the misappropriation of groundwater without a permit if the conditions to approval of the Nordic Village Long Plat were not enforced. Petitioner did not argue or present evidence that the water allocated to the lots would not be sufficient to serve all of the uses authorized under the proposed zoning.

During the administrative hearing, the Director of Planning, Perry Huston, emphasized that the issue of the MDNS issued for the Nordic Village Long Plat was not subject to review:

> [W]hat's before us today is a rezone. The [Nordic Village] long plat was approved over a year ago. If in fact the water supply that was asserted to support those lots does not exist, there will be no development on those lots.

(CP at 89, lns 7-10). Director Huston further emphasized that the issue of sufficiency of water would be reviewed at the building permit stage when a specific use is proposed: "If in fact the proponent cannot legally use the water supply he's asserted, his rezone is largely academic at that point because he'll never get a building permit to put anything on those lots and as you know, that's the point of review, when you're actually talking about

the specific water supply necessary to do whatever it is you intend to do." CP at 92, lns. 12-18.[7]

On August 23, 2011, the Okanogan County Board of Commissioners denied Petitioner's appeal of the SEPA DNS issued for the Mazama rezone. With respect to Petitioner's claim that water limits would be exceeded, the Board determined that:

> A) The water supply for any project permitted by the new zone would be reviewed at the time of issuance of a building permit. The appellant's claim that future restrictions on water use would not be enforced, and therefore would result in overuse of water were speculative and not supported by the record.
>
> B) The legal status of the water supply identified in a previous long plat which created the lots to which the rezone was requested was not a matter to be reviewed at this hearing . . .

(E-16). The Board of County Commissioners further concluded that Petitioner "failed to provide evidence that overcame the substantial weight afforded to decisions made by the responsible official." (E-16, Attachment B (Conclusion 7)). Following the SEPA hearing, the Board of County Commissioners approved the proposed Mazama rezone on August 23, 2011. (E-15).

[7] Director Huston's testimony is consistent with state law. State law requires proof of adequate water supply to obtain a building permit. RCW 19.27.097.

E. The Okanogan County Superior Court Affirmed the Okanogan Board of County Commissioner's Decision to Deny the SEPA Appeal and Approve the Rezone

Petitioner appealed the Board of County Commissioner's decision denying his SEPA appeal and approving the Mazama rezone to Okanogan County Superior Court pursuant to the LUPA, chapter 36.70C RCW. The superior court likewise denied the appeal. The court rejected Petitioner's argument that the Mazama rezone would inevitably cause a significant impact on the environment because water usage limits would not be enforced: "This Court may not speculate that public agencies will not do their duty or that property owners will necessarily ignore the plat limits." (CP at 40, lns. 5-7).

Petitioner filed for direct review to this Court. Respondent Mazama opposed direct review. As of submission of this Response Brief, this Court has not ruled on whether to grant direct review.

IV. Standard of Review

This appeal is governed by LUPA, chapter 36.70C RCW. This Court stands in the same position as the superior court reviewing the County's decisions based upon the administrative record. *HJS Dev. Inc. v. Pierce County ex. rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003); *Biermann v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434 (1998). The decision under review consists of the

Okanogan County Board of or Commissioner's decision denying Petitioner's appeal of the SEPA DNS for the Mazama rezone and the subsequent decision to approve the Mazama rezone.

Petitioner carries the burden of demonstrating that one of six standards is met. Petitioner seeks review under the following four of the six standards of review:

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

RCW 36.70C.130(1).

A decision to issue an MDNS or DNS is reviewed under the clearly erroneous standard. *See Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Norway Hill Pres. & Protection Ass'n v. King County*

Council, 87 Wn.2d 267, 274, 552 P.2d 674 (1976) (internal quotations omitted).

When reviewing a SEPA threshold determination under LUPA, a reviewing court must be mindful that "the decision of the governmental agency shall be accorded substantial weight." RCW 43.21C.090.

V. Argument

A. Petitioner's Challenge to the County's SEPA Threshold Determinations for the Plat of Nordic Village Is Barred Because Petitioner Did Not Appeal the Plat Approval Within 21 Days of Approval as Required by LUPA and Did Not Exhaust His Administrative Remedies

The improper collateral nature of this appeal is evident by Petitioner's requested relief. Petitioner asks this Court to order withdrawal of the County's SEPA MDNS that the County issued for the Nordic Village long plat. (Petitioner's Opening Brief ("P. Brief") at 3 (Second Assignment of Error) & 38). Petitioner concedes that the approval of the Nordic Village Long Plat is not reviewable under LUPA and has not appealed either the preliminary or final land use decision approving the Nordic Village Long Plat. (P. Brief at 10 ("No appeal of the Nordic Village [Long Plat] approval was filed.")). Nevertheless, Petitioner asks this Court to review issues affirmatively decided during the Nordic Village Long Plat approval process by requesting an EIS for the plat, necessarily voiding the plat approval until the EIS is concluded. (P. Brief at 38).

Petitioner's request is barred by three well-established principles of land use law: (1) LUPA's 21-day statute of limitation to appeal land use decisions; (2) SEPA's prohibition against orphan SEPA appeals; and (3) failure to exhaust administrative remedies.

1. LUPA Prohibits Collateral Challenges to the City's Land Use Decision Approving the Nordic Village Long Plat and Related SEPA Determination of Mitigated Nonsignificance

For purposes of appeal, SEPA determinations assume the character of the underlying action triggering SEPA compliance. RCW 43.21C.075(2)(b); *see also Raynes v. City of Leavenworth*, 118 Wn.2d 237, 249, 821 P.2d 1204 (1992). If the underlying action is a "land use decision," whether or not the agency complied with SEPA in issuing the land use decision is reviewable under LUPA. RCW 43.21C.075(2)(b).

