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"Wet Growth": Exploring the Intersection Between Water Resources and Land Use Law in Washington

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I. Introduction

It is a generally accepted principle that use and development of property depend on water supply. To some degree, all uses of land, whether residential, commercial, industrial or agricultural, require water. Similarly, those uses of land have the potential to adversely impact water supply, both by increasing demand for the limited resource and by potentially affecting the quality of the resource.

In light of the relationship between land development and water resources, Washington statutes governing land use require local jurisdictions to consider water resources when reviewing project approvals and when planning for growth. Requirements to consider water resources in the land use approval context have been on the books for decades, to a limited degree. Since its adoption in 1969, the subdivision statute required local jurisdictions to ensure that "appropriate provisions" have been made for "water supplies" before approving a subdivision of land.[1] More recently, the Legislature has increased the emphasis on water availability in the land use context with the adoption of the Growth Management Act ("GMA"), which requires local jurisdictions to consider water supply in both general planning efforts and review of specific projects.[2]

These statutory provisions and the more general question of the proper role of water resources management in land use law have received more scrutiny in recent years. This may be in part due to our evolving understanding of the limited nature of the water supply and the impacts that growth has on water resources.[3] In academic circles, some legal scholars are pushing for even more integration between water resources management and land use decision-making.[4] Advocates of this position are viewed as an off-shoot of the smart growth movement and have been coined advocates of "wet

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[1] Laws of 1969, 1st Ex.Sess., ch. 271 § 11. When the Legislature adopted the Growth Management Act, it amended the subdivision statute to the current phrasing "potable water." *See* Laws of 1990, 1st Ex.Sess., ch. 17 § 52.

[2] *See*, *e.g.*, RCW 36.70A.020(10) (among the goals of the GMA is to "protect… and enhance the state's high quality of life, including… availability of water"); RCW 36.70A.070(5) (jurisdictions must adopt development regulations in the rural areas that protect "rural character," including protecting "surface and groundwater resources"); RCW 36.70A.030(15) ("rural character" is defined as development that is consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas); RCW 36.70A.070(1) (comprehensive plans "shall provide for protection of the quality and quantity of groundwater used for public water supplies"); RCW 19.27.097(11) (prior to issuance of building permit, applicant must provide "evidence of an adequate water supply").

[3] *See*, *e.g.*, RCW 90.54.010(1) (water resources planning statute is based on understanding that "growth and prosperity have significantly increased the competition for this limited resource").

[4] Craig Arnold has collected essays that explore the need for greater integration of water and land use regulations from a policy standpoint. WET GROWTH: SHOULD WATER LAW CONTROL LAND USE? (Craig Anthony Arnold ed., Environmental Law Institute 2005) ("WET GROWTH: SHOULD WATER LAW CONTROL LAND USE?"). Many of the essays argue that water resources considerations should have more control over land use planning.

growth."[5] Generally, these scholars argue that land use and water resource laws do not adequately protect water resources.[6] Some attribute declining water supply and quality to various regulatory shortcomings, including the division of land use planning authority from water resources regulatory authority.[7] By way of example, responsibility for management and regulation of water resources in Washington rests primarily with the Washington State Department of Ecology ("Ecology"), while regulation of land use authority has been delegated to local governments. Several scholars have argued that this "fragmentation" bars meaningful water resources protection.[8] Fundamentally, these scholars pose the provocative question of whether water law and water supply concerns should control land use.

To date in, Washington, there has been no real momentum to abandon entirely the divisions of regulatory authority over water resources and land use. Such a move seems highly unlikely. However, the recent litigation described in this article is forcing the question of what local jurisdictions should be doing to weigh water supply considerations in their land use planning and permitting processes. The outcome of these cases may be significant for land use practitioners, local jurisdictions and developers.

Section II of this paper provides a brief summary of water resources law and describes the key statutory provisions in which land use law requires consideration of water supply issues. Section III summarizes three key pending cases that interpret those statutory provisions. These cases suggest an evolving legal landscape where local jurisdictions will be under increasing pressure to play a more active role in considering and evaluating water supply needs in the context of local land use planning and permitting.

