State Supreme Court to Review Whatcom County's Compliance with the Growth Management Act

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On October 20, 2015, the Washington State Supreme Court will hear arguments in the appeal of a case addressing Whatcom County's compliance with the Growth Management Act. The case, Hirst v. Whatcom County,1 focuses on the county's obligation to protect water quality and quantity in the water-deprived rural area of the county.

The essential facts in the case are not disputed. In its 2013 opinion that Whatcom County has not complied with the Growth Management Act's requirements to protect water quality and quantity, the Growth Management Hearings Board cited:

• "reports on contaminated groundwater and drinking water;"

• "increase in shellfish contamination;"

• "an increase in exempt wells for single residential use without required proof that the groundwater withdrawal will not impact stream flows;"

• "governing regulations from the last century (1985 state administrative regulations and a 1999 County Water Resource Plan);" and

• "the county's own resolution and Comprehensive Plan, stating its water resources are unknown and the future water uses are uncertain." 2

Whatcom County has never disputed that the county's rural area has water pollution and water supply problems. Instead, the county argues that it is already doing enough to protect its water resources.

With respect to water pollution, the county says that it does not have to address old, preexisting pollution; it is only required to address new pollution. Bear in mind that the Sumas-Blaine aquifer is already highly contaminated with nitrates, that many streams and lakes in Whatcom County do not meet water quality standards, and that contamination continues to close shellfish harvest areas. If the county is correct that current levels of water pollution are acceptable because they are grandfathered in, and are therefore exempt from the Growth Management Act's requirements to protect water quality, the threshold of "old" pollution will be allowed to get higher with each

consecutive Comprehensive Plan. County health — the health of county residents and of the county economy — is poorly served by this approach.

With respect to water quantity, the county favors new greenfield development in rural areas over senior water right holders. Contrary to the “first in time, first in right” doctrine of prior appropriation, the county asserts that new houses that use permit-exempt wells can take water away from all senior water right holders, whether that water is used by farmers or included in instream flows.

This issue came up because of the simple, undisputed fact that there is not enough water to go around in the county’s rural area. As the Department of Ecology has acknowledged, “[m]ost water in the Nooksack watershed is already legally spoken for.” 3 In 1985, Ecology recognized water scarcity during the dry season by adopting an instream flow rule for the Nooksack watershed, which covers most of the county. According to Ecology, an instream flow is “a water right for the stream and the resources that depend on it. It has a priority date like any other water right. Instream flows are the stream flow levels that will protect and preserve instream resources and values.” 4

If either Ecology or the county were actually committed to “protecting and preserving instream resources and values,” everybody would be on the same side. But the county, joined by Ecology, the Building Industry Association, the Realtors®, and the Farm Bureau, claim that instream resources and values do not have to be protected in Whatcom County.

Instead, according to the county and its friends, the 1985 instream flow rule was intended to protect new development that relies on permit-exempt wells. They say that instream flow requirements have no force or effect against junior permit-exempt wells. These new wells always have a right to pump water, they say, even if it means that streams dry up and farmers have to stop irrigating.5 Farmers with water rights from 1986 on may be required to cut down on their water use to protect instream flows, but new houses with new wells will always get water – down to the last drop and the last dead fish.

The state Court of Appeals agreed with the county’s arguments,6 finding that state water law does not protect instream flows from junior permit-exempt groundwater withdrawals. According to the Court of Appeals, junior permit-exempt wells have an absolute right to violate the requirement to protect and preserve instream flows unless Ecology says otherwise in its specific basin-by-basin rules.7 And although the Growth Management Act says that it requires the county to protect and enhance water resources, the Court found that “cooperation with Ecology” is all that the GMA really requires.8

The appellants in this case, four Whatcom County residents and the statewide smart growth organization Futurewise, believe that the court’s interpretation of state water law is simply wrong. And, in an interesting twist, so does Ecology — in a different case.

