To be considered by the
Metropolitan King County Council on
Tuesday, January 16, 2018, at 1:30 p.m.

Metropolitan King County Council
Office of the Hearing Examiner
David Spohr, Hearing Examiner

MEETING MATERIALS FOR THE
METROPOLITAN KING COUNTY COUNCIL

APPEAL OF A DECISION OF THE HEARING EXAMINER

Proposed ordinance no. **2016-0414**
Preliminary Plat Application of **Echo Lake Estates**
Department of Permitting and Environmental Review file no. **PLAT160002**
Location: South side of SE 96th Street, east of Snoqualmie Parkway, **Snoqualmie**

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SUMMARY INFORMATION

Overview: This summary starts with identifying information, before discussing the substantive background for the current appeal. It then turns to the current issues, covering the steps Council would need to consider in sequential order: Are Appellants eligible to bring an appeal? If so, is our Supreme Court's *Hirst* decision directly applicable to pending applications? And finally, if *Hirst* is applicable to today's application, what then? We cite to the pages of relevant discussions in the parties' briefs and in our appealed decisions. Those documents, along with maps, the *Hirst* decision, and a draft ordinance, are included in the packet.

RE: Proposed ordinance no. **2016-0414**
Preliminary Plat Application of **Echo Lake Estates**
Department of Permitting and Environmental Review file no. **PLAT160002**
South side of SE 96th Street, east of Snoqualmie Parkway, **Snoqualmie**

Parties to the Appeal:

Appellants: City of Snoqualmie; and
King County Public Hosp. Dist. No. 4 (d/b/a Snoqualmie Valley Hosp.)

Applicant: Puget Western, Inc.

Background:

On September 29, 2016, we held a public hearing on this proposed six-lot subdivision, the water for which would eventually be served by permit-exempt wells drawing from the Raging River basin. Ex. 2. On October 12, 2016, we approved the preliminary plat, the same week our Court ruled Whatcom County's comprehensive plan noncompliant for failing to require applicants to show that permit-exempt wells would not impair senior water rights. *Whatcom County v. Hirst*, 186 Wn.2d 648, 668, 381 P.3d 1 (2016).

Although they had not participated in our hearing process, on November 7, 2016, Appellants requested that we reconsider our approval, asserting that we erred by determining that the Applicant had sufficiently shown: (a) physical water availability, (b) legal water availability, given the pre-existing Ecology WAC for the Raging River basin, and (c) legal water availability, given the new *Hirst* decision. The parties then jointly sought and received several briefing extensions while the state legislature attempted to figure out a solution for *Hirst*. When the legislative session ended without a compromise on *Hirst*—and without a $4 billion capital budget, due to the *Hirst* stalemate—the parties submitted additional briefing.

On October 6, 2017, we issued a "Final Order." Ord. Att. A. In it, we analyzed whether Appellants were allowed to challenge our 2016 approval, given Appellants' failure to participate in our hearing process. *Id.* at 86–93.

We rejected as too narrow the Applicant's and DPER's assertion that only a "party" could file a challenge. For example, the neighbor who attended our hearing and offered information

and argument regarding water availability would have been allowed to file a later challenge, despite his not having filed a motion to intervene and become a party.

Similarly, we rejected as too broad Appellants' interpretation that any person, whether or not the person participated in the public hearing (either live or by submitting written comments prior to the record closing) could file a challenge. Such an interpretation would create even more absurd results (than the Applicant's or DPER's interpretation), functionally allowing anyone to skip participating in the open record hearing process and later ask for a "do over" to try to submit evidence and argument they should have submitted during the public hearing process.

We concluded that Appellants, having failed to offer sufficient grounds for failing to submit their evidence at or by our September 2016 hearing, lacked standing and had failed to exhaust their administrative remedies.

Nevertheless, rather than simply reinstate our October 2016 decision in full, on our own initiative we re-examined that decision. Ord. Att. A at 93–100. We explained why the Applicant had (a) met the required threshold of sufficient factual (sometimes referred to as "physical") water availability. *Id.* at 93–94. We then explained (b) why WAC 173-507-030, which closed the Raging River basin to certain uses, did not (and does not) apply to permit-exempt wells. *Id.* at 94–95.

As to the most complex issue, we exhaustively examined whether (c) prior to the County amending its comprehensive plan and development regulations to create a *Hirst*-compliant system, *Hirst* applies directly to pending applications such as Echo Lake; we concluded *Hirst* does not. *Id.* at 95–100. However, we found unconscionable the result the *Hirst* dissent warned, of foisting the "complex," "costly," "astronomical," "massive, and likely insurmountable [] burden" of proving legal water availability onto "individuals applying for a building permit"—here, the individual purchasers who would buy Echo Lake lots after final platting and try to construct a home. *Id.* at 100–101. Thus we added a condition that the Applicant must, prior to final plat approval, satisfy whatever—after the legislature decides on a fix and/or the County amends its comprehensive plan and development regulations—legal water requirements will apply to building permit applicants. *Id.* at 101–103; *see also* Ord. Att. B at 12.

Current Appeal:

Appellants timely filed an appeal statement. Ex. 3. The Applicant responded. Ex 4. DPER did not participate. Appellants then filed a reply. Ex. 5.

Are Appellants' Eligible to Bring an Appeal?

The threshold question is whether Appellants have exhausted their administrative remedies and have standing to bring today's appeal. Appellants addressed this. Ex. 3 at 14–17; Ex. 5 at 36–46. The Applicant addressed this. Ex. 4 at 25–27. And we addressed this in our Final Order. Ord. Att. A at 86–93. We note, however, that the scenario we considered in our Final Order is potentially different in two ways from the one the Council considers today.

First, the code section we construed in the context of a reconsideration motion is not identical to the one Council must construe in the context of an appeal. KCC 20.22.230 starts with, "A person initiates an appeal to the council…by…filing…." Appellants essentially interpret this as synonymous with, "Any person my file an appeal to the council…. That person initiates the appeal by filing…." But the actual KCC 20.22.230 is a *how-to* appeal section, not a *who-may* appeal section, discussing whom an appellant serves with documents, deadlines, the content of the appeal statement, and filing fee. We do not read any talismanic quality into "a person" in determining who is eligible to appeal, just as we rejected the Applicant's and DPER's argument that we assign major weight to "party" for purposes of deciding who is eligible to seek reconsideration.

Appellants argue that the restriction on who can appeal could only come through a code amendment. Ex. 3 at 40. But no amendment could accurately capture all the permutations. For example alternative language like, "A *participant* in the hearing below is entitled to file an appeal," would be both underinclusive and overinclusive. If, for example, some procedural error (such as the Applicant not posting the appropriate sandwich board giving notice of Echo Lake) had occurred, Appellants' nonparticipation would not bar their challenge. Similarly, if the actual neighbor who came to our hearing and detailed his water situation and the specific water-related burden he feared from Echo Lake, had instead merely shown up and offered some nonspecific platitudes, he would have "participated," but not enough to entitle him to appeal.[1]

Appellants assert that we should have reopened the record to allow them to belatedly submit evidence to establish their standing (i.e. establishing their water rights and how Echo Lake would burden those rights), and that by not doing so we have created an unfair Catch-22. Ex. 4 at 44. Yet it was Appellants who created their own hurdle by not participating in the open-record hearing process. Moreover, if our code actually means what Appellants argue it means—that the open record (meaning, allowing for submission of new evidence) hearing we held in September 2016 was merely provisional and (even absent some judicially-approved exception to the exhaustion requirement) any person can essentially ask for a second hearing to submit evidence, our code would violate state law. Counties like King must establish a review process that "shall provide for no more than one consolidated open record hearing." RCW 36.70B.060(3). We are reticent to interpret our code as providing for multiple open record opportunities. But again, the issue Council considers today is not the precise one we tackled in our Final Order.

The second way Council's consideration may be different from ours is that in our Final Order we constructed a hypothetical neighbor who might have had a valid excuse for not participating in the hearing process. Ord. Att. A at 90–91. Our hypothetical neighbor undertook due diligence before our hearing and saw: that the Applicant had made a sufficient factual water availability showing; that the Raging River basin-related WAC did not apply to permit-exempt wells; and no point (in September 2016) trying to advance a claim that Echo

[1] Courts sometimes treat standing and exhaustion as separate concepts, and sometimes as interrelated. *See, e.g.*, *Harrington v. Spokane County*, 128 Wn. App. 202, 211, 114 P.3d 1233 (2005) ("The statutory standing requirement of exhaustion of administrative remedies was not satisfied.")

Lake impaired her water rights (because prior to October's *Hirst*, hers would have been a futile claim). We reasoned that hers:

> would have been a winning argument, excusing that hypothetical appellant's failure to exhaust her remedies, and providing ample ground (if she filed a motion for reconsideration) for us to reopen the record to allow her to submit her evidence of a senior water right, establish standing, and challenge whether the Applicant has shown legal water availability, or (if instead she filed an appeal to Council) for the Council to remand the case to us to allow her to do so.

We then contrasted our actual Appellants, who were belatedly attacking the factual sufficiency of Applicant's water showing and also asserting that a WAC unchanged since at least 2003 bared Echo Lake, two items that could have and should have been raised at our hearing.

In their appeal brief to Council, Appellants again challenge factual water availability and the Raging River basin closure (the WAC discussed above). Ex. 3 at 18 (lines 20–24), 20 (lines 2 & 9). Appellants double down in their reply brief, again referencing stream closures and expanding their attack on physical water availability. Ex. 5 at 36 (lines 8–9), 49 (lines 6–12). Appellants thus again show that they had every reason to participate in our September 2016 hearing process and no excuse not to. This confirms our decision not to allow additional open-record proceedings to provide a second bite at the apple.

But what if, at oral argument, Appellants concede (and jettison) their factual water availability and WAC claims, and solely advance a *Hirst*-based argument? Appellants' could then argue that their failure to participate in September 2016 should be excused because it seemed futile (at the time) for them to participate: the prevailing law—prior to the Court reversing the lower court in October 2016—was that a development utilizing permit-exempt wells was just that, "exempt." Council's issue might thus look somewhat different than the one we analyzed in our Final Order.

There is no crystal-clear answer for that scenario. Courts are typically stingy in doling out "futility" dispensations. Thus, this "exception to the exhaustion doctrine applies only in rare factual situations," and even "those remedies the plaintiff 'thought to be unavailing' should be pursued." *Spokoiny v. Washington State Youth Soccer Ass'n*, 128 Wn. App. 794, 802, 117 P.3d 1141 (2005) (citations omitted). Futility likely does not exist merely because—had Appellants advanced their impairment-of-water-rights theory at our hearing—our decision would have been "unfavorable." *Cf. Stafne v. Snohomish County*, 174 Wn.2d 24, 36, 271 P.3d 868 (2012). So even a *Hirst*-only appeal should likely be dismissed. But in case Council decides that Appellants are not barred from a *Hirst*-only challenge, we turn to the *Hirst* issue the Council would then face.

Is *Hirst* Applicable to Pending Applications?

A tremendous amount of ink has been spilled on whether *Hirst* requires that a county first amend its comprehensive plan and development regulations and *then* apply those new

policies and regulations to future applications or, conversely, whether (even before any comprehensive plan or regulations are amended) *Hirst* must be immediately applied to even pending applications that vested under the existing policies and regulations. That issue is thoroughly analyzed in the written materials. *See* Ex. 3 at 17–19; Ex. 4 at 27–29; Ex. 5 at 46–50; Ord. Att. A at 95–100.[2]

Outside of this pending application, the Council has had occasion to consider the impact of *Hirst* on the County's regulatory system. The Court issued *Hirst* while the 2016 comprehensive plan was pending. In its December 2016 comprehensive plan update, the Council interpreted *Hirst* as requiring:

> the County to develop a system for review of water availability in King County, with a particular focus on future development that would use permit exempt wells as their source of potable water. This system will be implemented through amendments to the King County Comprehensive Plan and development regulations.[3]

The Council required a "Water Availability and Permitting Study" ("Study") with the desired outcome of

> Modifications, as needed, to the Comprehensive Plan, King County Code and County practices related to ensuring availability of water within the Comprehensive Plan and determining the adequacy of water.

Thus the Council has already determined that *Hirst* mandates planning-related requirements, not immediate permit review requirements.

It is possible that both Council and we have made the same mistake, and *Hirst* actually applies to any application not finalized before *Hirst*'s October 6, 2016, issuance. Under that interpretation, last fall Council should have not only required the Study but also taken immediate action, such as instituting a moratorium on permit applications relying on permit-exempt wells or passing emergency or interim regulations to require that such applicants immediately show nonimpairment. We think the Council was correct, but if (after studying these written materials and entertaining oral argument), Council reverses course, it should also take immediate legislative action to avoid, for example, DPER continuing to issue building permits involving permit-exempt wells, absent a showing of nonimpairment of senior water rights.

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[2] Appellants' accusation that we "blew off" *Hirst*, Exhibit 5 at 34, is somewhat difficult to square with reality. We devoted eight-plus, single-spaced pages of our Final Order assessing potential options for what *Hirst* may mean, reviewing retrospective versus prospective application, analyzing Ecology and DPER understandings of *Hirst*, providing no less than two dozen quotations from (or other page-specific references to) not just the majority *Hirst* opinion, but the concurring and dissenting *Hirst* opinions as well, and then applying *Hirst* to the next steps in Echo Lake. Ord. Att. A at 95–103. That does not make our ultimate determination infallible, but an accusation of "overkill" would have been closer to the mark than "blew off."

[3] *Available at* kingcounty.gov/~/media/Council/documents/CompPlan/2016/FullCouncil/adoptedplan/%20Attachment_A-KingCountyComprehensivePlan-120516.ashx?la=en at 12-20.

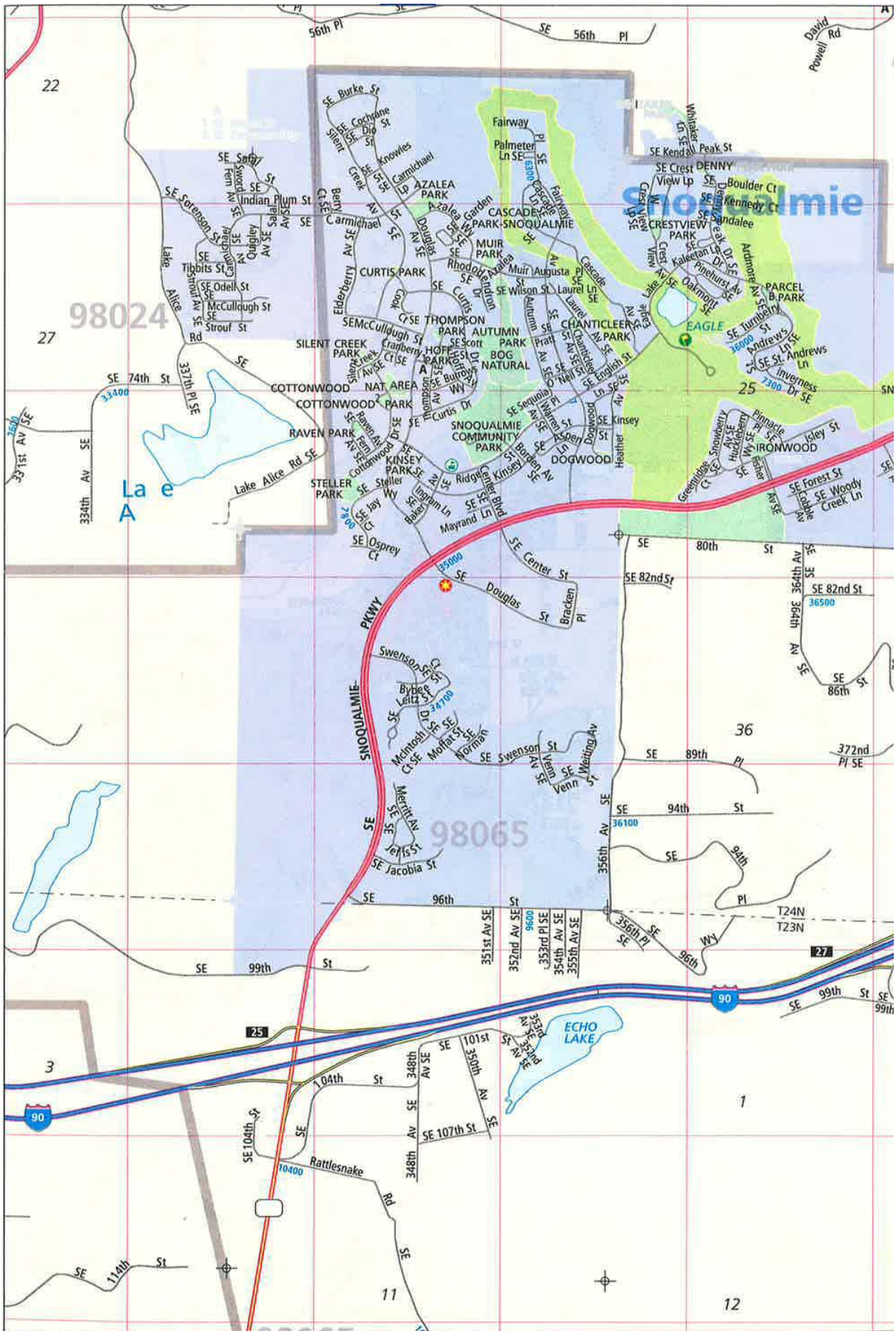
If *Hirst* is Applicable to Pending Applications, What Then?

If the Council determines now that *Hirst* commands that pending applications involving permit-exempt wells must show nonimpairment of senior water rights, what is the remedy for Echo Lake? Appellants make two requests.

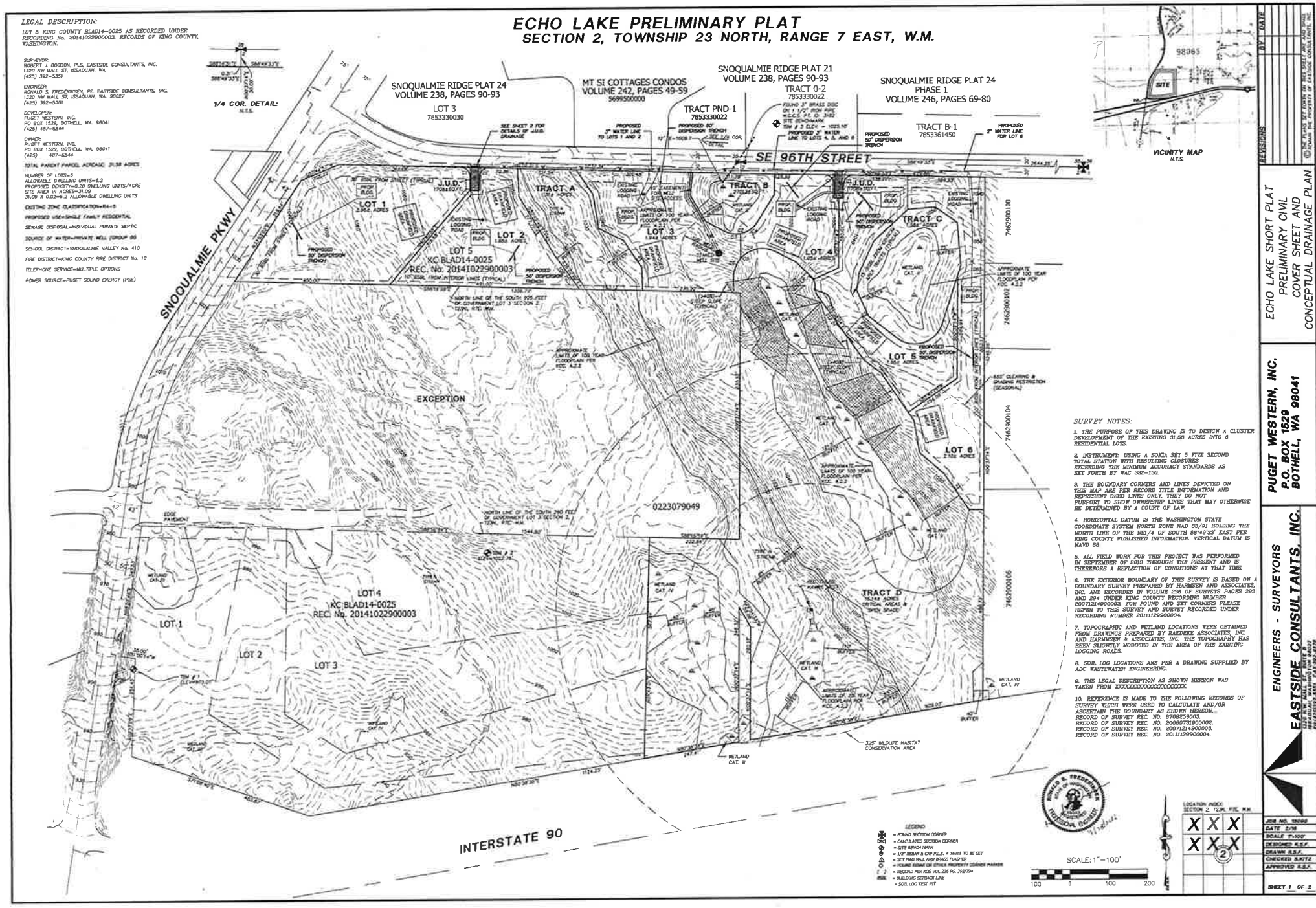
First, Appellants ask Council to deny the preliminary plat application. Ex. 3 at 20 (line 1); Ex. 5 at 50 (lines 14–19). Yet to avoid shifting a potentially massive burden onto hapless individual Echo Lake lot purchasers, we have already required that the Applicant establish legal water availability prior to final plat approval. Ord. Att. A at 101–102; Ord. Att. B at 112. Our code only requires that proof of "any required water rights, shall be submitted…before recording" the final plat. KCC 19A.16.030.F. Our Court explicitly endorsed leaving resolution of the water rights question to the final plat approval stage. *Knight v. City of Yelm*, 173 Wn.2d 325, 345, 267 P.3d 973 (2011). And if ever there were a time to leave a determination to final plat approval, this is it. Council may know more (than us) about what is happening in Olympia and can better (than we can) predict what is likely to emerge from the legislature or from the County's Study, but nobody knows for certain today precisely what the pertinent requirements will be at that point in the future when the Applicant completes all its engineering and other work required to be in a position to request final plat approval.

Second, and in the alternative, Appellants request the Council require that we hold a second open-record hearing prior to final plat approval. The *Knight* Court affirmed a superior court requirement that Knight have an "opportunity to challenge the City's evidence of water provisions before final plat approval." *Id.* at 344 & n.12. However, unlike our Appellants, Knight had participated in that examiner's preliminary plat public hearing and provided extensive evidentiary support for why approval would harm her water rights. *Id.* at 328–29, 342–43. Moreover, the County currently has no established process for a second open record hearing. Indeed, if the County had established a review process that provides a second open record hearing, it would violate RCW 36.70B.060(3).

Instead, if the Applicant completes all the engineering and other necessary steps to obtain final plat approval, that approval will be an appealable final land use decision. If Appellants conclude then that the Applicant is not in compliance with whatever standard comes out of Olympia and/or the Council's planning process, Appellants can take that challenge to Superior Court via the Land Use Petition Act, chapter 36.70C, RCW.


98024
98065
Snoqualmie
SNOQUALMIE PKWY SE
SE 56th Pl
SE Burke St
SE Cochrane St
Fairway Pl
Palmeter Ln SE
SE Kendall Peak St
SE Crest View Lp
DENNY
Boulder Ct
Kennedy Ct
Sandalee
CRESTVIEW PARK
Whitaker Ln SE
SE Sorenson St
Indian Plum St
Berry Ct SE
Carmichael Av SE
AZALEA PARK
Azalea Garden
CASCADE PARK-SNOQUALMIE
MUIR PARK
CURTIS PARK
Rhododendron
Muir
Augusta Pl
Cascade
Laurel Ln SE
SE Wilson St
Tibbits St
SE Odell St
McCullough St
Strouf St
Lake Alice Rd
Elderberry Av SE
Cook
SE Curtis Dr
SE McCullough St
THOMPSON PARK
AUTUMN PARK
CHANTICLEER PARK
EAGLE
SE Turnberry St
Andrews Ln SE
SE St. Andrews Ln
Inverness Dr SE
PARCEL B PARK
Ardmore Av SE
Kaleetan Lp Dr SE
Pinehurst Av SE
Oakmont
SILENT CREEK PARK
Cranberry
HOFF PARK
BOG NATURAL AREA
SE Scott
SE Burrows Wy
SE Pratt St
SE Chanticleer Av SE
SE Nell St
SE English St
SE 74th St
337th Pl SE
COTTONWOOD NAT. AREA
COTTONWOOD PARK
Curtis Dr
SE Sequoia Pl
Warren St
Dogwood St
SE Kinsey
SNOQUALMIE COMMUNITY PARK
Aspen
DOGWOOD
Heather
Pinnacle Pl SE
Huckleberry Av SE
Isley St
IRONWOOD
Fisher Av SE
RAVEN PARK
Raven Av SE
Fern Av SE
Cottonwood
KINSEY PARK
Ridge
Center Blvd
Borden Av SE
Greenridge Ct SE
SE Forest St
SE Woody Creek Ln
STELLER PARK
SE Steller Wy
Ingraham Ln
Baker
SE Jay Ct
SE Osprey Ct
Mayrand Ln
SE Center St
SE Douglas St
Bracken Pl
SE 80th St
SE 82nd St
364th Av SE
SE 86th St
Swenson St
Bybee
Leitz St
McIntosh Ct SE
Moffat St SE
Norman
SE Swenson St
Venn Av SE
Venn St
Waiting Av SE
SE 89th Pl
372nd Pl SE
SE 94th St
356th Av SE
Merritt Av SE
Verts St
SE Jacobia St
SE 96th St
351st Av SE
352nd Av SE
353rd Pl SE
354th Av SE
355th Av SE
356th Pl SE
T24N
T23N
SE 99th St
ECHO LAKE
SE 101st St
350th Av SE
351st Av SE
SE 104th St
348th Av SE
SE 107th St
SE 104th St
Rattlesnake Rd SE
SE 114th St
Lake Alice
90
25
27
22
27
25
3
1
11
12
36

ECHO LAKE PRELIMINARY PLAT
SECTION 2, TOWNSHIP 23 NORTH, RANGE 7 EAST, W.M.



LEGAL DESCRIPTION:

LOT 5 KING COUNTY BLAD14-0025 AS RECORDED UNDER RECORDING No. 20141022900003, RECORDS OF KING COUNTY, WASHINGTON.

SURVEYOR:
ROBERT J. BOGDON, PLS, EASTSIDE CONSULTANTS, INC.
1320 NW MAIL ST, ISSAQUAH, WA.
(425) 392-5351

ENGINEER:
RONALD S. FREDERIKSEN, PE, EASTSIDE CONSULTANTS, INC.
1320 NW MAIL ST, ISSAQUAH, WA. 98027
(425) 392-5351

DEVELOPER:
PUGET WESTERN, INC.
PO BOX 1529, BOTHELL, WA. 98041
(425) 487-6544

OWNER:
PUGET WESTERN, INC.
PO BOX 1529, BOTHELL, WA. 98041
(425) 487-6544

TOTAL PARENT PARCEL ACREAGE: 31.58 ACRES

NUMBER OF LOTS=6
ALLOWABLE DWELLING UNITS=6.2
PROPOSED DENSITY=0.20 DWELLING UNITS/ACRE
SITE AREA IN ACRES=31.09
31.09 X 0.02=6.2 ALLOWABLE DWELLING UNITS

EXISTING ZONE CLASSIFICATION=R4-5

PROPOSED USE=SINGLE FAMILY RESIDENTIAL

SEWAGE DISPOSAL=INDIVIDUAL PRIVATE SEPTIC

SOURCE OF WATER=PRIVATE WELL (GROUP 99

SCHOOL DISTRICT=SNOQUALMIE VALLEY No. 410

FIRE DISTRICT=KING COUNTY FIRE DISTRICT No. 10

TELEPHONE SERVICE=MULTIPLE OPTIONS

POWER SOURCE=PUGET SOUND ENERGY (PSE)

SURVEY NOTES:

1. THE PURPOSE OF THIS DRAWING IS TO DESIGN A CLUSTER DEVELOPMENT OF THE EXISTING 31.58 ACRES INTO 6 RESIDENTIAL LOTS.

2. INSTRUMENT USING A SOKIA SET 5 FIVE SECOND TOTAL STATION WITH RESULTING CLOSURES EXCEEDING THE MINIMUM ACCURACY STANDARDS AS SET FORTH BY WAC 332-130.

3. THE BOUNDARY CORNERS AND LINES DEPICTED ON THIS MAP ARE PER RECORD TITLE INFORMATION AND REPRESENT DEED LINES ONLY. THEY DO NOT PURPORT TO SHOW OWNERSHIP LINES THAT MAY OTHERWISE BE DETERMINED BY A COURT OF LAW.

4. HORIZONTAL DATUM IS THE WASHINGTON STATE COORDINATE SYSTEM NORTH ZONE NAD 83/91 HOLDING THE NORTH LINE OF THE NE1/4 OF SOUTH 88°49'35" EAST PER KING COUNTY PUBLISHED INFORMATION. VERTICAL DATUM IS NAVD 88.

5. ALL FIELD WORK FOR THIS PROJECT WAS PERFORMED IN SEPTEMBER OF 2013 THROUGH THE PRESENT AND IS THEREFORE A REFLECTION OF CONDITIONS AT THAT TIME.

6. THE EXTERIOR BOUNDARY OF THIS SURVEY IS BASED ON A BOUNDARY SURVEY PREPARED BY HARMSEN AND ASSOCIATES, INC. AND RECORDED IN VOLUME 238 OF SURVEYS PAGES 293 AND 294 UNDER KING COUNTY RECORDING NUMBER 20071214900003. FOH FOUND AND SET CORNERS PLEASE REFER TO THE SURVEY AND SURVEY RECORDED UNDER RECORDING NUMBER 20111129900004.

7. TOPOGRAPHIC AND WETLAND LOCATIONS WERE OBTAINED FROM DRAWINGS PREPARED BY RAEDEKE ASSOCIATES, INC. AND HARMSEN & ASSOCIATES, INC. THE TOPOGRAPHY HAS BEEN SLIGHTLY MODIFIED IN THE AREA OF THE EXISTING LOGGING ROADS.

8. SOIL LOG LOCATIONS ARE PER A DRAWING SUPPLIED BY ADC WASTEWATER ENGINEERING.

9. THE LEGAL DESCRIPTION AS SHOWN HEREON WAS TAKEN FROM XXXXXXXXXXXXXXXXXXXXX.

10. REFERENCE IS MADE TO THE FOLLOWING RECORDS OF SURVEY WHICH WERE USED TO CALCULATE AND/OR ASCERTAIN THE BOUNDARY AS SHOWN HEREON.
RECORD OF SURVEY REC. NO. 8708259003.
RECORD OF SURVEY REC. NO. 20060731900002.
RECORD OF SURVEY REC. NO. 20071214900003.
RECORD OF SURVEY REC. NO. 20111129900004.

LEGEND
- = FOUND SECTION CORNER
- = CALCULATED SECTION CORNER
- = SITE BENCH MARK
- = 1/2" REBAR & CAP P.L.S. # 16915 TO BE SET
- = SET MAG NAIL AND BRASS FLASHER
- = FOUND REBAR OR OTHER PROPERTY CORNER MARKER
- (R) = RECORD PER RDS VOL 236 PG. 293/294
- BSBL = BUILDING SETBACK LINE
- = SOIL LOG TEST PIT

SCALE: 1"=100'

LOCATION INDEX
SECTION 2, T23N, R7E, W.M.

X	X	X
X	X	X

JOB NO.	13092
DATE	2/18
SCALE	1"=100'
DESIGNED	R.S.F.
DRAWN	R.S.F.
CHECKED	R.S.F.
APPROVED	R.S.F.
SHEET	1 OF 2

NO.	DATE	REVISIONS

ECHO LAKE SHORT PLAT
PRELIMINARY CIVIL
COVER SHEET AND
CONCEPTUAL DRAINAGE PLAN

PUGET WESTERN, INC.
P.O. BOX 1529
BOTHELL, WA 98041

ENGINEERS - SURVEYORS
EASTSIDE CONSULTANTS, INC.
1320 NW MAIL ST. SUITE B
ISSAQUAH, WEST WASHINGTON 98027
PHONE (425) 392-5351

BEFORE THE KING COUNTY HEARING EXAMINER

In Re Preliminary Plat of Echo Lake Estates, PUGET WESTERN, INC., Applicant.	)	NO.: PLAT160002 PROP. ORD. 2016-0414 APPEAL STATEMENT OF CITY OF SNOQUALMIE AND KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 4 APPEALING HEARING EXAMINER'S FINAL ORDER AND AMENDED DECISION AND REPORT ISSUED ON OCTOBER 6, 2017

I. APPEAL STATEMENT

Pursuant to King County Code ("KCC") Sections 20.22.220(B)(1) and 20.22.320, the City of Snoqualmie ("City") and the King County Public Hospital District No. 4 (d/b/a Snoqualmie Valley Hospital) ("Hospital") hereby appeal the following decisions of the King County Hearing Examiner:

A. Amended Report and Decision, dated October 6, 2017 in the matter of the Echo Lake Estates Preliminary Plat application, Department of Permitting and Environmental Review File No. PLAT160002, Proposed Ordinance No. 2016-0414 ("Amended Plat Decision"); and

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(425) 831-1888 / 831-6041 fax
BSterbank@ci.snoqualmie.wa.us

B. Final Order, dated October 6, 2017 in the matter of the Echo Lake Estates Preliminary Plat application, Department of Permitting and Environmental Review File No. PLAT160002 ("Final "Order").