II. Overview of Water and Land Use Laws

When discussing the integration of water supply considerations into land use planning and development review, it is important to recognize two key distinctions between Washington laws governing water resources and land use. First, under Washington law, water rights are fundamentally different from rights to real property. In Washington, water is a public resource.[9] With limited

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[5] *See*, *e.g.*, Craig Anthony Arnold, *Integrating Water Controls and Land Use Controls: New Ideas and Old Obstacles ("Arnold"),* in WET GROWTH: SHOULD WATER LAW CONTROL LAND USE? 7-10.

[6] *See*, *e.g.*, A. Dan Tarlock and Lora A. Lucero, *Connecting Land, Water, and Growth*, 34 The Urban Lawyer 971(2002) ("Tarlock and Lucero"); Arnold, in WET GROWTH: SHOULD WATER LAW CONTROL LAND USE? 1-55 (; Barton H. Thompson, *Water Management and Land Use Planning: Is it Time for Closer Coordination?* In WET GROWTH: SHOULD WATER LAW CONTROL LAND USE? 95-118; Janet C. Neuman, *Dusting Off the Blueprint for a Dryland Democracy: Incorporating Watershed Integrity and Water Availability Into Land Use Decisions*, in WET GROWTH: SHOULD WATER LAW CONTROL LAND USE? 119-169 .

[7] *See*, *e.g.*, Tarlock and Lucero;Arnold, in WET GROWTH: SHOULD WATER LAW CONTROL LAND USE? 34-44 .

[8] *Id.*

[9] *See* Const., art. XXI ("The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use."); RCW 90.03.010 ("Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise"); *Dep't of Ecolog v. Bur. of Reclamation y*, 118 Wn.2d 761, 766, 827 P.2d 275 (1992) (water is publicly owned and private parties may acquire a right to use the water).

exceptions,[10] a water right permit or certificate is required to divert or withdraw water from a natural source, such as a river or aquifer. The right evidenced by a permit or certificate is the right to *use* water, as opposed to a right of ownership in a piece of real estate.[11] The water right is therefore a "usufructuary" right.

The Washington Legislature has adopted numerous laws establishing the prior appropriation doctrine as the core principle of water law in this state.[12] Under Washington's prior appropriation doctrine, attributes of a water right include: quantity (the amount of water the holder may use expressed in both annual and instantaneous quantities); place of use, or location in which the right can be exercised; the point of diversion or withdrawal from which the water can be taken; and the purpose of use to which the water can be put (for example, industrial, irrigation, or municipal, among others); time of use (seasonal or continuous); and, of course, priority.[13] Beneficial use is the basis, the measure, and the limit of a water right.[14] Priority between water rights is determined by seniority, such that the first in time is first in right.[15] Under Washington's relinquishment statute, all or part of a perfected water right is subject to relinquishment if it is not used, in whole or in part, for any period of five consecutive years, unless nonuse is excused under one or more statutory provisions.[16] Subject to required regulatory review and approval, water rights may be changed or transferred to allow new points of diversion or withdrawal, to change the purpose or season of use, and transfer to a new place or location of use.[17] Many requirements or conditions apply to water rights changes and transfers depending on the specifics, but the touchstone is no impairment of other water rights.

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[10] RCW 90.44.050.

[11] However, once a certificate is issued, it is recorded with Ecology and the county recorder and becomes appurtenant to the real property on which it is used. RCW 90.03.330(1). .*See, e.g., Bur. of Reclamation*, 118 Wn.2d at 767 (A "holder of a water right owns no title to any molecules of water until that water is diverted" and under the holder's "control and possession").

[12] The Water Code has evolved over the years and includes, among others, the surface water code, Chapter 90.03 RCW, the groundwater code, Chapter 90.44 RCW, the Water Resources Act, Chapter 90.54 RCW, and statutes governing water rights registration and relinquishment, Chapter 90.14 RCW.

[13] RCW 90.03.290(3) (Ecology issues permits stating "the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied"); RCW 90.03.380(1) ("The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used").

[14] *Department of Ecology v. Acquavella*, 131 Wn.2d 746, 755, 935 P.2d 595 (1997) (*citing 1* Wells A. Hutchins, Water Rights Laws in the Nineteen Western States 9 (U.S. Dep't of Agriculture 1971).