The Washington Legislature adopted LUPA to serve as the "exclusive means" of judicial review of land use decisions. RCW 36.70C.030. The Legislature's stated purpose in enacting LUPA was to reform the process for judicial review of land use decision to provide "consistent, predictable, and timely judicial review." RCW 36.70C.010. To that end, LUPA imposes strict jurisdictional requirements that must be followed to perfect a timely appeal of a land use decision and invoke a court's jurisdiction. RCW 36.70C.040 (requiring that appeals be filed

within 21 days from issuance of the land use decision); *see also James v. Cnty. of Kitsap*, 154 Wn.2d 574, 583, 115 P.3d 286 (2005) ("To have standing to bring a land use petition under LUPA, the petitioner must have exhausted his or her administrative remedies . . . [and filed for] judicial review . . . within 21 days of the issuance of the land use decision."). A land use decision is "unreviewable by the courts if not appealed to superior court within LUPA's specified time frame." *Habitat Watch v. Skagit Cnty.*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005); *see also Chelan Cnty. v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002). This Court has repeatedly adhered to LUPA's jurisdictional filing requirements despite the harshness of the result. *Wenatchee Sportsmen's Ass'n. v. Chelan Cnty.*, 141 Wn.2d 169, 185, 4 P.3d 123 (2000) (refusing to review an appeal of a land use decision filed after the 21-day deadline despite what the dissent referred to as a "flagrant disregard for the law that occurred in this case.") (Talmadge, J. dissenting).[8]

Here, Petitioner admits that he did not file a timely administrative or LUPA appeal of the Nordic Village Long Plat and the associated SEPA MDNS. (P. Brief at 10 ("No appeal of the Nordic Village [Long Plat] approval was filed.")). Yet the focus of this appeal is whether there is

[8] This does not suggest that there is error in this case. Mazama only raises this point to emphasize the strict adherence to LUPA's jurisdictional deadline for filing appeals of land use decisions.

adequate water to serve 12 lots created by the Nordic Village Long Plat. (P. Brief at 3 ("The principal substantive issue relating to [Petitioner's assignment of errors] is whether or not the six commercial and six residential parcels of the Nordic Village [Long Plat] are served by a 'legal water supply' . . . ")). The Nordic Village Long Plat SEPA MDNS required that Mazama serve all proposed lots with "an adequate and legal water supply" to achieve final approval. (E-2, Staff Report, Attachment O (SEPA condition 1)). With the approval of the Class B water system by WDOH (not appealed) and the recording of the Water Users Agreement (the contents of which are incorporated on the face of the final Nordic Village Long Plat), the Board of Commissioners found that "all conditions of approval have been met" and approved the final plat on March 22, 2011. (E-3).

The record demonstrates that Petitioner commented on the application and specifically questioned whether Petitioner had adequate water rights to serve the new lots. (E-2, Attachment H). Nevertheless, Petitioner did appeal the approval of the Nordic Village Long Plat, and Petitioner offers no justification for not appealing that land use decision.

Petitioner argues that he may now revisit issues decided during the Nordic Village Long Plat approval because he filed a timely appeal of the SEPA DNS for the Mazama rezone. This Court has specifically rejected

the argument that a timely appeal of a current land use decision opens up earlier land use decisions to judicial review. *Wenatchee Sportsmen's Ass'n*, 141 Wn.2d 169. *Wenatchee Sportsmen's Ass'n* involved two separate decisions with respect to a particular piece of property: (1) a 1996 site-specific rezone; and (2) a 1998 subdivision approval. 141 Wn.2d. at 177. Opponents filed a timely LUPA appeal of the 1998 subdivision approval in which they argued that the underlying 1996 rezone was invalid. The Court concluded that the validity of the 1996 rezone could not be challenged because the rezone was not timely appealed: "It was too late . . . to challenge approval of the [1996] rezone in a LUPA petition filed in 1998." *Id.* at 181. The Court also rejected the attempt to bootstrap arguments that should have been raised in an appeal of the rezone into the appeal of the plat. *Id.*

This case is remarkably similar to *Wenatchee Sportsmen's Ass'n.* Here, Petitioner asserts, without citation to authority, that appealing the Mazama rezone DNS allows Petitioner to look back and collaterally challenge the County's determination that sufficient groundwater is available to service the Nordic Village Long Plat. (P. Brief at 28). This argument was squarely raised and rejected in *Wenatchee Sportsmen's Ass'n*: "[T]he issue of whether the RR-1 zoning allows for urban growth outside of an IUGA should have been raised in a timely LUPA challenge

to the *rezone*, not in the latter challenge to the plat." 141 Wn.2d at 181. Petitioner's argument that adequate water does not exist to service the property should have been raised in a timely appeal of the Nordic Village Long Plat approval and may not be raised in this appeal of the Mazama rezone and its SEPA DNS. To permit such result would destroy the strong legislative policy favoring finality of land use decisions that LUPA is designed to advance.

2. Petitioner's Appeal of the SEPA MDNS for the Nordic Village Long Plat Is Barred as an Orphan SEPA Appeal

Petitioner takes the rather remarkable position that because his LUPA petition does not seek "substantive judicial review of the County's approval of the [Nordic Village] long plat" that Petitioner is free to argue that the corresponding SEPA determination was issued in error. (P. Brief at 28). This position is at odds with the established law because it violates the prohibition against orphan SEPA appeals. RCW 43.21C.075(1)(2)(a).

Petitioner acknowledges that the decision to approve the Nordic Village long plat is beyond review. (*See* P. Brief at 27-28 (arguing that LUPA does not apply because Petitioner's land use petition does not seek review of the Nordic Village long plat approval)). The concession further emphasizes the impropriety of Petitioner's collateral SEPA appeal of the MDNS issued for the Nordic Village Long Plat. Appeals of SEPA

determinations must be filed with an appeal of the government action triggering SEPA:

> (1) Because a major purpose of this chapter is to combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action. The State Environmental Policy Act provides a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of this chapter. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.
>
> (2) Unless otherwise provided by this section:
> (a) Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.

RCW 43.21C.075(1)(2)(a). This Court has made it very clear that an appeal of a SEPA determination must be linked to a specific governmental action: "SEPA unequivocally declares that its right of judicial review 'shall without exception be of the governmental action together with its accompanying environmental determinations.'" *State v. Grays Harbor Cnty.*, 122 Wn.2d 244, 857 P.2d 1039 (1993) (emphasis added) (quoting Richard L. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis § 20, at 244-45 (1993)); *see also* RCW 43.21C.075(1). Linking the SEPA determination with the action

triggering SEPA precludes "judicial review of SEPA compliance before an agency has taken final action on a proposal, foreclose[s] multiple lawsuits challenging a single agency action and den[ies] the existence of 'orphan' SEPA claims unrelated to any government action." *Grays Harbor Cnty.*, 122 Wn.2d at 251. Appeals of SEPA determinations that are not filed with the underlying government action (in this case the Nordic Village Long Plat) are barred as "orphan" SEPA appeals. *Id.*

Here, Petitioner readily concedes that he has not appealed the approval of the Nordic Village Long Plat and further concedes that the County's decision to approve the Nordic Village Long Plat is beyond review. (P. Brief at 10, 27-28). Nevertheless, Petitioner appeals the SEPA MDNS for the Nordic Village Long Plat. Because Petitioner has not also appealed the approval of the Nordic Village long plat, his appeal of the SEPA MDNS is barred as an orphan SEPA appeal.[9] *Grays Harbor Cnt.y*, 122 Wn.2d at 251.