Copies of the Amended Plat Decision and Final Order are attached as Exhibits A and B to this Appeal Statement.

II. PROPERTY LOCATION

There are two parcels of real property that are the subject of the Echo Lake Preliminary Plat application and the Hearing Examiner's Final Order and Amended Report and Decision: King County Parcel Nos. Parcel Nos. 746290-0110 ("the Property"). The Property is generally located on the south side of SE 96th and east of Snoqualmie Parkway, in unincorporated King County adjacent to the corporate boundaries of the City of Snoqualmie, Washington.

III. PARTIES' LEGAL INTEREST

A. City of Snoqualmie's Legal Interest. The City of Snoqualmie is a Washington municipal corporation whose corporate boundaries abut the Property on the west, and are immediately to the north of SE 96th. The City owns and operates a municipal water system serving water customers both inside the City's corporate boundaries and outside the City's corporate boundaries but inside its urban growth area ("UGA"). The City's water system has limited water rights available to serve its customers, and faces demands for additional water service from property owners and owners of a small local Group B water system located west of the Property, and in unincorporated King County but outside the City and its UGA boundary. The owners of that Group B system believe that the Echo Lake Estate's proposed exempt well will impair their own, preexisting well. Those owners have previously made demands for City water service. The City has a reasonable fear of harm from the proposed Echo Lakes subdivision,

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because the City reasonably expects that adjacent property owners (including Mr. Meyers) will demand City water service (for which the City has not obtained additional supply) when the Echo Lake Estate's water withdrawals impair their preexisting well. The City has a legal interest in protecting its water system and limited water rights, in avoiding harm from the Echo Lakes Estates plat, and in ensuring that, before any preliminary or final plat is approved that proposes to rely on an exempt well, King County makes legally sufficient determinations of the physical and legal availability of water for that proposed preliminary plat, as required by the Washington Supreme Court's decision in *Whatcom County v. Hirst*, 186 Wash.2d 648, 381 P.3d 1 (2016) ("*Hirst*").

B. King County Public Hospital District No. 4's Legal Interest. The King County Public Hospital District No. 4 is also a Washington municipal corporation. The Hospital owns property immediately to the west south, and north of the Property. The Hospital operates its administrative offices on the Hospital property, and those offices are served by a water right and domestic water well that predates the Echo Lake Estate's proposed exempt well on the Property. The Hospital has a reasonable fear that it will be harmed by the proposed Echo Lake Estates, whose proposed exempt well located too close to and will impair Hospital's existing water well and water rights, which will leave the Hospital offices with reduced or no water. The Hospital may not legally obtain water from the City's municipal water system because the Hospital property is located outside the UGA boundary and King County has repeatedly denied the Hospital's and City's request to amend the UGA boundary to include the Hospital property. The Hospital has a legal interest in its property, which includes the real property, the Hospital's water right, and existing domestic water well. The Hospital also has a legal interest in ensuring that, before any preliminary or final plat is approved that proposes to rely on an exempt well, King County makes legally sufficient determinations of the physical and legal availability of water for that proposed

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preliminary plat, as required by the Washington Supreme Court's decision in *Hirst*.

IV. ERRORS IN THE DECISIONS BEING APPEALED

The Final Order and the Amended Plat Decision contain multiple, egregious errors of fact and law, which include but are not limited to the following:

A. The Final Order erroneously concludes that the City and Hospital were not entitled to seek reconsideration because they did not "exhaust administrative remedies" by participating in the Hearing Examiner's initial, September 29, 2016 hearing. There is no requirement in the King County Code, the Examiner's adopted rules, or applicable judicial precedent that require a party seeking reconsideration before a Hearing Examiner to have participated in the initial public hearing where the rules do not otherwise so require. There also is no requirement in either the King County Code, the Examiner's adopted rules or applicable judicial precedent that a party seeking Examiner reconsideration must "exhaust administrative remedies" where such exhaustion is not specified in adopted code or rules. And, as the Final Order recognizes, the Code standard for appealing to the King County Council allows any "person" to appeal a Hearing Examiner decision to the King County Council. The Final Order erred by concluding that the City and Hospital were required to exhaust administrative remedies.

B. The Final Order erroneously concludes that the City and Hospital failed to exhaust administrative remedies, and that doing so was not futile or without reasonable excuse. As the state Legislature, newspapers around the state, and all participants in this matter have recognized, the Supreme Court's decision *Hirst* substantially and dramatically changed the standard of proof and rules applicable to approval of preliminary plats, by requiring that an applicant prove (and the County find) that water is both physically and legally available without impairing pre-existing, senior water rights. As the Final Order acknowledges at pages 18-19,

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the issues raised by Hirst are so serious and far-reaching that the state's Republican Party refused to vote to approve a capital budget unless a "*Hirst* fix" was included; the Democratic Party similarly viewed *Hirst* as imposing significant and, in their view, salutary changes, and refused to amend the law to "correct" *Hirst*. A stalemate resulted, meaning *Hirst* stands but the State has no adopted capital budget. The City and Hospital could not have exhausted their administrative remedies by raising legal issues pertaining to *Hirst* at the September 29, 2016 public hearing, and it would have been futile to do so, because Hirst was not decided until October 6, 2016 – a full week *after* the hearing before the Examiner. Prior to Hirst, the City and Hospital believed that an "exempt" well was exempt from the need to prove non-impairment of senior water rights. Prior to Hirst, it would have been futile for the City or Hospital to attend the hearing or argue that the Echo Lake Estate's applicant was required to prove that it would not impair the Hospital's well, the adjacent Group B system's well (operated by Mr. Meyer) or the Raging River closure. The Examiner erred by concluded that the City and Hospital were required to exhaust remedies, that their failing to exhaust was not futile, and that they did not have sufficient reasonable excuse for not doing so.

C. The Final Order erroneously concludes that the Hospital and City were required to establish "standing" in order to seek reconsideration. Nothing in the King County Code nor the Examiner's adopted rules requires that a party seeking reconsideration must establish "standing" or some specified injury in order to do so. Examiner's own Final Order acknowledges that the King County Code allows any "person" to appeal to the King County Council, without the requirement for exhaustion of remedies or standing, and that "If one could file an appeal to Council, one should be able to file a motion for reconsideration to us beforehand to avoid the need for a costly appeal to Council." Further, the cases erroneously

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relied upon by the Final Order either construed a provision in the Land Use Petition Act ("LUPA") RCW 36.70C.060(2), which applies only to a land use petition to superior court and not to a motion for reconsideration before the Hearing Examiner, or – unlike this case – involved locally-adopted code provisions that explicitly required participation in earlier hearing examiner proceedings.

D. Having erroneously concluded that the Hospital and City were required to establish "standing" in order to participate, the Final Order abused the Hearing Examiner's discretion and violated the City and Hospital's state and federal procedural and substantive due process rights by refusing to re-open the hearing to allow the City and Hospital to provide evidence of standing, and by refusing to admit proffered evidence of standing. Because *Hirst* was decided *after* the September 29, 2016 hearing, there was no reason (and it would have been futile) for the Hospital and City to attend the hearing and establish standing as the Examiner now erroneously deemed necessary in order to assert their *Hirst* arguments. Further, applicable judicial precedent (*Lauer v. Pierce County*) expressly allows a party in a land use proceeding whose standing has been challenged to submit evidence of standing *after* the administrative process has concluded. The City and Hospital raised their due process objections, and cited *Lauer*, but the Final Order's discussion and conclusion on "standing" erroneously ignored both. Having concluded (erroneously) that the City and Hospital were required to demonstrate standing, the Final Order compounded that error by refusing to re-open the hearing and/or otherwise admit the City's and Hospital's evidence of "standing," which the Final Order admits "likely would have been sufficient to establish standing."

E. The Final Order erroneously concludes that the Hospital and City lack standing. The case relied upon in the Final Order (*Knight v. City of Yelm*) holds that a party need only allege

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sufficient facts to establish standing, not that the party must *prove* standing in order to be allowed to participate. The Final Order admits that the facts alleged by the City and Hospital likely would have been sufficient to establish standing."

F. The Final Order erroneously takes judicial notice of a decision from a prior Hearing Examiner proceeding, *Hawes* -- V16006259, without providing the parties notice and an opportunity to object. Further, the Final Order erroneously relied upon *Hawes* in any event. *Hawes* reportedly involved an animal control proceeding, not a preliminary plat, which is governed by different statutes, rules and caselaw (*e.g., Hirst* did not apply in *Hawes*). *Hirst* involved a situation in which the County participated in the Examiner's hearing but simply "forgot" to provide necessary evidence. *Hawes* stands in stark contrast to the Echo Lake Estates proposed plat, where the Supreme Court's *Hirst* decision dramatically changed the applicable burden of proof and rules applicable to preliminary plats, about which the City and Hospital could not have known and could not have addressed by participating in the pre-*Hirst* Examiner hearing.

G. The Final Order erred in considering vesting, under either state law or the King County Code. The legal standard applicable to plats, in RCW 58.17.110 and KCC 20.22.180(A), has not changed; both require a plat applicant to demonstrate (and the County to find) adequate provision for water supply has been made. Hirst changed the burden of proof for the applicant and the County, but there was no change to the underlying legal standard (adequate provision of water), and therefore *Hirst* does not implicate vesting. To the extent it concludes otherwise, the Final Order erred.

H. The Final Order erroneously concluded that *Hirst* and RCW 58.17.110 do not require a preliminary plat applicant to demonstrate physical and legal water availability prior to

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approval of a preliminary plat. The Final Order erred by concluding that a showing of legal water availability (a mixed factual and legal decision) could be made in the future, prior to final plat approval, and administratively by the Department of Planning and Environmental Review ("DPER"), without the need for notice, a hearing, or opportunity for participation by other interested parties as would be required for a preliminary plat. Further, the Final Order contravened *Hirst*, and is arbitrary and capricious, by ruling that future legal water availability could be determined prior to the final plat by what *DPER* "considers sufficient to support building permit applications," as opposed to requiring DPER to base its determination on the physical and legal availability of water needed to support the Echo Lakes Plat *and* that will not impair senior water rights (including those of the Hospital, adjacent Group B systems, and instream closures and minimum flows) are not impaired. The Examiner lacks authority to confer upon DPER the ability to decide what amount of water is "sufficient to support building permit applications"; rather, the applicant must establish (and DPER must conclude) that the proposed Echo Lake plat well will not impair senior water rights, including the Hospital's, Mr. Meyer's Group B system, or the Raging River. And, the case relied upon by the Final Order (*Knight v. City of Yelm*) does not allow imposition of a condition deferring physical and legal water availability to the final plat stage in the manner allowed by the Examiner in this case. The facts in *Knight* were much different and its holding does not apply here.

I. The Amended Plat Decision erred by finding (Finding Nos. 11-12) adequate provision of physical water. The Amended Plat Decision erroneously relied upon water well reports from wells (including the Hospital's) other than the applicant's proposed well. Further, the Amended Plat Decision relied only upon evidence from late fall, when groundwater levels are high. Most important, the determination of physical water is interrelated to the

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determination of legal water availability, which includes a determination of whether water for the Echo Lake Estates plat will physically impair senior water rights like the Hospital's. The evidence relied upon in the Amended Plat Decision was insufficient to support a finding of physical water availability.

J. The Final Order (pages 15-16) and Amended Plat Decision (Conclusion 4) err by concluding that Hirst does not apply to permit-exempt wells until after a County amends its comprehensive plan and development regulations. The Supreme Court included no such limitation in Hirst, and its plain language indicates that the County must make a determination of adequate legal availability of water as part of a preliminary plat decision. Further, applicable Supreme Court and other judicial precedents establish that *Hirst* applies retroactively to pending preliminary plat applications such as Echo Lake Estates.

K. The Amended Plat Decision (Conclusion 5 and Condition J) err by allowing a determination of legal water availability to be made in the future, prior to a final plat decision, rather than now, as part of the preliminary plat decision. This condition is neither reasonable nor legal, as explained in Section IV(H) above.

V. REASONS FOR REVERSAL OR MODIFICAITON

The reasons for reversal and modification are set forth in Section IV above.

VI. HARM SUFFERED OR ANTICIPATED BY PARTIES

The harm suffered or anticipated by the parties is set forth in Section III above.

VII. RELIEF REQUESTED

The City and Hospital respectfully request that the King County Council reverse the Hearing Examiner's Final Order and Amended Report and Decision, conclude that the City and Hospital have standing and adequately exhausted their administrative remedies to the extent

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required by law, and deny the proposed preliminary plat of Echo Lake Estates in light of the Applicant's failure to prove the physical and legal availability of water as required by *Hirst*.

In the alternative, the County Council should amend the Final Order and Amended Plat Decision to require that, prior the final plat decision, the Hearing Examiner shall provide notice and a public hearing, at which the Applicant must demonstrate and the Examiner must determine that water will be physically and legally available to serve the Echo Lakes Estates and that use of such water by Echo Lakes Estates will not impair any senior water rights, including without limitation those held by the Hospital, Mr. Meyer's Group B system, and those represented by the closure and minimum instream flows for the Raging River.

Respectfully submitted this 30th day of October, 2017.

CITY OF SNOQUALMIE

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EXHIBIT “A”
Examiner's Amended Report and Decision
(omitted as duplicate)

EXHIBIT “B”
Examiner's Final Order
(omitted as duplicate)

BEFORE THE KING COUNTY HEARING EXAMINER

In Re Preliminary Plat of Echo Lake Estates, PUGET WESTERN, INC., Applicant.	NO. PLAT160002 PROP. ORD. 2016-0414 APPLICANT'S RESPONSE TO CITY OF SNOQUALMIE AND KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 4'S APPEAL OF HEARING EXAMINER'S FINAL ORDER AND AMENDED DECISION AND REPORT ISSUED ON OCTOBER 6, 2017

I. INTRODUCTION AND PROCEDURAL HISTORY

On October 12, 2016, the King County Hearing Examiner ("Hearing Examiner") issued a Report and Decision, ("Decision"), approving applicant, Puget Western, Inc.'s ("Puget Western" or "Applicant"), preliminary plat application for a six-lot subdivision, Echo Lake Estates, under File No. PLAT160002, Proposed Ordinance No. 2016-0414. On November 7, 2016, the City of Snoqualmie, a Washington municipal corporation, and King County Public Health District No. 4, d/b/a Snoqualmie Valley Hospital (collectively "Appellants"), filed a motion for reconsideration pursuant to King County Code ("KCC") 20.22.220, asserting the Hearing Examiner based his Decision on erroneous information and failed to comply with existing laws, specifically the October 2016 Supreme Court decision in *Whatcom Cnty. v. Hirst*, 186 Wn.2d 648, 658, 381 P.3d 1 (2016) ("*Hirst*").

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On November 8, 2016, the Hearing Examiner issued an order requesting briefing in response to the issues raised by Appellants' motion for reconsideration. On February 16, 2017, after consideration of all briefing, the Hearing Examiner issued an Order Related to Motion for Reconsideration and Request for Further Briefing (the "Initial Order"). In the Initial Order, the Hearing Examiner issued final determinations on certain issues, but requested additional briefing on others.

Over the next several months, the Hearing Examiner granted several jointly-requested extensions to the briefing schedule in order to determine whether the legislature would pass a bill addressing *Hirst* or otherwise affecting Puget Western's application. After the legislative session ended without a *Hirst* bill—and without a capital budget as a result—all parties submitted additional briefing.

On October 6, 2017, the Hearing Examiner issued a final order ("Final Order"), denying Appellants' motion for reconsideration on the grounds that Appellants failed to exhaust administrative remedies as required by law, and lacked standing. In addition, the Hearing Examiner, *sua sponte*, reconsidered its own Initial Order and issued an Amended Report and Decision ("Amended Plat Decision"). The Amended Plat Decision approved the preliminary plat application with an added condition that prior to final plat approval, the Applicant must demonstrate water availability "sufficient to support building permit applications [for] the Echo Lake lots" as determined by the King County Department of Permitting and Environmental Review ("DPER"). Final Order, at 19. On October 30, 2017, Appellants filed an appeal statement asking the Metropolitan King County Council ("Council") to reverse the Final Order and Amended Plat Decision and deny the proposed preliminary plat. In the alternative, Appellants' appeal asks the Council to amend the Final Order and Amended Plat Decision to require a new public hearing at final plat, and require the Applicant to demonstrate affirmatively that water will be physically and legally available without impairing any senior water rights or instream flows.

This document contains Puget Western's response to each allegation of error included in Appellants' appeal statement. As the Hearing Examiner correctly determined in the Final Order,

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because "Appellants failed to exhaust their administrative remedies and lack standing…they cannot seek further review." Final Order, at 19. In any event, as fully explained below, the Hearing Examiner's Amended Plat Decision and Final Order properly approved the Echo Lake Estates preliminary plat application consistent with all applicable laws. Puget Western respectfully requests the Metropolitan King County Council ("Council"): (1) deny Appellants' appeal; (2) affirm the Hearing Examiner's Amended Plat Decision; and (3) affirm the Hearing Examiner's Final Order.

II. RESPONSE TO ALLEGATIONS OF ERROR

A. The Final Order correctly concludes Appellants may not move to reconsider the Hearing Examiner's Decision where both Appellants failed to participate, attend, or otherwise comment during the properly noticed public hearing on Puget Western's preliminary plat application. Final Order, at 4–5. Participation in every step of administrative review related to a land use application is required to challenge that land use application. *Citizens for Mount Vernon*, 133 Wn.2d 861, 869–70 (1997); *Lauer v. Pierce Cnty.*, 173 Wn.2d 242, 255–56, 267 P.2d 988 (2011). Appellants made no attempt to participate in the open record public hearing for the Echo Lake Estates project, nor have Appellants alleged any procedural impropriety that prevented their participation. As the Hearing Examiner noted in the Final Order, allowing a person to request reconsideration or appeal a decision, whether or not they participated in the public hearing, "would create…absurd results." *Id.*, at 4. The Hearing Examiner correctly determined that Appellants failed to exhaust administrative remedies prior to either moving for reconsideration or appealing the Decision.

B. The Hearing Examiner properly concluded in the Final Order that Appellants' failure to exhaust administrative remedies was not excused by the doctrine of futility or otherwise. First, Appellants have never alleged any sort of procedural impropriety, which deprived Appellants of proper notice or otherwise prevented their participation at the public hearing. Second, as the Hearing Examiner explained in the Final Order, Appellants have consistently challenged whether Puget Western sufficiently demonstrated "appropriate provisions [for] potable water." Final Order, at 7. One of the many arguments Appellants have brought to challenge Puget Western's

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demonstration of water availability is based on the *Hirst* decision, which was issued after the initial hearing in this matter. *Hirst*, 186 Wn.2d at 658. *Hirst*, however, merely "provides Appellants with an extra argument for asserting that the applicant had not shown" adequate water availability—it does not excuse Appellants from failing to contest Puget Western's demonstration of appropriate provisions for potable water at the public hearing. Final Order, at 7 (emphasis added). Appellants could easily have brought their other challenges to Applicant's demonstration of water availability at the public hearing, and then, after the *Hirst* decision's issuance, amended their appeal or request for reconsideration thereof to include alleged error pursuant to *Hirst*. Appellants did not, and the Hearing Examiner correctly determined *Hirst* cannot excuse Appellants' failure to exhaust administrative remedies.

C. The Hearing Examiner's Final Order correctly concludes that Appellants must establish standing in order to request reconsideration of the Hearing Examiner's Decision. In order to establish standing to challenge an administrative decision, such as preliminary plat approval, a party must demonstrate they are "aggrieved or adversely affected" by the decision. *Knight v. City of Yelm*, 173 Wn.2d 325, 341, 267 P.3d 973 (2011). Appellants argue that any person, regardless of whether they have an interest in the land use decision at issue, may seek reconsideration or appeal a Hearing Examiner decision. Appeal Statement, at 5. Appellants' argument, in that regard, would lead to absurd results—allowing anyone, from anywhere, regardless of whether they participated in the public hearing, to challenge a decision of the Hearing Examiner. Appellants must first establish standing in order to seek reconsideration.

D. The Hearing Examiner's Final Order correctly denies Appellants' request to re-open the hearing record for provision of new evidence to demonstrate standing. In declining to re-open the hearing record, Appellants argue the Hearing Examiner violated their due process rights since the Court decided *Hirst* after the public hearing date, and therefore it was futile for Appellants to have attended the hearing and submitted facts into the record. Appeal Statement, at 6. As explained *supra* section II.B, Appellants could have timely brought their other challenges to Applicant's demonstration of water availability, and had ample opportunity to submit appropriate evidence into

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the hearing record. The Hearing Examiner's decision not to re-open the record long after its close was appropriate, and did not violate Appellants' due process rights.

E. The Hearing Examiner's Final Order correctly determined Appellants lack standing to pursue reconsideration or appeal. Where, as here, a petitioner seeks to demonstrate the injury required to support standing by alleging a threatened injury rather than an existing injury, they must show the injury is immediate, concrete, and specific, as opposed to conjectural or hypothetical. *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 662, 375 P.3d 681 (2016). Appellants relied solely on conclusory allegations of injury—as they do again on appeal—in order to demonstrate standing. *See* Appeal Statement, at 2–4 (the "owners…believe that the Echo Lake Estate's proposed exempt well will impair their own, preexisting well") (emphasis added). The Hearing Examiner correctly concluded Appellants lack standing to bring a motion for reconsideration or appeal.

F. The Hearing Examiner's Final Order appropriately took judicial notice of a prior Hearing Examiner proceeding, *Hawes* – V16006259. The Hearing Examiner need not provide parties notice and opportunity to object prior to taking judicial notice of a decision pursuant to the Hearing Examiner Rules of Procedure and Mediation ("Hearing Examiner Rules"). Hearing Examiner Rules, XIII.C.2. In addition, the Hearing Examiner properly referred to or otherwise relied on *Hawes*. Appellants' attempt to distinguish *Hawes* on the basis that it was not a land use decision subject to *Hirst* is irrelevant. The Hearing Examiner referenced *Hawes* for its discussion and analysis of evidentiary rules regarding hearing records contained in the Hearing Examiner Rules and KCC—provisions that are neither unique to preliminary plat applications nor affected by *Hirst*. The Hearing Examiner, therefore, appropriately referenced and analyzed *Hawes* in the Final Order.

G. The Hearing Examiner's Final Order did not err in considering vested rights in the broad context of determining the implications of the *Hirst* holding. Specifically, the Hearing Examiner did not determine vested rights were controlling in this matter, only that they were "instructive." Final Order, at 15.

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H. The Hearing Examiner's Final Order correctly concludes that *Hirst* does not require an applicant to affirmatively demonstrate nonimpairment of senior water rights and instream flows in a pending preliminary plat application. Rather, *Hirst* places the onus on King County to amend its comprehensive plan and applicable regulations to comply with *Hirst*. As the Hearing Examiner noted, the *Hirst* Court found Whatcom County's process for determining whether an applicant had demonstrated sufficient proof of adequate water noncompliant—the Court did not issue a finding of invalidity. Final Order, at 15. In other words, King County's process for determining whether adequate water provisions support a preliminary plat application is as legal today as it was prior to the *Hirst* decision. The Hearing Examiner properly noted Whatcom County's "regulations themselves, not the County's interpretation of them, [were] the problem" in *Hirst*. Final Order, at 16. *Hirst* places a burden on county governments to amend their comprehensive plans—not on individual applicants to conduct prohibitively expensive hydrogeological studies in order to affirmatively demonstrate nonimpairment on a case by case basis.

Appellants also contend the Hearing Examiner erred by approving the preliminary plat application subject to a condition requiring a showing of adequate water availability by DPER at final plat approval. As the Hearing Examiner recognized, the only party with standing to challenge the imposition of the condition is Puget Western, because that condition is "materially less advantageous" to the Applicant. Final Order, at 19. Appellants, however, are not damaged by the decision to add a condition to the preliminary plat approval because the decision to add the condition is more advantageous to Appellants. Regardless, *Knight v. City of Yelm* specifically authorizes the approval of a preliminary plat subject to final determination of appropriate provisions for water at final plat approval. 173 Wn.2d 325, 345, 267 P.3d 973 (2011). The Hearing Examiner, therefore, acted within his authority to approve Applicant's preliminary plat application subject to determination of provisions of adequate water availability by DPER prior to final plat approval.

I. The Amended Plat Decision correctly determined the Applicant met its burden of proof to show factual water availability to serve the preliminary plat. By providing water well

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reports, submitting testimony regarding water flow, and receiving Washington State Department of Health approval of its proposed well site, Applicant demonstrated factual availability of water.

J. As explained above, *supra* section II.H, the Hearing Examiner's Final Order correctly concludes that *Hirst* does not require an applicant to affirmatively demonstrate nonimpairment of senior water rights and instream flows in a pending preliminary plat application. Rather, *Hirst* places the onus on King County to amend its comprehensive plan and applicable regulations to comply with *Hirst*.

K. As explained above, *supra* section II.H, only the Applicant can challenge an additional condition of plat approval because it is only disadvantageous to the Applicant. Additionally, *Knight v. City of Yelm* clearly authorizes the approval of a preliminary plat subject to final determination of appropriate provisions for water at final plat approval. The Hearing Examiner's decision to authorize approval subject to final determination of provisions for water at final plat approval was appropriate.

III. RELIEF REQUESTED

The Hearing Examiner correctly concluded that Appellants failed to exhaust their administrative remedies and lack standing to move for reconsideration of the Hearing Examiner's initial decision, or seek review of the Final Order and Amended Plat Decision to the Council. In addition, the Hearing Examiner's decision to approve Puget Western's preliminary plat application correctly applied all applicable laws. For these reasons, Puget Western respectfully requests the Council deny the appeal, and affirm the Hearing Examiner's Final Order and Amended Plat Decision in all respects.

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DATED this 16th day of November, 2017.

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BEFORE THE KING COUNTY HEARING EXAMINER

In Re Preliminary Plat of Echo Lake Estates, PUGET WESTERN, INC., Applicant.	)	NO.: PLAT160002 PROP. ORD. 2016-0414 REPLY APPEAL STATEMENT OF CITY OF SNOQUALMIE AND KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 4 CONCERNING HEARING EXAMINER'S FINAL ORDER AND AMENDED DECISION AND REPORT ISSUED ON OCTOBER 6, 2017

I. INTRODUCTION

Appellants City of Snoqualmie ("City") and the King County Public Hospital District No. 4 ("Hospital") submit this joint Reply Appeal Statement as directed by to the Hearing Examiner's October 31, 2017 Notice of Appeal. The City and Hospital are referred to collectively as "Appellants."

This case raises fundamental issues of fairness and due process. It also raises the fundamental question of whether the County will honor its duty to implement a decision of our state Supreme Court in order to protect both the environment and the property and water rights of adjacent property owners.

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Last October, the Supreme Court decided the case of *Whatcom County v. Hirst*, 186 Wash.2d 648, 381 P.3d 1 (2016) ("Hirst") (copy attached at Appendix A). *Hirst* fundamentally altered the rules applicable to counties reviewing preliminary plats and building permits. As the Hearing Examiner put it, "solving *Hirst's unraveling of water management authority in Washington* was so important that the Senate majority refused to take up the capital budget until a fix for *Hirst* was found. . . ."[1] The reason for the Legislature's urgency was that, in *Hirst*, the Supreme Court for the first time imposed directly *on counties* the responsibility to determine both the legal and physical availability of water, *prior* to approving a plat or issuing a building permit, even if the plat or building permit proposed to rely on an exempt water well(s), which pre-Hirst could be utilized without the need to obtain a water right accompanied by limitations on impairment of minimum instream flows or the senior water rights of neighboring property owners.

Despite Hirst's broad effect, only one week after *Hirst,* was decided the Hearing Examiner issued his Report and Decision approving the proposed Echo Lake Estates preliminary plat ("Plat Decision"). The Plat Decision failed to even mention *Hirst*, let alone attempt to apply it to the proposed plat, or explain why it did not apply.

The City and Hospital filed a motion asking the Examiner to reconsider the Plat Decision. The City and Hospital pointed to *Hirst* and explained why the Plat Decision was erroneous, in light of *Hirst's* multiple explanations that "through these statutes [RCW 19.27.097(1) and 58.17.110(2)], *the GMA requires counties to assure that water is both factually and legally available.*"[2]

Bowing to the plat applicant Puget Western, Inc. ("PWI'"), the Hearing Examiner promptly put the City and Hospital in a "Catch 22": he demanded that the City and Hospital

[1] Hearing Examiner Final Order at 18.
[2] *Hirst*, 186 Wn.2d at 674 (emphasis added).

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demonstrate their legal "standing" to seek reconsideration, then refused to open the record to allow them to submit evidence proving it. The City and Hospital offered evidence, which the Examiner even reviewed and acknowledged "likely would have been sufficient to establish standing." Examiner Final Order at 8. The Examiner violated basic rules of constitutional due process and fairness by requiring the City and Hospital to prove their standing, but denying them any opportunity to do so.

The Examiner also committed legal error by requiring the City and Hospital to have exhausted their administrative remedies, but then refusing to reopen the record to do so. Nothing in the County Code or Hearing Examiner Rules required the City and Hospital to have attended the initial hearing before the Examiner before moving for reconsideration. The Examiner himself admitted that the County Code allows any "person" to file an appeal to the County Council, and that it would be absurd to allow any person to appeal but then restrict motions for reconsideration to only those who had previously participated in a hearing before the Examiner. And, the court cases cited by the Hearing Examiner and PWI do not actually state that parties are generally required to have participated in every initial hearing before an Examiner in order to seek reconsideration or appeal to a county council or court. The single case in which such a requirement was applied, *Thompson v. City of Mercer Island*, came to that result because the City's adopted code expressly required attendance and participation in all hearings – something that the King County Code simply does not require. And, of course, requiring "exhaustion of administrative remedies" at all is wrong where exhaustion would have been "futile." In this case, the City and Hospital could not have attended the initial hearing to argue that the County had a duty to ensure the legal and physical availability of water, because that duty did not exist until Hirst was decided, weeks *after* the initial hearing before the Hearing Examiner.

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Most important, the Examiner refused to apply *Hirst*. Despite acknowledging that "*Hirst's* unraveling of water management authority in Washington was so important that the Senate majority refused to take up the capital budget until a fix for *Hirst* was found," the Examiner concluded that counties were not responsible for determining legal and physical water availability after all. Instead, he concluded that all Hirst requires is for counties to adopt new development regulations concerning water availability; in the meantime, no county, "much less King County, should do anything other than apply its current plans and regulations to completed applications until such time as the county can enact new, Hirst-compliant plans and regulations." Examiner Final Order at 15. The Examiner basically "blew off" the Supreme Court's *Hirst* decision, effectively telling the Legislature, "*Hirst* is no big deal. It just requires some additional planning."

The Examiner admitted his conclusion was tenuous. He acknowledged that "the [Supreme Court] majority intends its [*Hirst*] ruling to apply to current subdivision or building permit applications, including. . .Echo Lake," and that "no less than ten times did the majority raise RCW 58.17.110, a pre-existing code" governing subdivisions, to support its conclusion that "the GMA requires local governments to determine that applicants for building permits or subdivision developments have demonstrated that an adequate water supply is legally available before authorizing approval." Examiner Final Order at 13-14. The Examiner admitted that "a court may say, "What part of *Hirst's* local governments must determine that 'applicants for building permits or subdivision developments have demonstrated that an adequate water supply is legally available before authorizing approval' did you not understand?" Examiner Final Order at 13. He went on to justify his disregard of the Supreme Court's opinion by stating that a reviewing court would not pay attention to it anyway,[3] by complaining that *Hirst* was "upsetting the apple cart by

[3] Final Order at 16.

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requiring governments to hammer existing applicants with new burdens prior to comprehensive legislative amendments,"[4] and by rationalizing that the proposed Echo Lake is "the tiniest preliminary plat application we have ever been involved with."[5] None of these justifications – especially not the plat's size -- have any merit. *Hirst* represents the Supreme Court's acknowledgment that subdivisions' use of exempt wells *do* have a *cumulative* impact on streams that are closed to new water uses or that have minimum instream flows, and on senior water right holders. *Hirst* was the Supreme Court's figurative "line in the sand," where counties and other local governments are no longer free to ignore those cumulative impacts, but must, instead, "ensure an adequate water supply *before* granting a. . .subdivision application." Hirst, 186 Wn.2d at 658. And by longstanding Supreme Court precedent, because the Court did not say that its *Hirst* decision was to apply only prospectively, *i.e.*, to new subdivision applications, the duty *Hirst* imposes on counties begins *now* – with Echo Lakes Estates.

That is why the Legislature was so concerned with *Hirst*. It is also why this County Council, which has always acted proactively to protect the environment, must reverse the Hearing Examiner's decision and deny the proposed plat, because the Applicant has consistently refused to offer any proof whatsoever that water is actually legally available without impairing senior water rights, including those represented by the Raging River closure and those held by the Hospital and a neighboring water association.

If the County Council determines to let the decision stand, it should, at a minimum, revise the new condition (Condition 17) the Hearing Examiner placed on the preliminary plat approval. Condition 17 requires the applicant to establish, prior to final plat approval, "not only the physical water requirements set forth in Public Health's September 28, 2015 approval (Exhibit 13), but

[4] Final Order at 17.
[5] Final Order at 19.

