



Memorandum

Date: December 20, 2016

To: Okanogan Board of County Commissioners

From: Perry D. Huston, Director

Topic: Proposed alternatives to Ordinance 2016-5

Purpose

This memorandum outlines alternatives to the process adopted through Interim Ordinance 2016-5 for determining water adequacy for land use applications that propose new permit exempt wells (RCW 90.44.050) as the source of potable water. The Whatcom-Hirst ruling restated the Counties responsibility to determine that water from a new permit exempt withdrawal is both physically and legally available in accordance with RCW 58.17 and RCW 19.27. The Whatcom-Hirst decision established a more stringent requirement for a complete record supporting the decisions made regarding water availability for land use applications.

History

On November 8, 2016 the Okanogan Board of County Commissioners adopted Interim Ordinance 2016-5 in response to the Whatcom-Hirst Supreme Court decision. The ordinance requires all applications that propose to use a permit exempt well as the source of potable water be reviewed by the Hearing Examiner in a public hearing. The Hearing Examiner will render the determination that water is both legally and physically available for withdrawal or conversely it is not. The decision of the Hearing Examiner may be appealed to Superior Court in accordance with RCW 36.70C Land Use Petition Act (LUPA). The BOCC conducted a public hearing on December 19, 2016 at 1:30 p.m. to take public testimony on Ordinance 2016-5 and on proposed new title to Okanogan County Code (OCC) 20 Permit Review and Administration. It is proposed that the final form of the controls enacted in response to Whatcom-Hirst be amended into OCC 20 prior to adoption.

Alternatives

Several speakers at the public hearing and written comments received expressed concern that requiring all applications to appear before the Hearing Examiner was unduly burdensome. They suggested an administrative review process be implemented. In response to this public input I would propose the following three

alternatives be considered by the BOCC.

Alternative 1: Incorporate Ordinance 2016-5 as an amendment to OCC 20 as adopted.

Alternative 2: Amend OCC 20 to require all plat proposals (including short plats) to appear before the Hearing Examiner. All building permit applications will be reviewed administratively by the Planning Department for water adequacy.

Alternative 3: Amend OCC 20 to require all land use applications be reviewed administratively for water adequacy by the planning department.

Discussion

Alternatives 2 and 3 would amend the procedures in Ordinance 2016-5 and subsequently be incorporated into OCC 20 to create an administrative review process. The administrative review process would require the following steps:

- 1) A complete application would be vested for a period of 7 years to complete the project. The application would be reviewed in accordance with existing requirements and reviewed for water adequacy. The information gathered during the omnibus hearings in January as well as the site specific information obtained from the applicant would be used as the basis for the decision regarding water adequacy.
- 2) When the decision regarding lawful water availability is made notice shall be published and mailed to water right holders in the WRIA, adjoining landowners, and commenting agencies. The notice will read as follows (draft):
“The Planning Department has reviewed an application for (building permit/other land use) at (location) and has determined that the proposed use of a permit exempt well in accordance with RCW 90.44.050 will provide an adequate supply of potable water. This decision will not be final until (deadline/20 days). Anyone with standing who desires a public hearing be held on this application to determine water adequacy must submit a request in writing by the deadline listed above. The request must state the basis upon which the request is made which must include a statement that the requesters lawful use of water from a senior source will be impaired if the decision stands.”
- 3) As noted in section 2 the notice of decision is distributed. If no hearing is requested a notice of final decision is published and mailed in accordance with section 2. The notice of final decision starts the LUPA 21 day appeal period. At the conclusion of the appeal period the decision will stand as final.

Summary

The primary objective of the process adopted through Ordinance 2016-5 and the proposed alternatives in this memorandum is to create a record of decision that is defensible. This in turn gives the landowner greater certainty in terms of the decisions made regarding the land use application under review.

It is important to note that while all the processes listed above create a requirement for

a more detailed analysis of land use applications as they relate to water adequacy and create an expanded notification list no new appeal processes are created. In accordance with OCC 2.67 all administrative decisions may be appealed to the hearing examiner. In accordance with RCW 36.70C LUPA all final land use decisions may be appealed by anyone with standing to Superior Court. Nothing in Ordinance 2016-5 or the proposed alternatives creates a new appeal step.

The objective of the expanded notification process is to neutralize as an appeal issue the assertion that “I didn’t know”. With the notification requirement and hence an opportunity to express any objections in a timely manner the final decision is more defensible. In accordance with LUPA all administrative remedies must be exhausted before the decision can be taken to Superior Court.

Recommendation

Review the alternatives listed above as well as other information gathered during the public review process and instruct staff regarding the desired amendments to OCC 20.