[15] *Id. See also* RCW 90.03.010.

[16] RCW 90.14.160-.180. The Legislature has provided many exemptions to relinquishment. RCW 90.14.140. Statutory relinquishment did not replace the common law doctrine of abandonment. *See Okanogan Wilderness League v. Twisp*, 133 Wn.2d 769, 781, 947 P.2d 732 (1997). Rights are lost through abandonment when there is intentional non-use of the water. *Id.* Even a right that is exempt from relinquishment may be abandoned. *Id. See also R.D. Merrill Co. v. Pollution Control Hearings Bd*., 137 Wash.2d 118, 126, 969 P.2d 458 (1999).

[17] RCW 90.03.380.

Second, Washington laws provide very different regulatory structures for water and land use. Local governments exercise land use and zoning regulatory authority.[18] This "bottom-up" approach is most prominent in the GMA, Chapter 36.70A RCW, which gives deference to local planning decisions and specifically allows jurisdictions to accommodate their unique local circumstances.[19] By contrast, the Surface and Groundwater Codes and related water laws establish a more "top-down" management structure with Ecology playing a central, although not exclusive role.[20] While a type of pre-Code vested right exists, the only way to obtain a new water right, with a notable exception,[21] is to apply to Ecology under an administrative permitting process.[22] In most regions of the state, new Ecology-issued water rights, other than temporary or emergency water permits, are either not available or may be issued only after a lengthy application process and, in some cases, provision of mitigation by the applicant.

III. Interrelationship Between Water Resources and Land Use Law

Despite these differences, the laws governing water rights and land use are intertwined. For example, certain water laws attempt to coordinate water resource management with land use regulatory efforts.[23] These seemingly broad but vague pronouncements authorize Ecology to "recommend land use management policy modifications" as necessary to protect water resources.[24] Similarly, they require local governments, "whenever possible," to exercise their authority "consistent

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[18] Throughout the years the Washington State Legislature has adopted several enabling statutes including the Planning Commission Act (Chapter 35.63 RCW), Optional Municipal Code (Title 35A RCW), Planning and Enabling Act (Chapter RCW 36.70 RCW), the Growth Management Act (Chapter RCW 36.70A), and the Shoreline Management Act (Chapter 90.58 RCW), all of which establish procedural and substantive requirements to guide local jurisdictions when exercising their land use authority.

[19] *See*, *e.g.*, RCW 36.70A.3201 ("The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community."); WAC 365-195-010(3) (GMA planning "should be a "bottom up" effort, involving early and continuous public participation, with the central locus of decision-making at the local level").

[20] Some aspects of the water code incorporate a local planning effort. *See*, *e.g.*, Chapter 90.82 RCW (encourages local development of watershed plans for Water Resource Inventory Areas); Chapter 70.116 RCW (purveyors create coordinated water system plans to address regional water supply issues). However, in general, Ecology's role in administering water rights is significant, especially by comparison to the bottom-up structure of the GMA, which lacks a similar centralized state agency oversight. *See*, *e.g.*, RCW 32.21A.064 (Ecology is responsible for "[t]he supervision of public waters within the state and their appropriation, diversion and use" and the director "shall regulate and control the diversion of water in accordance with the rights thereto"). *See also* RCW 90.03.010; RCW 90.44.020.

[21] *E.g.*, RCW 90.44.050 (exempt well).

[22] RCW 90.03.010.

[23] *See*, *e.g.*, RCW 90.54.130 (Ecology "may recommend land use management policy modifications it finds appropriate for the further protection of ground and surface water resources in this state"); RCW 90.54.090 (Local jurisdictions "shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter" of the water code). *See also* Chapter 90.82 RCW, (Watershed Planning); Chapter 70.116 RCW (Coordinated Water System Planning statute directs to coordinate water system planning with planning under the Growth Management Act).

[24] RCW 90.54.130.

with" the Water Resources Act, Chapter 90.54 RCW.[25] However, courts have not interpreted the provisions and these water law provisions do not appear to be the basis of any significant Ecology policy initiatives or administrative actions.