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such *legal* water availability as DPER will consider sufficient to support building permit applications for the Echo Lake Estate lots." This condition is too loose, and allows the applicant and DPER to free-lance. *Hirst* requires a showing of legal availability along with proof that a proposed subdivision or building permit will not impair senior water rights. At a minimum, the County Council should revise Condition 17 to remove DPER's apparent discretion, and require instead "such legal water availability sufficient to support building permit applications for Echo Lake Estate lots without impairing pre-existing senior water rights or violating any stream closures or minimum instream flows."

II. REPLY APPEAL STATEMENT

A. Hearing Examiner Erred by Ruling City and Hospital Were Required to Have Participated in Initial Hearing.

The Final Order erroneously concludes that the City and Hospital were not entitled to seek reconsideration because they did not "exhaust administrative remedies" by participating in the Hearing Examiner's initial, September 29, 2016 hearing. As noted in the Appeal Statement, there is simply no requirement *anywhere* in the King County Code, the Examiner's adopted rules, or applicable judicial precedent that require a party seeking reconsideration before a Hearing Examiner to have participated in the initial public hearing where the rules do not otherwise so require. There also is no requirement in either the King County Code, the Examiner's adopted rules or applicable judicial precedent that a party seeking Examiner reconsideration must "exhaust administrative remedies" where such exhaustion is not specified in adopted code or rules.

The Applicant's Response does not address in any way this critical absence of any County Code or Hearing Examiner rule requirement for initial hearing participation. Instead, it points to two different Supreme Court decisions (*Citizens for Mount Vernon*, and *Lauer v.*

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Pierce County), as supposedly standing for the notion that "participation in every step of administrative review related to a land use application is required to challenge that land use application." PWI Response at 3. Those cases just don't apply here.

First, those cases involve judicial review of land use decisions, under the Land Use Petition Act, Chapter 36.70C RCW. That statute includes detailed requirements for establishing standing and exhaustion of administrative remedies – the same type of requirements that are *absent from* the King County Code and County Hearing Examiner Rules.

Second, the cases simply don't say what PWI claims. For example, in *Citizens for Mount Vernon* the developer, Haggens, argued first that the citizens had failed to exhaust because they did not appeal the City Council's decision to the Growth Board. *Citizens for Mount Vernon*, 133 Wn.2d at 867. The Court held that the Board lacked jurisdiction over a specific project decision, and that therefore Citizens had properly proceeded in superior court. *Id.* at 868. Haggens next contended that Citizens had failed to exhaust "because Citizens failed to raise the issue of the rezone and the project approval *specifically enough* in the public hearing process." *Id.* The Court held:

> *The statute states nothing of the degree of participation or the specificity with which issues must be raised to seek judicial review.* . . . The only administrative remedy available to Citizens under the Land Use Petition Act, prior to seeking review in superior court, was participation in the public hearings. *The record reflects Citizens did participate and Haggens makes no claim they did not.*
>
> *This court has not specifically addressed how much participation at a public hearing is required to exhaust an administrative remedy. . . .*
>
> * * *
>
> [T]he appropriate issues must first be raised before the agency. [Citations omitted] *In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record.*

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> * * *
>
> *The record here reflects Citizens participated in all aspects of the administrative process and raised the appropriate project approval issues.*
>
> * * *
>
> Haggen contends Citizens' failure to specifically raise the technical, legal argument of compatibility between R-2A zoning and a commercial PUD demands the project be approved without an examination of the case on the merits. *Individual citizens did not have to raise technical, legal arguments with the specificity and to the satisfaction of a trained land use attorney during a public hearing.*

Id. at 868-871 (emphasis added).

The foregoing quotation does establish two different points – but not PWI's contention. First, as the Court observed, the Land Use Petition Act (or "LUPA", Chapter 36.70C RCW)) does not define "the degree of participation" before an administrative agency necessary to seek judicial review under LUPA, and the *Citizens* decision does not do so, either. Instead, the Court noted that there was only *a single opportunity* for the citizens to exhaust their remedies – to speak for three minutes before the City Council – and that they had done so. The Citizens Court did not address how much participation is required in a process where, as here, that has *multiple* opportunities for participation (*e.g.*, participation at hearing *or* filing a motion for reconsideration). Citizens did not establish participation in a hearing as a prerequisite to exhaustion of remedies for LUPA purposes. Second, the Court indicated that while an issue must be raised as the administrative level, a LUPA petition need have only raised "the appropriate project approval issues," and that a technical legal argument is not necessarily required. Citizens for Mount Vernon does *not* hold what PWI says, *i.e.*, that "participation in every step of administrative review related to a land use application is required to challenge that land use application"

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Neither does *Lauer v. Pierce County,* the other case relied on by PWI. In *Lauer*, the Court rejected an applicant's argument that neighboring property owner appellants were required to have intervened in the applicant's prior judicial proceeding. The Court held that exhaustion required only that a party utilize administrative remedies; the exhaustion doctrine "does not require parties to participate in litigation." 173 Wn.2d at 256. "Once they learned of the Garrisons' construction plan, Lauer and de Tienne fully participated in every step of administrative review related to this case, exhausting all remedies." *Id.* The Court observed that the neighbors had in fact exhausted their remedies by participating in administrative proceedings even though they had not intervened in prior litigation. The Court did not hold that "participation in every step" is "*required*" for exhaustion, as PWI incorrectly argues.

The *only* case that does hold that "participation in every step" is required bases its holding on the fact that the underlying local government code (Mercer Island's) expressly *required* participation in every step. In *Thompson v. Mercer Island*, 193 Wn.App. 653 (Div. I 2016), the Court dismissed a LUPA petition for lack of jurisdiction, on the grounds that the petitioner lacked standing due to his failure to exhaust administrative remedies. In that case, exhaustion was required because the *statute*, RCW 36.70C.060(2), expressly requires that person is "aggrieved or adversely affected" only "when ... the petitioner has exhausted his or her administrative remedies to the extent required by law." *Thompson*, 193 Wn.App. at 661, citing RCW 36.70C.060(2). The Court then considered the city's code provision, which expressly required that only a "party of record" may appeal an administrative staff decision to the city's planning commission, and a person could become a "party of record" only by submitting written comments to city staff, in advance of the administrative staff approval, concerning the application. *Id.* at 660. Similarly, the city's planning commission appeal decision could be

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appealed to superior court, but only by a person who had become a "party of record." The Court affirmed dismissal of one of the LUPA petitioners, Misselwitz, because he failed to submit written comments on the application or appeal to the planning commission, and thus never became a "party of record" qualified to appeal to superior court. *Id.* at 661 ("Misselwitz did not submit written comments about the application and did not appeal the decision to the planning commission. These are the steps in the administrative process that he failed to complete.").

Thus, in *Thompson*, the Mercer Island City Code contained express requirements limiting judicial appeal opportunities to a "party of record," and detailing certain participation (written comment, appeal to planning commission) required to become a "party of record." *The King County Code contains no such administrative participation or exhaustion requirements*. The Examiner lacked authority to establish such requirements in this case, and *Citizens for Mount Vernon* and *Lauer v. Pierce County* provided no authority for the Examiner, either. The County Council should reverse the Examiner's unsupported "interpretation" that the City and Hospital were required to have participated in the initial hearing in order to have filed a motion for reconsideration. In the Examiner's own words, "the standard involving an appeal to Council employs "a person," and "[i]f one could file an appeal to Council, one should be able to file a motion for reconsideration beforehand." Further Briefing Order at 4, *citing* KCC 20.22.220(A)(2) and KCC 20.22.230(A) & (D). While the Examiner expressed concern that allowing a person who had not participated in the initial hearing to file a reconsideration motion would lead to "absurd results," because a person could wait to see how a matter turned out and then file a motion (Final Order at 4), that is a policy concern that the County Council may address, if it wishes, via subsequent amendments to the King County Code. The Examiner's policy concerns do not

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empower him to amend the Code on his own. In any event, as discussed below, that is not what happened – the City and Hospital did not "lay in the weeds," but rather brought their motion after the Hearing Examiner deliberately ignored a new, binding decision of our state Supreme Court, that the City and Hospital could not have anticipated or addressed by participating in the Examiner's initial hearing.

B. Hearing Examiner Erred By Concluding That City and Hospital Failed to Exhaust Administrative Remedies.

As explained at pages 4 – 5 of the Appeal Statement, the Hearing Examiner also erroneously concluded that the City and Hospital failed to exhaust administrative remedies, and that doing so was not futile or without reasonable excuse. *Hirst* dramatically changed the "rules of the game," and the Examiner's initial plat decision completely ignored *Hirst*.[6] The City and Hospital could not have exhausted their administrative remedies by raising legal issues pertaining to *Hirst* at the September 29, 2016 public hearing, and it would have been futile to do so, because Hirst was not decided until October 6, 2016 – a full week *after* the hearing before the Examiner. Prior to Hirst, the City and Hospital believed that an "exempt" well was exempt from the need to prove non-impairment of senior water rights. Prior to Hirst, it would have been futile for the City or Hospital to attend the hearing or argue that the Echo Lake Estate's applicant was required to prove that it would not impair the Hospital's well, the adjacent Group B system's well (operated by Mr. Meyer) or the Raging River closure.

PWI contends (following the Examiner) that the City and Hospital were required to exhausted remedies, because the City and Hospital have also contended that PWI's showing of

[6] It is not known why Examiner's initial Echo Lake Estates preliminary plat decision failed to address Hirst; it may be the Examiner was unaware that the Supreme Court had decided *Hirst* the week prior. Either way, the significance and breadth of the decision – what the Examiner himself labeled "Hirst's unraveling of water management authority in Washington" – warranted the City and Hospital's motion for reconsideration asking the Hearing Examiner to consider and apply Hirst to the Echo Lake Estates preliminary plat.

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physical water availability was also inadequate. PWI Response at 3-4. That the City and Hospital included in their motion issues that PWI now argues could have been raised earlier, does *not* somehow also void a challenge based on *Hirst*, which could *not* have been raised at the time of the initial hearing. And, the additional arguments to which PWI points have been rejected by both PWI and the Examiner as without merit. In essence, PWI and the Examiner are arguing the City and Hospital should have raised "losing" issues, just to preserve standing in case a new Supreme Court decision fell out of the sky to provide the basis for a subsequent reconsideration motion. PWI's and the Examiner's position are ridiculous. As the Examiner himself acknowledged, a person who alleges that prior to *Hirst*, a permit-exempt well was exempt from the need to show non-impairment, and so it would have been futile to attend and challenge a preliminary plat, but after Hirst, needed to raise that argument, "would have [presented] a winning argument, excusing that hypothetical appellant's failure to exhaust her remedies, and providing ample ground (if she filed a motion for reconsideration) for use to reopen the record to allow her to submit her evidence of a senior water right, establish standing and challenge whether the Applicant has shown legal water availability. . . ." Final Order at 7. That is *exactly* what the City and Hospital did, and exactly what their motion for reconsideration argued. Motion for Reconsideration at 4-8. There was no way for the City and Hospital to have raised their *Hirst* challenge at the initial hearing, which occurred *prior to* issuance of *Hirst*.

C. Hearing Examiner Erred in Requiring Standing.

The Final Order erroneously concludes that the Hospital and City were required to establish "standing" in order to seek reconsideration, and the reasons for its error are the same as discussed in Section A above. Nothing in the King County Code nor the Examiner's adopted rules requires that a party seeking reconsideration must establish "standing" or some specified

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injury in order to do so. The Examiner's own Final Order acknowledges that the King County Code allows any "person" to appeal to the King County Council, without the requirement for exhaustion of remedies or standing, and that "If one could file an appeal to Council, one should be able to file a motion for reconsideration to us beforehand to avoid the need for a costly appeal to Council." Further, the cases erroneously relied upon by the Final Order either construed a provision in the Land Use Petition Act ("LUPA") RCW 36.70C.060(2), which applies only to a land use petition to superior court and not to a motion for reconsideration before the Hearing Examiner, or – unlike this case – involved locally-adopted code provisions that explicitly required participation in earlier hearing examiner proceedings. While PWI and the Examiner claim it would be "absurd" to allow someone to skip the initial hearing and then file a motion for reconsideration, this is a policy argument that the County Council may address (if it wishes) by amending the King County Code to impose a "standing" requirement. The Examiner lacks the power to do so on his own, especially under the guise of "interpretation." It is well established that a decision maker – even one to whom some deference is required – is not entitled to add terms to a statute or regulation that are not there under the guise of "interpretation." *See, e.g., Western Telephage, Inc. v. City of Tacoma*, 95 Wn. App. 140, 974 P.2d 1270 (1999); *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 627–28, 869 P.2d 1034 (1994); *Postema v. Pollution Control H'rngs Bd.*, 142 Wn.2d 68, 77, 11 P.3d 26 (2000).

D. Hearing Examiner Violated City and Hospital's Due Process Rights by Refusing to Re-Open Record.

Having erroneously concluded that the Hospital and City were required to establish "standing" in order to participate, the Final Order abused the Hearing Examiner's discretion and violated the City and Hospital's state and federal procedural and substantive due process rights

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by refusing to re-open the hearing to allow the City and Hospital to provide evidence of standing, and by refusing to admit proffered evidence of standing. PWI does not address the City and Hospital's due process rights at all, other than repeating its meritless argument that the City and Hospital should have raised "losing" arguments at the hearing, just to preserve the later possibility of a reconsideration motion. But that argument does nothing to address the "Catch 22" position in which the Examiner placed the City and Hospital, by requiring it (after the fact) to prove "standing" when no such requirement occurs in the Examiner's Rules or the County Code, but simultaneously preventing them from doing so. Nor does it address the fact that *Hirst* was decided *after* the September 29, 2016 hearing, so there was no reason (and it would have been futile) for the Hospital and City to attend the hearing and establish "standing" as the Examiner erroneously deemed necessary.

The Examiner's decision is especially wrongheaded for two other reasons. First, Further, applicable judicial precedent (*Lauer v. Pierce County*) expressly allows a party in a land use proceeding whose standing has been challenged to submit evidence of standing *after* the administrative process has concluded, in order to rebut a challenge to that party's "standing." *Lauer v. Pierce County*, 173 Wn.2d 242, 254 (2011) (Court "easily rejected" argument that LUPA petitioners lacked standing on grounds that petitioners relied on evidence outside the administrative record, because "*the [standing] requirement plainly indicates that the legislature anticipated later consideration of facts related to judicial standing.*") (Italics added). The City and Hospital cited this part of *Lauer*, but the Final Order's discussion and conclusion on "standing" ignored *Lauer's* express holding. PWI's Response ignores this part of *Lauer*, too, despite relying upon it, incorrectly, for other arguments (see above). Second, even the Examiner frankly admitted that the City and Hospital's evidence "likely would have been

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sufficient to establish standing." The Examiner's admission only highlights the due process violation that occurred when the Examiner denied the City and Hospital the chance to prove their standing, while admitting that they could have done so had the Examiner only accepted their evidence.

E. Hearing Examiner Erroneously Concludes City and Hospital Lack "Standing."

The Examiner also committed reversible error by ruling the City and Hospital lack "standing." The case the Examiner relied upon in the Final Order (*Knight v. City of Yelm*) holds that a party need only allege sufficient facts to establish standing, not that the party must *prove* standing in order to be allowed to participate. In any event, the Final Order admits that the facts alleged by the City and Hospital "likely would have been sufficient to establish standing." The Examiner's admission puts to rest PWI's contention that the City and Hospital's proof relied upon "conclusory allegations of injury" or was somehow otherwise insufficient. The City and Hospital have sufficiently demonstrated "standing," not only to file a motion for reconsideration to the Examiner, or to appeal to the County Council, but also to file a land use petition in superior court under LUPA. The critical problem, then, was the Examiner's fatally flawed decision to keep out the precise evidence that he concluded "likely would have been sufficient to establish standing."

F. Hearing Examiner Wrongly Relied On Inapplicable Prior Decision.

The Final Order erroneously takes judicial notice of a decision from a prior Hearing Examiner proceeding, *Hawes* -- V16006259, without providing the parties notice and an opportunity to object. Further, the Final Order erroneously relied upon *Hawes* in any event. *Hawes* reportedly involved an animal control proceeding, not a preliminary plat, which is governed by different statutes, rules and caselaw (*e.g., Hirst* did not apply in *Hawes*). *Hirst*

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involved a situation in which the County participated in the Examiner's hearing but simply "forgot" to provide necessary evidence. *Hawes* stands in stark contrast to the Echo Lake Estates proposed plat, where the Supreme Court's *Hirst* decision dramatically changed the applicable burden of proof and rules applicable to preliminary plats – *after* the Hearing Examiner's initial hearing had already occurred. The City and Hospital could not have known about *Hirst*, and could not have addressed it by participating in the pre-*Hirst* Examiner hearing. There was nothing the City and Hospital "forgot" about Hirst. That decision just didn't exist at the time of the Examiner's initial hearing. By relying on *Hawes*, where the County itself participated, but "forgot" key evidence, the Examiner relied on a decision that did not apply, and thus erred.

G. The Hearing Examiner Erred in Considering Vesting.

The Final Order contains another major legal error: it wrongly considered the "vested rights" doctrine. The legal standard applicable to plats, in RCW 58.17.110 and KCC 20.22.180(A), has not changed; both require a plat applicant to demonstrate (and the County to find) adequate provision for water supply has been made. *Hirst* did change the burden of proof for the applicant and the County, but there was no change to the underlying legal standard (adequate provision of water), and therefore *Hirst* does not implicate vesting. To the extent it concludes otherwise, the Final Order erred.

PWI's response on this issue is to put its head in the sand, and claim that the Examiner did not determine vested rights were "controlling," only "instructive." PWI Response at 5. This is a distinction without a difference. The Examiner himself said, "we start with the vested rights doctrine. . ." which, he maintained, "provides some context." Final Order at 15. This consideration led the Examiner to conclude that the Supreme Court did not really mean what it plainly said (i.e., "[t]he GMA requires counties to ensure an adequate water supply before

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granting a building permit or subdivision application"), because "[w]e do not lightly assume that a court in a state with such strong vested rights protections for subdivision and building permit applicants intended to make a sea change in the rules applicable to pending subdivision and building applications. . . ." In other words, the Examiner chose to ignore *Hirst's* plain wording, based on the Examiner's incorrect reliance on the vested rights doctrine. This was error.

H. Hearing Examiner Improperly Applied Hirst and the Platting Statute (RCW 58.17.110(2)).

The Final Order mistakenly concluded that *Hirst* and RCW 58.17.110 do not require a preliminary plat applicant to demonstrate physical and legal water availability prior to approval of a preliminary plat, and that, instead, all that Hirst requires is for counties to revamp their comprehensive plans and development regulations. PWI justifies this by pointing out, as the Examiner did, that the Court did not issue a finding of invalidity. PWI Response at 6. The reasons the Court did not do so, though, are easily explained. First, only the Growth Board – not the Court – issues a determination of invalidity. The Board's decision is discretionary, and it is not required to make a determination of invalidity even if the criteria for it are satisfied, as the Supreme Court explained. *Hirst*, 186 Wn.2d at 695. And the Board's determination is reversible only for abuse of discretion. *Id.* Second, the Court held that counties *already* have duty under the GMA to ensure legal and physical availability of water; that holding formed the basis for the Court's subsequent holding that additional comprehensive plan and development regulation changes were necessary, to ensure consistency with the counties' pre-existing GMA legal duties. There was no need for a determination of invalidity, given the Court's ruling that counties need to ensure water availability as part of ongoing platting and building permit decisions. The Court's decision not to reverse the Growth Board on its decision not to declare Whatcom County's comp plan invalid does not justify the Examiner's decision to ignore the

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Court's repeated (10 times) reference to RCW 58.17.110(2) as requiring counties to ensure legal and physical water availability – without impairment of senior water rights – as part of any subdivision approval.

The Final Order also erred by concluding that a showing of legal water availability (a mixed factual and legal decision) could be made in the future, prior to final plat approval, and administratively by the Department of Planning and Environmental Review ("DPER"), without the need for notice, a hearing, or opportunity for participation by other interested parties as would be required for a preliminary plat. Further, the Final Order contravened *Hirst*, and is arbitrary and capricious, by ruling that future legal water availability could be determined prior to the final plat by what *DPER* "considers sufficient to support building permit applications," as opposed to requiring DPER to base its determination on the physical and legal availability of water needed to support the Echo Lakes Plat *and* that will not impair senior water rights (including those of the Hospital, adjacent Group B systems, and instream closures and minimum flows) are not impaired. The Examiner lacks authority to confer upon DPER the ability to decide what amount of water is "sufficient to support building permit applications"; rather, the applicant must establish (and DPER must conclude) that the proposed Echo Lake plat well will not impair senior water rights, including the Hospital's, Mr. Meyer's Group B system, or the Raging River. And, the case relied upon by the Final Order (*Knight v. City of Yelm*) does not allow imposition of a condition deferring physical and legal water availability to the final plat stage in the manner allowed by the Examiner in this case. The facts in *Knight* were much different and its holding does not apply here.

PWI contends the Examiner's imposition of Condition No. 17 was appropriate, and that the City and Hospital lack standing to challenge it because they are "not damaged by the

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decision to add a condition to the preliminary plat approval. . . ." PWI Response at 6. This bare assertion is incorrect. As discussed above, Condition 17 attempts confer unfettered discretion upon DPER to determine how much water is needed to be legally available, instead of applying the *Hirst* standard (water must not impair senior water rights, including those represented by stream closures or minimum instream flows).

I. The Amended Plat Decision Erred by Finding Physical Water Availability.

The Amended Plat Decision (Finding Nos. 11-12) also contains a significant error, by finding adequate provision of physical water. The Amended Plat Decision erroneously relied upon water well reports from wells (including the Hospital's) other than the applicant's proposed well. Further, the Amended Plat Decision relied only upon evidence from late fall, when groundwater levels are high. Most important, the determination of physical water is interrelated to the determination of legal water availability, which includes a determination of whether water for the Echo Lake Estates plat will physically impair senior water rights like the Hospital's. What Hirst requires, in the way of physical water availability, is sufficient physical water during dry times of year while also *not* impairing senior water rights. *None* of the evidence relied upon in the Amended Plat Decision addresses these conditions, but instead, addresses only water as outlined in well reports. This evidence was insufficient as a matter of law to support the Amended Plat Decision's finding of physical water availability.

J. Hearing Examiner Erroneously Interpreted *Hirst*.

The Final Order (pages 15-16) and Amended Plat Decision (Conclusion 4) err by concluding that Hirst does not apply to permit-exempt wells until after a County amends its comprehensive plan and development regulations. The Supreme Court included no such limitation in *Hirst*, and its plain language indicates that the County must make a determination

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of adequate legal availability of water *as part of* a preliminary plat decision. Further, applicable Supreme Court and other judicial precedents establish that *Hirst* applies retroactively to pending preliminary plat applications such as Echo Lake Estates.

K. Amended Plat Decision Erroneously Defers Determination of Legal Water Availability.

The Amended Plat Decision (Conclusion 5 and Condition J) err by allowing a determination of legal water availability to be made in the future, prior to a final plat decision, rather than now, as part of the preliminary plat decision. This condition is neither reasonable nor legal, as explained in Section IV(H) above. *Knight* does not involve conditions such as this case, where the question of whether any water is legally available *at all* is at the heart of the matter. Under such circumstances, a condition deferring demonstration of legal water availability to the final plat stage was erroneous.

III. RELIEF REQUESTED

For all the reasons discussed above, the City and Hospital respectfully request that the King County Council reverse the Hearing Examiner's Final Order and Amended Report and Decision, conclude that the City and Hospital have standing and adequately exhausted their administrative remedies to the extent required by law, and deny the proposed preliminary plat of Echo Lake Estates in light of the Applicant's failure to prove the physical and legal availability of water as required by *Hirst*.

In the alternative, the County Council should amend the Final Order and Amended Plat Decision to require that, prior the final plat decision, the Hearing Examiner shall provide notice and a public hearing, at which the Applicant must demonstrate and the Examiner must determine that water will be physically and legally available to serve the Echo Lakes Estates and that use of such water by Echo Lakes Estates will not impair any senior water rights,

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including without limitation those held by the Hospital, Mr. Meyer's Group B system, and those represented by the closure and minimum instream flows for the Raging River.

Respectfully submitted this 27th day of November, 2017.

CITY OF SNOQUALMIE

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186 Wash.2d 648
Supreme Court of Washington,
En Banc.

Whatcom County, a municipal corporation, Respondent,
v.
Eric **Hirst**, Laura Leigh Brakke; Wendy Harris; David Stalheim; and Futurewise, Petitioners,
Western Washington Growth Management Hearings Board, Defendant.

No. 91475–3
|
Argued Oct. 20, 2015
|
Filed Oct. 6, 2016

Synopsis
Background: County sought review of Growth Management Hearings Board's final decision and order determining that rural element of county's comprehensive plan and zoning code failed to comply with Growth Management Act (GMA). Objectors sought review of Board's final decision and order, arguing that Board erred by declining to declare ordinance invalid. Following transfer of objectors' appeal, the Superior Court, Skagit County, Michael E. Rickert, J., consolidated appeals. Board certified consolidated appeals for direct review by the Court of Appeals. The Court of Appeals, 186 Wash.App. 32344 P.3d 1256, affirmed in part, reversed in part, and remanded. County sought review.

Holdings: After granting review, the Supreme Court, Wiggins, J., held that:

[1] GMA requires counties to consider and address water resource issues in land use planning;

[2] county's comprehensive plan was insufficient to comply with county's duty under GMA to protect groundwater resources when issuing building permits;

[3] GMA's listing of enhancement of water quality as a goal of the Act does not require a county's comprehensive plan to include provisions that enhance water quality; and

[4] Board has discretion to decide whether or not to declare a comprehensive plan invalid, after finding noncompliance with GMA.

Affirmed in part, reversed in part, and remanded.

Madsen, C.J., filed concurring opinion.

Stephens, J., filed dissenting opinion in which Fairhurst and Gordon McCloud, JJ., joined.

West Headnotes (21)

[1] **Zoning and Planning**
Review in general

The Washington Administrative Procedure Act governs judicial review of challenges to actions of Growth Management Hearings Board. Wash. Rev. Code Ann. § 34.05 et seq.

Cases that cite this headnote

[2] **Zoning and Planning**
Scope of Review
Zoning and Planning
Presumptions and Burdens

Though county actions are presumed compliant on judicial review of challenges to actions of Growth Management Hearings Board, this deference is neither unlimited nor does it approximate a rubber stamp; instead, deference to counties remains bound by the goals and requirements of the Growth Management Act (GMA). Wash. Rev. Code Ann. §§ 36.70A.320(1), 36.70A.320(3).

Cases that cite this headnote

[3] **Zoning and Planning**
Construction by board or agency

Court, on judicial review of challenges to actions of Growth Management Hearings Board, does not afford counties any deference when it comes to interpreting the Growth Management Act (GMA). Wash. Rev. Code Ann. §§ 34.05.570(3)(d), 36.70A et seq.

Cases that cite this headnote

[4] **Zoning and Planning**
Decisions of boards or officers in general

On appeal to the Supreme Court, in a proceeding seeking judicial review of a decision of the Growth Management Hearings Board, the county retains the burden of establishing that the Board's decision is based on an erroneous interpretation of the law.

Cases that cite this headnote

[5] **Zoning and Planning**
Administrative review

To find an action by a state agency, county, or city clearly erroneous under the Growth Management Act (GMA), the Growth Management Hearings Board must be left with the firm and definite conviction that a mistake has been committed. Wash. Rev. Code Ann. §§ 36.70A.320(1), 36.70A.320(3).

Cases that cite this headnote

[6] **Zoning and Planning**
Construction by board or agency
Zoning and Planning
De novo review in general

On appeal in a judicial review action, Supreme Court reviews the legal conclusions of the Growth Management Hearings Board de novo, giving substantial weight to the Board's interpretation of the Growth Management Act (GMA). Wash. Rev. Code Ann. § 36.70A et seq.

Cases that cite this headnote

[7] **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court reviews questions of statutory interpretation de novo.

Cases that cite this headnote

[8] **Statutes**
Intent

Court's fundamental purpose in statutory interpretation is to ascertain and discern the legislature's intent.

Cases that cite this headnote

[9] **Statutes**
Plain Language; Plain, Ordinary, or Common Meaning

In interpreting a statute, the court discerns legislative intent from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole.

Cases that cite this headnote

[10] **Administrative Law and Procedure**
Construction

Rules of statutory interpretation also apply to

administrative rules and regulations.

Cases that cite this headnote

[11] **Statutes**
Language

When the language of a statute is clear, court, in interpreting the statute, looks only to the wording of the statute.

Cases that cite this headnote

[12] **Zoning and Planning**
Water-related uses and regulations; flooding and wetlands

The Growth Management Act (GMA) requires counties to consider and address water resource issues in land use planning. Wash. Rev. Code Ann. §§ 36.70A.070(1), 36.70A.070(5)(c)(iv).

Cases that cite this headnote

[13] **Water Law**
Availability; prevention of overdraft, exploitation, groundwater mining, and other depletion of resources
Zoning and Planning
Comprehensive or general plan, validity

County's comprehensive plan was insufficient to comply with county's duty under the Growth Management Act (GMA) to protect groundwater resources when issuing building permits, where plan did not require county to make a determination of water availability but rather relied on determinations of water availability provided by Department of Ecology's "Nooksack Rule" establishing minimum flows for basins, which did not regulate or otherwise restrict permit-exempt uses. Wash. Rev. Code Ann. §§ 19.27.097, 36.70A.070(1), 36.70A.070(5)(c)(iv); Wash. Admin. Code 173-501-070(2).

Cases that cite this headnote

[14] **Water Law**
Availability; prevention of overdraft, exploitation, groundwater mining, and other depletion of resources

A minimum flow, once established by Department of Ecology pursuant to the Water Resources Act (WRA) for surface waters, is an existing water right that may not be impaired by subsequent groundwater withdrawals; accordingly, when the department determines whether to issue a permit for appropriation of public groundwater, it must consider the interrelationship of the groundwater with surface waters, and must determine whether surface water rights would be impaired or affected by groundwater withdrawals. Wash. Rev. Code Ann. § 90.03.345, 90.44.030.

Cases that cite this headnote

[15] **Water Law**
Availability; prevention of overdraft, exploitation, groundwater mining, and other depletion of resources
Water Law
Grant or denial

Under the Water Resources Act (WRA), where there is hydraulic continuity and withdrawal of groundwater would impair existing surface water rights, including minimum flow rights, then denial of a permit for appropriate of public groundwater is required. Wash. Rev. Code Ann. § 90.03.345, 90.44.030.

Cases that cite this headnote

[16] **Water Law**
Availability; prevention of overdraft,

exploitation, groundwater mining, and other depletion of resources
Zoning and Planning
Other particular considerations

Counties must consider minimum flows when issuing building permits, even for developments relying on permit-exempt wells. Wash. Rev. Code Ann. §§ 19.27.097(1), 58.17.110.

Cases that cite this headnote

[17] **Zoning and Planning**
Comprehensive or general plan, validity

Growth Management Act's listing of enhancement of water quality as a goal of the Act does not require a county's comprehensive plan to include provisions that enhance water quality. Wash. Rev. Code Ann. § 36.70A.020.

Cases that cite this headnote

[18] **Environmental Law**
Regulation in general

Section of the Water Resources Act (WRA) requiring quality of natural environment to be protected does not impose a duty on counties to enhance water quality. Wash. Rev. Code Ann. § 90.54.020.

Cases that cite this headnote

[19] **Zoning and Planning**
Water-related uses and regulations; flooding and wetlands

Rulings by Growth Management Hearings Board that county's rural element policies did not protect water quality and that particular policy was not a measure limiting development to protect water resources, as required by Growth Management Act (GMA), did not impose upon county a duty to enhance water quality and thus was not contrary to GMA, which imposed no such duty on county; rulings essentially found that county's current inspection system policies were flawed and that continuing to rely on this flawed system would not protect water quality in the future. Wash. Rev. Code Ann. § 36.70A.070(5)(c)(iv).

Cases that cite this headnote

[20] **Zoning and Planning**
Administrative review

Growth Management Hearings Board has discretion to decide whether or not to declare a comprehensive plan invalid, after finding noncompliance with Growth Management Act (GMA). Wash. Rev. Code Ann. § 36.70A.300(3)(b).

Cases that cite this headnote

[21] **Statutes**
Mandatory or directory statutes

In interpretation of a statute, the legislature's use of the term "may" generally indicates the existence of an option that is a matter of discretion.

Cases that cite this headnote

****3** Appeal from Skagit County Superior Court, 13–2–01147–9, Honorable Michael E. Rickert.

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Opinion

WIGGINS, J.

***657** We granted review of this challenge to the Western Washington Growth Management Hearings Board's (Board) decision on the validity of **Whatcom County's** ***658** (County) comprehensive plan and zoning code under the Growth Management Act (GMA or Act), chapter 36.70A RCW. The County argues that the Board's conclusions are based on an erroneous interpretation of the law and asks us to hold that the County's comprehensive plan protects the quality and availability of water as required by the GMA.

****4** ¶2 We reject the County's arguments. The GMA requires counties to ensure an adequate water supply before granting a building permit or subdivision application. The County merely follows the Department of Ecology's "Nooksack Rule";[1] it assumes there is an adequate supply to provide water for a permit-exempt well unless Ecology has expressly closed that area to permit-exempt appropriations. 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. We reverse the Court of Appeals in part and remand to the Board for further proceedings.

