

Addendum
Final Environmental Impact Statement
Okanogan County Code 17A
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COMPREHENSIVE PLAN AND ZONING

COMPREHENSIVE PLAN DNS PUBLISHED: September 17, 2014; FEIS PUBLISHED: June 29, 2016

In the evaluation of the updated comprehensive plan, adopted December 2014, and the implementing zoning ordinance adopted July 26, 2016, one issue of concern was the County's responsibility to protect groundwater and surface water through the course of its planning processes.

The Comprehensive Plan

A comprehensive plan is not a regulatory document, but a County Document identifies the policies for future regulations. Fn 1

FN 1 " A comprehensive plan, however, is not regulatory but merely suggests regulatory measures." Barrie v. Kitsap County 93 Wash.2d 843 (1980)

Exempt wells had long been used to serve development in rural counties such as Okanogan under the requirements of RCW 90.44.050 .Since the adoption of the county's original comprehensive plan rules on the use of exempt wells had changed markedly, beginning principally with the Supreme court decision in WDOE v. Campbell and Gwinn 146 Wash.2d 1 (2002) In which the court reversed 50 years of prior interpretation (dissent at pp20) to hold that the 5000 gal. per day exemption for exempt use applied at the planning state for any project and not to the subsequent individual lot or lot owner. That decision was followed by Kittitas County v. EWGMHB 172 wn 2d 144 (2011) in which the court held that counties were responsible for adopting regulations to assure that the exempt permit rules as articulated in Campbell and Gwinn were enforced at the local level. IN that case the Court summarized its holding in Campbell and Gwinn as follows:

In Campbell & Gwinn, this court interpreted the permit exemption of RCW 90.44.050 and held that commonly owned developments are not exempt and therefore must comply with the established well permitting process if the total development uses more than 5,000 gallons of water per day. 146 Wash.2d at 4, 43 P.3d 4. The case did not directly address the impact of the holding on county planning or land use decisions, noting only that "[amici] urge that [the GMA] planning duties will be hindered if the exempt well provision does not apply to multiple wells in a development." Id. at 18 n. 9, 43 P.3d 4.

[and held that]

County is responsible for land use decisions that affect groundwater resources, including subdivision, at least to the extent required by law. In recognizing the role of counties to plan for land use in a manner that is consistent with the laws regarding protection of water resources and establishing a permitting process, we do not intend to minimize the role of Ecology. Ecology maintains its role, as provided by statute, and ought to assist counties in their land use planning

to adequately protect water resources. We note that the record demonstrates that Ecology in fact communicated with the County about concerns regarding the availability of water during its planning process.

¶ 61 Without a requirement that multiple subdivision applications of commonly owned property be considered together, the County cannot meet the statutory requirement that it assure appropriate provisions are made for potable water supplies. Instead, nondisclosure of common ownership information allows subdivision applicants to submit that appropriate provisions are made for potable water through exempt wells that are in fact inappropriate under Campbell & Gwinn when considered as part of a development, absent a permit. To interpret the County's role under RCW 58.17.110 to only require the County to assure water is physically underground effectively allows the County to condone the evasion of our state's water permitting laws. This could come at a great cost to the existing water rights of nearby property owners, even those in adjoining counties, if subdivisions and developments overuse the well permit exemption, contrary to the law.

...The GMA requires that counties provide for the protection of groundwater resources and that county development regulations comply with the GMA. The Board properly interpreted the GMA's mandate to protect water to at least require that the County's subdivision regulations conform to statutory requirements by not permitting subdivision applications that effectively evade compliance with water permitting requirements.

Kittitas at 180-181

In adopting a comprehensive plan, the County opted to follow Chapter 36.70, the Planning Enabling Act adopted in 196—rather than the Planning Commission Act, RCW 35.63) which had been followed in the previous plan. The planning Enabling Act provides in part::

The land use element shall also provide for protection of the quality and quantity of groundwater used for public water supplies.

RCW 36.70.330.

To meet this requirement in the Comprehensive Plan and given the changes in interpretation enunciated by the Supreme Court as recently at 2011 spelling out the County's responsibilities, the December 2014, Comprehensive plan included two policy statements reflected the requirement that in approving any development permit the County would follow state requirements with respect to issuing permits affecting groundwater and surface water:

Official controls implementing this Plan provide a wide variety of opportunities for land uses essential to the custom, culture and economy of Okanogan County and particularly reinforce the priority uses for agriculture, forestry, mining and recreation essential to the County economy and well-being. In addition, such controls identify requirements to assure that proposed new development will meet state and local requirements for available water supplies and particularly exempt wells, capacity of the area for on-site septic facilities, and the ability of

the community to provide adequate levels of public services, conservation and protection of resource lands and critical areas as required by law.