Laws governing land use also integrate water resources considerations in the land use planning and approval process. For example, several GMA sections address consideration of water resources in land use planning.[26] Other land use statutes require sufficient water supply for specific projects.[27] Unlike the statutory provisions in the Water Code, these provisions in the land use code have been the focus of recent litigation exploring the nature and extent to which local jurisdictions must consider water resources when exercising their land use authority. As described in further detail below, that litigation may have significant ramifications for local governments and developers.

A. What Level of Proof of Water Availability Is Necessary for Development Proposals?

During review of specific projects, three statutory provisions require the local jurisdiction to review the adequacy of the water supply to serve the intended development. These statutes require the local government to consider water supply at three distinct phases of a land use project, as it proceeds from preliminary plat review through the more specific review of applications for building permits.

At preliminary plat review a local jurisdiction may not approve a proposal unless it can determine that "appropriate provisions" have been made for potable water.[28] By final plat approval, the local government considers the same criteria and the final plat shall not be approved unless it is accompanied by the recommendation of approval from the entity providing water to the project.[29] Finally, by the time of building permit review, an applicant is required to "provide evidence of an adequate water supply for the intended use of the building."[30] The statute further specifies the evidence "may be 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."[31] The legislature adopted this evidentiary requirement at the building permit stage as part of the GMA.[32] The statutory provisions all suggest that some demonstration of water supply is necessary at various stages in a development project. However, the

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[25] RCW 90.54.090.

[26] *See footnote 1.*

[27] *See*, *e.g.*, RCW 58.17.110, .150 (subdivision statute provides that "appropriate provisions" be made for potable water supplies); RCW 19.27.097(1) (prior to issuance of building permit applicant must provide "evidence of adequate water supply).

[28] RCW 58.17.110(2) ("A proposed subdivision… shall not be approved unless the city, town, or county legislative body makes written findings that… appropriate provisions are made for… potable water supplies").

[29] RCW 58.17.150(1) (each preliminary plat submitted for final approval must be accompanied by the recommendation of the agency supplying water as to the adequacy of the water supply)

[30] RCW 19.27.097(1).

[31] *Id.*

[32] Laws of 1990 1st Ex.Sess. ch. 17 § 63.

specific level of detail, especially as it pertains to plat approvals, is not entirely clear and has not been defined by courts.

Recent litigation in the Thurston County Superior Court and on appeal before the Court of Appeals explores the question of what evidence of water supply is required at the time of preliminary and final plat approval. *JZ Knight v. City of Yelm*, Thurston County No. 08-2-00489-6 (Judgment and Amended Findings and Conclusions, Nov. 7, 2008), on appeal No. 38581-3-II (Wash. Ct. App. Div. II, Nov. 21, 2008). At issue in the case are the statutory provisions regarding sufficient water supply for proposed subdivision projects.

In *JZ Knight,* the petitioner filed an appeal of the City Yelm's approval of five preliminary plat approvals under the Land Use Petition Act ("LUPA"), Chapter 36.70A RCW. Petitioner challenged the City's conclusion that the developments had made appropriate provisions for potable water supply. The City was to be the purveyor of water to the challenged projects. Consistent with City policies, some of the applicants sought to transfer to the City water rights in sufficient quantities to serve the proposed development. However, petitioner alleged that the City had insufficient water to serve projects that had already been approved such that, even with these added quantities transferred from some of the developers, the City had not provided sufficient evidence of water quantity to serve the developments. The preliminary plat approvals at issue included a condition that required the applicant to provide a potable water supply adequate to serve the development at final plat approval "and/or" prior to the issuance of any building permit. Ecology filed an *amicus* brief in support of the petitioner's challenge in the superior court but has not done so in the Court of Appeals.