FACTS

I. Factual History

¶3 This case is the latest step in a series of disputes concerning the County's land use regulations. The history is only summarized here; a detailed history of the disputes is contained in our 2009 opinion, *Gold Star Resorts, Inc. v. Futurewise*, 167 Wash.2d 723, 726–33, 222 P.3d 791 (2009). In *Gold Star Resorts,* we considered several challenges under the GMA to the County's comprehensive plan—specifically, challenges to provisions regarding limited areas of more ***659** intensive rural development and rural densities. We agreed with the Board and directed the County to revise its comprehensive plan in order to conform to the 1997 amendments to the GMA. *Id.* at 740, 222 P.3d 791.

¶4 In response to our ruling in *Gold Star Resorts* and a series of subsequent board rulings requiring the County to bring its comprehensive plan into compliance with the GMA, the County amended its comprehensive plan and zoning code by adopting Ordinance No. 2012–032. Ordinance No. 2012–032 was an effort to comply with the GMA's requirement that the County's rural element include measures to protect surface and groundwater resources. To accomplish this objective, the ordinance amended the County's Comprehensive Plan Policies 2DD–2.C and –2.D, and adopted by reference numerous preexisting county regulations. These policies, and the regulations they incorporate, were intended to address the GMA requirements to protect both water availability and

water quality.

¶5 Regarding water availability, the County's development regulations adopt Ecology's regulations—the regulations allow a subdivision or building permit applicant to 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." **Whatcom County** Code (WCC) 24.11.090(B)(3), .160(D)(3), .170(E)(3).[2]

***660** II. Procedural History

¶6 Eric **Hirst**, Laura Leigh Brakke, Wendy Harris, David Stalheim, and Futurewise (collectively **Hirst**) filed a petition for review with the Board, challenging Ordinance No. 2012–032. Relevant to this appeal, **Hirst** challenged the adequacy of the County's measures to protect surface and groundwater resources ****5** (Policies 2DD.–2.C.1 through .9) and sought a declaration of invalidity.[3]

A. Board's discussion of applicable law

¶7 The Board held a hearing and issued a final decision and order (FDO). The Board began its decision by citing to the "Applicable Law" as provided by the GMA. As the Board observed, the GMA imposes several requirements on a local government's planning. Relevant here, the GMA requires counties to consider and address water resource issues in land use planning. *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wash.2d 144, 178, 256 P.3d 1193 (2011) (counties must regulate to ensure land use is not inconsistent with available water resources). Accordingly, a county's comprehensive plan must " 'provide for protection of the quality and quantity of groundwater used for public water supplies.' " FDO at 13 (emphasis omitted) (quoting RCW 36.70A.070(1)). The GMA also requires counties to plan for a rural element that " 'indude[s] measures that ... protect ... surface water and groundwater resources.' " *Id.* at 14 (emphasis omitted) (quoting RCW 36.70A.070(5)(c)(iv)).

¶8 The Board also noted that counties must include a rural element in their comprehensive plan that includes " 'lands that are not designated for urban growth, agriculture, forest, or mineral resources.' " *Id.* at 13 (quoting RCW 36.70A.070(5)). The County's comprehensive plan must ensure that this rural element maintains its " ' "[r]ural ***661** character" ' " by planning its land use and development in a manner that is " 'compatible with the use of the land by wildlife and for fish and wildlife habitat' " and " '[t]hat are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.' " *Id.* (emphasis omitted) (quoting RCW 36.70A.030(15)(d), (g)).

¶9 In addition to these planning requirements, the Board noted that the GMA provides 13 goals to guide the development of a county's comprehensive plan. These include a goal to " '[p]rotect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.' " *Id.* (emphasis omitted) (quoting RCW 36.70A.020(10)). These goals "are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." RCW 36.70A.020. Read collectively, these goals convey some conceptual guidance for growth management. Richard J. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 SEATTLE U. L. REV. 5, 8 (1999).

¶10 The Board interpreted these planning requirements and goals to indicate that

> patterns of land use and development in rural areas must be consistent with protection of instream flows, groundwater recharge, and fish and wildlife habitat. A County's Comprehensive Plan rural lands provision must include measures governing rural development to protect water resources.

FDO at 21.

¶11 The GMA does not define the requirements to plan for the protection of water resources found in RCW 36.70A.070. The Act also fails to define how the requirements are to be met. Thus, **Hirst** argued that the County's comprehensive plan must itself protect the availability of water resources, placing the burden on local governments to protect the availability of water, RCW 36.70A.020(10), protect ***662** groundwater resources, RCW 36.70A.070(5)(c)(iv), and ensure an adequate water supply when it approves a building permit, RCW 19.27.097(1) and RCW 58.17.110. The County countered that it complied with the GMA by drafting a comprehensive plan that incorporates and is consistent with Ecology's regulations in water resource inventory area (WRIA) 1.[4] In ****6** evaluating this relationship between Ecology's responsibility to protect water pursuant to the Water Resources Act of 1971

(WRA), chapter 90.54 RCW, and the responsibility of local governments to protect water availability and quality pursuant to the GMA, the Board stated that "it is the local government—and not Ecology—that is responsible to make the decision on water adequacy as part of its land use decision, and in particular, with respect to exempt wells." FDO at 23.

B. Board's findings and conclusions on water quality and availability

¶12 **Hirst** presented considerable evidence and the Board found substantial evidence of limits on water availability in rural **Whatcom** **County**. *See id.* at 23–28. These water availability limitations were reflected in findings that a large portion of the County is in year-round or seasonally closed watersheds and that most of the water in the Nooksack watershed was already legally appropriated. *Id.* at 23–34. The Board also found that average minimum instream flows in portions of the Nooksack River "are not met an average of 100 days a year." *Id.* at 24. Despite the limited water availability, 1,652 permit-exempt well applications have been drilled in otherwise closed basins since ***663** 1997 and an additional 637 applications were pending in March 2011. *Id.* Further, the Board noted that the County recognized as early as 1999 that this proliferation of rural, permit-exempt wells was creating " 'difficulties for effective water resource management.' " *Id.* (quoting Ex. C–671–D at 49 (1999 ***Whatcom*** ***County*** *Water Resource Plan*)).

¶13 The Board concluded that the County failed to comply with the GMA, specifically with the requirement to protect surface water and groundwater resources pursuant to RCW 36.70A.070(5)(c). The Board's conclusion that the comprehensive plan does not protect water availability is predicated on the Board's finding that

> the water supply provisions referenced [by the amended policies] do not require the County to make a determination of the legal availability of groundwater in a basin where instream flows are not being met.

FDO at 40. Implicit in this conclusion is the Board's determination that water is not presumptively available for permit-exempt withdrawals in WRIA 1. However, despite concluding that the comprehensive plan does not protect water availability or water quality, the Board denied **Hirst's** request for a declaration of invalidity and instead remanded the ordinance to the County to take corrective action.

¶14 Both parties appealed separately. The County's appeal, focusing exclusively on its measures to protect ground and surface water resources, challenged the Board's determination of noncompliance with the GMA. **Hirst** challenged the Board's decision not to declare the ordinance invalid. The cases were consolidated in Skagit County Superior Court, and the Board issued its certificate of appealability of the FDO, certifying the consolidated appeals for direct review to the Court of Appeals. Following the County's appeal of a second order of compliance issued by the Board in April 2014, the Court of Appeals granted review. Its review consolidated that appeal, the prior consolidated ***664** appeals for direct review, and the County's motion for discretionary review of the original FDO.

¶15 The Court of Appeals reversed the Board, holding that the Board erroneously interpreted and applied the law in holding that the ordinance failed to comply with the GMA. The Court of Appeals further held that the Board engaged in unlawful procedure by taking official notice of and relying on two documents without first providing the County notice and the opportunity to contest the documents. The Court of Appeals affirmed the Board's decision not to declare the ordinance invalid, holding that the decision was a proper exercise of the Board's discretion.[5]

****7** ¶16 We granted review and now reverse the Court of Appeals in part.

ANALYSIS

¶17 The County argues that the Board's conclusions are based on an erroneous interpretation of the law. RCW 34.05.570(3)(d). Though there are several arguments raised in the County's appeal of the Board's decision, the appeal focuses on the subject of water availability. This principal issue concerns the actions local growth management planners and administrators must take to ensure water availability under the GMA.

***665** Consistent with the Board's determination, **Hirst** asserts that the GMA requires local governments to determine water availability as part of its land use decision. They argue that the County's plan does not require the County to obtain evidence that water is legally available before issuing building permits or approving subdivisions that rely on permit-exempt appropriations. Thus, **Hirst** asserts that the comprehensive plan results in

water withdrawals that impact minimum instream flows.

¶19 The County responds that its comprehensive plan protects the availability of water because it ensures that the County will approve a subdivision or building permit application that relies on a permit-exempt well for its water supply only when the proposed well "does not fall within the boundaries of an area where [Ecology] has determined by rule that water for development does not exist." WCC 24.11.090(B)(3), .160(D)(3), .170(E)(3). In effect, the County's position is that water is presumptively available—i.e., that "not unavailable" is synonymous with "available."

¶20 In effect, the County delegates the decision on water availability to Ecology's Nooksack Rule, chapter 173–501 WAC. The Nooksack Rule establishes minimum instream flows for WRIA 1, covering most of the County. However, the County argues—and Ecology agrees—that the closures and minimum flow requirements established by the rule are not applicable to permit-exempt wells in the County. Thus, the County argues that its comprehensive plan complies with the GMA requirements because water is presumptively available in the County for permit-exempt wells. The County asserts that under the GMA, the proper inquiry is whether its comprehensive plan is consistent with Ecology's regulations designed to protect water and to ensure that water is legally available.

¶21 We reject these arguments in the context of the GMA challenge before us. The GMA places an independent responsibility to ensure water availability on counties, not on Ecology. To the extent that there is a conflict between ***666** the GMA and the Nooksack Rule, the later-enacted GMA controls.

¶22 Ecology adopted the Nooksack Rule in 1985, and the rule has not been amended. We have since recognized that "Ecology's understanding of hydraulic continuity has altered over time, as has its use of methods to determine hydraulic continuity and the effect of groundwater withdrawals on surface waters." *Postema v. Pollution Control Hr'gs Bd.*, 142 Wash.2d 68, 76, 11 P.3d 726 (2000). When Ecology adopted the minimum instream flow rules, such as those contained within the Nooksack Rule, it "did not believe that withdrawals from deep confined aquifers would have any impact on stream flows." *Id.* at 88, 11 P.3d 726. However, we now recognize that groundwater withdrawals can have significant impacts on surface water flows, and Ecology must consider this effect when issuing ****8** permits for groundwater appropriation. *Id.* at 80–81, 11 P.3d 726.

¶23 We hold that the same standard applies to counties when issuing building permits and subdivision approvals. We have been protective of minimum instream flow rules and have rejected appropriations that interfere with senior instream flows. *E.g.*, *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wash.2d 571, 598, 311 P.3d 6 (2013); *Foster v. Dep't of Ecology*, 184 Wash.2d 465, 362 P.3d 959 (2015). Our jurisprudence and well-established principles of statutory interpretation lead us to affirm the Board's decision that the County's comprehensive plan does not satisfy the GMA requirement to protect water availability.

I. Standard of Review

[1] [2] [3] [4]¶24 The Washington Administrative Procedure Act, chapter 34.05 RCW, governs judicial review of challenges to board actions. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 154 Wash.2d 224, 233, 110 P.3d 1132 (2005). Though county actions are presumed compliant, this deference "is neither unlimited nor does it approximate a rubber stamp." ***667** *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 161 Wash.2d 415, 435 n.8, 166 P.3d 1198 (2007). Instead, deference to counties remains "bounded ... by the goals and requirements of the GMA." *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wash.2d 543, 561, 14 P.3d 133 (2000). Further, we do not afford counties any deference when it comes to interpreting the GMA. *Kittitas County*, 172 Wash.2d at 156, 256 P.3d 1193 (citing *Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 157 Wash.2d 488, 498, 139 P.3d 1096 (2006)). On appeal to this court, the County retains the burden of establishing that the Board's decision is based on an erroneous interpretation of the law. *King County*, 142 Wash.2d at 553, 14 P.3d 133.

[5] [6]¶25 The Board must find compliance "unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(1), (3). To find an action clearly erroneous, the Board must be " 'left with the firm and definite conviction that a mistake has been committed.' " *King County*, 142 Wash.2d at 552, 14 P.3d 133 (quoting *Dep't of Ecology v. Pub. Util. Dist. 1 of Jefferson County*, 121 Wash.2d 179, 201, 849 P.2d 646 (1993)). We review the Board's legal conclusions de novo, giving substantial weight to the Board's interpretation of the GMA. *Id.* at 553, 14 P.3d 133.

[7] [8] [9] [10]¶26 We review questions of statutory interpretation de novo. *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wash.2d

342, 350, 340 P.3d 849 (2015). Our fundamental purpose in statutory interpretation is to ascertain and discern the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wash.2d 1, 9, 43 P.3d 4 (2002). The court discerns legislative intent from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. *Id.* at 9–19. These rules of statutory interpretation also apply to administrative rules and regulations. ***668** *See Overlake Hosp. Ass'n v. Dep't of Health,* 170 Wash.2d 43, 51–52, 239 P.3d 1095 (2010).

¶27 The dissent ignores these important rules of statutory interpretation, and focuses solely on a single statute in isolation from its relevant GMA statutory scheme. Dissent at 24–26 (discussing RCW 19.27.097). As a result, the dissent reaches a conclusion about the meaning of this statute that is at odds with our jurisprudence on statutory interpretation and with the GMA's larger structure, overarching goals, and requirements.

II. The Board Correctly Ruled That the County's Rural Element Fails To Comply with the Requirement To Protect Water Availability

¶28 We reverse the Court of Appeals and hold that the Board properly interpreted and applied the law in concluding that the County's comprehensive plan fails to provide for the protection of water resources. The ****9** Board's decision properly placed the burden on the County to ensure the availability of water under the GMA pursuant to the legislative intent, relevant statutory schemes when read in context and as a whole, and this court's jurisprudence considering groundwater appropriations that impact minimum flows.

A. Washington's history of water regulation

¶29 We hold that the County's comprehensive plan does not protect water availability because it allows permit-exempt appropriations to impede minimum flows. In reaching this holding, we note that minimum flows are exactly that: flows or levels "to protect instream flows necessary for fish and other wildlife, recreation and aesthetic purposes, and water quality." *Swinomish Indian Tribal Cmty.,* 178 Wash.2d at 592, 311 P.3d 6. By statute, the only exception to these flows is found at RCW 90.54.020(3) and, though this case does not implicate this exception, we have been extremely protective of withdrawals pursuant to that statute. ***669** *See id.*; *Foster,* 184 Wash.2d 465, 362 P.3d 959. As scientific understanding of water resources has increased, so too have Washington's restrictions on the availability of water. Washington's original water code, chapter 90.03 RCW, was enacted in 1917 and regulated only surface water appropriations. In 1945, the legislature passed the groundwater code to subject the withdrawal of groundwater to the permitting process then applicable to surface water rights in order to protect senior water rights and the public welfare. *See* RCW 90.44.020; RCW 90.03.290(3). Specified withdrawals were exempt from these permit requirements:

> [A]ny withdrawal ... for single or group domestic uses in an amount not exceeding five thousand gallons a day ... is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter.

RCW 90.44.050. These permit-exempt withdrawals are appropriations. *Swinomish Indian Tribal Cmty.,* 178 Wash.2d at 588, 311 P.3d 6. Recognizing that any withdrawal of water impacts the total availability of water, we have held that an appropriator's right to use water from a permit-exempt withdrawal is subject to senior water rights, including the minimum flows established by Ecology. *See Campbell & Gwinn,* 146 Wash.2d at 16, 43 P.3d 4; *Swinomish Indian Tribal Cmty.,* 178 Wash.2d at 598, 311 P.3d 6. These exemptions existed in part because the legislature's goal in 1945 was to encourage the development and settlement of rural family farms drawing between 200 and 1,500 gallons of water per day. *Five Corners Family Farmers v. State,* 173 Wash.2d 296, 321–22, 268 P.3d 892 (2011) (Wiggins, J., dissenting) (citing Kara Dunn, *Got Water? Limiting Washington's Stockwatering Exemption to Five Thousand Gallons Per Day,* 83 WASH. L. REV. 249, 258 (2008)).

¶30 These legislative priorities continued to change as Washington's population increased and the limitations on its natural resources became more apparent. *See Swinomish Indian Tribal Cmty.,* 178 Wash.2d at 592, 311 P.3d 6 ("Growing, ***670** competing demands for water led to a number of new laws over time, and among these are acts and statutes designed to further the goal of retaining sufficient water in streams and lakes to sustain fish and wildlife, provide recreational and navigational opportunities, preserve scenic and aesthetic values, and ensure water quality."). "In 1955, the legislature declared the policy of the State to be that sufficient water flow be

maintained in streams to support fish populations and authorized rejection of water right applications if these flows would be impaired." *Id.* (citing LAWS OF 1955, ch. 12, § 75.20.050 (codified as amended at RCW 77.57.020)).

¶31 The legislature continued to enact measures to protect the flows necessary for fish, wildlife, and water quality with the minimum water flows and levels act of 1969, chapter 90.22 RCW. In part, this act authorized Ecology to "establish minimum water flows ... for the purposes of protecting fish, game, birds, or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest." RCW 90.22.010. Once established, ****10** minimum flows are like any other appropriative water right in that they are subject to the rule of "first in time is the first in right." *Swinomish Indian Tribal Cmty.*, 178 Wash.2d at 591, 311 P.3d 6.

¶32 The WRA was intended to ensure adequate water to "meet the needs of the state's growing population" while concurrently maintaining "instream resources and values." RCW 90.54.010(1)(a). To balance growth and stream maintenance, the WRA directed Ecology to allocate waters in a way that maximizes the net benefits to the people of the state and to retain "base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." RCW 90.54.020(3)(a). Included in this mandate is the authority to establish minimum water flows and water levels (RCW 90.03.247 and RCW 90.22.010), base flows, and WRIAs. RCW 90.54.040. At this time, the legislature also made ***671** Ecology the primary administrator of chapter 90.03 RCW, concerning surface waters, and of chapter 90.44 RCW, concerning groundwater. *See* ch. 43.27A RCW.

¶33 By 1979, however, "public policy had dramatically changed from what had been true when the water code was first enacted." *Swinomish Indian Tribal Cmty.*, 178 Wash.2d at 595, 311 P.3d 6. Replacing the 1917 policies encouraging "maximum diversion of water" were the modern policies of "[o]btaining maximum benefits, prudent management of the state's water resources with input of interested entities, preservation of water within the streams and lakes as necessary for instream and natural values, and avoidance of wasteful practices." *Id.* at 595–96, 311 P.3d 6.

¶34 In order to obtain the maximum benefit from the state's water resources, the legislature tasked Ecology with developing WRIAs. RCW 90.54.040(1), (2). Beginning in 1985, Ecology developed the Nooksack Rule (WRIA 1), the first of 62 WRIAs designated, described, and subject to rules promulgated by Ecology. *See generally* chs. 173–501 to 173–564 WAC. Though specific rules apply to each of these WRIAs, *see id.* they generally share the purpose "to retain perennial rivers, streams, and lakes in [the WRIAs] with instream flows and levels necessary to provide for preservation of wildlife, fish, scenic, aesthetic, and other environmental values, and navigational values, as well as recreation and water quality." WAC 173–501–020; *see also* RCW 90.54.020(3).

¶35 In 1990 and 1991, the legislature addressed issues related to water use when it enacted the GMA " 'in response to public concerns about rapid population growth and increasing development pressures in the state.' " *King County*, 142 Wash.2d at 546, 14 P.3d 133 (quoting Alan D. Copsey, *Including Best Available Science in the Designation and Protection of Critical Areas Under the Growth Management Act*, 23 SEATTLE U. L. REV. 97 (1999)). This legislation followed "decades of lax and optional land use regulations." *Quadrant Corp.*, 154 Wash.2d at 232, 110 P.3d 1132. Through the GMA, the ***672** legislature sought to minimize "uncoordinated and unplanned growth," which it found to "pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state." RCW 36.70A.010.

¶36 Importantly, the GMA concentrates future growth into urban growth areas. *See* RCW 36.70A.110. Through this requirement, "the Act seeks to minimize intrusion into resource lands and critical areas, preserve large tracts of open space easily accessible to urban residents, foster a sense of spatial identity by separating communities with great expanses of sparsely populated rural land, and induce sufficient development density to be efficiently served by mass transportation and other public facilities." Settle, *supra*, 23 SEATTLE U. L. REV. at 12. Put another way, the Act concentrates development in cities and discourages development and will "attempt to wean Washingtonians from the sprawling, low-density development patterns that have prevailed throughout the nation since World War II." *Id.* at 12–13.

¶37 The GMA reinforces the conservation goals and priorities first established in the WRA by requiring local governments to plan for the protection of their local environment. The GMA requires counties to adopt a comprehensive plan and development regulations consistent with the comprehensive plan. *See* ****11** RCW 36.70A.040. Among other requirements, comprehensive plans must include a rural element that harmonizes the

Act's goals with local circumstances and also protects the rural characteristics of the area. *See* RCW 36.70A.070(5)(a), (c). Protecting the rural character of the area requires planning to protect surface and groundwater resources. RCW 36.70A.070(5)(c)(iv).

B. The GMA requires counties to have a comprehensive plan that protects surface and groundwater resources

¶38 We hold that the Board properly concluded that the GMA requires counties to make determinations of ***673** water availability. The language placing this burden on the county or local government is clear, consistent, and unambiguous throughout the Act.

[11]¶39 We begin with the plain language of the statute, *Ass'n of Wash. Spirits & Wine Distribs.*, 182 Wash.2d at 350, 340 P.3d 849. When the language is clear, we look only to the wording of the statute. *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wash.2d 599, 609, 998 P.2d 884 (2000). The language of chapter 36.70A RCW, entitled "Growth Management—Planning by Selected Counties and Cities," is clear. RCW 36.70A.040, **"Who must plan—Summary of Requirements**," provides in part:

> (1) Each county [subject to the Act] shall conform with all of the requirements of [chapter 36.70A RCW].

Subsection .040(3) outlines the duties of the county's legislative authority and each city located within the county to conform to the Act's mandates, starting with "adopt[ing] a countywide planning policy under RCW 36.70A.210," and then places specific duties on the county. This language clearly requires the county legislative authority—and not Ecology—to take planning action, including adopting a comprehensive plan.

¶40 Language placing the burden on counties to take action is consistent throughout the GMA. "Counties shall include a rural element" in their comprehensive plans. RCW 36.70A.070(5). These rural elements must protect the rural character of the area "as established by the county." RCW 36.70A.070(5)(c). The GMA also places the onus on counties to ensure that their development regulations and comprehensive plans comply with the GMA. RCW 36.70A.130(1)(a) ("a county or city shall ... ensure the plan and regulations comply with the requirements of this chapter.").

[12]¶41 The GMA requires counties to consider and address water resource issues in land use planning. Specifically, a county's comprehensive plan must "provide for protection of the quality and quantity of groundwater used for public ***674** water supplies." RCW 36.70A.070(1). The GMA also requires counties to plan for a rural element that "include[s] measures that ... protect ... surface water and groundwater resources." RCW 36.70A.070(5)(c)(iv). Read as a whole, it is dear that the GMA holds counties "responsible for land use decisions that affect groundwater resources." *Kittitas County*, 172 Wash.2d at 180, 256 P.3d 1193.

C. The County's comprehensive plan conflicts with the GMA

[13]¶42 The GMA requires that an applicant for a building permit for a single family residence or a development must produce proof that water is both legally available and actually available. But the County does not require any showing that water is available for a building permit when the applicant is relying on permit-exempt water appropriation. This failure by the County is the crux of this case.

¶43 The GMA places specific requirements on local governments when approving building permits or authorizing subdivisions. *See* RCW 19.27.097(1); RCW 58.17.110(2).[6] In order ****12** to comply with the GMA, counties must receive sufficient evidence of an adequate water supply from applicants for building permits or subdivisions before the county may authorize development. RCW 19.27.097(1) provides in relevant part:

> Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building.

***675** In addition, RCW 58.17.110(2) provides:

> A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for ... potable water supplies....

Through these statutes, the GMA requires counties to assure that water is both factually and legally available.

Kittitas County, 172 Wash.2d at 179–80, 256 P.3d 1193.

¶44 The dissent focuses solely on the text of RCW 19.27.097 and concludes that "adequate," as the term is used in the statute, requires a permit applicant to demonstrate that water is merely factually available. This narrow interpretation of "adequate" ignores our discussion in *Kittitas County* and fails to appreciate the larger GMA scheme. In *Kittitas County*, we rejected the argument that the GMA required only a showing of factual availability in order to obtain a building permit from the county. *Id.* Instead, we held that the GMA requires counties to "plan for land use in a manner that is consistent with the laws regarding protection of water resources." *Id.* at 180, 256 P.3d 1193. Were we to read the GMA to require counties to assure merely that "water is physically underground," it would allow the county to condone the evasion of existing water rights, contrary to law. *Id.*

¶45 Further, because the dissent fails to read this statute in conjunction with related provisions within the GMA, the dissent ignores the responsibility the GMA places on counties to protect groundwater resources under RCW 36.70A.070. When read as a whole, the GMA places the burden on counties to protect groundwater resources, and requires counties to assure that water is both factually and legally available before issuing building permits.[7]

***676** Here, the County's existing comprehensive plan does not require the County to make a determination of water availability. Instead, the comprehensive plan relies on determinations of water availability provided by Ecology's Nooksack Rule, chapter 173–501 WAC.

¶47 The Nooksack Rule establishes minimum flows for 48 basins in WRIA 1, covering the County. WAC 173–501–030. Most of the 48 basins are closed, and over half of the basins are closed year-round because they are already overdrawn. *See* WAC 173–501–040; *see also* BECKY PETERSON ET AL., 2010 WRIA 1 STATE OF THE WATERSHED REPORT 10 (2011). However, the Nooksack Rule establishes two tiers of "closed" basins in WRIA 1: basins dosed to all appropriations except permit-exempt appropriations and basins closed to all appropriations including permit-exempt appropriations. *See* WAC 173–501–040(1), –070(2). Despite significant evidence that minimum flows are not met in rural **Whatcom** **County**, **Whatcom** Creek is the only basin—out of 48 basins in WRIA 1—closed to permit-exempt appropriations. WAC 173–501–070. Thus, the Nooksack Rule does not restrict permit-exempt wells from appropriating water in otherwise closed basins.

¶48 The County interprets the Nooksack Rule to mean that water is actually available for permit-exempt appropriations in otherwise closed basins, even if the basin is closed because the watercourses fall below minimum flows during all or parts of the ****13** year. The Board correctly rejected this interpretation. The Board found that despite substantial evidence of impaired instream flows, the County continues to authorize development relying on permit-exempt groundwater appropriations in otherwise closed basins. FDO at 42. The County's deference to the Nooksack Rule as a substitute for an actual determination of water availability expressly allows permit-exempt appropriations to interfere with established minimum flows because the Nooksack Rule exempts these appropriations from minimum flow ***677** requirements. *See* WAC 173–501–030(3), –060, –070(2). The result is an unchecked reduction of minimum flows unless and until Ecology closes a basin to all future appropriations. *See* WAC 173–501–070(2).

¶49 In ruling that the County's comprehensive plan does not provide for the protection of water availability, the Board specifically found amended rural element policies 2DD–2.C.6 and –2.C.7 noncompliant with the GMA. These policies incorporate provisions of the WCC.[8] In turn, the incorporated provisions of the WCC defer to the Nooksack Rule by excluding the permit-exempt groundwater appropriations from the need to demonstrate water availability and by authorizing permit-exempt groundwater appropriations in otherwise closed basins. *See* WCC 24.11.090(B)(3) (the director will approve an application for a permit-exempt water appropriation only if the appropriation "does not fall within the boundaries of an area where [Ecology] has determined by rule that water for development does not exist"), .160(D)(3) (same), .170(E)(3) (same).

¶50 These policies are contrary to the requirements of the GMA. As noted, amended rural element policies 2DD–2.C.6 and –2.C.7 specifically incorporate WCC 21.04.090, WCC 21.05.080(3), and WCC 24.11.050, which are WCC provisions governing public and private water systems. Each of these ordinances requires an applicant for a public or private water system to make a showing of water availability to withdraw more than a total of 5,000 gallons ***678** per day. But as the Board noted at page 42 of the FDO, "ultimately, a building permit for a private single-residential well does not require the applicant to demonstrate that groundwater withdrawal will not impair surface flows."

¶51 Indeed, the County's rules for approving permit-exempt applications authorize groundwater appropriations in otherwise closed basins. The County

asserts that its comprehensive plan protects surface flows because it provides that the director will approve an application for a permit-exempt water appropriation only if the appropriation "does not fall within the boundaries of an area where [Ecology] has determined by rule that water for development does not exist." WCC 24.11.090(B)(3), .160(D)(3), .170(E)(3). In effect, these ordinances provide that the County determines water availability by referencing the minimum flows and basin closures established by the Nooksack Rule. The problem is that the Nooksack Rule—including the minimum flows and closed basins established by the rule—does not regulate or otherwise restrict permit-exempt uses. *See* WAC 173–501–070(2). The County thus reasons that water is always available for permit-exempt appropriations. In reality, the County's incorporation of the Nooksack Rule authorizes permit-exempt groundwater appropriations that draw from minimum flows and otherwise closed basins, setting up a conflict with the County's obligation to protect water availability under the GMA.

D. The County's plan fails to protect the availability of water resources

¶52 Recognizing the conflict between the GMA and the Nooksack Rule, the Board ****14** properly held the County to the requirements imposed by the GMA. The Board ruled that policy 2DD–2.C.7 does not comply with the requirements of the GMA because under the policy, "a building permit for a private single-residential well does not require the applicant to demonstrate that groundwater withdrawal will not impair surface flows." FDO at 42. This violates the requirement ***679** in RCW 19.27.097(1) that applicants "for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply." *See also* RCW 58.17.110(2) (proposed subdivisions shall not be approved without evidence of adequate potable water). Further, the Board found that policy 2DD–2.C.7 "fails to limit rural development to protect ground or surface waters with respect to permit-exempt wells as required by RCW 36.70A.070(5)(c)(iv)." FDO at 42.

¶53 As discussed in Section II.B of this opinion, *supra*, the County's policies incorporate WCC provisions that do not allow water to be withdrawn from "an area where [Ecology] has determined by rule that water for development does not exist." WCC 24.11.090(B)(3), .160(D)(3), .170(E)(3). As counsel conceded at oral argument, these ordinances further provide that an application for a permit-exempt appropriation will be approved without any analysis of that withdrawal's impact on instream flows.[9] The Board found that these provisions result in water withdrawals from closed basins and senior instream flows—flows that the record indicated drop below the minimum levels 100 days out of the year. The Board properly held that this conflicts with the requirement placed on counties to protect water availability under the GMA, as well as our holding in *Postema*, 142 Wash.2d 68, 11 P.3d 726.[10]

***680** The County's adoption of the Nooksack Rule with its presumption that water is available for permit-exempt appropriations fails to satisfy the protective purposes and requirements of the GMA. As Ecology acknowledges in its amicus briefing, the Nooksack Rule is "[b]ased on the scientific understanding [in 1985, when] Ecology determined that only limited instances would occur in which groundwater withdrawals might impair instream flows." Ecology's Amicus Curiae Br. at 19–20. But "Ecology's understanding of hydraulic continuity has altered over time," and the effects of groundwater withdrawals on surface waters are well known. *Postema*, 142 Wash.2d at 76, 11 P.3d 726. Indeed, the County knew in 1999 that the proliferation of rural, permit-exempt wells was creating " 'difficulties for effective water resource management.' " FDO at 24 (quoting Ex. C–671–D at 49). The County cannot reasonably rely on this regulation to satisfy its responsibility under the GMA to protect water availability.

¶55 Indeed, the County's reliance on the Nooksack Rule turns the GMA goal of directing growth to urban areas upside down. The County's comprehensive plan allows the unchecked growth of single domestic dwellings relying on permit-exempt wells in rural areas; this is precisely the "uncoordinated and ****15** unplanned growth" that the legislature found to "pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state." RCW 36.70A.010.

¶56 The County argues that placing responsibility for protecting water resources on local governments transfers Ecology's statutory responsibility to administer chapter 90.44 RCW to the counties. They are wrong under our ***681** description of the proper division of authority set forth in *Kittitas County*: "Ecology is responsible for appropriation of groundwater by permit ..., the County is responsible for land use decisions that affect groundwater resources." 172 Wash.2d at 180, 256 P.3d 1193.

¶57 Rather than address the language of the GMA, the County asserts that the proper inquiry is whether its comprehensive plan is consistent with Ecology's regulations designed to protect water and to ensure that water is legally available. For support, the County cites

numerous provisions describing the GMA as a cooperative endeavor between local governments and state agencies with subject matter expertise. *See, e.g.*, RCW 90.54.130 (Ecology may provide local governments and state agencies with advisory recommendations to assist the counties in protecting water resources).