[9] This is not to suggest that a government may not enforce mitigating conditions imposed pursuant to SEPA beyond the 21-day time period in LUPA. A government's authority to enforce mitigation conditions is a far different issue from a private appeal of a SEPA threshold determination.

3. Petitioner's Challenge to the SEPA MDNS for the Nordic Village Long Plat Is Barred Because Petitioner Did Not Exhaust His Administrative Remedy by Filing a Timely Administrative Appeal of the MDNS

A final barrier to Petitioner's attempt to use its appeal of the Mazama rezone DNS to revisit the Nordic Village Long Plat MDNS is the Petitioner's failure to pursue an administrative appeal of the MDNS issued for the Nordic Village Long Plat. SEPA imposes a strict exhaustion requirement. If an agency accords an aggrieved party an opportunity for administrative review, it must be exhausted before judicial review is sought:

> If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an administrative appeal procedure, such person shall, prior to seeking any judicial review, use such agency procedure if any such procedure is available, unless expressly provided otherwise by state statute.

RCW 43.21C.075(4); *see also Grays Harbor Cnty.*, 122 Wn.2d 244, 249 (citing *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 30, 785 P.2d 447 (1990); *see* Settle, The Washington State Environmental Policy Act § 20(c), at 249-0 to 249-2 (1993)).

Okanogan County provides an administrative appeal process for SEPA determinations. OCC § 14.04.220. There is no dispute that Petitioner did not file a timely administrative appeal of the County's SEPA

MDNS for the Nordic Village Long Plat. The record reflects that Petitioner was aware of the proposal and knew at the time that Mazama sought to use the exempt well to provide water for domestic and commercial uses—the complaint he raises now. (E-2, Attachment H). Nevertheless, Petitioner did not file a timely administrative appeal of the SEPA MDNS. Instead, Petitioner seeks to use an administrative appeal of the SEPA DNS for the Mazama rezone to collaterally attack the earlier SEPA MDNS for the Nordic Village Long Plat. Petitioner's appeal is an untimely challenge of the Nordic Village Long Plat and should be denied.

4. WAC 197-11-340 Does Not Extend the Established Statute of Limitations, and Even if it Did, Petitioner Has Not Demonstrated that Misrepresentation or Lack of Material Information Contributed to the Issuance of the SEPA MDNS

Petitioner contends that WAC 197-11-340 subjects the SEPA MDNS to review and challenge in perpetuity. Specifically, Petitioner alleges that if an appellant alleges that a SEPA threshold determination was procured by misrepresentation or lack of material information that WAC 197-11-340 opens the door challenge the determination regardless of the length of time that has passed.

Petitioner's argument fails for two reasons: (1) Petitioner's construction of WAC 197-11-340(3)(a)(iii) places it in conflict with express statutory provisions in LUPA and SEPA prohibiting retroactive or

collateral appeals that are divorced from challenges of the government action triggering SEPA; and (2) Petitioner has not demonstrated that either the SEPA determination for the Nordic Village Long Plat or the Mazama rezone was procured by misrepresentation or lack of material disclosure.

a. Petitioner's Construction of WAC 197-11-340 Is in Direct Conflict with Express Statutory Limitations on Challenges to Land Use Decisions and Their Corresponding SEPA Determinations

Administrative rules may not conflict with clear statutory provisions. *Alpine Lakes Prot. Soc'y v. Ecology*, 135 Wn. App. 376, 394, 144 P.3d 385 (2007) (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002)). As explained above, three express statutory provisions prohibit the present challenge of the SEPA MDNS for the Nordic Village Long Plat. *See* RCW 36.70C.040(2), (3) (prohibiting review of land use decision and corresponding SEPA determinations beyond 21-day appeal period); RCW 43.21C.075(1) (prohibiting orphan appeals); RCW 43.21C.075(4) (requiring exhaustion of administrative remedies). Petitioner's intended use of WAC 197-11-340 nullifies these clear pronouncements of legislative policy favoring finality of land use decisions and must be rejected. *Skamania Cnty. v. Columbia River Gorge Comm'n.*, 144 Wn.2d 30, 48, 26 P.3d 241 (2001) (reciting that in

Washington there is a "strong public policy favoring administrative finality in land use decisions").

Petitioner argues that withdrawal of a DNS under WAC 197-11-340 is different than an appeal. Several problems exist with this approach. First, Petitioner's argument ignores the fundamental reality that Petitioner raises the issue in an appeal filed pursuant to the LUPA which has strict barriers to untimely appeals. Second, to accept Petitioner's argument would undermine the Legislature's clear purpose to provide finality to land use decisions. Allowing appellants to circumvent the appeal periods by retroactively challenging SEPA determinations because of alleged misrepresentation or lack of material information would subject land use decisions and their corresponding SEPA determinations to the shifting sentiments of science and hindsight. This is contrary to the express and well-established legislative policies designed to ensure finality of land use decisions. Under RCW 43.21C.075(1), the SEPA determination is merged with the final land use decision once the final land use decision is issued. Petitioner's argument that a mere claim that misrepresentation or lack of material information in the SEPA process opens the door to perpetual appeal under WAC 197-11-340 fails in the face of clear legislative expressions favoring finality of land use decision and their corresponding SEPA determinations.

b. Petitioner Has Not Demonstrated that the SEPA Determinations Were Procured Because of Lack of Material Information or Misrepresentation

A final defect in Petitioner's claim is that he has utterly failed to demonstrate that the MDNS for Nordic Village Long Plat was procured by misrepresentation or lack of material information. Under WAC 197-11-340, a DNS may be withdrawn when "[t]he DNS was procured by misrepresentation or lack of material disclosure." WAC 197-11-340(3) (emphasis added). Petitioner fails to point to any misrepresentation or lack of material information in the SEPA checklist supporting the MDNS. Instead, Petitioner's only evidence of misrepresentation is Mr. Rough's testimony during the hearing for the Nordic Village Long Plat. Petitioner Gresh argues that Mr. Rough's testimony that "'all conditions of approval have been met' directly procured final approval of the long plat . . ." P. Brief at 26 (emphasis added).[10] WAC 197-11-340(3) allows for the withdrawal of a DNS because of misrepresentation or lack of material disclosure; it does not permit withdrawal of an unappealable land use decision like the approval of the Nordic Village Long Plat. Thus, Petitioner has not alleged, much less argued, that the SEPA MDNS was procured by misrepresentation or lack of material disclosure.