The trial court determined that a preliminary plat may be approved subject to a condition that compliance with all requirements in RCW 58.17.110, including water supply, be demonstrated before final plat approval.[33] By the time of trial parties had largely agreed with this conclusion.[34] The court held that proof of adequate water supply must be met before the building permit stage.[35] The Court therefore concluded that "the hearing examiner's condition, as written and as adopted by the Yelm City Council, is an erroneous interpretation of the law."[36]

The court in its decision also addressed the proof required to satisfy the statutory obligation. While acknowledging that the question was not presented because no application for final plat approval was under review, the court nonetheless opined that *if* the matter were before the court as an appeal of final plat approval, the court would require "a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions."[37] The court disagreed with the City's and developers' contention that only a "reasonable expectation" of an adequate future water

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[33] *JZ Knight v. City of Yelm*, Thurston County Superior Court No. 08-2-00489-6, Amended Findings and Conclusions (Nov. 7, 2008), at 5-6.

[34] *Id.* at 3, 6.

[35] *Id.* at 6.

[36] *Id.*

[37] *JZ Knight v. City of Yelm*, Thurston County Superior Court No. 08-2-00489-6, Letter Opinion (Oct. 7, 2008) at 4; Amended Findings and Conclusions (Nov. 7, 2008), at 6.

supply is required for preliminary or final plat approval. Accordingly, the superior court determined that the local land use authority must find that there will be an actual quantity of water available to support a proposed development at least at the time of final plat approval.

On November 21, 2008, the City of Yelm and one of the five applicants appealed the superior court decision. Much of the briefing focuses on the petitioner's standing to bring the appeal. However, the appeal also substantively challenges the trial court's findings related to what type of proof is necessary at the final plat stage to demonstrate an adequate water supply to support the development. Fundamentally, the City challenges the trial court's authority to enter findings and conclusions.[38] Substantively, the City challenges the trial court's conclusion of law that the City must demonstrate at final plat stage that it has sufficient quantities in approved water rights to serve approved development as well as the specific development proposal at issue.[39] The City acknowledges that it is required to make a more detailed determination of water availability at the final plat stage.[40] However, the City argues that the trial court's findings were too rigid. The City argues that the plain language of the subdivision statute does not expressly require a showing of approved water rights at the final plat stage.[41] Additionally, the City argues that the superior court's conclusion that the City must show legal water rights sufficient to serve all approved development is a burdensome standard that is inconsistent with the dynamic nature of water rights planning for public water systems.[42] The City contends that the superior court should never have reached this question because no final plat application had been submitted such that the findings on this issue amount to an advisory opinion.[43]

In its appellate court response briefing, JZ Knight agrees that the question of the proper standard for potable water at final plat stage is not ripe for review, so long as the Court of Appeals affirms the trial court's ruling on the City's condition and upholds requirements imposed by the trial court ensuring that petitioner receives notice of any final plat application.[44] However the petitioner contests the City's argument that final plat approval only requires a "reasonable expectancy" that water will be available.[45] The petitioner argues that the statutes require that the City show more than just a

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[38] City's Opening Brief at 46-47. Once a superior court decision under LUPA is appealed, its findings are "surplusage" and "nullities" under reported Washington decisions. [cite.]

[39] City's Opening Brief at 18-24.

[40] *See* City's Opening Brief at 17, 38.

[41] *See* City's Opening Brief at 18-19.

[42] *See* City's Opening Brief at 22 ("Forcing the City to secure water rights for everything that could be built under present and past approvals, and to hold water rights for projects that may not be constructed for years, if ever would be extremely wasteful of public funds and would tend to motivate a City to avoid such wasteful expenditures by declining to accommodate growth… The reality is that water acquisition and usage are in constant flux depending upon the City's existing sources, the acquisition of new water rights, the conversion of existing water rights from other uses, the efficacy of conservation and reclamation measures, and the amount of development that actually occurs.").

[43] *See* City's Opening Brief at 18. Additionally, the City argues that the trial court's entering of findings and conclusions was inappropriate in the context of a LUPA appeal where the trial court sits in an appellate context.

[44] Brief of Respondent JZ Knight at 43.

[45] Brief of Respondent JZ Knight at 44-47.

"reasonable expectation" of potable water based on the City's anticipated ability to secure water in the future.

In light of the jurisdictional and ripeness questions raised on appeal, it is not clear whether the appellate court will reach the substantive question of what level of proof is necessary to satisfy the "appropriate provisions" standard at the final plat stage. Oral argument is scheduled for November 23, 2009.