¶58 Notwithstanding the cooperative approach envisioned by the Act, the GMA clearly places sole responsibility for land use decisions affecting groundwater resources on local governments. Counties are authorized by statute to grant or deny building permits, and the legislature has imposed on the counties the responsibility of protecting the availability of water, RCW 36.70A.020(10), protecting groundwater resources, RCW 36.70A.070(5)(c)(iv), and ensuring an adequate supply of water when it approves a building permit. RCW 19.27.097(1); RCW 58.17.110.

¶59 In contrast, the legislature recognized that Ecology plays an advisory role to counties making land use decisions by providing counties with model regulations and assistance. RCW 90.54.130; *Kittitas County*, 172 Wash.2d at 180, 256 P.3d 1193. In counties required to plan pursuant to the GMA, the legislature recognized that Ecology's permitting authority could provide evidence of the availability of water (RCW 19.27.097(1)). And in counties that are not required to plan pursuant to the GMA, the legislature gave Ecology authority to coordinate with the Department of Health to determine ***682** whether an applicant must demonstrate the legal availability of water (RCW 19.27.097(2)). In addition, Ecology may provide local governments with advisory recommendations to assist those governments in protecting water resources. RCW 90.54.130. The legislature further recognized Ecology's administrative role in the GMA, stating that a county's land use regulations "should be consistent with ... instream flow rules" promulgated by Ecology. WAC 365–196–825(3). Notably, none of these statutes authorize local governments to delegate their GMA planning responsibilities to Ecology.

¶60 Further, interpreting "assistance" to merely require counties to conform to existing regulations would render the GMA's water protection requirements superfluous. The legislature adopted the GMA in 1991, 20 years after the WRA and six years after Ecology promulgated the Nooksack Rule. As observed throughout this opinion, the Act places numerous requirements on local governments to protect the availability of water. *See* RCW 36.70A.070(1), (5)(c)(iv); *see also* RCW 19.27.097; RCW 58.17.110. "Statutes must be interpreted and construed so that all the language is given effect, with no portion rendered meaningless of superfluous." *G–P Gypsum Corp. v. Dep't of Revenue*, 169 Wash.2d 304, 309, 237 P.3d 256 (2010); *see also Tunstall v. Bergeson*, 141 Wash.2d 201, 211, 5 P.3d 691 (2000) ("To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute."). The GMA provisions would be superfluous if the County's only obligation was to defer to Ecology's water regulations.

¶61 The County specifically contrasts its cooperative efforts with the actions at issue in *Kittitas County*, where we affirmed the Board's finding of noncompliance in part because the policies in that case effectively evaded compliance with Ecology's water permitting ****16** requirements. *See Kittitas County*, 172 Wash.2d at 180–81, 256 P.3d 1193. Asserting that its ***683** plan is entirely consistent with Ecology's regulations, the County urges us to find that its comprehensive plan is GMA compliant.

¶62 This argument is incongruous: the fact that the County's provisions are wholly consistent with Ecology's regulations does not, by itself, render them consistent with the GMA's requirements. We require 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." *Id.* at 180, 256 P.3d 1193; *see also* WAC 365–196–825(3). However, nothing in *Kittitas County* or in the GMA suggests that consistency with Ecology's regulations is sufficient for GMA compliance. *See* 172 Wash.2d at 180–81, 256 P.3d 1193. This argument rests on a logical fallacy. The GMA requires counties to have a comprehensive plan that protects surface and groundwater resources, and it requires applicants seeking approval for building permits or subdivision developments to provide that county with evidence of an adequate water supplies as well as potable water supplies, among other provisions. *See* RCW 36.70A.070(5)(C)(iv); RCW 19.27.097(1); RCW 58.17.110. The Board correctly found that the County's plan does not satisfy these requirements.

¶63 It is true that the GMA places significant responsibility on local growth management planners and administrators to work with existing laws and regulations "toward producing a single harmonious body of law." WAC 365–196–700(2). However, the scope of this responsibility does not support a dilution of the Act's purpose. Recognizing the challenge this presents to local governments, the legislature directed the Department of Commerce to provide technical assistance to local governments. *See* RCW 36.70A.190. Additionally, Ecology was authorized to provide land use management

advisory recommendations to state agencies and local governments in furtherance of protecting this state's water resources. RCW 90.54.130.

¶64 This cooperative approach is designed to give local governments the tools they need to make informed ***684** decisions toward achieving harmony under the GMA. However, the cooperative approach does not allow counties to disregard evidence of minimum flow impairments in reliance on an outdated regulation. The GMA is a mandate to government at all levels—municipalities, counties, regional authorities, special purpose districts, and state agencies—to engage in coordinated planning and cooperative implementation. WAC 365–196–700(5). In allocating responsibilities to achieve these policy goals, the legislature placed the responsibility to plan for the protection of water resources on county governments. *See Kittitas County,* 172 Wash.2d at 179, 256 P.3d 1193.

E. The County plan is inconsistent with our minimum flows jurisprudence

¶65 In addition to the deficiencies in the County's comprehensive plan under the GMA, the Board properly ruled that the plan is inconsistent with our decisions protecting closed basins and minimum flows from groundwater appropriations. There is no question that a permit-exempt well may not infringe on an earlier-established right to water under the doctrine of prior appropriation. *See Campbell & Gwinn,* 146 Wash.2d at 16, 43 P.3d 4. We reiterated this point in *Swinomish Indian Tribal Community,* recognizing that an appropriator's right to use water from a permit-exempt well is subject to rights with priority in time, including minimum flows. 178 Wash.2d at 598, 311 P.3d 6. The GMA protects these senior water rights by requiring local governments to determine that applicants for building permits or subdivision developments have demonstrated that an adequate water supply is legally available before authorizing approval. RCW 19.27.097(1); RCW 58.17.110.

[14] [15]¶66 Here, the Board specifically found that the "water supply provisions referenced ... do not require the County to make a determination of the legal availability of groundwater," with the result that the County's ordinance directly conflicts with the standard announced in *Postema.* FDO at ***685** 40. In *Postema,* we held that a minimum flow, once established by Ecology, is an existing water right that may not be impaired by subsequent groundwater withdrawals. ****17** 142 Wash.2d at 81, 11 P.3d 726. "Accordingly, when Ecology determines whether to issue a permit for appropriation of public groundwater, Ecology must consider the interrelationship of the groundwater with surface waters, and must determine whether surface water rights would be impaired or affected by groundwater withdrawals." *Id.* at 80–81, 11 P.3d 726. "[W]here there is hydraulic continuity and withdrawal of groundwater would impair existing surface water rights, including minimum flow rights, then denial [of a permit] is required." *Id.* at 93, 11 P.3d 726.

¶67 Though *Postema* was specifically decided in the context of Ecology's requirements prior to issuing permits, the rule in Washington is that groundwater appropriations cannot impede minimum flows.[11] *Swinomish Indian Tribal Cmty.,* 178 Wash.2d at 598, 311 P.3d 6. It would be incongruous to limit *Postema* to the holding that Ecology must consider the effect of groundwater appropriations on minimum flows when issuing permits but that the County does not need to consider these same impacts when issuing building permits. The County emphasizes that Ecology expressly does not engage in the usual review of a permit application when considering permit-exempt wells and exempt-use applications are not reviewed for impairment of existing rights. This argument misses the mark—the GMA explicitly assigns ***686** that task to local governments. *See* RCW 19.29.097(1); RCW 58.17.110.

¶68 A recent decision from Division One of the Court of Appeals in *Fox v. Skagit County,* 193 Wash.App. 254, 372 P.3d 784 (2016), *petition for review filed,* No. 93203–4 (Wash. June 7, 2016),[12] lends further support to the conclusion that counties must consider minimum flows when issuing building permits, even for developments relying on permit-exempt wells. The case concerned the denial of a building permit where the only source of water for the proposed development was from a permit-exempt well in hydraulic continuity with a river that was subject to an instream flow rule, and that regularly falls below its minimum flow requirements. *Id.* at 260, 372 P.3d 784. The Court of Appeals rejected the argument that a permit-exempt well would satisfy on its own the "adequate water supply" requirement for a building permit under RCW 19.27.097. *Id.* at 269–70, 372 P.3d 784. Because the right to use a permit-exempt well is subject to the prior appropriation doctrine, the court held that a determination of water availability for purposes of issuing a building permit requires that the county consider whether the development would impair senior water rights, including rights established by an instream flow rule. *Id.* The opinion in *Fox* is consistent with our prior decisions in *Kittitas County, Swinomish Indian Tribal Community,* ****18** and *Postema,* and with our decision today.

***687** By deferring to Ecology's Nooksack Rule, the County authorizes building permits on a presumption of water availability in lieu of the GMA's requirement of "evidence of adequate water supply." As authorized by RCW 90.54.020(3), Ecology's Nooksack Rule established instream flows as "necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values" at WAC 173–501–030(1) to (3); these regulations expressly provide that only **Whatcom** Creek is closed to permit-exempt uses. *See* WAC 173–501–040(1), –070(2). However, the Nooksack Rule does not provide that water is legally available for permit-exempt uses in all other streams in WRIA 1. *See* WAC 173–501–040(1), –070(2); see *generally* ch. 173–501 WAC.

[16]¶70 As the Board correctly states, each water use appropriation requires a fact-specific determination. RCW 19.29.097(1); RCW 58.17.110. Because the County's plan does not require applicants to present evidence of water availability, the unasked question in the County is whether there is water that is legally available and that can be appropriated in certain areas of rural **Whatcom County** without conflicting with the applicable instream flows. Instead of evidence, the County presumes that water is available for all permit-exempt wells unless Ecology has explicitly closed a basin to all groundwater appropriations, specifically including permit-exempt appropriations.[13] The Board correctly found that this approach has an adverse impact on minimum flows, that it does not comply with the GMA, and that it is incompatible with our decisions that ***688** consistently protect instream flows from impairment by groundwater withdrawals.

III. The Board Properly Ruled That the County's Rural Element Fails To Comply with the Requirement To Protect Water Quality

¶71 We reverse the Court of Appeals in part and hold that the Board's ruling that the County's rural element does not comply with the requirement to protect water quality is based on a proper interpretation and application of the law. The County argues—and the Court of Appeals agreed—that the Board's reliance on preexisting water quality problems in **Whatcom County** improperly imposed a duty on the County to "enhance" water quality rather than to merely "protect" water quality. The County is correct that it does not have a duty to enhance water quality; however, the Board's ruling does not require counties to enhance water quality and the decision is supported by substantial evidence.[14]

A. Comprehensive plans are not required to include provisions that enhance water quality

¶72 The GMA imposes several requirements and goals on a local government's planning. Comprehensive plans "*shall* provide for *protection* of the quality ... of groundwater used for public water supplies." RCW 36.70A.070(1) (emphasis added). It is a *goal* of the GMA to "[p]rotect the environment and *enhance* the state's high quality of life, including air and water quality." RCW 36.70A.020(10) (emphasis added).

¶73 **Hirst** urges us to hold that counties must "enhance" water quality, relying on the ****19** County's related ***689** argument that local governments must adhere to the "planning goals" and "[g]eneral declaration of fundamentals" found in RCW 34.70A.020 and RCW 90.54.020, respectively, such that a county's comprehensive plan must both "protect" and "enhance" water quality. However, nothing in the language of either statute or in our prior interpretations of the GMA goals support this interpretation.

¶74 Subsection .020 of the GMA, chapter 36.70A RCW, provides 13 planning goals to "guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under [subsection .040]." The goals "are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." RCW 36.70A.020. Additionally, "the GMA 'explicitly denies any order of priority among the thirteen goals' and it is evident that 'some of them are mutually competitive.' " *Quadrant Corp.*, 154 Wash.2d at 246, 110 P.3d 1132 (quoting Settle, *supra*, at 11). Nothing in this plain language suggests that GMA goals impose substantive requirements on local governments.

[17]¶75 Indeed, we rejected a similar argument in *Swinomish Indian Tribal Community* when we held that the term "protect" does not impose a duty on counties to "enhance" water quality under RCW 36.70A.172(1). 161 Wash.2d at 428, 166 P.3d 1198. There, we considered the Swinomish Tribe's argument that the requirement to "protect" critical areas under the GMA requires measures to "enhance" because "where an area is already in a degraded condition, it is not being protected unless that condition is improved or enhanced." *Id.* at 427, 166 P.3d 1198. In rejecting that argument, we recognized that the term "protect" may encompass an option of enhancement but that the term itself does not require enhancement. *Id.* at 429, 166 P.3d 1198. We also considered the legislature's deliberate use of the terms "protect" and "enhance" throughout the GMA, finding that "[i]n several

sections of the GMA, the legislature *allows* enhancement of natural conditions under the ***690** GMA without *requiring* enhancement." *Id.* We have acknowledged that RCW 36.70A.020 lists the enhancement of water quality as a goal of the GMA, *see id.* but have never held that local governments are bound by these goals in addition to the enumerated requirements of the Act. *See Quadrant Corp.*, 154 Wash.2d at 246, 110 P.3d 1132. We adhere to that holding here—the GMA does not require counties to "enhance" water quality.

[18]¶76 **Hirst's** argument under the WRA fares no better than their argument under the GMA. Subsection .020 of the WRA, entitled "General declaration of fundamentals for utilization and management of waters of the state," reads in relevant part:

> Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:
>
> ....
>
> (3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:
>
> ....
>
> (b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served....
>
> ....
>
> (5) Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs.

RCW 90.54.020. The plain language of this section requires the quality of the natural environment to be "protected." ***691** Waters are ****20** protected in part when "wastes and other materials and substances" are not allowed to enter the waters when those materials will reduce the existing quality of the water. RCW 90.54.020(3)(b). The statute further provides that "[a]dequate and safe supplies of water shall be preserved." RCW 90.54.020(5). The language in the WRA does not suggest that water quality must be "enhanced," and it does not supersede language from the GMA requiring water to be "protected." These goals, while admirable, simply do not impose a duty on counties to enhance water quality.

B. The Board's conclusion about water quality is not based on a duty to enhance water quality

[19]¶77 The Board did not rule that the County had an obligation to enhance water quality. Its ruling that the County's policies relating to water quality do not satisfy the requirements of the GMA identifies two specific problems. We address these concerns in turn.

¶78 First, the Board concluded that the County policies 2DD.2.C.1, –2.C.3, –2.C.4, and –2.C.8 either do not apply throughout the County's rural area or apply only to parts of the rural area. *See* FDO at 36, 39, 43. The Board further found that "no measures exist to limit development to protect water resources in the remaining portions of the County's Rural Area." *Id.* at 38 (emphasis omitted); *see also id.* at 39 ("[T]he County's Stormwater Manual does not provide measures to protect groundwater throughout the County's Rural Area."). Given these deficiencies, the Board concluded that

> the County is left without Rural Element Measures to protect rural character by ensuring land use and development patterns are consistent with protection of surface water and groundwater resources throughout its Rural Area. This is especially critical given the water supply limitations and water quality impairment documented in this case....

***692** *Id.* at 43. The conclusion that these policies do not protect water quality is not based on a duty to enhance water quality.

¶79 Second, the Board found that policy 2DD–2.C.2 "is not a measure limiting development to protect water resources as required in RCW 36.70A.070(5)(c)(iv)." *Id.* at 37–38. This policy is implemented through chapter 24.05 WCC, which allows private homeowners in rural areas to inspect their own septic systems rather than requiring professional inspections. The Board noted

significant disparity in reported failure rates and compliance rates between homeowners who self-inspect versus professional inspections, as well as studies showing water quality contamination from faulty septic systems. *Id.* at 37.

¶80 In essence, the Board ruled that the County's current inspection system policies were flawed and that continuing to rely on this flawed system would not protect water quality in the future. *See id.* at 36–39. This also does not impose a duty on counties to enhance water quality. We therefore reverse the Court of Appeals and hold that the Board applied the proper legal standard and analysis in concluding that the County's rural element policy does not comply with the GMA.

¶81 The County also asserts that the Board's findings are not supported by substantial evidence. We note that the Board cited a "proliferation of evidence in the record of continued water quality degradation resulting from land use and development activities," *id.* at 35, including scientific reports in Ecology's 2010 *State of the Watershed Report*, Washington Department of Fish and Wildlife's *Land Use Planning for Salmon, Steelhead and Trout*; and the Puget Sound Partnership's *2012/2013 Action Agenda for Puget Sound.* KATIE KNIGHT, WASH. DEP'T OF FISH & WILDLIFE, LAND USE PLANNING FOR SALMON, STEELHEAD, AND TROUT: A LAND USE PLANNER'S GUIDE TO SALMONID HABITAT PROTECTION AND RECOVERY (2009) (WDFW 2009 REPORT); PUGET SOUND P'SHIP, THE 2012/2013 ACTION AGENDA FOR PUGET SOUND (2012). These ***693** reports conclude that water resource degradation in the County can be attributed to land use and land development practices. FDO at 32–33 (citing WDFW 2009 REPORT, *supra*, at 77 (2009)). These reports also determined that " 'stormwater runoff is the leading contributor to water quality pollution of urban waterways in western Washington ****21** State.' " *Id.* at 32 (quoting WDFW 2009 REPORT, *supra*, at 39–40).

¶82 The County's arguments dismissing this evidence as merely "generalized evidence of water quality problems" miss the point: as the Board properly observed, counties must include protective measures in their comprehensive plan. *Id.* at 35 (citing *Kittitas County*, 172 Wash.2d at 164, 256 P.3d 1193). The Board's conclusion that the County plan does not have the necessary measures to comply with this requirement is all that is needed to establish that the County's comprehensive plan does not satisfy the GMA. The evidence cited by the Board is not essential to this ruling; it is instead intended to underscore the importance of implementing effective protective measures in rural **Whatcom County**. Therefore, we reverse the Court of Appeals' holding that the Board's decision improperly imposed a duty on the County to "enhance" water quality rather than to merely "protect" water quality and affirm the Board's ruling that the County's rural element fails to comply with the requirement to protect water quality.

IV. The Board Has Discretion To Declare a Comprehensive Plan Invalid

[20]¶83 Finally, **Hirst** cross appeals the Board's decision declining to declare the County's comprehensive plan invalid. **Hirst** argues that the Board erroneously interpreted and applied the GMA because it applied an incorrect legal standard. We hold that the Board did not abuse its discretion in declining to make a determination of invalidity.

¶84 The GMA provides statutory remedies for plans or regulations that the Board determines violate the ***694** GMA. As we have previously observed when interpreting these provisions, the GMA provides the Board with "two options: (1) it may enter a finding of noncompliance or (2) it may enter a finding of invalidity." *Town of Woodway v. Snohomish County*, 180 Wash.2d 165, 174, 322 P.3d 1219 (2014) (citing RCW 36.70A.300(3)(b), .302). We review the Board's exercise of these options for abuse of discretion. *See id.*

[21]¶85 RCW 36.70A.302(1) provides the legal standard under which the Board determines whether to make a finding of invalidity:

> (1) The board *may* determine that part or all of a comprehensive plan or development regulations are invalid if the board:
>
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
>
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

(Emphasis added.) The legislature's use of the term "may" generally indicates the existence of an option that is a matter of discretion. *Nat'l Elec. Contractors Ass'n v.*

Riveland, 138 Wash.2d 9, 28, 978 P.2d 481 (1999) (citing *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 381, 858 P.2d 245 (1993)); *see also* WAC 365–196–210(20).

¶86 In denying **Hirst's** request for an order of invalidity, the Board stated:

> This Board has previously held that it will declare invalid only the most egregious noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act. Although the Board finds areas of noncompliance ***695** with the GMA, Petitioners have not met the standard for a declaration of invalidity.

FDO at 50 (footnote omitted).

¶87 **Hirst** argues, correctly, that the GMA standard for a determination of invalidity is not "the most egregious noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act." While this is a correct statement of the law, it is irrelevant to determining whether the Board properly exercised its discretion by requiring a heightened showing before it elects to invalidate a noncompliant provision. As the quoted language shows, the Board is ****22** asserting its own standards for invalidating provisions. **Hirst's** argument fails to acknowledge that the plain language of subsection .302(1) articulates the threshold requirements for a board to make a determination of invalidity; a board may not make a determination of invalidity if those requirements are not satisfied, but it is not required to make a finding of invalidity if they are. *Cf. Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 176 Wash.App. 555, 578, 309 P.3d 673 (2013) (Board's determination of invalidity satisfied the statutory requirements and was based on due consideration of the facts), *review denied*, 179 Wash.2d 1015, 318 P.3d 279 (2014). Therefore, we affirm the Court of Appeals on this issue and hold that the Board did not abuse its discretion in declining to make a finding of invalidity.

CONCLUSION

¶88 We reverse the Court of Appeals and hold that the County's comprehensive plan does not satisfy the GMA requirements to protect water availability or water quality. However, we affirm the Court of Appeals' holding that the Board did not abuse its discretion in declining to make a finding of invalidity. We therefore reverse the Court of Appeals in part and remand to the Board for further proceedings consistent with this opinion.

WE CONCUR.

Johnson, J.

Owens, J.

González, J.

Yu, J.

***696** MADSEN, C.J. (concurring)

¶89 I agree with the majority that the Growth Management Act (GMA), chapter 36.70A RCW, places a burden on counties to assure the factual and legal availability of water before issuing building permits. And **Whatcom County** (County) failed to meet this burden by simply relying on the Department of Ecology's "Nooksack Rule"[1] rather than actually making a finding that water was available. I write separately to emphasize the duty of the State, tribes, and local governments to work together to ensure there is available water before issuing building permits, rather than letting their burden fall onto individual permit applicants.

Discussion

¶90 The majority holds that the County failed to meet its duty under the GMA to ensure water was factually and legally available before issuing building permits. Majority at 4, 9. I agree with this holding. The GMA places a duty on counties to ensure that water is both factually and legally available before they issue building permits. RCW 19.27.097(1); RCW 58.17.110(2); *see* majority at 10–12. This court has recognized this duty before. *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wash.2d 144, 179–80, 256 P.3d 1193 (2011); *see* majority at 11–12.

¶91 Here, the County failed to ascertain whether there was available water before issuing building permits. Rather, the County shifted its statutory duty under the

GMA to the Department of Ecology by adopting Ecology's presumptive Nooksack Rule. Where, as here, Ecology has not actually determined whether water is available, the County is not entitled simply to rely on Ecology's rule.[2] As the majority ***697** holds, the County has an independent duty under the GMA to ensure water is both factually and legally available before issuing building permits.

¶92 I write separately to address the dissent's concern that the majority is shifting the burden of showing water availability onto individual permit applicants. Dissent at 3, 10. ****23** Like the dissent, I fear the majority could be read to say that if the County cannot rely on Ecology's rule, then it can shift its burden onto permit applicants. But that is not so. Rather, the State and local governments have independent statutory duties to ensure water availability, and they must work together to protect water resources and ensure water availability as part of their comprehensive planning process.[3]

¶93 The State and the counties each have an independent statutory duty to ensure water availability. For example, before issuing a groundwater permit, Ecology *must* investigate and affirmatively find "(1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights or (4) be detrimental to the public welfare." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 8, 43 P.3d 4 (2002) (citing RCW 90.03.290). Under the GMA, a county's comprehensive plan, RCW 36.70A.040, *must* include a land use element that provides for the "protection of the quality and quantity of groundwater used for public water supplies." RCW 36.70A.070(1). And before issuing a building permit, a county *must* determine that there are potable water supplies. RCW 58.17.110(2)(a). Thus, both the State and the counties have an independent duty to ensure water availability prior to issuing permits.

***698** Although each has an independent statutory duty, the legislature envisioned cooperation between the State and local governments when it enacted the Water Resources Act of 1971 (WRA), chapter 90.54 RCW, and, later, the GMA. The legislature included language highlighting this cooperative approach throughout the statutes:

> To ensure that available water supplies are managed to best meet both instream and offstream needs, a comprehensive planning process is essential.... Through *a comprehensive planning process that includes the state, Indian tribes, local governments,* and interested parties, it is possible to make better use of available water supplies and achieve better management of water resources. Through comprehensive planning, conflicts among water users and interests can be reduced or resolved. It is in the best interests of the state that comprehensive water resource planning be given a high priority.

RCW 90.54.010(1)(b) (emphasis added); RCW 36.70A.103 (state agencies shall comply with local comprehensive plans), .106(1) (state agencies may provide comments to local governments on a proposed comprehensive plan); RCW 19.27.097(2) (county and state may mutually determine to which areas the building permit requirements do not apply); *see also* WAC 365–196–700(5) ("The [WRA] is a mandate to government at all levels to engage in coordinated planning and cooperative implementation.").

¶95 This court has recognized the cooperative spirit that the legislature envisioned when enacting these statutes. In *Kittitas County*, while reaffirming the county's responsibility in land use decisions, we emphasized, "[W]e 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." 172 Wash.2d at 180, 256 P.3d 1193 (emphasis added). The majority too recognizes the cooperative approach that the GMA envisions. Majority at 14. But the majority focuses on how the County cannot use the cooperative approach to "disregard evidence of minimum flow impairments in reliance on ***699** an outdated regulation." *Id.* at 16. While I agree, I think it should be made clear that the statutes do not expect the burden to fall on individual applicants where the County has failed to meet its initial burden of determining water availability through its comprehensive planning and development regulations.

¶96 When the counties and Ecology combine their planning and water resources authority, the technical resources and planning solutions offer a wide range of tools to ensure ****24** water availability. For example, a county can make its densities consistent with water availability, provide water mitigation, or ensure there are limited impervious surfaces so that more water goes into streams.[4] Although the legislature has placed a burden on individual applicants to provide evidence of water, RCW

19.27.097(1), there are steps that the State and the counties *must* take under their statutory duties to protect water resources, ensure water availability, and engage in a comprehensive planning process. The burden on permit applicants under RCW 19.27.097(1) assumes that the State and the counties have already complied with their statutory duties to ensure the availability of water. Thus, the burden to provide evidence of water falls on individual applicants only where the State and the counties have first fulfilled their statutory duties of ensuring that water is available.

¶97 The State and the counties cannot meet their respective duties to protect this State's dwindling water resources by relying on one another's rules or shifting their burdens to others. As stewards of our valuable water resources, the State and the counties must work together to develop ***700** comprehensive plans to address water usage in our State. RCW 90.54.010(b). I write separately to emphasize it is the burden of the State and local governments, independently and in cooperation, to determine water availability in the first instance. This is not a burden to be shifted onto individual permit applicants.

STEPHENS, J. (dissenting)

¶98 The majority's decision hinges on an interpretation of RCW 19.27.097 that is unsupported by the plain language of the statute, precedent, or common sense. It assumes this provision of the building code requires **Whatcom County** to determine water right priorities before it may grant a building permit that relies on a permit-exempt well. It also assumes this provision prohibits the county from relying on the Department of Ecology's determination of whether water is available for withdrawal in a particular basin. The effect of the majority's holding is to require individual building permit applicants to commission a hydrogeological study to show that their very small withdrawal does not impair senior water rights, and then have the local building department evaluate the adequacy of that scientific data. The practical result of this holding is to stop counties from granting building permits that rely on permit-exempt wells. Not only is this contrary to the clear legislative purpose of RCW 19.27.097, it potentially puts counties at odds with the Department of Ecology and imposes impossible burdens on landowners. I respectfully dissent.

I. RCW 19.27.097 Does Not Require Building Permit Applicants To Provide Evidence of the Legal Availability of Water

¶99 The majority holds that to satisfy the Growth Management Act (GMA), chapter 36.70A RCW, the county cannot rely on the Department of Ecology's water availability determinations, but instead must require building permit applicants relying on permit-exempt wells to provide ***701** the county with evidence that water is both factually and legally available. *See* majority at 10–12. The majority's holding relies on a faulty interpretation of RCW 19.27.097. That statute provides in relevant part,

> (1) Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may he in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply. In addition to other authorities, the county or city may impose conditions on building permits requiring connection to an existing public water system where the existing ****25** system is willing and able to provide safe and reliable potable water to the applicant with reasonable economy and efficiency. An application for a water right shall not be sufficient proof of an adequate water supply.
>
> (2) Within counties not required or not choosing to plan pursuant to RCW 36.70A.040, the county and the state may mutually determine those areas in the county in which the requirements of subsection (1) of this section shall not apply. The departments of health and ecology shall coordinate on the implementation of this section. Should the county and the state fail to mutually determine those areas to be designated pursuant to this subsection, the county may petition the department of enterprise services to mediate or, if necessary, make the determination.

RCW 19.27.097.

¶100 While part of the GMA, this statute is codified in the building code, chapter 19.27 RCW. *See Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wash.2d 144, 178–79, 256 P.3d 1193 (2011). It sends a simple message to building permit applicants: "show me the water." It does not require counties to modify their growth management ordinances to deviate from the Department of Ecology's determination of whether water is available for use in a particular basin. Nor does it require applicants to undertake the burden of showing that the use of a

permit-exempt well will not impair senior water rights.

***702** The plain language of RCW 19.27.097 supports this interpretation. The methods that an applicant may use to show there is an "adequate water supply" speak to the actual presence of water, not its legal availability. RCW 19.27.097(1) ("Evidence may be in the form of ... a letter from an approved water purveyor stating the ability to provide water."). Furthermore, the statute uses the term "adequate" to describe the water supply; it does not use "available." *Id.* This is important, as "[w]e presume the legislature intends a different meaning when it uses different terms." *Foster v. Dep't of Ecology*, 184 Wash.2d 465, 473, 362 P.3d 959 (2015). In the water code, where the legislature intends an investigation of both factual *and* legal availability of water, it uses the term "available." *See* RCW 90.03.290(1) (providing that under the water code's appropriation procedure, it is the duty of the Department of Ecology to "determine what water, if any, is *available* for appropriation" (emphasis added)), .290(3) ("if [the department] shall find that there is water *available* for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit.... But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights," the department shall reject the application (emphasis added)). In GMA regulations, the term "adequate" refers to actual water supply, not legal availability. *See* WAC 365–196–210(3) (Department of Commerce GMA regulations defining "adequate public facilities" as "facilities which have the capacity to serve development without decreasing levels of service below locally established minimums"), -410(1)(d) ("The housing element must contain at least the following features: ... [a]dequate provisions for existing and projected housing needs of all economic segments of the community.").

¶102 The majority's attempt to tie the GMA's broad policy objectives and planning goals to this statute overlooks ***703** the fact that RCW 19.27.097 applies to both GMA and non-GMA counties. The statute speaks directly to an individual applicant's burdens, not to the required elements of a county's comprehensive plan. *See* RCW 19.27.097(1) ("Each *applicant* for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building." (emphasis added)). Although under this statute non-GMA counties can require building permit applicants to provide evidence of an adequate water supply, this is not mandated. In non-GMA counties, applicants may or may not have to show evidence of potable water. RCW 19.27.097(2) ("Within counties not required or not choosing to plan pursuant to RCW 36.70A.040, the county and the state may mutually determine those areas in the ****26** county in which the requirements of subsection (1) of this section shall not apply.").

¶103 The majority's holding, which requires applicants for a building permit in a GMA county to prove the legal availability of water, will lead to inconsistent protection for senior water rights holders across the state. *See* 1992 Op. Att'y Gen. No. 17, at 7 n.4 ("In areas where RCW 19.27.097(1) does not apply, the local building department will not need to determine whether there is an adequate water supply before issuing a building permit."). Under the majority's interpretation, senior water rights holders in GMA counties can rely on counties to look at applicants' evidence and deny building permits when permit-exempt wells would interfere with senior water rights. However, in non-GMA counties where applicants relying on permit-exempt wells do not have to prove water is legally available, senior water rights holders bear the burden of determining a permit-exempt well is interfering with their rights and initiating a lawsuit to stop the impairment.[1] We cannot ***704** read the requirements of the building code to create such unequal protection for senior water rights holders.

¶104 Noticeably missing from the majority's analysis of RCW 19.27.097 is any discussion of the inconsistent protection its interpretation creates. The majority brushes off this argument, stating, "While the dissent correctly notes that RCW 19.27.097 contains separate requirements for GMA and non-GMA counties, this does not give this court grounds to ignore the rest of the GMA." Majority at 11 n.6. This court should not interpret a statute so as to give people in some counties greater protection for their water right than others, especially when the result is to foster piecemeal decision-making regarding water use. By interpreting RCW 19.27.097 to mean "show me the water" and allowing counties to rely on the Department of Ecology's determination of whether water is *legally* available, I do not ignore the other provisions of the GMA. Instead, I harmonize the GMA and the Water Resources Act of 1971 (WRA), chapter 90.54 RCW, and its goal of consistent decision-making—something the majority fails to do.

¶105 The WRA requires the Department of Ecology, "through the adoption of appropriate rules ... to develop and implement ... a *comprehensive* state water resources program which will provide a process for making decisions on future water resource allocation and use." RCW 90.54.040(1) (emphasis added). The ordinary meaning of "comprehensive" is "covering a matter under

consideration completely or nearly completely." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 467 (2002); *see Tingey v. Haisch*, 159 Wash.2d 652, 658, 152 P.3d 1020 (2007) ("When a term has a well-accepted, ordinary meaning, a regular dictionary may be consulted to ascertain the term's definition."). The legislature recognized the need for comprehensive planning to effectively manage water resources:

> ***705** To ensure that available water supplies are managed to best meet both instream and offstream needs, a comprehensive planning process is essential.... Through a comprehensive planning process that includes the state, Indian tribes, local governments, and interested parties, it is possible to make better use of available water supplies and achieve better management of water resources. Through comprehensive planning, conflicts among water users and interests can be reduced or resolved.

RCW 90.54.010(1)(b).