[10] This statement was made at the final plat hearing more than a year after the time to appeal the SEPA MDNS had expired. Further, Mr. Rough is the County Planner and did not process or issue the MDNS. The responsible official, Mr. Hermston, issued the MDNS.

Petitioner's reference to errors in securing approval of the Nordic Village Long Plat reveals the impropriety of the entire appeal. To avoid LUPA's clear prohibition against collateral challenges to land use decisions Petitioner cloaks his arguments under the guise of SEPA appeals when in fact—as the quoted statement reveals—Petitioner is challenging issues decided in the approval of the Nordic Village Long Plat that Petitioner did not timely appeal.

Even if Petitioner re-construes his argument in reply to attack the MDNS, Petitioner has not demonstrated that there was any misrepresentation of lack of material disclosure in the SEPA checklist to warrant withdrawal. The checklist for the Nordic Village Long Plat clearly described the proposal as a subdivision containing both residential and commercial uses: "A long plat of twelve lots, containing six lots of residential use and six lots of commercial use with onsite water and septic." (E-2, Staff Report at Attachment L). Okanogan County forwarded the checklist to state agencies and the public and received a number of comments, including comments specifically directed to adequacy of the water. Comments received revealed that the checklist and application materials clearly demonstrate that the checklist described Mazama's to use the exempt water for both residential and commercial

uses.[11] Petitioner himself commented that he did not believe adequate water rights exist, which demonstrates that even Petitioner knew of the circumstances and issues he now claims resulted in an erroneous approval of the Nordic Village Long Plat. In light of the comments, especially Petitioner's own comments, Petitioner cannot claim that the SEPA MDNS was procured by misrepresentation or lack of material disclosure. Rather, Petitioner's argument and comments reveal that this enter appeal is premised upon an impermissible collateral attack on a final land use decision.

B. Petitioner Fails to Meet His Burden That the County's SEPA Determinations Are Clearly Erroneous

1. SEPA Background

SEPA requires that decision makers consider the potential environmental impacts of their actions before they act; it does not demand a particular substantive result in government decision-making. *Anderson v. Pierce County*, 86 Wn. App. 290, 300, 936 P.2d 432 (1997). Proposed actions that significantly affect the quality of the environment must prepare an environmental impact statement that assesses those impacts and explores alternatives. RCW 43.21C.030(c). An action "significantly

[11] Moreover, the Okanogan County incorporated those comments into its SEPA determination by imposing mitigating conditions that, among other things, required adequate water. Those conditions were carried into the final plat approval which incorporated provisions that limit total use to 2,880 gpd as allocated to Lot 1.

affects the environment whenever more than a moderate effect on the quality of the environment is a reasonable probability." *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn.2d 267, 278, 552 P.2d 674 (1976).

Before acting on any non-exempt proposal, local governments must make a "threshold determination" of whether the proposal is a "major action significantly affecting the quality of the environment." *Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001). As it did here, the lead agency considers an environmental checklist prepared by the applicant when making the determination. *Id.* (citing 197-11-315). The checklist is designed to identify reasonably sufficient information to evaluate the environmental impact of the proposal. WAC 197-11-335. The checklist is designed so that it may be completed by a lay applicant; a checklist is not deficient because the applicant did not hire experts to answer the questions. Likewise, responses are based upon the applicant's own knowledge and answers like "do not know" are appropriate. In sum, the checklist is designed to give the responsible official (and reviewing agencies) enough information about the proposal so that "an intelligent threshold determination" can be made. R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 13.01[4][c] at 13-46 (2009).

The responsible official must issue a "determination of significance" (or DS) if the action is likely to have a probably significant impact. A threshold determination of non-significance (or DNS) signifies that the proposal will not have more than a moderate impact on the environment and an EIS is not required. The lead agency may issue an MDNS when mitigating conditions adequately address potential impacts. WAC 197-11-350(2).

2. Petitioner Fails to Demonstrate that Mazama Rezone Will Have A Significant Impact on the Environment

Petitioner admits in its brief the rezone had no environmental consequences of note:"[T]here was (and is) not dispute that the Nordic Village's water impacts are essentially the same under with zoning classification . . . " P. Brief at 12. As such, the Petitioner fails to establish that the rezone DNS was clearly erroneous. Upon review of a threshold determination, a reviewing court must be mindful that "the decision of the governmental agency shall be accorded substantial weight." RCW 43.21C.090. The standard of review is that of "clearly erroneous." *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*

Rezones are typically not considered environmentally significant events. *See e.g. Hayden v. City of Port Townsend*, 93 Wn.2d 870, 613 P.2d 1164 (1980); *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 817-818, 576 P.2d 54, 61-61 (1978); *Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wn.2d 416, 423, 526 P.2d 897 (1974). With respect to rezones, Professor Settle's oft cited treatise concluded that courts are not inclined to find rezones significant where "(1) they can have no environmental impact without subsequent implementing action which will be subject to SEPA, and (2) they do not imply a commitment to later implementing action likely to have adverse environmental consequences." R. Settle, *SEPA*, §13.01[1] at 13-13.

Here the proposed action triggering the SEPA DNS is a rezone of the Mazama property from urban residential to neighborhood commercial. A comparative analysis of the two zones demonstrates that the rezone is not likely to have more than a moderate effect on the quality of the environment. The two zones are remarkably similar and allow many of the same uses. *See* OCC § 17.21.010. Both zones permit commercial uses, but the neighborhood commercial zone adds greater flexibility with respect to the types of commercial uses and particularly small office commercial uses that will fit within the allotted water cap.

Applying Professor Settle's test demonstrates that the rezone will not have more than a moderate effect on the environment. First, a rezone has no environmental impact without subsequent development that is subject to SEPA. The rezone did not change the water allotment to the lots created by the Nordic Village Long Plat; it only changed the types of uses allowable on the lots. The new uses are still subject to the same water restrictions imposed on the unappealed final Nordic Village Long Plat.