The appeal to the Supreme Court was supported by the Squaxin Island Indian Tribe. The Tribe noted that it has “first-hand experience with WRIA rules that do not regulate permit-exempt wells, and the regulatory free-for-all.” 9 In 2009, “frustrated with the proliferation of unregulated permit-exempt wells in the Johns Creek basin near Shelton,” 10 the Tribe petitioned Ecology to amend the relevant instream flow rule to expressly regulate permit-exempt wells. Ecology refused to amend the rule, however, citing “its stated priority of developing instream flow rules for new watersheds, rather than fixing existing rules.” 11

Ecology argued — correctly, we believe — that even though permit-exempt uses were not part of the instream flow rule, the rule still had to comply with the statutory priority system. Contrary to its position in the Whatcom County case, the Ecology Dept. observed that “[e]ven permit-exempt groundwater uses [...] are still ‘appropriations’ within the meaning of the water code” and “[a] water management rule cannot abrogate water law or the doctrine that regulatory instream flows constitute appropriations (water rights) that cannot be impaired by junior users.” Ecology further stated, “[T]hose exempt uses, even though not part of the Rule, are still part of the priority system and a senior user is not without remedies should that senior user maintain that junior permit exempt uses are causing impairment.” 12

We believe that Ecology’s position in the Squaxin Island Tribe case, not Ecology and the county’s position in the Whatcom County case, accurately describes state law. The purpose of instream flows is to protect natural resource values, not to promote development in areas where no more water is available. Ecology acknowledges that instream flows “are required to support fishing, recreation, stock watering, navigation and other uses of water.” They “provide habitat for fish and support wildlife.” Stream flows “influence groundwater levels, as well as other surface water.” They are “a key aspect of water quality.” 13 We believe that the GMA requires Whatcom County to protect water resources for just these reasons, and that the Ecology interpretation of the Nooksack instream flow rule cannot stand under state water law.

But regardless of Ecology’s stance in our case, it is ultimately the county’s responsibility to protect its own resources. Whatever decision the Supreme Court makes, Whatcom County’s water problems will not go away. We will all — farmers, food-eaters, fish and future generations — pay the price if the county continues to fail to protect its water resources.

The county is planning for its future right now, through the ongoing process of updating the Comprehensive Plan. Whether or not the Supreme Court requires the county to act as a wise steward, the county has the ability to address water problems in its land use planning.

It is time for Whatcom County to adopt some common sense best practices in its land use planning. As the Growth Management Hearings Board observed, “the county has many options for adopting measures to reverse water resource degradation in its Rural Area through land use controls.” The county may “limit growth in areas where water

availability is limited or water quality is jeopardized by stormwater runoff." It may "reduce densities or intensities of uses, limit impervious surfaces to maximize stream recharge, impose low impact development standards throughout the Rural Area, require water conservation and reuse, or develop mitigation options." And the county "may direct growth to urban areas rather than rural areas." 14

If the county follows the path of least resistance, it will not adopt any of these measures. It is easier not to implement best practices, despite the mountains of evidence showing that the status quo is creating polluted aquifers, starved rivers, and an environment that is increasingly unable to rebound from stresses caused by climate change and drought. We desperately need leadership at the state and local levels. Those who insist on the status quo — in Whatcom County, the Tea Party and the development industry — are always at the table. Citizens will need to insist on stewardship, because the alternative could not be clearer: a future of water scarcity and degradation.

Endnotes

1. Supreme Court Case No. 91475-3.

2. Hirst v. Whatcom County, Western Wash. Growth Mgmt. Hearings Bd. Case No. 12-2-0013, Final Decision and Order (June 7, 2013) ("FDO") at p. 30.

3. Dept. of Ecology, Focus on Water Availability: Nooksack Watershed, WRIA 1 at 1.

4. Wash. Dept. of Ecology, Introduction to Instream Flows and Instream Flow Rules, http://www.ecy.wa.gov/programs/wr/instream-flows/isf101.html.

5. While wells take water from groundwater, not from streams, groundwater and surface water are interrelated. In fact, the County's consultants have estimated that groundwater provides 70 percent of base flows in Whatcom County's rivers. FDO at 24, quoting Whatcom County Draft EIS, 10-Year Urban Growth Area Review (2009), at 4.3-2 - 4.3-3.

6. Whatcom County v. Western Wash. Growth Mgmt. Hearings Bd., 186 Wn. App. 32; 344 P.3d 1256 (2015).

7. Id., 186 Wn. App. 32 at 55-56.

8. Id. at 51.

9. Amicus Curiae Brief of the Squaxin Island Tribe, Hirst v. Whatcom County, Supreme Court Case No. 91475-3 (May 22, 2015) at p. 6.

10. Amicus Curiae Brief of the Squaxin Island Tribe at pp. 6-7, citing Squaxin Island Tribe v. Washington State Dept. of Ecology, 312 P.3d 766, 177 Wash.App. 734 (2013).

11. Squaxin Island Tribe Amicus Brief at 7.

12. Id. at 7, quoting Dept. of Ecology Response Brief at 41, 44, 47 (emphasis added).

13. Id.

14. FDO at 43.