¶106 The legislature also recognized that water does not respect human-made boundaries. It found that "[c]omprehensive water resource planning is best accomplished through a regional planning process sensitive to the unique characteristics and issues of each region." RCW 90.54.010(1)(c). The legislature entrusted the Department of Ecology with the task of developing and implementing the "comprehensive state water resources program." RCW 90.54.040(1). It also instructed ****27** local governments, including counties, to "whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter." RCW 90.54.090. In response to the WRA, the Department of Ecology established the Water Resources Management Program, *see* ch. 173–500 WAC, and water resource inventory areas, such as the "Nooksack Rule" at issue in this case, *see, e.g.*, ch. 173–501 WAC. *See also Postema v. Pollution Control Hr'gs Bd.*, 142 Wash.2d 68, 81, 83, 11 P.3d 726 (2000).

¶107 I would interpret RCW 19.29.097 to align with the WRA. Allowing counties to integrate the Department of Ecology's water determinations into their comprehensive plans and rely on them when reviewing building permit applications promotes the integrated, comprehensive management the legislature envisioned. It also promotes consistent water management throughout a basin, recognizing that basins cross county lines.

¶108 In contrast, the majority's rule clashes with the WRA. The majority's holding will lead to county-by-county ***706** decisions on water use that directly undermine the WRA's mandate for a comprehensive water management plan. Not only that, but the majority's approach risks a race-to-the-bottom in water management. Counties, lacking both the Department of Ecology's expertise and its statewide perspective, are ill equipped to thoroughly vet the information that permit applicants will offer to show no impairment. Nor do county building departments have an obligation to perform their own research or consult with other potentially affected parties (e.g., tribes or other counties) before deciding whether a small well will negatively impact a senior water right. Of course, counties often *do* have an incentive to approve building permits, increasing the local tax base and boosting economic growth through new development. Requiring counties to make their own determination of whether water is *legally* available—rather than allowing them to rely on the Department of Ecology—undermines the comprehensive water management required by the WRA.[2]

¶109 Finally, the majority's interpretation is contradicted by the Department of Commerce's GMA development regulations and a formal attorney general opinion. The Department of Commerce regulations incorporate RCW 19.27.097's requirement that applicants for building permits provide evidence "of an adequate water supply for the intended use of the building." WAC 365–196–825(1). The regulations also state that cities and counties should consult 1992 Attorney General Opinion No. 17 (AG Opinion), ***707** which interprets RCW 19.27.097's requirements "for assistance in determining what substantive standards should be applied." WAC 365–196–825(2). Formal attorney general opinions "are generally 'entitled to great weight.' " *Five Corners Family Farmers v. State*, 173 Wash.2d 296, 308, 268 P.3d 892 (2011) (quoting *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wash.2d 787, 803, 920 P.2d 581 (1996)).

¶110 The AG Opinion explains that "an 'adequate' water supply is one that is of sufficient quality and sufficient quantity to satisfy the demand created by the new building." 1992 Op. Att'y Gen. No. 17, at 7. Determining whether there is sufficient quantity depends on the source of the water: a public water system or another water source. *Id.* at 9–10. Moreover, this is solely a local determination. *Id.* ("[L]ocal building departments will be able to exercise greater discretion when determining whether other water sources provide water of sufficient quality and quantity" than they may exercise over ****28** public water systems). The AG Opinion explains that "any applicant for a building permit who claims that the building's water will come from surface or ground waters of the state, other than from a public water system, must

prove that he has a right to take such water." *Id.* at 10–11. In order to meet this burden, the applicant must either have a permit from the Department of Ecology or meet the requirements for a permit-exempt well.[3] *See id.* (discussing permitting requirements and exception). Nothing in the AG Opinion suggests a building permit applicant must hire experts or undertake litigation to demonstrate that a permit-exempt well will not impair any senior water right.

***708** In a footnote, the AG Opinion explains that junior water rights—established either by permit or by beneficial use of a permit-exempt well—may at times be curtailed to ensure no impairment of senior water rights. *See id.* at 11 n.5. The AG Opinion states,

> Although RCW 19.27.097 states that a water right permit from the Department of Ecology may be evidence of an adequate water supply, we believe that, because of the first-in-time doctrine, it may not be sufficient evidence in cases where water is not actually available for withdrawal. In areas experiencing drought severe enough to deprive those holding junior water rights of water, for example, a local building department could require evidence in addition to the water right that a sufficient quantity of water actually would be available for the building to be constructed.

Id.

¶112 This statement should not be misconstrued to suggest that an applicant must prove the legal availability of water before the local building department may grant a building permit. It does not impose a mandate on local departments. Rather, this passage in the AG Opinion describes a situation in which junior water rights have been curtailed, and cautions that mere reliance on a Department of Ecology permit may not be sufficient in such situations. But, the curtailment of junior water rights occurs only after competing water rights have been resolved in superior court. *See Rettkowski v. Dep't of Ecology*, 122 Wash.2d 219, 225, 234, 858 P.2d 232 (1993), *aff'd in part and rev'd in part*, 128 Wash.2d 508, 910 P.2d 462 (1996). The AG Opinion therefore suggests that a local building department *could* require additional evidence of no impairment if there has already been a water rights determination and junior rights have been curtailed. This limited situation will not affect the majority of building permit applications.

***709** *II. The Majority Misinterprets* Kittitas County v. Eastern Washington Growth Management Hearings Board *and* Postema v. Pollution Control Hearings Board

¶113 The majority relies on *Kittitas County* to reach its holding that RCW 19.27.097 requires applicants to show that water is legally available, and that the county, not the Department of Ecology, must make the ultimate determination of water availability. *See* majority at 11 ("Through [RCW 19.27.097(1) and RCW 58.17.110(2)], the GMA requires counties to assure that water is both factually and legally available. *Kittitas County*, 172 Wash.2d at 179–80, 256 P.3d 1193."). The majority misinterprets that decision. In *Kittitas County* we invalidated Kittitas County's subdivision regulations that allowed multiple, separately evaluated subdivision applications for properties that are all part of the same development. We held such regulations "tacitly allow[ ] subdivision applicants to evade this court's rule in *Campbell & Gwinn*."[4] *Kittitas County*, 172 Wash.2d at 177, 256 P.3d 1193 ****29** (citing *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 43 P.3d 4 (2002)). We held,

> 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 require the County to only assure water is physically underground effectively allows ***710** the County to condone the evasion of our state's water permitting laws.

Id. at 180, 256 P.3d 1193.

¶114 The majority interprets this case to hold that the county must evaluate the factual and legal availability of water. Majority at 11–12. What *Kittitas County* in fact holds is that county regulations cannot circumvent the requirements for valid permits issued by the Department of Ecology; subdivision applicants required to obtain water permits must obtain valid permits. In *Kittitas County*, we assumed the validity of permit-exempt wells, without requiring a further showing of no water rights impairment. 172 Wash.2d at 180, 256 P.3d 1193. Thus, our decision in *Kittitas County* does not support the majority's imposition of additional burdens on building permit applicants and local jurisdictions.

¶115 The majority also improperly relies on our holding in *Postema* to conclude that "[i]t would be incongruous to limit *Postema* to the holding that Ecology must consider the effect of groundwater appropriations on minimum flows when issuing permits but that [**Whatcom**] **County** does not need to consider these same impacts when issuing building permits." Majority at 17. There are two problems with this statement. First, it rests on the same faulty interpretation of RCW 19.27.097(1), discussed above. Second, it is not "incongruous" to limit *Postema* 's holding to the facts of that case. By transposing a rule adopted for permitted wells into the permit-exempt context, the majority ignores the distinction between these types of withdrawals. *See* majority at 17. This statutory-based distinction is discussed in greater detail below. While *Postema* requires the Department of Ecology to determine if a permitted withdrawal of groundwater would negatively impact instream flows, nothing in that decision, or in the GMA, shifts this burden onto counties when individuals rely on permit-exempt wells.[5]

***711** *III. The Practical Effect of the Majority's Holding Is To Prevent New Construction That Relies on Permit-exempt Wells*

¶116 The majority's holding amounts to a policy decision that GMA counties should not issue building permits that rely on permit-exempt groundwater withdrawals. This is not a policy decision we are at liberty to make.

¶117 Determinations of water availability are complex and costly. We recognized in *Postema* that "[t]he interrelationship [between groundwater withdrawals and surface water] can be quite complex and effects are sometimes difficult or impossible to measure in the field. Also, pumping groundwater may not have a discernable effect on surface water until considerable time has passed, depending upon the conditions." 142 Wash.2d at 75–76, 11 P.3d 726.[6] The majority fails to ****30** acknowledge the astronomical task it assigns to individual applicants. This task is particularly difficult to justify in light of the smallness of permit-exempt withdrawals.[7]

***712** This is not to say that studying the effect of permit-exempt wells is unimportant, just that it is unlikely to be undertaken by individuals applying for a building permit. In a recent publication, the Department of Ecology explained what is needed to assess the cumulative effects of permit-exempt groundwater withdrawals. *See* ANN WESSEL, DEP'T OF ECOLOGY, DRAFT: MITIGATION OPTIONS FOR THE IMPACTS OF NEW PERMIT-EXEMPT GROUNDWATER WITHDRAWALS 7–9 (2015).[8] "To understand how exempt well consumptive water use translates into effects on streams at a local scale," one must consider multiple factors, including well density, hydrogeologic factors, distribution of wells and well depths within the subbasin, timing of withdrawals, difference in indoor and outdoor consumptive water use, and tangential hydrologic changes due to landscape changes. *Id.* at 9. "To evaluate the effects of groundwater withdrawals on particular streams, some type of groundwater model is typically needed. If only one groundwater withdrawal is being analyzed, a simple analytical program may suffice." *Id.* at 10. The cost of building these models can be quite high. In a recent Court of Appeals case, it was estimated that the cost of the "specific hydrogeological data and models [that] are needed for informed decisions about managing and allocating water use and protecting surface flows in the Johns Creek basin" would be approximately $300,000. *Squaxin Island Tribe v. Dep't of Ecology*, 177 Wash.App. 734, 738, 312 P.3d 766 (2013). Once funding was obtained, it would take "at least two years to perform the study and to make its results useable to decision-makers." *Id.*

***713** Furthermore, to best determine the effect of any groundwater withdrawal, it is necessary to investigate the hydrogeology of *all* connected surface and groundwaters. In a draft report discussing the appropriate technical methods for assessing the effects of groundwater withdrawals on surface water, technical experts from the Department of Ecology stated that "water-withdrawal proposals are always best evaluated in the context of an entire watershed. Therefore, the Committee recommends that tools and capacity be developed for basin-scale analysis of water resources." DEP'T OF ECOLOGY, DRAFT: REPORT OF THE TECHNICAL ADVISORY COMMITTEE ON THE CAPTURE OF SURFACE WATER BY WELLS ES–7 (1998).[9] The committee

found that "the area of investigation for capture analysis must be large enough that 100% of the capture for a well or group of wells can be accounted for; this may only extend to the nearest surface water, but more often extends out ... to the boundaries of the groundwater basin and, sometimes, beyond into adjoining basins." *Id.* at 33. The commit ****31** tee recognized that "[a]ppropriate analysis and data collection ... requires extensive effort, particularly if, as is frequently the case, the capture analysis is done without the benefit of previously developed base information on a basin's hydrogeology." *Id.* Given the complex nature of groundwater and surface water interaction, the majority's conclusion that RCW 19.27.097 requires individual applicants to show no impairment will effectively halt local departments from granting building permits.

¶120 The majority's holding pushes a massive, and likely insurmountable, burden onto individuals applying for a building permit. This was not the legislature's intent when it enacted RCW 19.27.097.[10] The exemption for small ***714** withdrawals of groundwater has "two evident and interrelated purposes: (1) to save the appropriator of a very small withdrawal the trouble and expense of applying for a permit where the effect of the withdrawal would be very slight; (2) to save the state the trouble and expense of processing applications for small withdrawals with little impact on the total water available." 1997 Op. Att'y Gen. No. 6. at 6. Requiring individual building permit applicants to show that their small withdrawal of water will not impair senior rights undermines both of these goals.

¶121 A far more sensible approach is to recognize that RCW 19.27.097 requires applicants to show only that sufficient water is factually adequate to support the proposed building, and that it is permissible for the county's regulations to follow the Department of Ecology's Nooksack Rule. This holding is consistent with GMA regulations and with the WRA. *See* WAC 365–196–825(3) ("If the department of ecology has adopted rules on this subject [adequate potable water], or any part of it, local regulations should be consistent with those rules. Such rules may include instream flow rules...."); RCW 90.54.040 (requiring the Department of Ecology to develop and implement a comprehensive water resources program). It is also consistent with *Kittitas County*, in which we stated that the Department of ***715** Ecology "ought to assist counties in their land use planning to adequately protect water resources," and maintained its role as the administrator of water appropriations. *Kittitas County*, 172 Wash.2d at 180, 256 P.3d 1193; *see also Almgren v. Dep't of Ecology*, No. 11–109c, 2014 WL 3700692, at *7 (Wash. Pollution Control Hr'gs Bd. July 1, 2014) ("to make these decisions [concerning water availability in land use permitting], the local government relies on information and expertise from other agencies including from Ecology." (citing *Kittitas County*, 172 Wash.2d at 178, 256 P.3d 1193)).

¶122 I would hold that the county's code is consistent with RCW 19.27.097 and properly incorporates the Department of Ecology's Nooksack Rule. Thus, the county complied with GMA requirements to protect water. Because the majority holds otherwise, I respectfully dissent.

Fairhurst, J.

Gordon McCloud, J.

All Citations

186 Wash.2d 648, 381 P.3d 1

Footnotes

1 The Nooksack Water Resource Inventory Area, chapter 173–501 WAC.

2 Though not related directly to this appeal, the County also took steps to address our decisions in *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 43 P.3d 4 (2002) and *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wash.2d 144, 256 P.3d 1193 (2011). Specifically, WCC 21.01.040 requires contiguous parcels of land with the same ownership to be considered as one parcel for the purpose of permit -exempt water appropriations. The County also adopted policies incorporating regulations and programs to protect water quality. These measures include critical area regulations, a storm water management program, sewage regulations, and measures designed to protect the Lake **Whatcom** watershed. The Board ruled that the measures designed to protect the Lake **Whatcom** watershed comply with the GMA and these measures are unrelated to this appeal. *See Futurewise v.* ***Whatcom*** ***County***, Nos. 05–2–0013 and 11–2–0010c (W. Wash. Growth Mgmt. Hr'gs Bd. Jan. 23, 2014).

3 **Hirst** also asserted, unsuccessfully, that the County's transportation element was inconsistent with its rural element in violation of RCW 36.70A.070 or RCW 36.70A.130; this issue is not before us on appeal.

4 WRIAs establish instream flows affecting the approval of water rights permits and appropriations for most of the state; WRIA 1 is in effect in the County. *See* ch. 173–501 WAC (the Nooksack Rule). There are now 62 WRIAs designated, described, and subject to the rules promulgated by Ecology. *See generally* chs. 173–501 to –564 WAC. Though specific rules apply to each of these WRIAs, they generally share the purpose of retaining "perennial rivers, streams, and lakes in [the WRIAs] with instream flows and levels necessary to provide for preservation of wildlife, fish, scenic, aesthetic, and other environmental values, and navigational values, as well as recreation and water quality." WAC 173–501–020.

5 As an initial matter, we reject **Hirst's** argument that the County's failure to assign error to the Board's findings of fact by number renders these findings verities on appeal. We affirm the Court of Appeals on this issue, noting that the Board did not specifically delineate findings of fact by number; instead, it produced a blend of factual findings and legal conclusions. *See* FDO at 23–44. As the Court of Appeals properly found, "the nature and extent of the County's challenges to [the findings of fact] are clear. Thus, this court's review is not in any way hindered by the absence of formal assignment of error." ***Whatcom County*** *v. W. Wash. Growth Mgmt. Hr'gs Bd.,* 186 Wash.App. 32, 44, 344 P.3d 1256, *review granted,* 183 Wash.2d 1008, 352 P.3d 188 (2015). We may review administrative decisions in spite of technical violations when a proper assignment of error is lacking but the nature of the challenge is clear and the challenged finding is set forth in the party's brief. *Yakima County v. E. Wash. Growth Mgmt. Hr'gs Bd.,* 168 Wash.App. 680, 687 n.1, 279 P.3d 434 (2012). Both are present here, and we reach the merits of the County's challenges.

6 The dissent places undue significance on RCW 19.27.097's location within the state building code. Dissent at 25. Though contained within Titles 19 and 58 RCW, both RCW 19.27.097 and 58.17.110(2) are part of the GMA. The legislature enacted the GMA in 1990 and amended the GMA in 1991. RCW 19.27.097 was in the 1990 act and amended in 1991. *See* LAWS OF 1990, 1st Ex. Sess., ch. 17, § 63; LAWS OF 1991, Spec. Sess., ch. 32, § 28. RCW 58.17.110(2) was amended by the 1990 act. *See* LAWS OF 1990, ch. 17, § 52. While the dissent correctly notes that RCW 19.27.097 contains separate requirements for GMA and non-GMA counties, this does not give this court grounds to ignore the rest of the GMA. We must read RCW 19.27.097 in conjunction with the larger GMA statutory scheme of which it is a part. *See Campbell & Gwinn,* 146 Wash.2d at 9–11, 43 P.3d 4.

7 The dissent notes that this interpretation of RCW 19.27.097 may result in differences between GMA and non-GMA counties in the level of protection for water rights holders. However, the legislature has created a distinction between GMA counties and non-GMA counties, and the resulting differences in resource management between those counties is a natural consequence of this legislation.

8 **Whatcom County** Comprehensive Plan policy 2DD–2.C.6:

> Limit water withdrawals resulting from land division through the standards in the following **Whatcom County** Land Division regulations, adopted herein by reference:
>
> a. WCC 21.04.090 Water supply, Short Subdivisions
>
> b. WCC 21.05.080 Water supply, Preliminary Long Subdivisions.
>
> **Whatcom County** Comprehensive Plan policy 2DD–2.C.7:
>
> Regulate groundwater withdrawals by requiring purveyors of public water systems and private water system applicants to comply with Washington State Department of Ecology ground water requirements per WCC 24.11.050, adopted herein by reference.

9 Wash. Supreme Court oral argument, ***Whatcom County*** *v.* ***Hirst,*** No. 91475–3 (Oct. 20, 2015), at 3 min., 25 sec., *audio recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org.

10 The dissent relies on a 1992 attorney general opinion (AGO) to support its conclusion that RCW 19.27.097 does not require proof of the legal availability of water. Dissent at 27–28. We do not read the AGO to support this conclusion. Rather, the AGO recognizes that in order to assure "adequate" water supply, a local county requires proof of both sufficient quantity and quality before issuing a building permit. 1992 Op. Att'y Gen. No. 17, at 7. Additionally, the AGO recognizes due to our state's "first in time, first in right" water priority system, a local building authority might have to require more than a right to withdraw groundwater by Ecology permit or exemption in order to meet the "adequacy" requirement, and might require proof of legal availability. *See id.* at 11 n.5. However, the AGO fails to fully consider counties' responsibilities under the GMA when permit-exempt wells impede minimum flows. While we give opinions of the attorney general considerable weight, they are not controlling on this court. *Wash. Fed'n of State Emps. v. Office of Fin. Mgmt.,* 121 Wash.2d 152, 164, 849 P.2d 1201 (1993). Further, we give less deference to such opinions when they involve issues of statutory interpretation. *Id.* While the AGO is not

inconsistent with our decision today, we decline to give it weight or consideration here because we find it of limited application to the specific facts of this case, and because it fails to interpret RCW 19.27.097 within the larger GMA statutory scheme.

11 In *Postema,* we considered Ecology's denial of applications for groundwater appropriation permits on the basis that groundwater sources are in hydrological continuity with surface water sources and further appropriations were foreclosed under RCW 90.03.290. 142 Wash.2d at 77–78, 11 P.3d 726. In analyzing whether Ecology properly denied permits under RCW 90.03.290, we considered the statutory requirements placed on Ecology to consider the interrelationship between surface waters and groundwater in issuing permits and asserted that Ecology "must determine whether surface water rights would be impaired or affected by groundwater withdrawals." *Id.* at 80–81, 11 P.3d 726. This was particularly relevant because RCW 90.03.290, which authorizes Ecology to issue permits for water appropriation, "does not ... differentiate between the impairment of existing rights based on whether the impairment is de minimis or significant." *Id.* at 90, 11 P.3d 726.

12 The decision of the Court of Appeals in *Fox* was issued after oral argument in the present case had occurred. Petitioners submitted this additional authority to the Court for consideration. Appellant's Statement of Additional Authority at 1. In their statement, the petitioners quoted several passages from the opinion, prefacing each quote with a short statement about the context or meaning of the passage. Respondent County objected to petitioners' statement, claiming that it contained impermissible argument in violation of RAP 10.8. Objection to Appellants' Statement of Additional Authority at 1. Respondent asked this court to either reject the statement or, in the alternative, strike all argument from the statement. *Id.* at 2. Under RAP 10.8, a party should identify the issue for which the additional authority is offered but the statement "should not contain argument." We agree with the respondent that the petitioners' commentary on the quoted passages crosses the line between permissible identification and impermissible argument. We grant the respondent's motion to strike this language from petitioners' statement, but we decline to reject the statement in full.

13 Counties may not rely on Ecology's inaction in failing to close a basin as a determination that water is presumptively available for appropriation. Such inaction fails to provide any assurance that a new permit-exempt well will not infringe on senior water rights, and thus fails to satisfy the obligation the GMA places on counties to ensure that water is legally available before issuing a building permit. *See* RCW 19.29.097(1); RCW 58.17.110. However, if and when Ecology makes a determination to close a basin to all future appropriations, including permit-exempt appropriations, this positive action by Ecology amounts to a recognition that water is not available for any use, and may form a reasonable basis for a county to find that water is not legally available for further appropriation.

14 During oral argument, the County conceded that it had notice of two documents by the second hearing before the Board and that the documents were now properly a part of the record. *See* Wash. Supreme Court oral argument, *supra,* at 52 min., 45 sec. to 57 min., 17 sec. Based on this concession and our reasoning at Section III.B, *infra,* we do not address this procedural argument further.

1 The Nooksack Water Resource Inventory Area, chapter 173–501 WAC.

2 By adopting the Nooksack Rule, the County *presumes* there is an adequate supply to provide water for a permit-exempt well unless Ecology has expressly closed that area to permit-exempt appropriations. Majority at 4. As the majority notes, this means the County's position is that "water is presumptively available–i.e., that 'not unavailable' is synonymous with 'available.' " *Id.* at 7. For further discussion of the Nooksack Rule, see *id.* at 12–13.

3 Ecology is, of course, not a party to this case, so this court cannot direct what it must do to assist the County in the development of a comprehensive plan and zoning code that meets the County's obligations under the GMA. But this case presents an opportunity to highlight the generally applicable importance of comprehensive planning between the State and local governments under the Water Resources Act of 1971, chapter 90.54 RCW, and the GMA.

4 Wash. Supreme Court oral argument, ***Whatcom County*** *v.* ***Hirst,*** No. 91475–3 (Oct. 20, 2015), at 30 min., 50 sec., *audio recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org. *See also Kittitas County Conserv. Coal. v. Kittitas County,* Nos. 07–1–0004c & 07–1–0015, 2014 WL 4809403, at *8–11 (E. Wash. Growth Mgmt. Hr'gs Bd. Aug. 13, 2014) (detailing the comprehensive plan, developed after remand from this Court in *Kittitas County,* 172 Wash.2d 144, 256 P.3d 1193, found in compliance with the GMA).

1 Permit-exempt wells that are regularly, beneficially used, are "entitled to a right equal to that established by a permit." RCW 90.44.050. "The authority to adjudicate and enforce water rights ... is specifically granted to the superior courts...." *Rettkowski v.*

Dep't of Ecology, 122 Wash.2d 219, 225, 858 P.2d 232 (1993), *aff'd in part and rev'd in part,* 128 Wash.2d 508, 910 P.2d 462 (1996).

2 If the Department of Ecology determines that water is not legally available for permit-exempt withdrawals, it has the authority to close a basin to all future consumptive use, including permit-exempt wells. *See* WAC 173–501–070(2) (closing **Whatcom** Creek "to any further appropriation, including otherwise exempted single domestic use"). Under the rule I propose, counties could integrate the Department of Ecology's rules into their codes and rely on its closure of a basin to permit-exempt withdrawals to deny a building permit. Although the majority does not address this scenario, its holding suggests that counties could *not* rely on the Department of Ecology's decision to close a basin, but would instead have to engage in an independent analysis to determine if a proposed permit-exempt withdrawal would, in fact, affect a senior water right before denying a building permit.

3 To be eligible to utilize a permit-exempt well, the withdrawal of groundwater must be "for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052 [Whitman County clustered residential developments pilot project], or for an industrial purpose in an amount not exceeding five thousand gallons a day." RCW 90.44.050.

4 In *Campbell & Gwinn*, we held that "commonly owned developments are not exempt [from water permitting requirements] and therefore must comply with the established well permitting process if the total development uses more than 5,000 gallons of water per day." *Kittitas County,* 172 Wash.2d at 177, 256 P.3d 1193.

5 The majority finds additional support for its position "that counties must consider minimum flows when issuing building permits, even for developments relying on permit-exempt wells" in *Fox v. Skagit County,* 193 Wash.App. 254, 372 P.3d 784 (2016) (Division One), *petition for review filed*, No. 93203–4 (Wash. June 7, 2016). Majority at 17. A petition for review is pending in *Fox,* and it offers no greater authority than the decision below, also from Division One of the Court of Appeals. *See id.* For the reasons explained above, I would reject Division One's view that a county must determine whether a permit-exempt well would infringe senior water rights before issuing a building permit. *See id.* at 271, 372 P.3d 784.

6 The majority relies on *Postema* for the proposition that the Department of Ecology's understanding the effects of groundwater withdrawals on surface water has changed over time. *See* majority at 7. The majority then states that because in *Postema* we held the Department of Ecology must take these impacts into consideration when issuing groundwater withdrawal permits, counties must also take these impacts into account when issuing building permits. *Id.* at 7–8. As explained above, *Postema* does not require counties to evaluate the legal availability of water when considering building permits relying on permit-exempt wells. Furthermore, just because the Department of Ecology's understanding of water has evolved does not mean that counties are required to reevaluate the science behind the Department of Ecology's basin rules. If a party wishes to challenge a basin rule because of "old" science, the party may do so under Washington's Administrative Procedure Act, chapter 34.05 RCW. A challenge to the county's comprehensive plan is not the appropriate procedure.

7 Domestic use permit-exempt wells may not withdraw more than 5,000 gallons of water per day. RCW 90.44.050. That equates to 3.47 gallons per minute (gpm). For comparison, for houses constructed under the Department of Housing and Urban Development mortgage insurance relying on individual water systems, "[t]he system should be capable of delivering a flow of 5 gpm." 24 C.F.R. § 200.926d(f)(2)(i). The withdrawals at issue in *Postema* were 280 gpm, 142 Wash.2d at 101, 11 P.3d 726; 200 gpm, *id.* at 103, 11 P.3d 726; 3,500 gpm, *id.* at 108, 11 P.3d 726; 60 gpm, *id.* at 111, 11 P.3d 726; and 100 gpm, *id.* at 115, 11 P.3d 726.

8 This publication, number 15–11–017, is available at http://www.ecy.wa.gov/programs/wr/wrac/images/pdf/15-11-017-reviewdraft.pdf [https://perma.cc/SAM2-88WK].

9 This publication, number WR–98–154, is available at https://fortress.wa.gov/ecy/publications/documents/98154.pdf [https://perma.cc/JS6H-S3DX].

10 *See* Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington:Past, Present, and Future,* 16 U. PUGET SOUND L. REV. 867, 881–96 (1993) (recounting full legislative history). Relevant here is that at the time the legislature enacted RCW 19.27.097, it considered eliminating permit-exempt wells. The original Engrossed Substitute House Bill 2929 included a provision that removed the exemption; required those who wanted to construct a previously permit-exempt well to provide the Department of Ecology with 60 days' notice; allowed the Department of Ecology to require those wishing to construct a formerly exempt well "to apply for a water right permit if the area within which the withdrawal would occur is known

or believed to have problems related to water availability, water quality, interference with existing water rights, or other related problems which could be adversely affected by additional withdrawals of ground water"; and allowed the Department of Ecology to deny the permit "if water is not available, if the use is not a beneficial use, if the use would adversely affect existing water rights, if the use would threaten water quality or if the use would be inconsistent with a local comprehensive plan." ENGROSSED SUBSTITUTE H.B. 2929, at 54–55, 51st Leg., Reg. Sess. (Wash. 1990). The senate amended the bill, removing these provisions. S. AMEND. ENGROSSED SUBSTITUTE H.B. 2929, 51st Leg., Reg. Sess. (Wash. 1990). After significant debate, *see* Settle & Gavigan, *supra*, at 886–87, the bill that was ultimately signed by the governor did not contain these provisions. *See* LAWS OF 1990, 1st Ex. Sess., ch. 17.

1200 King County Courthouse
516 Third Avenue
Seattle, WA 98104

KING COUNTY

Signature Report

January 3, 2018

Ordinance

Proposed No. 2016-0414.2 **Sponsors** McDermott

AN ORDINANCE concurring with the hearing examiner's approval, subject to conditions, of the preliminary plat of Echo Lake Estates, located on the south side of SE 96th Street, east of the Snoqualmie Parkway, department of permitting and environmental review file no. PLAT160002.

BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

SECTION 1. This ordinance hereby adopts as its action, and incorporates herein as its own the findings, conclusions and decision, the hearing examiner's October 6, 2017, final order, contained in Attachment A to this ordinance, and the hearing examiner's October 6, 2017, amended report and decision, contained in Attachment B to this ordinance, approving, subject to conditions, the preliminary plat of Echo Lake Estates,

located on the south side of SE 96th Street, east of the Snoqualmie Parkway, department of permitting and environmental review file no. PLAT160002.

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

_____

J. Joseph McDermott, Chair

ATTEST:

_____

Melani Pedroza, Clerk of the Council

APPROVED this _____ day of _____, _____.

_____

Dow Constantine, County Executive

Attachments: A. Hearing Examiner Report Dated October 6, 2017, B. Amended Hearing Examiner Report and Decision Dated October 6, 2017

October 6, 2017

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
King County Courthouse
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Seattle, Washington 98104
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hearingexaminer@kingcounty.gov
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FINAL ORDER

SUBJECT: Department of Permitting and Environmental Review file no. **PLAT160002**

ECHO LAKE ESTATES
Preliminary Plat Application

Location: South side of SE 96th Street, east of Snoqualmie Parkway, Snoqualmie

Appellants: City of Snoqualmie; King County Public Hospital District No. 4 (d/b/a Snoqualmie Valley Hospital)
represented by **Bob Sterbank**
PO Box 987
Snoqualmie, WA 98065
Telephone: (425) 831-1888
Email: BSterbank@ci.snoqualmie.wa.us

Applicant: Puget Western Inc
represented by **Heather Burgess**
724 Columbia Street NW Suite 320
Olympia, WA 98501
Telephone: (360) 742-3500
Email: hburgess@phillipsburgesslaw.com

King County: Department of Permitting and Environmental Review
represented by **Devon Shannon** *and* **Jina Kim**
King County Courthouse
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INTRODUCTION

On September 29, 2016, we held a public hearing on a proposed six-lot subdivision, Echo Lake Estates. Bill Moffet testified for Puget Western Inc (Applicant). Kim Claussen and Pat Simmons testified for the Department of Permitting and Environmental Review (DPER). Two neighbors also appeared; Ron Meyers offered testimony and asked questions, while Joseph Amedson only noted that he was potentially interested in purchasing one of the lots and asked a question about distances.

On October 12, we issued a Report and Decision approving the preliminary plat, the same week our Court decided *Whatcom County v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016). The City of Snoqualmie (the City) and the King County Public Hospital District No. 4 d/b/a Snoqualmie Valley Hospital (the Hospital) (collectively Appellants) timely filed a motion for reconsideration on November 7.

The parties jointly requested several extensions to our initial briefing schedule while they attempted to resolve the case. Those settlement efforts stalled, and we received the briefs. On February 16, 2017, we issued a preliminary order listing several determinations to that point, including:

- rejecting Appellants' motion to reopen the record to admit new evidence, explaining that the factual record will remain as it closed on September 29, 2016;
- taking judicial notice of WAC 173-507-030;
- taking judicial notice of *Hirst*, even though the Court did not issue its mandate in *Hirst* until November 1, 2016, well after our October 12, 2016, decision; and
- rejecting Applicant's alternative argument that if *Hirst* requires current applicants to demonstrate legal water availability, we should bump that demonstration to the building permit application stage.

We closed by requesting briefings on several open topics. The parties then jointly sought and received several briefing extensions, while the legislature attempted to figure out a solution for *Hirst*. When the legislative session ended without a compromise, the parties submitted additional briefing. Along with our simultaneously-issued Amended Report and Decision, we now issue this final order.

EXHAUSTION AND STANDING

The threshold question is whether Appellants, who failed to participate at all in our hearing process, have standing and/or sufficiently exhausted their remedies such that they should be able to challenge our decision.

Our standard for reconsideration is:

> Before the expiration of the applicable appeal period…, a party may file with the examiner a motion requesting that the examiner reconsider a determination. A timely motion stays the timelines…until the examiner rules on the motion. The examiner may grant the motion if the person making the motion shows that the determination was based in whole or in part on erroneous information or failed to

> comply with existing laws, regulations or adopted policies or if an error of procedure occurred that prevented consideration of the interest of persons directly affected by the action.