Petitioner argues that significant impacts are inevitable because water withdrawal will misappropriate groundwater. Yet, water cannot be misappropriated until it is actually withdrawn and water will not be withdrawn until a specific development or use is proposed. Thus, Petitioner's claim that the rezone will "inevitably" misappropriate groundwater is based on speculation. *See Kiewit Construction Group v. Clark County,* 83 Wn. App. 133, 142 920 P.2d 1207 (1996) (concluding that environmental impacts that are "remote or speculative" do not need to be addressed in an EIS). Petitioner offers no evidence (quantitative or qualitative) that the water allocated to each lot is not sufficient for all new uses allowed under the proposed rezone or that the allocated withdrawals will have a significant impact on the environment.

Applying the second part of Professor Settle's test, the rezone does not imply a commitment to an action that is likely to have adverse environmental consequences. The rezone provides greater flexibility in the types of uses that the property may be used for, but does not commit the property to any specific use or development allowed under the new zone. It certainly does not commit an owner or lessee to use the property in a certain way. And, in any event, the water use limitations inscribed on the face of the Nordic Village Long Plat and recorded in the Water Users Agreement would apply to any subsequent development.

3. Petitioner Misconstrues the Water Exemption To Prohibit Mixed Exempt Withdrawals From a Single Well

Respondents believe Petitioner's claims about the water allocations from exempt wells in this case, as applied to the Nordic Village Long Plat, is beyond the reach of this Court in this case for the jurisdictional arguments outlined above. Nevertheless, on the merits, Petitioner's case fails to provide grounds for reversing the conditions of the Nordic Village Long Plat. The sole environmental impact claimed by Petitioner is that the rezone will inevitably result in the misappropriation of groundwater. Specifically, Petitioner argues: (1) that a rezone will "inevitably" appropriate groundwater without a permit in violation of RCW 90.44.050; and (2) that an action that conflicts with state law results in a per se

significant impact. In addition to being purely speculative, the argument misconstrues the groundwater exemption and SEPA.

Petitioner's argument that the SEPA determinations were issued erroneously is based upon an erroneous view of the groundwater exemption and the purpose of groundwater well reports. Petitioner argues that the groundwater exemption limits the withdrawal to the exemption that the well was drilled for. P. Brief at 16-20. Petitioner points to the well construction report as a legal limitation on the groundwater withdrawal. Both arguments are addressed in turn. P. Brief at 20-23.

a. A Landowner With Multiple Exempt Uses May Use a Single Well to Withdraw Water for those Exempt Uses Within the Statutory Limits

All groundwater withdrawals require a permit except for withdrawals for the following distinct categories of exempt uses: (1) stock-watering purposes; (2) watering a lawn or non-commercial garden not exceeding one-half acre in area; (3) single or group domestic uses in an amount not exceeding five thousand gallons per day; (4) industrial or commercial purposes in an amount not exceeding five thousand gallons per day. RCW 90.44.050[12]; *see Kim v. Pollution Control Hearings*, 115 Wn. App. 157, 163, 61 P.3d 1211 (2003) (concluding that a commercial nursery qualified as industrial for purposes of the industrial use

[12] The full text of RCW 90.44.050 is attached as Exhibit B to this brief.

exemption). This Court has held that four exemptions are distinct. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 313, 268 P.3d 892 (2011). Provisions in one exempt category do not apply to the other three exempt categories. *Id.* (holding that 5,000 gpd limit for domestic, industrial and lawn watering exemptions did not apply to the stock watering exemptions).

Petitioner argues that a well drilled for one exempt use cannot be used to service another exempt use without a permit. That argument is not supported by the plain language of the statute and is further undermined by established precedent. RCW 90.44.050 does not state expressly or implicitly that each distinct category of exempt withdrawal must be withdrawn from a separate well that is dedicated to the exempt withdrawal.[13] The exemption clearly applies to "withdrawals" and not the number of wells used to secure that water: "*EXCEPT, HOWEVER,* That any withdrawal of public water groundwaters" for the exempt uses is exempt from the requirement to obtain a permit. RCW 90.44.050 (underlined emphasis added). The groundwater code does not require the multiple wells be constructed for each distinct exempt withdrawal.

[13] The converse is well supported by WDOE — the exempt water allocation for a property may be achieved by one or more wells. *See* WDOE, *Focus on Groundwater* (April 2008) *available at*: https://fortress.wa.gov/ecy/publications/publications/fwr92104.pdf (last visited Sept. 14, 2012).

Use of one well to provide groundwater for multiple exempt uses was tacitly endorsed by the Court of Appeals, Division Two. In *Kim v. Pollution Control Hearings Bd.* the Court of Appeals addressed whether a property owner was required to obtain a permit to withdraw water from a single well that provided water for their residence and a commercial nursery that operated on the property. 115 Wn. App. 157, 158, 61 P.3d 1211 (2003). The Department of Ecology ordered the Kims to stop withdrawing water for the commercial nursery unless they applied for a permit. The Department of Ecology did not order the Kims to stop using the well for their residence. On appeal, the Court of Appeals concluded that the withdrawal for the commercial nursery constituted an "industrial use" for purposes of the industrial use exemption and reversed WDOE's order, thus allowing the Kims to withdraw water to serve their domestic needs as well as the commercial nursery (under the industrial exemption) from a single well on their property.

The Attorney General of Washington endorsed the Court of Appeals *Kim* decision in an Attorney General Opinion ("AGO") that reached a similar conclusion when considering whether water withdrawn for a non-commercial garden counted towards the 5,000 gallon per day exemption for domestic uses. Washington Attorney General Opinion No. 6 (2009). The Attorney General concluded that it did not because the

statute provided for four separate exempt uses. *Id.* at 6. Under the AGO's reasoning, one exempt well could be drilled for a domestic use (i.e. a residence) so long as withdrawals for that use do not exceed 5,000 gallons per day. That same well, may be used to withdraw unlimited water for a non-commercial garden on the property so long as the garden does not exceed one-half acre in area. *See id.* Extending the AGO reasoning, to other examples affirms the reasonableness of the approach. For instance, consider a farmer that resides on the property. Under the statue, the farmer is entitled to drill one exempt well to withdraw water service the residence under the domestic use exemption (so long as it does not exceed 5,000 gpd) and water for stock watering and water for a commercial uses as provided in *Kim*, so long as each use stays within its specific exempt limits.