CP at 8-9

Recent court decisions concerning exempt wells have changed the historic view of exempt wells and the County is required to follow state guidelines with respect to uses and developments on exempt wells.

CP at 11-12

The two provisions set the policy base for the adoption of official controls which will enable the county to meet the requirements of the state with respect to consideration of water availability consistent with all statutory requirements and judicial interpretations thereof.

The March 26, 2016 DEIS for the proposed zoning ordinance noted reliance on regulatory controls to assure that lawful water was available at the time in light of the Campbell and Gwinn decision on project limitations and the Kittitas County decision making counties assure that projects did not evade the limitation by using multiple wells in a common ownership and project. (see pp. 28)

The FEIS expanded on this point in its response

At the time the zoning ordinance implementing the Comprehensive plan was under environmental review in the EIS, a new case in the Court of appeals set down what was at the time the most recent interpretation of the balance of requirements between Counties and WDOE in terms of determinations of water availability. That case was Hirst and Whatcom County v. Washington Growth Management Hearings Board 186 Wash.App. 32 (February 2015).

That case was used as guidance in the FEIS with respect to the availability of water in the Methow and Okanogan WRIA's (WAC 173-548 and 549) based on the statements in those two regulations that water remained available for appropriation and the agency would take action in the event that circumstances changed. (WAC 173-548-060; WAC 173-549-060).

The County did a detailed analysis of the concerns about water quantity and exempt wells in connection with the "response to comments" in the FEIS where concerns about exempt wells and lawful water were raised (SEE FEIS Response to comments pp 14-20 attached.)

Subsequent to the issuance of the FEIS and the adoption of the zoning Code, the Supreme court issued a decision in the Whatcom County case (sub nom Hirst v. Whatcom County) October 6, 2016.

IN that case the Supreme Court stated that the County could not rely solely on the WDOE to determine whether water was available or not available by reason of open v. closed basins listed in the WRIA regulations—the County had an independent duty to determine if its regulations made sure that water was both physically and legally available.

Since the New Hirst Decision change the operating assumptions about County responsibilities, the responsible official has concluded that it is appropriate to review the FEIS and zoning ordinance in light of the new decision to assure County policies and practices were consistent with the new requirements.

IN making this review, two questions were asked”

1. Is there a need to change the zoning ordinance by reason of the Hirst decision?
2. Is there a need to add addition provisions to the County building and subdivision requirements to assure that in meeting the test for water availability imposed by RCW 19.57.050 and RCW 58.17.110, the county assures that water is both physically and legally available?

The two questions will be answered in turn.

1. Is there a need to change the zoning ordinance by reason of the Hirst decision? No

The County EIS reflected a very slow rate of growth spread across a wide spectrum of the County. While much of the growth is on exempt wells, the county review identified that it was not lot size that created a demand for water but the actual use. The conclusions were summarized in the Response to Comments at pages 13-15 including the conclusion that the densities allowed may “none or very little” difference in the water usage.

Exempt wells may use of to 5000 gpd for domestic and “industrial” uses, irrigate up to ½ acre of lawn per exempt withdrawal which may be spread over one or more lots, and an unlimited amount for stock watering. The County already had rules in place to address multiple uses and has exercised it authority to specifically limit uses (See plat of North Village for an example of regulatory controls used.)

Where a proposal seek to use more than allowed by an exempt well, the task of availability shifts to WDOE who has responsibility for the issuance of water right permits and the legal as well as physical availability of water. .

2. Is there a need to add addition provisions to the County building and subdivision requirements to assure that in meeting the test for water availability imposed by RCW 19.57.050 and RCW 58.17.110, the county assures that water is both physically and legally available? Yes.

By placing the responsibility on the county to determine the legal as well as physical availability it is necessary to revisit both the evidence of possible availability in the county and the means by which the county assures that the fact of both legal and physical availability are answered before permits are issued using exempt water

Because of the languge in Hirst, that the Count must make independent evaluation as to the availability of water. It may no longer rely on the provisions of WAC 173-548-060 and WAC173 549- 060 that the failure of WDOE to take additional action may be construed as evidence that groundwater is available for withdrawal. For this reason the County is proposing to adopt an interim ordinance requiring an open record hearing and written decision on the legal and physical availability of water before approving any land use permit requiring water form an existing or new exempt well.

This new ordinance is appropriate required to comply with the terms of the new Hirst decision. The new ordinance addresses process and not substantive decisions but does provide a mechanism by which the necessary findings and decisions can be made.

There new ordinance has no impact on the environment and there is no need to amend the zoning ordinance or its FEIS as a result.

Perry D. Huston 11-9-16

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