KCC 20.22.220.A.2 (underscore added). Similarly, for appeals of an examiner decision to the Council, KCC 20.22.230.A (underscore added) states that.

> A person initiates an appeal to the council from an examiner recommendation or decision by filing an appeal statement with the clerk of the council and providing copies of the appeal statement to the examiner and to all parties.

On one reading, the standard for appealing to Council is *broader* than the standard for asking the examiner to reconsider a decision, leading to an absurd result; if anything, standing requirements become *stricter* as one moves up the proverbial ladder. We reiterate what we wrote in February: it would be foolish to interpret the breadth of our reconsideration standard as any narrower than the Council's standard in analyzing an appeal from our final decision. If one could file an appeal to Council, one should be able to file a motion for reconsideration to us beforehand to avoid the need for a costly appeal to Council. We read the standards *in pari materia*.

The Applicant and County assert that only a party could file a motion for reconsideration; because neither the City nor the Hospital filed a petition to intervene before our September 29, 2016, hearing, we should not consider their motion.[1] For an *appeal* to the examiner from a County decision, hearings are "public" in the sense that anyone may observe, but participation is limited to the parties (including those who previously and successfully petitioned to become a party) and the witnesses the parties call. However, where the case reaches us as an *application*, the line between parties and nonparties is not so strong. The application hearing itself is a true "public hearing": anyone can come and offer evidence or argument, whether a party calls her to the stand or not, and whether or not she previously requested intervenor status.[2] Applicant's and the County's position certainly has some merit.[3] But ultimately we reject their proposed standard as too harsh.

For example, neighbor Ron Meyers took the time to participate in our September 29 hearing and offer information and argument regarding water availability. We bend over backwards to allow the public ample participation in application hearings. Rather than—as some examiners do—limiting members of the public to a three minute statement, we typically allow much more, including allowing attendees to ask questions of agency or applicant witnesses, as Mr. Meyer did.[4] He acquitted himself well. If, prior to the expiration of the appeal deadline, Mr. Meyers had

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[1] Exam. R. X.B. There appears to be some confusion about "parties of record" and "parties." They are not the same. The "party of record" list Appellants refer to is our mailing list of who we send our notices and decisions to; in high-profile cases it might reach into the triple digits. "Parties," conversely, is a much more limited term defined in Exam. R. II.J.

[2] For a preliminary plat application, we have been appointed to entertain the ordinance and hold the public hearing in Council's stead. KCC 20.22.050; KCC 20.20.020.E.

[3] *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 660–61, 375 P.3d 681 (2016) (appellant had no standing to appeal, despite his earlier participation.)

[4] Our hearing thus offered much more opportunity for public participation than the hearing discussed in *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997), where individual citizens were permitted to speak for only three minutes. Our Rules make clear that while only parties have a right to cross examine

moved for reconsideration, he would have had standing and/or have exhausted his remedies, despite of his not having filed a motion to intervene before the hearing.[5] To interpret the rules to require someone like Mr. Meyers to initially file a petition for intervention in order to have a voice later would be anathema to the public participation that is the hallmark of our open hearings process. It might also lead to a stampede of petitions for intervention, as anyone concerned about an application and wanting to have any future say in the matter would need to fight to obtain party status. That has never been how we have interpreted our process, and we do not change our view now.

Appellants' interpretation—that any person, *whether or not* he or she participated in the public hearing (either live or by submitting written comments prior to the record closing), could file a motion for reconsideration or an appeal—would create even more absurd results. Anybody could wait like a snake in the grass to see how the public hearing turned out and what our decision was, and then file a motion for reconsideration or an appeal, asking for a "do over" to try to submit evidence and argument they should have submitted during the public hearing process. That would make a mockery of the entire essence of the public hearing process.

With those understandings in place, we consider first exhaustion and then standing.

Exhaustion

A crucial rationale for the doctrine of exhaustion is that it "provides a more efficient process." *Durland v. San Juan County*, 182 Wn. 2d 55, 68, 340 P.3d 191 (2014). With the parties arguing back and forth about whether to include or exclude factual submissions filed well after the hearing, the absence of the ability to the cross examine factual assertions as at our hearing, and briefing issues surrounding factual water availability and WAC 173-507-030 that could have been tackled as part of an orderly hearing process, allowing non-participants a second bite at the apple post-hearing shows how monstrously inefficient a process that does not require participation in the initial public hearing would be.

If for some reason either the Hospital or the City had been too busy or had a conflict on September 29, 2016, either could have submitted something in writing on or before September 29, as the hearing record the examiner may draw from expressly includes "[w]ritten comments the examiner receives prior to the record closing." Exam. R. X.B.5. Neither did. We have never interpreted our code to mean that one can completely fail to participate (either in person or in writing) in our hearing process and yet later try to weigh in, and we do not change our view now. Otherwise a "public hearing" is really just a "try to show up if it's convenient, or at least submit something in writing, but if even that's too much trouble, don't worry. Just wait in the wings. You'll get a second bite at the apple later."

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witnesses, so long as it does not "unduly burden proceedings," we may allow others to do so "to create a complete record and enhance public confidence." Exam. R. XII.E.3. We did so at our September 29, 2016, hearing.

[5] Because Mr. Meyers did not appeal or seek reconsideration during the initial appeal window, and because today's Amended Report and Recommendation is in no respects less favorable to him, and in fact is more favorable to him, he would not have standing or have exhausted his administrative remedies to challenge today's Amended Report and Decision. But he would have had standing and have exhausted his remedies if he had filed something on or before November 7, 2016.

Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 947 P.2d 1208 (1997), is on point. The Court reaffirmed that it has and will continue to "require issues to be first raised at the administrative level and encourage parties to fully participate in the administrative process." *Id.* at 869. Appellant there had "participated in all aspects of the administrative process and raised the appropriate project approval issues." *Id.* at 869–70. It had "opposed the…project through written correspondence to the city council and through testimony at the public hearings." *Id.* at 870.

The sticking point in *Mount Vernon* was not whether the would-be appellants had to participate in the public hearing at all, but "how much participation at a public hearing is required to exhaust an administrative remedy." *Id.* at 869. The Court reasoned that "[i]ndividual citizens did not have to raise technical, legal arguments with the specificity and to the satisfaction of a trained land use attorney during a public hearing," and held that appellant had sufficiently exhausted its administrative remedies. *Id.* at 870–71. Thus, in considering post-hearing standing in light of *Mount Vernon*, we would need to look flexibly at what *degree* of participation would allow a later challenge.[6]

So, for example, if Mr. Meyers had, prior to the November 7, 2016, expiration of the appeal window, filed a motion for reconsideration or appeal, we or the Council might have needed to allow him to raise new water-related arguments for why Echo Lake should not be approved. But that is not our scenario at all. Appellants were a no-show at the September 29 public hearing and did not even take the time to submit any written comments. Allowing them to raise a challenge after the record closed would violate the sensible way that our Court addresses such questions, namely that we interpret our code, as the Court did, to "encourage parties to fully participate in the administrative process." *Mount Vernon* at 869. *See also Ward v. Board of Co. Com'rs, Skagit Co.*, 86 Wn. App. 266, 271–72, 936 P.2d 42 (1997) (observing the "logic" of "sensibly" confining the category of those seeking review of an administrative decision "to those who participated in the administrative process to the extent allowed").

Appellants are correct that no judicial opinion involves KCC chapter 20.22 or the Examiner's Rules or any code with language identical to ours. Thus none are *directly* controlling. But the clear line of judicial reasoning is unbroken. Moreover, even if there were no published court decision addressing the issue, we are confident a superior court would not lightly craft a rule that if a court provided legally sufficient notice of its hearing—say on a class action certification or whether to approve or dissolve a consent decree—someone who declined to participate would later be allowed to complain about the result and essentially ask for a "do over." And, any such rule would need to apply to the City of Snoqualmie and *its* public hearings as well. If we are wrong, and if a court tells us we must adopt a more open-ended understanding of what our hearing process means, we will certainly abide by that new interpretation. But we will not *sua sponte* create our *own* end-run around the hearing process today.

[6] As described above, our hearing offered much more opportunity for public participation than the hearing discussed in *Mount Vernon*, where individual citizens were permitted to speak for only three minutes. The *Mt. Vernon* Court was thus more generous in its treatment of its particular appellants, distinguishing some of its earlier, stricter decisions as applying to cases where the would-be appellant had a more formal process available than simply being allowed to speak for three minutes. *Id.* Even applying the more lenient *Mt. Vernon* test, Appellants fail, but it is not even a clear that a more lenient test is even applicable here, given the much broader (than the hearing in *Mt. Vernon*) opportunities for input our process allowed.

So the general rule—which we apply until instructed otherwise—is that a person who fails to participate in a public hearing process cannot later challenge the results of that public hearing. The question now is whether the facts here dictate some sort of exception or carve out.

Obviously, there could have been an "error of procedure… that prevented consideration of the interests of the person directly affected by the action," an explicit ground for a motion for reconsideration or an appeal. KCC 20.22.220.A.2, .240.D.1. Appellants' brief and reference to our party of record list, which is really our mailing list, caused us to go back and look at our Notice of Hearing.[7] The City was actually on our mailing list for our September 15, 2016, notice of hearing; it received actual notice. The Hospital was not on our mailing list, but neither was Mr. Meyers; that is why the code requires applicants to post sandwich boards on a site and why DPER mails initial notices of application to those within a certain radius. Again, Appellants did not, in their mountain of briefings, alleged any procedural irregularities that prevented their participation.

Similarly, if Applicant's preliminary plat application or DPER's recommendation had the proposed plats' water source coming from *outside* the Raging River basin and then (after hearing the facts and argument) we approved the application, with a modification to require that water be pulled instead from the Raging River basin, a person who exercised due diligence would have had no reason to suspect that Echo Lake would impact her (alleged) Raging River Basin water rights, and thus would have a valid excuse to complain later. But that is decidedly not our scenario. Nothing changed, factually, with Echo Lake. The Applicant's SEPA checklist stated that water service would be provided by construction of a Group B well to serve all six parcels. The Applicant identified the site as in the Raging River basin.[8] That and Public Health's approval of the water system were in the file and open for discovery and review. Nothing changed in DPER's preliminary report to the examiner. And nothing changed with our decision—we approved what the Applicant had been proposing and DPER had been recommending all along. Unlike our hypothetical appellant, the real Appellants lack a sufficient excuse.

The only excuse for their lack of participation Appellants raise is that *Hirst* presents changed circumstances. They argue it thus would have been "futile" for them to participate. "[E]xhaustion is excused if resort to administrative procedures would be futile." *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 74, 768 P.2d 462 (1989). We could certainly construct a hypothetical that would fit that bill. Suppose someone had timely submitted a motion asking us to reconsider our decision or an appeal asking the Council to overturn us with the following pitch:

> I was not sleeping on my rights, or at least not sleeping on my rights as I reasonably understood them before *Hirst*. I took the time to read the sandwich board, do my due diligence, and review the open public file. I saw that Applicant had made a sufficient showing of *factual* water availability, so I could not

[7] There appears to be some confusion about "parties of record" and "parties." The "Parties of Record" to which Appellants refer is our mailing list of who we send our notices and decisions to. This is a minor, six-unit development, but in large, high-profile cases the list might reach into the triple digits. "Parties," conversely, is a limited term defined in Exam. R. II.J.

[8] This case is not at all like *Lauer v. Pierce County*, 173 Wn.2d 242, 263, 267 P.3d 988 (2011), where the Court opened things up later because the applicants had knowingly misrepresented or omitted material facts in their application.

> legitimately challenge Echo Lake on that ground. I had read WAC 173-507-030 closing the Raging River basin, but saw that, unlike some other Ecology rules, WAC 173-507-030 did not apply to permit exempt wells, so I could not have challenged Echo Lake on that ground either.
>
> Since I also draw my water from the Raging River basin, I was and am concerned that, if built out, Echo Lake will impair my water availability. But prior to *Hirst*, I thought—as the Examiner, Applicant, and DPER did—that a permit "exempt" well was just that, exempt from the need to show non-impairment. Thus it seemed futile for me to present—either in writing prior to September 29 or at the September 29 hearing itself—evidence of my pre-existing water rights and my concern that Echo Lake would "drink my milkshake."

That would have been a winning argument, excusing that hypothetical appellant's failure to exhaust her remedies, and providing ample ground (if she filed a motion for reconsideration) for us to reopen the record to allow her to submit her evidence of a senior water right, establish standing, and challenge whether the Applicant has shown legal water availability, or (if instead she filed an appeal to Council) for the Council to remand the case to us to allow her to do so.[9] Our actual Appellants, instead, have (post-hearing) vociferously argued two other prongs for denial.

First, Appellants have—consistently since November 7, 2016—attempted to belatedly attack the factual sufficiency of Applicant's water showing. Again, Appellants knew all along—or would have known, if they had looked at the file—that the Applicant was proposing (and DPER was recommending) to take water from the Raging River basin, and the standard at all times was then (as now) that a preliminary plat applicant had to show "appropriate provisions" for "potable water supplies." *Hirst* provides Appellants with an extra *argument* for asserting that the applicant had not shown such adequate provisions. But Appellants have, from the moment they filed their motion for reconsideration, challenged whether the Applicant made a sufficient showing of factual water availability. While it is futile now for them to raise such a challenge, it would not have been futile for them to do so on or before September 29, 2016.

Second, Appellants have also since November 7, 2016, consistently argued that WAC 173-507-030 requires denying Applicant's proposal. Yet WAC 173-507-030 describes the Raging River basin as having been closed since 1951, was filed in 1979, and has not been impacted by any agency filings since at least 2003. http://apps.leg.wa.gov/WAC/default.aspx?cite=173-507-030. Appellants thus had ample reason to participate in the hearing process to raise their WAC-based arguments on or before September 29, 2016, and no sufficient excuse to for their failure to do so. Appellants simply failed to exhaust their remedies.

Standing

As to standing, Division I recently summarized the Court's standing jurisprudence in land use cases: a petitioner must show that she would suffer injury in fact as a result of the land use decision, meaning the petitioner must allege a specific and perceptible harm; where the harm is a

[9] On an appeal, Council's "consideration of an appeal from…a decision…of the examiner shall be based on the record as presented to the examiner at the public hearing and upon written appeal statements based upon the record." KCC 20.22.240. So Council could not directly allow in new evidence.

threaten injury rather than an existing injury, she must also show the injury is more than conjectural or hypothetical but is immediate, concrete, and specific. *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 662, 375 P.3d 681 (2016) (internal and external citations omitted). Appellants are incorrect thus that *Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011), created a special rule that mere allegations of injury are sufficient to establish standing.

Knight, in fact, is highly instructive. There, the petitioner participated in the examiner's public hearing on the preliminary plat approval and argued that approval would harm petitioner's water rights. *Id.* at 975. After the examiner granted conditional preliminary plat approval, petitioner moved for reconsideration, and when the examiner denied this, appealed to the city council. *Id.* at 977. The council found that petitioner had not shown that she would actually suffer any specific and concrete injury as it related to potable water, and thus was not an aggrieved person. *Id.* at 977. Our Court reversed, finding that petitioner had standing, that she had shown sufficient prejudice. *Id.* at 982.

Again, the *Knight* petitioner had participated in the examiner proceeding and had entered evidence into the record about the distance from her property to the proposed subdivision, her senior water rights within the same aquifer, and evidence of a water deficit for several years (backed up by petitioner's expert witness's calculations and hydrogeologist's report). *Id.* at 982–83. Knight's allegations were based on ample facts Knight had submitted into the record prior to the record's close.

In contrast to *Knight*, Appellants seek to make those showings not in relation to what is in the record as it closed on September 29, 2016, but by submitting *new* facts, such as parcel viewer shots, well logs, assessor's office ownership records, water rights reports on examination, a 1986 treatise, an email, and factual declarations tying Appellants' location, well, and interests to the record. Had those been submitted while the record was opened, they likely would have been sufficient to establish standing. But with the evidential record closed, they come too late. Based on the record as it closed September 29, Appellants lack a sufficient showing of injury or harm.

Appellants' argument that if we determine that they lack standing we will be denying "the City and the Hospital any opportunity to challenge [Applicant's] lack of evidence of adequate water in the potential threat to the Hospital's water rights and the City's municipal system," App. 8/4/17 br. at 8, is misleading. Appellants *already had* that opportunity; that was what the September 29, 2016, hearing was for, as Mr. Meyers' participation illustrated. And if one or both appellant could not have made it to that day's hearing, either or both could have submitted written documentation prior to the record's close. They did not, forfeiting their opportunity to establish standing. There is no second bite at the apple.

In previous cases, it has been the *County* that has failed to submit the necessary evidence prior to the record closing, and we have been similarly unmoved by the County's request that we re-open the record. For example in *Hawes—V16006259*, County Animal Services sought removal for a vicious dog because the Hawes (allegedly) failed to comply with the requirements for keeping their vicious dog in the County, requirements that had been set by an earlier Notice of Violation and Order of Compliance (NVOC). However, Animal Services failed to introduce that NVOC into the record during our removal hearing. We thus granted the Hawes appeal, reasoning that Animal Services could not prove a failure to comply with requirements when those requirements were not in the record. After we issued our decision, Animal Services moved for reconsideration,

asking us to reopen the record to allow them to belatedly submit the NVOC. We declined, stating that:

> The basic rule is that evidence submitted after hearing close is not considered or included in the hearing record, unless the examiner uses his or her discretion to reopen the record. Ex. R. XI.C.2. One of the three explicit bases KCC 20.22.220.A.2 provides for a motion for reconsideration is an "error of procedure… that prevented consideration of the interest of persons directly affected by the action." Animal Services did not assert any error of procedure that prevented them from submitting the NVOC. Nor is this a case where, for example, some twist was presented at hearing where the losing party could afterward plead surprise and argue for augmenting the record, posthearing; Animal Services' theory was always that the 2015 NVOC had been violated.[10]

In *Hawes* the rationale for re-opening the record was even stronger, because the County had at least participated in the hearing process: they had simply forgotten to introduce the crucial document. Yet we rejected the County's entreaty. Here, Appellants did not even bother to participate.

We will not be reopening the record. And on the record as a closed on September 29, 2016, Appellants come nowhere close to establishing standing.

***SUA SPONTE* RECONSIDERATION**

Thus, Appellants lack standing and failed to exhaust their administrative remedies. Appellants' motion to reopen the record and/or to reconsider our decision is DENIED.

We do not, however, wrap up our involvement by simply allowing our October 12, 2016, approval of the Echo Lake preliminary plat to stand as-is. Appellants' timely motion did accomplish one very important thing: it effectively kept our decision from becoming final and unreviewable, as it would have if November 7 had come and gone with no activity. And, "[u]pon a timely request or *sua sponte*, an examiner may reconsider a determination based on the existing evidential record." Exam. R. XVI.A.1. Because *Hirst* occurred after the record closed and is a (potential) game-changer, we will analyze *Hirst* under the existing evidential record (i.e. the record as it closed September 29, 2016) and reconsider our October 12 decision.

Before turning to *Hirst*, we wrap up two other points on which we requested briefing.

First, under the "existing evidential record" that closed September 29—which does not include any of Appellants' later-filed factual assertions or documents they attempted to inject into the record—the Applicant proved by a preponderance of the evidence *factual* water availability sufficient to meet the requirement that a preliminary plat applicant show "appropriate provisions are made for…potable water supplies." KCC 20.22.180. *See also Knight v. City of Yelm*, 173 Wn.2d 325, 344, 267 P.3d 973 (2011) (describing the *preliminary* plat—as opposed to a *final*

[10] Available at http://www.kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/animal%20enforcement/2017/2017%20march/V16006259_Hawes_OrderOnMotionForReconsideration.ashx?la=en.

plat—inquiry as an applicant having to make a "threshold" showing). This is addressed further in our Amended Report and Recommendation.

Second, WAC 173-507-030 is a promulgated rule, and we can stay true to our "existing evidential record" while still reconsidering our October 2016 decision in light of this WAC, which states:

> [Ecology] having determined there are no waters available for further appropriation through the establishment of rights to use water consumptively, closes the following streams to further consumptive appropriation for the periods indicated. These closures confirm surface water source limitations previously established administratively under authority of chapter 90.03 RCW and RCW 75.20.050.

The WAC then goes on to list "SURFACE WATER CLOSURES," including Stream: Raging River, Tributary to Snoqualmie River; Date of Closure: 9/20/51; and Period of Closure: All year. Given that whatever the Raging River basin has been closed for, it has been closed for since 1951, and WAC 173-507-030 was filed in 1979 and has not been impacted by any agency filings since 2003, if it is applicable to the permit exempt wells at play for Echo Lake, it was applicable in October 2016, and thus our decision was an error. We thus reconsider our decision in light of this WAC.

The County argues that because the Raging River closure is only a "SURFACE WATER CLOSURE," this WAC only applies to surface waters, and is not applicable to groundwater withdrawals. Co. 8/4/17 Br. at 6–7. Appellants have the better argument here, that the surface water/groundwater analysis is more nuanced. WAC 173-507-040 states that in "future permitting actions" (presumably meaning after 1979) relating to groundwater withdrawals, the natural interrelationship of surface and groundwaters shall be fully considered in water allocation decisions." The surface/groundwater distinction is not so clear cut.

Instead, it is Applicants' who carry the day on this point. It is not the surface water/groundwater distinction but that WAC 173-507-030 (Snohomish) simply does not apply to permit-exempt wells at all. When Ecology wants to write a rule covering permit exempt wells for a particular basin it knows how to do so. *See, e.g.*, WAC 173-505-030(2) (Stillaguamish) ("appropriation" covers "groundwater withdrawals otherwise exempted from permit requirements"); WAC 173-517-100(2) (Quilcene-Snow Water) (closure applies to "permit-exempt withdrawals"); WAC 173-527-070 (Lewis) (basin closed to "new permit-exempt withdrawals"). While our Court recognizes that there is "some appeal to the idea that all of the rules should mean the same thing," it rejected the invitation to "search for a uniform meaning to rules that simply are not the same." *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 87, 11 P.3d 726 (2000). *Hirst* confirmed this, explaining that Ecology's Nooksack Rule (WAC 173–501) only closed one out of the 48 covered basins to permit-exempt appropriations. 186 Wn.2d at 676. *Hirst* did not say Whatcom County was wrong to interpret WAC 173-501 as inapplicable; for 47 of its basins *Hirst* said that the WAC *itself* that was not sufficiently protective.

In case there is any lingering doubt, as Appellants point out, Ecology's interpretation of its own regulations is entitled to great weight. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). As Appellants note, in November 2016 Ecology issued a

Focus on Water Availability.[11] In that document Ecology has some things to say about *Hirst*, discussed below. But as to WAC 173-507 itself, Ecology is clear that the "the rule [Instream Resources Protection Program rule (WAC 173-507)] adopted by Ecology for this watershed does not limit the use of permit-exempt wells" (emphasis added). While WAC 173-507 and a host of other WACs will likely (unless or perhaps even if the legislature enacts something) need to be amended to comply with *Hirst*, the current version of WAC 173-507-030 does not impact our case.

IF OR HOW DOES *HIRST* APPLY?

Introduction

The other issues in this case—whether Appellants have standing or a sufficient excuse for failing to exhaust their administered remedies, whether we should belatedly re-open the evidential record, whether under the existing record Applicant has shown (for preliminary plat purposes) sufficient factual water availability, and whether WAC 173-507-030 impacts our permit-exempt wells—have crystal-clear answers. Conversely, *Hirst* not only lacks crystal clarity, it is downright murky. Using a more legal analogy, we would reach our other rulings here even if we applied a strict, clear-and-convincing standard against the County and Applicant; conversely, it is challenging to find a reading of *Hirst* that passes even the most lenient preponderance-of-the-evidence standard. Anyone claiming absolute knowledge of how *Hirst* applies to current applications is either (a) unsuccessfully attempting to fool us or (b) fooling themselves. Nevertheless, we give it the old college try.

Nobody—including the Applicant or the County—claims that the County's current Comp Plan and implementing regulations are *Hirst*-compliant. Action 13 in the County's 2016 Comp Plan, addresses *Hirst* by name, interpreting it as requiring "the County to develop a system for review of water availability in King County, with a particular focus on future development that would use permit exempt wells as their source of potable water," starting with a Water Availability and Permitting Study carrying a July 1, 2018 deadline for final reporting, followed by implementation through amendments to the Comp Plan and development regulations.[12]

Either the legislature will have to overrule *Hirst*, the County will have to amend its Comp Plan and regulations to ensure future consistency with *Hirst*, or some combination of the two needs to happen (state legislature partially eases *Hirst* and County needs to conform its Comp Plan and regulations to comply with the new legislative enactment). The question is what happens in the interim.

There are three ways of looking at what *Hirst* means. First, *Hirst* requires only that the County craft a *Hirst*-compliant system for future applications—i.e. even if someone filed an application tomorrow, that application would still be analyzed under the current Comp Plan and regulations. Second, *Hirst* applies immediately (*i.e.* even before the Comp Plan or regulations are updated) to any applications not vested prior to *Hirst*. And third, *Hirst* applies to any decision anyone in the County (including the examiner) has to make, regardless of whether the application vested to the requirements in place at the time a completed application was submitted (here, March 2016).

[11] See https://fortress.wa.gov/ecy/publications/documents/1111012.pdf (rev. Nov. 2016),
[12] Available at http://kingcounty.gov/~/media/Council/documents/CompPlan/2016/FullCouncil/adoptedplan/Attachment_A-KingCountyComprehensivePlan-120516.ashx?la=en at 12-20.

Appellants' citation to *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 208 P.3d 1092 (2009), with its holding that its decisions are retrospective as well as perspective, is helpful and would win if the County were arguing that *Hirst* could not retroactively be applied to mean that the County's previously-adopted Comp Plan is noncompliant. But it still begs the question of what *Hirst* was trying to say, either, essentially "counties need to amend their Comp Plans and regulations to set up an orderly process by which each county ensures that future applications seeking to employ permit exempt wells will meet our standard," or "starting on October 6, 2016, counties need to apply our standard to all new applications, despite the absence of such plans or regulations," or "starting on October 6, 2016 applications, even if a *pending* application vested under the rules and regulations in place at the time of application, counties need to apply our analysis to its current review." *Lunsford* and its ilk offers no window into what *Hirst* was trying to say.

Agency Understandings

Ecology and DPER conceivably do. While we strike Appellants' extra-record submittals and will not add to the evidential record, we take official notice of two documents Appellants note: Ecology's *Focus on Water Availability* discussed above and DPER's *Special Notice Private "Exempt" Wells.*[13] These are not documents that anyone could have been entered into the record by September 29, 2016, because they did not then exist. And while the Applicant is correct that neither of these quite fits the public regulation, rule or adopted policy of a public agency we may take official notice of, Exam. R. XIII.B.1.a, they are also not really an improper entry into the "evidential record." Each is a published, public *legal interpretation* of how each public agency understands *Hirst*.

We do not grant substantial weight (or otherwise accord deference) to what either of those entities thinks *Hirst* means. We do not accord DPER any deference, and while Ecology's interpretation of its *own regulations* is entitled to great weight, Ecology's interpretation of a *court decision* is not, at least not until Ecology promulgates a new or amended public rule in response. Exam. R. XV.F. Nevertheless, we will still mine DPER's and Ecology's expressions on *Hirst* for any useful clues, as the parties already have in their briefing.

Ecology explicitly discusses *Hirst* (albeit as the "recent decision [by] the Washington State Supreme Court," not by referencing *Hirst* by name) in its *Focus on Water Availability*. *Id.* at 2. The document is clear in its next sentence that the "rule adopted by Ecology for this [Snohomish River] watershed does not limit the use of permit exempt wells, as discussed above. *Id.* at 3. But the sentence after that states that "Counties may not issue permits for projects that will rely on a permit-exempt well, unless it (sic) determines that the water use will not impact instream flows or closed water bodies." *Id.* at 3. Ecology thus seems to think that *Hirst* applies to current applications. That is only a data point, but a data point nonetheless.

Conversely, it is not at all clear reading DPER's Notice what exactly DPER thinks *Hirst* means. One part of the Notice describes *Hirst* as meaning that "development permit applications that propose to use a private well water supply (in a basin that is closed or partially closed to surface water withdrawals by the Department of Ecology) must demonstrate that groundwater

[13] See https://fortress.wa.gov/ecy/publications/documents/1111012.pdf (rev. Nov. 2016), & http://www.kingcounty.gov/~/media/depts/permitting-environmental-review/fire-marshal/Media%20folder/RICKETTSDPERSpecialNoticeExemptWells003PDF.ashx?la=en (Dec. 2016)

withdrawal will not impair a senior water right," and states that "[*Hirst*] applies to 'permit-exempt' wells"; these sound like DPER is treating *Hirst* as applicable to current applications. But then the Notice sounds even more committal in the *other* direction:

> Because the Growth Management Hearings Board did not invalidate the County's development regulations (and the Supreme Court declined to reverse the Board's decision on that issue), King County DPER will continue to take in building permit applications, subdivision applications, and other development permit applications in the interim.

The rest of the Notice is noncommittal, starting with the pronouncement that landowners "ability to develop property when relying on private ('exempt') wells as the water source *may* be limited by a recent court decision," and returning with the warning that "King County does not make any warranties regarding water rights for proposed development." The Notice is best summed up with the true and thoroughly equivocal (as to the current application of *Hirst*) statement that, "King County government is *assessing* the ramifications of this case on issuance of building permits, subdivisions, and other development permits that utilize exempt wells."

We are not taking a jab at DPER. DPER faces the same damned if you do, damned if you don't scenario that we do. If DPER approves a building permit (or if we approve a preliminary plat application) relying on permit exempt wells, based on the plans and regulations in place on the date of complete application, a court may say, "What part of *Hirst*'s local governments must determine that 'applicants for building permits or subdivision developments have demonstrated that an adequate water supply is legally available before authorizing approval' did you not understand?" Similarly, if DPER or we evaluate a building permit or subdivision under a standard that requires an applicant to show legal water availability even for a permit-exempt well, despite neither the Comp Plan nor the current regulations requiring this, a court may say, "What part of our unbroken chain of vesting jurisprudence, the state subdivision/building code statutes, and your own code (which has never been declared invalid) did you not understand, and what made you think you could override a building/subdivision applicant's entitlement to have her completed application processed under the plans and regulations in place at the time of her application?"

We would summarize the DPER memo as, "Things are in flux. We're not exactly sure what's going on. If we don't, then no applicants can have any certainty related to permit-exempt wells. So everyone is on notice and has received fair warning that changes are a foot." We have no quibble with how DPER phrased their bulletin. Nor do we take much from it.

Hirst Text

Passages from the majority opinion imply that the majority intends its ruling to apply to current subdivision or building permit applications, including our current analysis of Echo Lake. *Id.* at 674 (applicant must "produce proof that waters both legally available and actually available") ("counties must receive sufficient evidence of an adequate water supply from applicants for building permits or subdivisions before the County may authorize development"); 675 ("Through these [building and subdivision] statutes, the GMA requires counties to assure that water is both factually and legally available"); 684 (GMA requires "local governments to determine that applicants for building permits or subdivision developments have demonstrated

that an adequate water supply is legally available before authorizing approval"); 685–86 (RCW 58.17.110 assigns to a county reviewing a permit application involving permit-exempt wells and exempt-use applications the task of reviewing for impairment of existing rights); and 687 (under RCW 58.17.110, each water use appropriation requires a fact-specific determination, and the County may not fail to ask "whether there is water that is legally available"). While there is more discussion in the case about building permits, no less than ten times did the majority raise RCW 58.17.110, a pre-existing code.

Justice Stephens' dissent seems to read the majority opinion in this way: "The practical result of this holding is to stop counties from granting building permits that rely on permit-exempt wells." 186 Wn.2d at 700. "The majority fails to acknowledge the astronomical task it assigns to individual applicants." *Id*. at 711. The "majority's conclusion that RCW 19.27.097 requires individual applicants to show no impairment will effectively halt local departments from granting building permits." *Id.* at 713. Justice Stephens did not say "will stop" or "will assign" or "will require"; she interpreted the majority as adding a burden on individual applicants in the present tense. Although Justice Stephens phrased her dissent in terms of building permit applications, where such burdens are even worse than for subdivision applicants—individual lot owners having no chance to amortize such costs over multiple lots—the majority lumped RCW 19.27.097's standard in with RCW 58.17.110's standard regarding potable water.

Yet the majority couched its holdings in terms of planning. *Id.* at 660 ("GMA requires counties to consider and address water resource issues in land use planning"); at 661 (counties required "to plan for the protection of water resources"); 672 (local governments required "to adopt a comprehensive plan and development regulations consistent with the comprehensive plan" which "requires planning to protect surface and groundwater resources"); 673 (section heading entitled "The GMA requires counties to have a comprehensive plan that protects surface and groundwater resources"); 673 (counties must "ensure that their development regulations and comprehensive plans comply with the GMA"); and (GMA requires counties to "consider and address water resource issues in land use planning"); 676 (county's existing comprehensive plan fails to "require the County to make a determination of water availability"). And most importantly, the majority framed its holding as, "We hold that the County's comprehensive plan does not protect water availability because it allows permit-exempt appropriations to impede minimum flows." *Id.* at 668; *see also id.* at 658.