The Court's decision in *Ecology v. Campbell & Gwinn,* 146 Wn.2d 1, 43 P.3d 4 (2002) does not undermine this interpretation as Petitioner contends. P. Brief at 16. *Campbell & Gwinn* addressed the application of one of the four exempt uses—the domestic use exemption. 146 Wn.2d at 9. The Court held that a developer of a residential subdivision could not cumulatively withdraw in excess of 5,000 gpd day under the exemption for domestic uses. In other words, a proponent of a 6-lot residential subdivision could not claim 6 exempt domestic use wells for each

individual lot, but could only rely upon one 5,000 gpd domestic group use exemption. In reaching its conclusion, the Court relied upon language specific to the independent domestic use exemption applied to a "single use or group uses." *Id.* at 18 (emphasis added). Because of the reference to "group uses" in the domestic use exemption, the Court reasoned that the Legislature did not intend to allow for multiple domestic use exemptions to service a common plan to develop multiple domestic uses.[14] *Id.* *Campbell* did not assess whether a developer could withdraw water to serve multiple distinct exemptions from a single well.

Petitioner's argument that multiple exempt withdrawals cannot be made from a single well is without merit.

b. The Intended Use Section of the Well-Report Form Does not have Legal Significance

Petitioner also erroneously assigns legal significance to the well reports and the County's water adequacy certification. P. Brief at 5 & 20. Petitioner argues that well report creates a legal restriction on how the well may be used in the future, but does not cite any authority for that position.

[14] Additionally, the "group use" restriction only applies to the domestic use exemption and similar language is not included in the exemption for the industrial use exemption. RCW 90.44.050; Kim, 115 Wn. App. at 158 (industrial exemption included commercial uses). As the Court confirmed in *Five Corners* the statutory exemptions are separate and distinct, thus the "group use" language that was essential to the Court's reasoning in *Campbell & Gwinn* does not apply to industrial or commercial proposals.

A well report is required by the Washington Well Construction Act ("WWCA"), chapter 18.104 RCW. RCW 18.104.050. The WWCA is independent of groundwater code, chapter 90.44 RCW, and serves an entirely unique purpose. The WWCA ensures that wells (whether they are exempt or not) are constructed and decommissioned in accordance with applicable standards and that such work is undertaken by properly experience individuals. *See* RCW 18.104.010 (expressing the purpose of the statue as "the regulation and licensing of well contractors and operators and for the regulation of well design and construction"). *See also* WAC chapter 173-160 (providing standards for construction and decommissioning wells); and chapter 173-162 (establishing licensing and certification requirements for well contractors and operators). It is not, as Petitioner suggests, a permit that limits how the water may be put to use.

Under the WWCA, a well report must be submitted to the WDOE within thirty days of completion of the construction of a well regardless of whether it is for an exempt use or not. RCW 18.104.050. Notably, the well report is submitted after construction, which further affirms that the contents of the report do not restrict use. By way of comparison, RCW 90.44.050 requires a permit to appropriate groundwater before a well is drilled unless it is exempt.

Similarly, the applicable regulations do not restrict the use of the well to what is listed on the well report. The applicable regulations define a "water well report" as "a document that describes how a water well, ground source heat pump, or grounding well was constructed or decommissioned and identifies components per the requirements of WAC 173-160-141." WAC 173-160-111(55). The definition of "water well report" does not include a description of how the water will be used or how much will be used. The rules state that the water well report need only identify the "intended use of well." WAC 173-160-141(2)(h) (emphasis added); *see also* RCW 18.104.108 (requiring notice of the "proposed use"). Nowhere in the rules or the form does it state or otherwise suggest that that well is restricted to the "intended use" at the time it was constructed or that the use could not be altered in the future.

Petitioner's reliance on the well report as a legal restriction on future withdrawals from the well is misplaced and not supported by applicable law.

C. The Court Should Award Mazama Properties, LLC its Costs and Attorneys' Fees Pursuant to RCW 4.84.370[15]

Pursuant to Rule of Appellate Procedure 18.1, Respondent Mazama requests that the Court award its reasonably attorneys' fees and

[15] Okanogan County takes no position on Respondent Mazama's request for attorney fees outlined in this section.

costs should it prevail in this appeal. Reasonable attorneys' fees and costs shall be awarded the prevailing party on appeal to the Court of Appeals or this Court of a local jurisdiction's land use decision that is also affirmed by the superior court below. RCW 4.84.370; *see also Habitat Watch v. Skagit County*, 155 Wn.2d 397, 413, 120 P.3d 56 (2005). The land use decision must have been issued in the requesting party's favor and at least two courts must affirm that decision. *Id.*

Here, Okanogan County issued a land use decision denying Petitioner's SEPA appeal and approving Mazama's application for a rezone. Petitioner challenged that decision before the Okanogan County Superior Court, which denied the appeal and affirmed the decisions of Okanogan County. In the event this Court also denies Petitioner's appeal and affirms the decisions under review, the Court must award Mazama its reasonable attorneys' fees and costs. RCW 4.84.370.

VI. Conclusion

The Court should deny Petitioner's appeal in this case on the jurisdictional grounds. This appeal is an inappropriate collateral attack on the conditions of the Nordic Village Long Plat which were not appealed and are beyond review. To allow Petitioner to collaterally challenge decisions made as part of an earlier land use decision in a subsequent

SEPA appeal merely by claiming mistake or misrepresentation would destroy clear legislative policies favoring finality of land use decisions.

Should the Court elect to reach the merits, Petitioner has provided no authority in fact or law to support its argument that a well drilled to serve a given parcel, and covenanted to serve residential and commercial uses to a limit of 2,880 gpd, violates any provisions of RCW 90.44.050, or that the decision of the County responsible official in issuing an DNS for a subsequent rezone of the platted properties is clearly erroneous.

For the reasons stated, Respondent Mazama Properties, LLC requests that the Court deny Petitioner's appeal and award Respondent Mazama its costs and fees as allowed by statute.

