How the Hirst decision will affect development plans

Ripple effects of this major change in water rights & land use planning are quickly spreading across state

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On October 6, 2016, the Washington Supreme Court ruled against Whatcom County in the case Whatcom County v. Hirst, Futurewise, et. al (“Hirst”). The impact of this decision is that now counties in the state of Washington must make water adequacy decisions as a part of underlying land use approvals. Previously, they were authorized to accept permit-exempt water appropriations as a basis for development approval without actually evaluating water availability or how the new development could impact water supply.

Local governments planning under Growth Management Act (“GMA”) can no longer defer to the State Department of Ecology (“Ecology”) standards under the Water Resources Act of 1971 (“WRA”), and are now responsible to make water adequacy decisions for development, and in particular, with respect to exempt wells. This involves the new requirement that local governments obtain evidence from applicants that water is legally available before issuing building permits and approving subdivisions or other land use applications that rely on permit-exempt water supplies – even where the development proposed is not located within the boundaries of areas restricted by Ecology rule.
Prior to the Hirst decision, developers and Whatcom County operated under Washington Administrative Code (WAC) provisions designed to protect the Nooksack River. These rules made it more difficult to get a new water right permit in the area because of instream flow protection standards. However, there was an exemption built in for residential wells. WAC 173-501-070(2) provides that “Single domestic, (including up to 1/2 acre lawn and garden irrigation and associated noncommercial stockwatering) shall be exempt from the provisions established in this chapter, except that Whatcom Creek is closed to any further appropriation, including otherwise exempted single domestic use.” Essentially, this “Nooksack Rule” assumes there is an adequate supply of water for residential use unless Ecology overtly closes the area to permit-exempt wells.

Whatcom County’s code provided that a subdivision or building permit application may rely on a private well only when the well site proposed by the applicant does not fall within the boundaries of an area where Ecology has determined by rule that water for development does not exist.

That all changed when the Supreme Court ruled that the Nooksack Rule does not satisfy the requirements of the GMA for protecting future water availability. As Washington Supreme Court Justice Wiggins wrote of the Nooksack Rule in the majority opinion, “This results in the County’s granting building permits for houses and subdivisions to be supplied by a permit-exempt well even if the cumulative effect of exempt wells in a watershed reduces the flow in a water course below the minimum instream flow. We therefore hold that the County’s comprehensive plan does not satisfy the GMA requirement to protect water availability and that its remaining arguments are unavailing.”
This decision shifts more responsibility for determining whether enough water is legally available to the counties. As Wiggins puts it, “The GMA places an independent responsibility to ensure water availability on counties, not Ecology.” This means that Whatcom County must determine whether there is an adequate, legal water supply for every proposed residential well. In response, the Whatcom County Council placed a moratorium on new applications for projects that rely on permit-exempt groundwater wells on property located within a basin.

In counties other than Whatcom, there is still trouble ahead for homeowners, local governments and businesses because the case sets a legal precedent for the entire state. Counties may put the onus on project applicants of all types to prove exactly how much water their proposal will require, the legality of obtaining that water and the impact to the water supply in the area. This likely means that new applications will need to include extensive expert reports to demonstrate, on a project by project basis, that the proposed wells will not adversely impact the amount of water flowing in nearby streams and rivers, or the amount of water available to other water users in the area.

For projects where new supplies of water are not available, applicants will need to reduce the scale of projects or purchase existing water rights from third parties. Public agencies have authority to purchase existing water rights through eminent domain, although private sector developers will be forced to purchase in the open market.

In light of the Hirst decision, Ecology has created an interactive map for developers and residents to determine the legal water availability at an address (see www.ecy.wa.gov/programs/wr/rights/domwtravail.html). However, at this time the interactive map is only active for Whatcom County, with other counties to be added at the request of those local governments.

The effect of this decision on a county’s long-range land use plans is also predictable. Counties updating their GMA planning will similarly need to carefully research the effect of the proposed changes on the supply of water to existing users and existing stream and river flows. This will naturally increase the cost and time required for preparing those plans and the complexity of future appeals.

Traditionally, this planning weighs 14 goals, and counties balance goals regarding competing interests such as housing and water supplies. Now the court has put its thumb on the scale to tilt it out of balance. Notwithstanding that agriculture and industry consume the vast majority of available water, and notwithstanding the planning goal of an adequate supply of affordable housing, water supply takes precedence, even if this means denying permits for needed housing or important public uses, such as a new community park. The ripple effects of this major change in water rights and land use planning are quickly spreading across the state, and will soon be lapping at the door of the legislature in Olympia.
Kristin French is a land use lawyer at Jordan Ramis PC. Contact her at 360.567.3900 or kristin.french@jordanramis.com. Joseph Schaefer is a land use planner at Jordan Ramis PC. Contact him at 503.598.7070 or joseph.schaefer@jordanramis.com.