The Chief Justice's *Hirst* concurring opinion backs this view, that the majority opinion should not be "read to… shift the burden on the permit applicants," and that instead the majority's opinion is limited to the planning process and to requiring counties to first amend their comprehensive plans and ordinances before they apply the majority's standard to individual applicants. *Hirst*, 186 Wn.2d at 696–700 (Madsen, C.J., concurring). She clarifies that state "statutes do not expect the burden to fall on individual applicants where the County has failed to meet its initial burden of determining water availability through its comprehensive planning and development regulations." *Id.* at 699. In fact, "the burden to provide evidence of water falls on individual applicants only where the State and the counties have first fulfilled their statutory duties of ensuring that water is available." *Id.* at 699.

Hirst Analysis

The *Hirst* majority certainly did no one any favors. With a single sentence, it could have quelled the dissent's fervor and soothed the concurrence's fears by stating the burden would first be on the government, not on applicants, to come up with a solution. Or it could have said the opposite—who said life is fair, burdens are burdens, etc. Instead it did neither. So what to make of a majority opinion, when the other four justices could not even agree what the decision means (let alone whether it was correct or not)?

We start with the vested rights doctrine, though not as a potential trump card. First, the vested rights doctrine applies to administrative or legislative, not judicial, changes. Second, on one reading of *Hirst*, even if a new application proposing a permit-exempt well source was submitted tomorrow, because the County's plans and regulations have not yet been amended in light of *Hirst*, that application would also need to be decided under the County's current plans and regulations, even though that application came in well after *Hirst*.

Yet the vesting concept provides some context. Even if we were authorized—and we are not—to place a moratorium on DPER accepting any future applications involving permit exempt wells until the County can come up with plans and regulations that adequately protect water, that would still not give us authority to change the regulations that apply to previously vested applications. We do not lightly assume that a court in a state with such strong vested rights protections for subdivision and building permit applicants intended to make a sea change in the rules applicable to pending subdivision and building applications when the court did not unequivocally say that this is what it intended. The majority certainly had the *authority* to do so, but we do not lightly assume that the majority meant, *sub silentio*, to require local decision-makers to apply *Hirst*'s prescriptions to vested applications.

And our vested rights code is even stronger than the state's. The courts have somewhat scaled back the vested rights doctrine. *See, e.g., Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 198–199, 334 P.3d 1143, 1146–47 (2014). The King County Code is broader: for almost any Type 1, 2, or 3 land use decisions, the application "shall be considered under the zoning and other land use control ordinances in effect on the date a complete application is filed." KCC 20.20.070.A. Vested nights are not controlling here, but they are instructive.

More importantly, the majority only sustained a finding of *noncompliance*, rejecting appellant's request to declare the pre-existing Whatcom County policies and regulations *invalid*. A holding of *noncompliance* is inconsistent with a ruling that Whatcom County, much less King County, should do anything other than apply its current plans and regulations to completed applications until such time as the county can enact new, *Hirst*-compliant plans and regulations.

The Court recently highlighted the distinction under GMA of finding a county's Comp Plan and regulations *noncompliant* versus a more severe finding that the continued operation of the county's plans and regulations would substantially interfere with goals of the GMA and were thus *invalid*. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 174–75, 322 P. 3d 1219 (2014). Although the *Woodway* majority reached the disputed conclusion that even a finding of

invalidity does not extinguish rights vested under state or local law, there was no dispute that following a finding of *noncompliance* the county's plans and regulations remain valid during the remand period.[14]

Moreover, the majority's discussion about the building and subdivision codes and their requirements that the county assure such applicants show legal water availability was in the context of rejecting Whatcom County's argument that it could "delegate" to Ecology the task of ensuring water compliance, and that Whatcom County did not have an independent duty to itself ensure this, as opposed to Hirst's argument that the County had the burden of protecting the availability of water and that the county's "comprehensive plan must itself protect the availability of water resources." *Id.* at 661, 665. The majority's holding is that counties have "an independent responsibility to ensure water availability," and that Whatcom County's "comprehensive plan does not satisfy the GMA requirement to protect water availability." *Id.* at 665, 666.

The majority did not say that, in interpreting their *current* building and subdivision codes, counties had to (or even were allowed to) hold an applicant to a standard the applicant was not—as of the time she submitted a completed application—required to meet. The majority explained the "burden on counties to take action" in terms of their comprehensive plans, not in terms of applying their current regulations. *Id.* at 673. The majority did not say that Whatcom County was misinterpreting its regulations or should apply a new interpretation; instead the majority found that the "County's rules for proving permit-exempt applications authorize groundwater appropriations in otherwise closed basins." *Id.* at 678. The regulations themselves, not the County's interpretation of them, was the problem.

Counsel have done an admiral job analyzing *Hirst* and its applicability to Applicant's preliminary plat application. Ultimately, we find the Applicant's and County's position the slightly more persuasive. Yet our interpretation of *Hirst* is less important than our answer on other issues in dispute for two reasons. First, while we get deference on the construction of *local* laws[15] such as KCC chapter 20.22, County subdivision codes, or the Examiner's Rules, the courts will likely pay little heed to what *we* think *Hirst* means whenever they reach the merits, as they will likely do in some future case. And second, as we discussed below, we reach the same decision on Echo Lake *regardless* of which way the courts ultimately interpret *Hirst*; thus our interpretation of *Hirst* in Applicant's and the County's favor is largely a distinction without a difference.

NEXT STEPS

Justice Stephens' dissent warns that "[d]eterminations of water availability are complex and costly." 186 Wn.2d at 711. She criticizes the majority for failing to "acknowledge the astronomical task it assigns to individual applicants." *Id.* at 711. She cites one example where compiling the hydrological data and crafting the model would cost approximately $300,000 and require two years. *Id.* at 712. She castigates the majority for pushing "a massive, and likely insurmountable, burden onto individuals applying for a building permit." *Id.* at 713. She cites *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000), which we note

[14] *Id.* at 175; *id.* at 186 (Johnson, J., dissenting) (a finding of a plan's or regulation's *invalidity* should override reliance on the vested rights doctrine).
[15] RCW 36.70C.130(1)(b).

consumed 67 pages of Washington Reports and illustrates the awful complexity surrounding groundwater withdrawals.

In several occasions in the main text and its footnotes, *Hirst*'s majority takes exception with various parts of the dissent, but never once does the majority defend itself on this point, never once says the dissent is overestimating the burden on applicants. The majority neither assures would-be applicants that counties will first enact a comprehensive system before such (ameliorated) burdens will fall on applicants, or bites the bullet and says, as the Division II majority candidly admitted in *Fox v. Skagit County*, 193 Wn. App. 254, 372 P.3d 784 (2016), "there are hardships attendant to *any* water right with a later priority date and too little water available to satisfy all rights," i.e., "tough luck, pal."[16]

In fact, the dearth of any such discussion in the *Hirst* majority opinion is yet one more reason to interpret it as not completely upsetting the apple cart by requiring governments to hammer existing applicants with new burdens prior to comprehensive legislative amendments. The *Hirst* majority's author is one of the most thorough and thoughtful members of a stellar bench. For example, in a recent water rights case, *Foster v. Washington State Dept. of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015), Justice Wiggins' dissent was twice as long and (to us at least) better reasoned than that majority's decision. Justice Wiggins showed an empathetic appreciation for the careful balancing, study, and refinements the state and local agencies had put into their water -related approach there. 184 Wn.2d at 488. We find it much easier to believe that Justice Wiggins included no such equivalent analysis in his *Hirst* majority opinion because he wrote it as only a planning-first, forward-looking decision, than to believe the alternative, that Justice Wiggins meant his opinion to apply to current applicants in a draconian manner and yet forgot to clearly say this and did not notice or care about the ramifications of such an abrupt sea change. Having read many Justice Wiggins opinions, we find the former view significantly more in line with past behavior.

But even assuming the worst, that the majority was sticking its head in the sand, we will not plunge our head into the same hole. We cannot predict what the legislature will come up with or what the County will do, but it would be unconscionable for us to approve a subdivision that allowed lots to be platted and sold where a hapless purchaser/applicant could be told, "Actually, you need to show legal water availability, which may cost you more to do than your lot is worth. Sorry."

If we had decided that *Hirst* applies to even pending applications, we would approve the preliminary plat, but with the added condition that the Applicant must show, prior to final plat approval, legal water availability. Similarly, although we decide today that *Hirst* applies first to the County to craft a *Hirst*-compliant comprehensive system, we still approve the preliminary plat with the same added condition that prior to final plat approval, the applicant shall establish, to DPER's satisfaction, not only the physical water requirements set forth in Public Health's September 28, 2015, approval (Exhibit 13), but such legal water availability as DPER will consider sufficient to support building permit applications for the Echo Lake lots Thus, under our Amended Report and Recommendation, an individual Echo Lake lot purchaser—like

[16] *Fox* involved permit exempt wells, but in a basin controlled by a WAC that "expressly indicates that it governs permit-exempt uses of water." *Id.* at 275 (citations omitted). *Fox* was thus tackling a legally different scenario than a permit-exempt well covered by our WAC 173–507.

Mr. Amedson, who came to our hearing interested in purchasing a lot—will not face the burdens the dissent articulated, the concurrence agreed with, and the majority offered nothing to rebut.[17] Although the Applicant's and County's primary argument is that *Hirst* does not apply to Echo Lake, each states that, in the alternative, we can approve today's preliminary plat with the condition that Applicant demonstrates legal water availability prior to final plat approval. Applicant 8/4/17 br. at 9; Co. 8/4/17 br. at 15. So it is not the Applicant or County taking exception to our approach. Rather it is *Appellants* that counter that we cannot peg the showing of legal water availability to the final plat stage. That is actually not true.

Our Court has explicitly ratified an examiner granting conditional approval of a preliminary plat with an outstanding water rights question, so long as "all requirements must be satisfied and confirmed in writing before *final* plat approval." *Knight v. City of Yelm*, 173 Wn.2d 325, 345, 267 P.3d 973 (2011) (italics added).[18] Even in the absence of *Knight*, one gets to the same point by walking through the County code. KCC 20.22.180 requires a preliminary plat to show "appropriate provisions are made for…potable water supplies," without further defining what counts as "appropriate" for preliminary plat—(as opposed to final plat)—purposes. KCC 20.20.040.A.4 does: for development proposals like a *preliminary* plat which require a source of potable water, an applicant must provide "documentation of an approved well by the Seattle-King County department of public health," something the Applicant has already provided here.[19] Instead, it is at the *final* plat stage that "[p]roof of…water availability, *including any required water rights*, shall be submitted…before recording." KCC 19A.16.030.F (emphasis added).

The line between what we require at the *preliminary* plat stage, which is an "approximate" exercise, versus the *final* plat stage, which requires "all elements and requirements," is often not a precise science. KCC 19A.04.260 & .250. *See also Knight v. City of Yelm*, 173 Wn.2d 325, 344, 267 P.3d 973 (2011) (describing the *preliminary* plat—as opposed to a *final* plat—inquiry as a "threshold" showing). But if there were ever a time to save something for the final plat approval stage, this is this case.

As article after article out of Olympia stated, solving *Hirst*'s unraveling of water management authority in Washington was so important that the Senate majority refused to take up the capital budget until a fix for *Hirst* was found; as no compromise on *Hirst* was found, the legislature closed without a $4 billion capital budget.[20] We will eat our hat if the next legislature also closes

[17] Ultimately, the same distinction-without-a-difference applies to whether Appellants have standing to challenge Echo Lake on the basis of *Hirst* and/or their failure to exhaust their administrative remedies as it relates to *Hirst* is excused. If we had found their lack of participation excused, and re-opened the record to allow them to establishing standing related to *legal* water availability, we would still reach the same approve-the-preliminary-plat-but-with-the-added-condition-that-the-Applicant-must-show-prior-to-final-plat-approval-legal-water-availability decision as we do today.

[18] In *Knight*, the Court affirmed the superior court's requirement that Knight have "an opportunity to challenge the City's evidence of water provisions before final plat approval." *Id.* at 344 & n.12. Knight, however, participated in the examiner's public hearing on the preliminary plat approval and argued (and provided extensive evidentiary support for her position) that approval would harm her water rights; the Court found Knight had standing. *Id.* at 328–29, 342–43. Conversely, our Appellants did not participate in the hearing process and do not have standing. They do not magically gain standing at a subsequent stage. We do not create a special process for them to weigh in later.

[19] Public Health's preliminary approval, received February 16, 2016, is Exhibit 10 in our record.

[20] Just to make sure we use appropriate language, we borrow the language from an Association of Washington Cities email that Appellants tried to insert into the record. We do not take particular notice of that letter, as a brief web search shows numerous articles confirming the essential political positioning, even if the precise description is slightly different.

without some *Hirst*–related enactment. Yet we possess no special tea leaves for predicting what the precise legislative fix will be, nor what will arise from the County's planning process. Thus, any specific condition we place now is almost guaranteed to be obsolete in a matter of months. The important thing is that we put a condition that *whatever* requirements wind up applying to permit-exempt well applicants, Echo Lake meets this before final plat approval, to avoid the unconscionable scenario of the burden of a required showing of legal water availability the dissent warns of being passed on to hapless individual purchasers.

CONCLUSION

If prior to or on September 29, 2016, Appellants had spent even a tiny fraction of the time they have spent *since* then trying to challenge Echo Lake, they would have been leagues further ahead. Yet, Appellants' November 7, 2016, motion for reconsideration served a very useful purpose, keeping our October 12, 2016, decision from becoming final and unchallengeable. Although Appellants do not have standing nor did they exhaust their remedies, their filing prodded us to reconsider our decision. Our attached re-approval of the Echo Lake preliminary plat adds the condition that prior to final plat approval and creation of any actual building lots, the Applicant will need to show prior to final plat approval, not only the *physical* water requirements set forth in Public Health's September 28, 2015, approval (Exhibit 13), but such *legal* water availability as DPER will consider sufficient to support building permit applications for the Echo Lake lots.

This should wrap it up. The Applicant and to a lesser extent the County could conceivably appeal this decision, because our Amended Report and Decision is materially less advantageous to them. But they have both already agreed, at least in principle,[21] with today's outcome. Mr. Meyers could have challenged our initial decision prior to November 7, 2016, but today's Amended Report and Decision is in no sense less advantageous to him and in a very real sense is more advantageous to him, so he too cannot seek further review. And Appellants failed to exhaust their administrative remedies and lack standing, so they cannot seek further review either.

There will be another application recommendation for some other development where Appellants can timely raise their concerns over how the County is handling water issues, likely a development involving more than six home sites—Echo Lake being the tiniest preliminary plat application we have ever been involved with. In a future case we will again give Appellants another opportunity to present their facts and argument during the actual hearing process. And by code, examiner decisions do not establish precedent, KCC 20.22.290, so either appellant would be free to offer the same arguments again, albeit in a timely fashion. But there is no second bite at the Echo Lake apple.

[21] If either the Applicant or the County has a concern with the precise language we used to craft this new condition 17—"Prior to final plat approval, the applicant shall establish, to DPER's satisfaction, not only the *physical* water requirements set forth in Public Health's September 28, 2015, approval (Exhibit 13), but such *legal* water availability as DPER will consider sufficient to support building permit applications for the Echo Lake lots"—both have standing and have exhausted their administrative remedies, so either is free to file a motion for reconsideration with proposed amendatory language.

ORDER

Appellants' motion for reconsideration and motion to reopen the closed record are DENIED. Appellants both lack standing and failed to exhaust their administrative remedies.

We *sua sponte* RECONSIDER our October 12, 2016, Report and Recommendation. Attached to this Order is an Amended Report and Recommendation.

DATED October 6, 2017.

David Spohr
Hearing Examiner

DS/ed

October 6, 2017

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AMENDED REPORT AND DECISION[1]

SUBJECT: Department of Permitting and Environmental Review file no. **PLAT160002**
Proposed ordinance no.: **2016-0414**

ECHO LAKE ESTATES
Preliminary Plat Application

Location: South side of SE 96th Street, east of Snoqualmie Parkway, Snoqualmie

Applicant: Puget Western Inc
represented by **Heather Burgess**
724 Columbia Street NW Suite 320
Olympia, WA 98501
Telephone: (360) 742-3500
Email: hburgess@phillipsburgesslaw.com

King County: Department of Permitting and Environmental Review
represented by **Devon Shannon** *and* **Jina Kim**
King County Courthouse
516 Third Avenue Room W400
Seattle, WA 98104
Telephone: (206) 477-1120
Email: devon.shannon@kingcounty.gov; jina.kim@kingcounty.gov

SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Approve, Subject to Conditions
Department's Final Recommendation:	Approve, Subject to Conditions
Examiner's October 12, 2016 Decision:	Approve, Subject to Conditions
Examiner's October 5, 2017 Decision:	Approve, Subject to Additional Conditions

[1] Findings 10–12, Conclusions 3–4, and Condition 17 are substantively amended from our October 12, 2016, report. Any changes to the remainder of the document are purely cosmetic.

EXAMINER PROCEEDINGS:

Hearing Opened: September 29, 2016
Hearing Record Closed: September 29, 2016

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

FINDINGS, CONCLUSIONS, AND DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. General Information:

Applicant:	Puget Western Inc. Attn David Yasuda PO Box 1529 Bothell, WA 98041 (425) 487-6544
Engineer:	Eastside Consultants 1320 NW Mall Street Issaquah, WA 98027 (425) 392-5351
STR:	02-23-07
Location:	The site is located east of Snoqualmie Parkway, on the south side of SE 96th Street, Snoqualmie
Parcel Nos.	746290-0110
Zoning:	RA-5
Acreage:	31.58 acres
Number of Lots:	Six
Density:	Approximately one unit per five acres
Lot Size:	Lots range from approximately one to three acres
Proposed Use:	Single Family Detached Dwellings
Sewage Disposal:	Individual on-site septic systems
Water Supply:	Private Community Well
Fire District:	King County Fire Protection District #10
School District:	Snoqualmie Valley

Complete Application Date: February 16, 2016 (date filed), March 15, 2016 (complete)

2. Except as modified herein, the facts set forth in the Department of Permitting and Environmental Review (DPER) reports to the Examiner and the DPER testimony is found to be correct and are incorporated herein by reference.

3. This matter involves a request to subdivide 31.58 acres, zoned RA-5, into six lots for single-family detached dwellings, into tracts for critical areas and their associated buffers, and into driveway tracts. Known as Echo Lake Estates, each lot will be approximately one to three acres in size.

4. The subject property has a relatively thin, west-to-east strip along SE 96th Street (the northern boundary), merging into a somewhat thicker north-to-south rectangle along the western edge. The property contains some steep slopes, numerous wetlands, and one creek.

5. Dwelling unit lots One through Four will be clustered in the northerly strip, with lots Five and Six dipping slightly into the northeast portion of the rectangle. A critical areas tract for a northeast-to-southwest flowing creek is to be set aside between lots Two and Three, a wetland area will be protected along SE 96th Street between lots Three and Four, and a wetlands depression will remain between lots Five and Six.

6. Steep slopes running northwest-to-southeast abut the southerly edges of lots Five and Six in the westerly rectangle portion. The area from the top of the steep slopes to the southern property boundary is all set aside as critical areas and their respective buffers. After review by its geologist, DPER concluded that the default, 50-foot steep slope buffer could be reduced to 25 feet, meaning no clearing or grading within 25 feet of the top, toe, or sides of any steep slopes, with no structures located closer than 40 feet (given the 15-foot building setback line added to the buffer).

7. Access is fairly straightforward—Snoqualmie Parkway to SE 96th Street to relatively short joint use or individual driveways, except for a somewhat longer driveway to the proposed homesite area on Lot Six. Ron Meyers, president of the small water association to the north and east, noted that is harder and harder to get onto Snoqualmie Parkway from SE 96th Street. Echo Lake Estates' six building lots will generate significantly fewer trips than the thresholds that would trigger more intensive traffic review or require off-site mitigation.

8. The area to be developed generally slopes to the west, with average slopes ranging from approximately five to ten percent. Because of the numerous critical areas and steep slopes near the dwelling lots, DPER required the applicant, in advance of this preliminary plat approval, to show that there was space for both a feasible building envelope and for a sufficient drainfield, and to obtain preliminary Public Health approval. The applicant has complied.

9. Drainage is always a heightened concern, especially in the Raging River drainage basin. Looking from west to east, a small portion at the northwest corner (part of Lot One) will drain to the Snoqualmie Parkway drainage system. Most of Lot Two and the western portion of Lot Three will flow to the on-site creek, which itself flows southeast across an adjacent parcel and then continues onto the southerly portion of the plat, toward the Interstate 90 drainage system. The eastern portion of Lot Three, along with Lot Four, flow north toward the on-site wetland, which itself outlets north across a culvert under NE 96th Street. Lot Five and most of Lot Six flow into a wetland depression that has no natural outlet. And the eastern portion of the south part of Lot Six flows south towards the on-site stream and eventually the Interstate 90 drainage system. Further engineering

review will be required, but the drainage seem sufficient for purposes of preliminary plat approval.

10. The most significant concern is potable water, especially given Mr. Meyers' testimony that his neighboring water association is in dire straits, having already been pinched by the Snoqualmie Ridge development. Mr. Meyers fears the impact future water withdrawals for Echo Lake Estates may have on him.

11. The applicant here submitted a water well report from 1982, from 1989, and from 1994. Ex. 13. Bill Moffett testified that they recently drilled a 300-foot deep well (approximately 130 feet deeper than the shallower, 168-foot main well Ron Meyers' association uses) with a 275-foot deep pump, and found the water table at around 150–160 feet. Their drawdown test produced "massive" water, way more than would be needed to supply six homes. And although Public Health noted several conditions that will need to be addressed prior to final platting, Public Health reviewed the evidence and approved the application for the well source site for a Group B system serving six lots as sufficient for preliminary plat purposes. Ex. 10.

12. While further approvals are due before *final* approval, the applicant has met its initial burden of proof on showing appropriate potable water for the preliminary plat stage. Mr. Meyers' travails are serious, and we in no way minimize them, but his evidence does not overcome the other evidence in the record. The applicant has made the required threshold showing of *factual* water availability. (Whether there is a required threshold showing of *legal* water availability is discussed in the Conclusions.)

13. Finally, no children will walk to school; a bus will pick up and return the children along SE 96th Street.

CONCLUSIONS:

1. The proposed subdivision, as conditioned below, would conform to applicable land use controls. In particular, the proposed type of development and overall density are specifically permitted under the RA-5 zone.

2. If approved subject to the conditions below, the proposed subdivision will make appropriate provisions for the topical items enumerated within RCW 58.17.110, and will serve the public health, safety, welfare use, and interest.

3. WAC 173-507-030 is inapplicable to the permit-exempt wells the applicant is proposing to use here.

4. In our attached Final Order, we analyze *Whatcom County v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016), in depth, concluding there that, more likely than not, *Hirst* does not apply to permit-exempt wells until after the County amends its comprehensive plan and regulations. But our conclusion on this point is in no sense ironclad. Moreover, the *Hirst* dissent's warning about the "astronomical task" a straight (meaning prior to the County taking a comprehensive look and figuring out some sort of solution) application of *Hirst* would assign to individual building permit applicants leads us to conclude that it would be unconscionable to allow final platting to occur here without the applicant first showing

the legal water availability that DPER would require of building permit applicants. We thus include a Condition 17, below.

5. The conditions for final plat approval set forth below are reasonable requirements and in the public interest.

DECISION:

The preliminary plat Echo Lake Estates, is APPROVED subject to the following conditions of approval.

1. Compliance with all platting provisions of Title 19A of the King County Code.

2. All persons having an ownership interest in the subject property shall sign on the face of the final plat a dedication that includes the language set forth in King County Council Motion No. 5952.

3. The plat shall comply with the base density requirements of the RA-5 zone classification, as well as the rural lot clustering requirements of KCC 21A.14.040. All lots shall be the larger of the minimal dimensional requirements of the RA-5 zone classification or those shown on the face of the approved preliminary plat except that minor revisions to the plat which do not result in substantial changes may be approved at the discretion of the DPER.

   Any/all plat boundary discrepancies shall be resolved to the satisfaction of DPER prior to the submittal of the final plat documents. As used in this condition, “discrepancy” is a boundary hiatus, an overlapping boundary, or a physical appurtenance which indicates an encroachment, lines of possession, or a conflict of title.

4. All construction and upgrading of public and private roads shall be done in accordance with the 2007 King County Road Design and Construction Standards (KCRD&CS) established and adopted by Ordinance No. 15753, as amended.

5. The applicant must obtain the approval of the King County Fire Marshal for the adequacy of the fire department access, fire hydrant locations, water main, and fire flow of the International Fire Code as amended by Chapter 17 of the King County Code (KCC) and in accordance with King County Public Rules.

6. The drainage facilities shall meet the requirements of the 2009 King County Surface Water Design Manual (KCSWDM). The site is subject to the conservation flow control and basic water quality requirements in the KCSWDM.

7. To implement the required Best Management Practices (BMPs) for treatment of storm water, the final engineering plans and technical information report (TIR) shall clearly demonstrate compliance with all applicable design standards. The requirements for BMPs are outlined in Chapter 5 of the 2009 KCSWDM. The design engineer shall address the applicable requirements on the final engineering plans and shall provide all necessary documents for implementation. The final recorded plat shall include all required covenants, easements, notes, and other details to implement the required BMPs for site development.

The required BMPs shall also be shown on the individual residential building permit application submittal. The individual building permit applications shall also include the required covenants, easements, notes, and other details to implement the BMP design.

8. The 100-year floodplain for any onsite or adjoining streams or wetlands shall be shown on the engineering plans and the final plat per Special Requirement 2 of the 2009 KCSWDM.

9. The proposed subdivision shall comply with the 2007 KCRD&CS and 2009 KCSWDM, including the following requirements:

   A. Driveway(s) and joint use driveways shall be improved per Sections 3.01 of the KCRD&CS, including drainage controls. Notes regarding ownership and maintenance of the joint use driveways shall be shown on the final plat.

   B. Modifications to the above road conditions may be considered according to the variance provisions in Section 1.12 of the KCRD&CS.

10. All utilities within proposed rights-of-way must be included within a franchise approved by the King County Council prior to final plat recording.

11. The applicant or subsequent owner shall comply with King County Code 14.75, Mitigation Payment System (MPS), by paying the required MPS fee and administration fee as determined by the applicable fee ordinance. The applicant has the option to either: (1) pay the MPS fee at the final plat recording, or (2) pay the MPS fee at the time of building permit issuance. If the first option is chosen, the fee paid shall be the fee in effect at the time of plat application and a note shall be placed on the face of the plat that reads, “All fees required by KCC 14.75, MPS, have been paid.” If the second option is chosen, the fee paid shall be the amount in effect as of the date of building permit application.

12. Lots within this subdivision are subject to KCC 21A.43, which imposes impact fees to fund school system improvements needed to serve new development. As a condition of final approval, 50% of the impact fees due for the plat shall be assessed and collected immediately prior to the recording, using the fee schedules in effect when the plat receives final approval. The balance of the assessed fee shall be allocated evenly to the plat’s dwelling units and shall be collected prior to building permit issuance.

13. The proposed subdivision shall comply with the Critical Areas code, as outlined in KCC 21A.24. Permanent survey markings and signs, as specified in KCC 21A.24.160, shall also be addressed prior to final approval. Temporary marking of critical areas and their buffers (e.g. with bright orange construction fencing) shall be placed on the site and shall remain in place until all construction activities are complete.

14. Preliminary plat review has identified the following specific requirements which apply to this project. All other applicable requirements from KCC 21A.24 shall also be addressed by the applicant:

   A. All on-site wetlands and critical areas buffers shall be placed within Critical Area Tracts (CAT) generally as shown on the revised site plan, dated July 11, 2016. A

15-foot building set back (BSBL) is required from the edge of all CAT boundaries and shall be shown on all affected lots on the engineering plans and final plat.

B. Prior to plat recording, a physical barrier such as a split railed fence or similar with critical area signs shall to be installed along the tract boundaries to demarcate the CAT boundaries.

C. The plans shall be routed to the Critical Area section for review and approval prior to engineering plan approval and final plat/recording.

D. The following note shall be shown on the final engineering plan and recorded plat:

RESTRICTIONS FOR CRITICAL AREA TRACTS AND CRITICAL AREAS AND BUFFERS

Dedication of a critical area tract/sensitive area and buffer conveys to the public a beneficial interest in the land within the tract/critical area and buffer. This interest includes the preservation of native vegetation for all purposes that benefit the public health, safety and welfare, including control of surface water and erosion, maintenance of slope stability, and protection of plant and animal habitat. The critical area tract/critical area and buffer imposes upon all present and future owners and occupiers of the land subject to the tract/critical area and buffer the obligation, enforceable on behalf of the public by King County, to leave undisturbed all trees and other vegetation within the tract/critical area and buffer. The vegetation within the tract/critical area and buffer may not be cut, pruned, covered by fill, removed or damaged without approval in writing from the King County Department of Permitting and Environmental Review or its successor agency, unless otherwise provided by law.

The common boundary between the tract/critical area and buffer and the area of development activity must be marked or otherwise flagged to the satisfaction of King County prior to any clearing, grading, building construction or other development activity on a lot subject to the critical area tract/critical area and buffer. The required marking or flagging shall remain in place until all development proposal activities in the vicinity of the critical area are completed.

No building foundations are allowed beyond the required 15-foot building setback line, unless otherwise provided by law.

15. A homeowners' association or other workable organization shall be established to the satisfaction of DPER which provides for the ownership and continued maintenance of the open space tract(s) and critical area tract(s).

16. The minimum 100-feet well radius shall be shown on the engineering plans and final plat, unless otherwise approved by King County Public Health.

17. Prior to final plat approval, the applicant shall establish, to DPER's satisfaction, not only the *physical* water requirements set forth in Public Health's September 28, 2015, approval (Exhibit 13), but such *legal* water availability as DPER will consider sufficient to support building permit applications for the Echo Lake lots.

DATED October 6, 2017.

David Spohr
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

A person appeals this Examiner decision by following the steps described in KCC 20.22.230, including filing with the Clerk of the Council a sufficient appeal statement and a $250 appeal fee (check payable to the King County FBOD). Appeal statements may refer only to facts contained in the hearing record; new facts may not be presented on appeal. KCC 20.22.230 also requires that the appellant provide copies of the appeal statement to the Examiner and to any named parties listed on the front page of the Examiner's decision.

Prior to the close of business (4:30 p.m.) on *October 30, 2017,* an electronic copy of the appeal statement must be sent to Clerk.Council@kingcounty.gov *and* a paper copy of the appeal statement must be delivered to the Clerk of the Council's Office, Room 1200, King County Courthouse, 516 Third Avenue, Seattle, Washington 98104. Prior mailing is not sufficient if actual receipt by the Clerk does not occur within the applicable time period. If the Office of the Clerk is not officially open on the specified closing date, delivery prior to the close of business on the next business day is sufficient to meet the filing requirement.

Unless both a timely and sufficient appeal statement and filing fee are filed by *October 30, 2017,* the Examiner's decision becomes final.

If both a timely and sufficient appeal statement and filing fee are filed by *October 30, 2017,* the Examiner will notify all parties and interested persons and provide information about "next steps."

MINUTES OF THE SEPTEMBER 29, 2016, HEARING ON DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. PLAT160002, PROPOSED ORDINANCE NO. 2016-0414.

David Spohr was the Hearing Examiner in this matter. Kim Claussen, Pat Simmons, Bill Moffet, Ron Meyers, and Joseph Amedson participated in the hearing.

The following exhibits were offered and entered into the hearing record on September 29:

Exhibit no. 1	Department of Permitting and Environmental Review file no. PLAT160002
Exhibit no. 2	Preliminary department report, transmitted to the Examiner on September 29, 2016
Exhibit no. 3	Application for Land Use Permits, received February 16, 2016
Exhibit no. 4	State Environmental Policy Act (SEPA) checklist, received February 16, 2016
Exhibit no. 5	SEPA Determination of Non-Significance, issued June 14, 2016
Exhibit no. 6	A. Affidavit of posting of notice of permit application, indicating March 23, 2016 as date of posting
	B. Affidavit of posting of SEPA threshold determination issuance, dated June 7, 2016
	C. Affidavit of posting of notice of hearing, posted August 16, 2016
Exhibit no. 7	A. Revised preliminary plat map, received July 11, 2016
	B. Revised conceptual drainage plan, received April 29, 2016
Exhibit no. 8	Assessors map of NE & NW 02-23-07, SE & SW 35-24-07
Exhibit no. 9	Critical areas designation (CAD) CADS120003, dated November 7, 2012
Exhibit no. 10	Public Health preliminary approval, received February 16, 2016
Exhibit no. 11	Wetland study by Raedeke Associates, Inc., received July 11, 2016
Exhibit no. 12	Wildlife reconnaissance by Raedeke Associates, Inc., received April 29, 2016
Exhibit no. 13	Technical information report by Eastside Consultants, dated February 15, 2016
Exhibit no. 14	iMap of plat, dated September 29, 2016

The Examiner took official notice of the following documents on October 5, 2017:

A.	State Ecology's *Focus on Water Availability* (rev. Nov. 2016), available at: https://fortress.wa.gov/ecy/publications/documents/1111012.pdf
B.	DPER's *Special Notice Private "Exempt" Wells* (Dec. 2016), available at: http://www.kingcounty.gov/~/media/depts/permitting-environmental-review/fire-marshal/Media%20folder/RICKETTSDPERSpecialNoticeExemptWells003PDF.ashx?la=en