DATED: September 17, 2012 **PERKINS COIE LLP**

By: _____

Alexander W. Mackie, WSBA No 06404
AMackie@perkinscoie.com
John T. Cooke, WSBA No. 35699
JCooke@perkinscoie.com
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

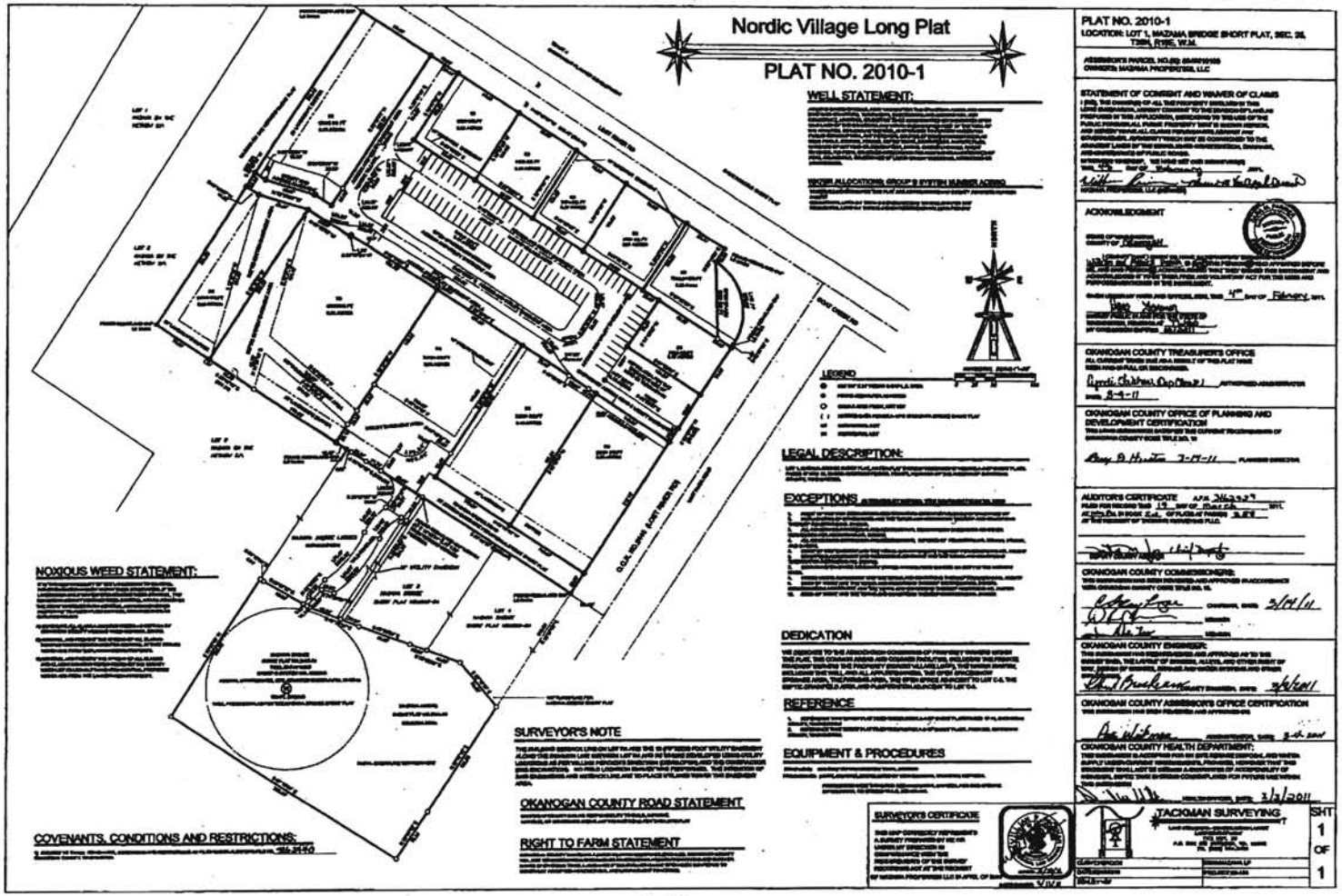
Attorneys for Respondent
Mazama Properties, LLC

DATED: September 17, 2012 **OKANOGAN COUNTY**

By: _____ (per telephone authorization)

Stephen M. Bozarth WSBA#29931
Deputy Prosecuting Attorney
Okanogan County, Washington
PO Box 1130 – 237 Fourth Avenue N
Okanogan, WA 98840
Telephone: 509.422.7280
Facsimile: 509.422.7290

Attorneys for Respondent
Okanogan County



11-258

APPENDIX A

10/21/2010 03:20:30 PM 3158777
Recording Fee $58.00 Page 1 of 6
Water INLAND PROFESSIONAL TITLE
Okanogan County Washington

Filed For Record at Request of
When Recorded Return to:

William Percich
P O Box 1312
Friday Harbor, WA 98250

10-099

WATER USERS AGREEMENT

Grantors (Declarants): **MAZAMA PROPERTIES, LLC**

Grantees (Declarants): **MAZAMA PROPERTIES, LLC**

TPN: **8849010100 (Parent)**

Short Legal: **Lots R1-R6 and Lots C1-C6, THE VILLAGE AT MAZAMA**

Related Documents:

THIS WATER USERS AGREEMENT is made by **MAZAMA PROPERTIES, LLC**, a Washington Limited Liability Company this 19th day of October, 2010.

NAME AND LOCATION OF WATER SYSTEM AND PARCELS SERVED

This Agreement pertains to the Village At Mazama Group B Water System, approved for twelve (12) connections in Mazama, WA, by Okanogan County Department of Health/Washington State Department of Health.

The water system will serve:

- the six (6) residential lots in The Village at Mazama Long Plat, TPN: 8849010100 (parent) and
- the six (6) commercial lots in The Village at Mazama Long Plat, TPN: 8849010100 (parent)

NOT SUBJECT TO EXCISE TAX
Okanogan County Treasurer
By Deputy
10-21-10

10/21/2010 03:20:30 PM 3158777
Recording Fee $60.00 Page 2 of 5
Water INLAND PROFESSIONAL TITLE
Okanogan County Washington

OWNERSHIP OF WELL/WATER SYSTEM AND ALLOCATION OF WATER USAGE

It is agreed by the parties owning the above-described parcels that said twelve (12) parcels shall be and are hereby granted full ownership and interest in and to the ownership of the well and water system.

Lots R-1 through R-6 (the residential lots) shall each have the right to use up to 350 gallons of water per day. Lots C-1 through C-6 (the commercial lots) shall each have the right to use up to 130 gallons of water per day. The total combined daily usage for all twelve (12) lots shall not exceed 2880 gallons.

In the event that the commercial lots are allocated an additional 5000 gallons usage per day, the additional water allocation shall be divided equally among the commercial lots and the 780 gallons per day formerly allocated to commercial lots shall be equally divided and allocated to the residential lots giving the residential lots a total of 480 gallons of water usage each per day.

COST OF MAINTENANCE OF WATER SYSTEM

Mazama Properties, LLC, shall be responsible for the maintenance and operational costs of the well and water system on a pro-rata basis (percentage of lots not yet sold) until such time as eight (8) lots have sold. At such time as eight (8) lots have sold, responsibility for maintenance and operational costs of the well and water system shall be turned over to the Village at Mazama Owner's Association.

Each parcel owner connected to the water system hereby covenants and agrees that he/she/it shall equally share the maintenance and operational costs of the well and water system herein described. A monthly or quarterly fee shall be collected from all parcel owners who have connected to the water system. There will be no connection fee. The parties shall establish and maintain a reserve account at a mutually agreed upon banking institution and each parcel owner connected to the water system shall be entitled to receive an annual statement from said institution or from the Water Manager showing the status of the reserve account. The funds in the reserve account may be commingled with other charges collected for the maintenance and operational costs of the well and water system and shall be sufficient to cover the cost of submitting water samples for quality analysis and maintaining, repairing or replacing the well and common waterworks equipment and appurtenances thereto. The monthly or quarterly assessment may be adjusted annually or more often as needed.

WATER LINE EASEMENTS

Water line easements and access to pumphouse and well for maintenance and repairs have been recorded in Auditor's File # 3143644.

10/21/2010 03:20:30 PM 3158777
Recording Fee $66.00 Page 3 of 5
Water INLAND PROFESSIONAL TITLE
Okanogan County Washington

MAINTENANCE AND REPAIR OF PIPELINES

All pipelines in the water system shall be sited and maintained so that there will be no leakage or other defects which may cause contamination of the water or injury or damage to persons or property. Cost of repairing and maintaining the common distribution pipelines shall be borne equally by all parties once they are hooked up the system. Each parcel owner shall be responsible for the maintenance, repair and replacement of pipe supplying water from the common water distribution piping to his/her/its own particular dwelling and property.

PROHIBITED PRACTICES

Water from this well may not be used for any outside irrigation. No more than one outside bib or riser per lot shall be connected to the potable water distribution system and this connection shall be fitted with the flow restriction device to allow no more than one gallon per minute.

It is understood and agreed that, when any lot in the Village at Mazama Long Plat becomes hooked up or connected to the water system, a water meter must be installed for the lot prior to any usage or occupancy.

WATER SYSTEM PURVEYOR

The parties hereto will designate an individual as purveyor of the water system. The purveyor, either directly or through contract with an approved Satellite Management Agency, shall be responsible for compliance of the water system, including arranging submission of all required water samples, handling routine and emergency system operations and being the contact for emergencies such as system shut down and repair. The purveyor is the contact person with Okanogan County Health Department and is responsible for submitting sample results, meter readings, updates to the Water Facilities Inventory Form as changes are made to the system and other system records. Water system records shall be available for review and inspections by all parcel owners and Okanogan County Health Department. The current name, address and phone number of the purveyor will be provided to the Okanogan County Health Department.

PROVISIONS FOR CONTINUATION OF WATER SERVICE

The parties agree to maintain a continuous flow of water from the well and water system herein described in accordance with public water supply requirements of the State of Washington and Okanogan County. In the event the quality or quantity of water from the well becomes unsatisfactory as determined by Okanogan County Health Department, the parties shall develop a treatment system, develop a new source of water and/or implement other approved options. Prior to development of a treatment system or a new source of water, the parties shall obtain written approval from the Department. Each undivided interest shall share equally in the cost of

developing the new source of water and installing the necessary equipment associated with the new source.

FUTURE MANAGEMENT

It is further agreed that if the water system substantially fails to meet compliance requirements, the parties shall contract with an approved Satellite Management Agency for operation and management.

RESTRICTIONS ON FURNISHING WATER TO ADDITIONAL PARTIES

It is further agreed by the parties that they shall not furnish water from the well and water system to any other persons, properties or dwellings without prior consent of all affected parcel owners and written approval from the Okanogan County Department of Health.

HEIRS, SUCCESSORS AND ASSIGNS

These covenants and agreements shall run with the land and shall be binding on all parties having or acquiring any right, title or interest in the land described herein or any party thereof and it shall pass to and be for the benefit of each owner thereof.

ENFORCEMENT OF AGREEMENT OF NON-CONFORMING PARTIES AND PROPERTIES

The parties agree to establish the right to make reasonable regulations for the operation of the system, such as the termination of service if bills are not paid within a given number of days of the due date and penalties for not complying with emergency conservation measures. Parties not conforming with the provisions of this agreement shall be subject to interest charges at the maximum legal rate per annum together with all penalty and collection fees.

Excessive water usage shall have a monetary penalty, the amount to be determined by the Village at Mazama Owner's Association.

This Water Users Agreement is signed by the owners of record of the water system described herein and shall be recorded in the office of the Okanogan County Auditor.

10/21/2010 03:20:30 PM 3158777
Recording Fee $66.00 Page 5 of 5
Water INLAND PROFESSIONAL TITLE
Okanogan County Washington

MAZAMA PROPERTIES, LLC

By: _____
William F. Percich, Managing Member

STATE OF WASHINGTON)
)ss
COUNTY OF SAN JUAN)

I certify that I know or have satisfactory evidence that William F. Percich is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the document and acknowledge it as Managing Member of Mazama Properties, LLC., to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

GIVEN under my hand and official seal this 19 day of October, 2010.

DEBORAH SUTLIFF NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 10-09-13

_____
Notary Public in and for the State of Wash
Washington, residing at: Friday Harbor
My Commission expires: 10-9-2013

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Arthur Gresh, Petitioner, v. Okanogan County and Mazama Properties LLC, Respondent.	No. 87127-2 CERTIFICATE OF SERVICE

I, SUZANNE NELSON, certify that on this 17th day of September, 2012, I caused to be served a true and correct copy of Response Brief of Mazama Properties, LLC and Okanogan County, to the Counsel as indicated below:

Via U.S. Mail and Email	*Via U.S. Mail and Email*
Michael T. Brady Law Office of Michael T. Brady 106 Bluff Street, No. 202 P.O. Box 715 Winthrop, Washington 98862-0715 Phone: 202.996.5002 Fax: 206.225.2055 Email: mbrady@methownet.com *Attorney for Petitioner*	Stephen M. Bozarth Deputy Prosecuting Attorney Okanogan County Prosecutor's Office P.O. Box 1130 Okanogan, Washington 98840 Phone: 509.422.7280 Fax: 509.422.7290 Email: sbozarth@co.okanogan.wa.us *Attorney for Okanogan County*

Signed this 17th day of September, 2012, in Seattle, Washington

Suzanne Nelson

Suzanne Nelson