B. Do Local Governments Have the Authority or Obligation to Review the Legality of An Applicant's Proposed Water Supply During Review of Land Use Applications?

A question that is beginning to arise with some frequency throughout the state is whether local governments have the obligation to review the legality of the manner in which an applicant demonstrates that "appropriate provisions" have been made for provision of potable water to the applicant's project. This question cuts directly to the issue of whether a local government exercising land use authority must also review an application for development for consistency with the Water Code. The issue commonly arises in the context of rural development projects where neither municipal supply nor new water rights are available and the local government with land use authority is not responsible for providing water service to the project. In these areas, applicants can seek to satisfy the statutory requirements to demonstrate appropriate provisions of potable water under RCW 58.17.110 and adequate water supply for building permits under RCW 19.27.097 through "exempt wells" authorized by RCW 90.44.050. Under that authority, up to 5,000 gallons per day ('gpd") may be withdrawn without a permit for domestic uses.[46]

As competition for waters increased in these areas, litigation has arisen concerning the scope of the exempt well statute. Initially, litigation explored the extent of a project proposal that can be served by the domestic well exemption. In *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P. 3d 4 (2002), the developer of a 16 lot subdivision claimed an exemption for a domestic well on each of the 16 lots. Ecology sought declaratory relief that the exemption applies to withdrawals for the entire subdivision, cumulatively. The Court agreed and held that a 16-lot residential development was entitled to a single 5,000 gpd exempt withdrawal. The Court reasoned that "the developer of a subdivision is, necessarily, planning for adequate water for group uses, rather than a single use, and accordingly is entitled to only one 5,000 gpd exemption for the project."

Following *Campbell & Gwinn*, a central question is which agency is responsible for evaluating proposals to use exempt wells when they are proposed to satisfy the water needs of a specific development proposal -- Ecology or local governments? *Kittitas County v. Kittitas County Conservation,* No. 271234 (Wash. Ct. App. Div. III, May 16, 2008) explores this question. In this case, the Eastern

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[46] The statute also exempts withdrawals of public groundwaters "for stock-watering purposes," "for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area," or for or for an industrial purpose in an amount not exceeding five thousand gallons a day." RCW 90.44.050. The exact quantities of withdrawals that are exempt for these other categories is subject to some controversy. *See* AGO 2009 No. 6 (addressing whether the exemption for groundwater withdrawals for lawn and noncommercial gardening of not more than ½ acre is also governed by the 5,000 GPD limitation); *Five Corners Family Farmers, et al., v. Dept. of Ecology and Easterday Ranches*, Franklin County Superior Court No. 09-2-51185-6 (addressing the stock-watering exemption).

Washington Growth Management Hearings Board determined that the GMA requires a local jurisdiction to adopt regulations that prevent applicants from relying on exempt wells in violation of *Campbell & Gwinn*. *Kittitas County Conservation, et al. v. Kittitas County*, EWGMHB Case No. 07-1-0015, Final Decision and Order (March 21, 2008). Among the questions presented to the Board was whether the County's subdivision regulations failed to adequately protect water quality and quantity by allowing multiple subdivision applications for a single "development."

The petitioners argued to the Board that the County code update did not comply with the GMA because the County did not adopt regulations that required all land in common ownership or "scheme of development" to be included in one application for a division of land. In other words, the petitioners argued that the County violated GMA because it did not adopt regulations ensuring that applicants do not circumvent the exempt well provisions. In support of their arguments, petitioners cited to various provisions of the GMA including the goal to " protect and enhance the state's high quality of life, including… availability of water,"[47] and the requirement to adopt regulations for the rural areas that protect "rural character," including "surface and groundwater resources."[48]

The County challenged the Board's jurisdiction to hear the matter, arguing that the case turned on *Campbell & Gwinn* and RCW 90.44.050, not the GMA. The County also argued that even if the Board had jurisdiction, the GMA does not require the County to evaluate whether proposed groundwater withdrawals violate RCW 90.44.050. Finally, the County argued that its SEPA regulations and requirements to review for cumulative impacts were adequate to address the petitioners' concerns.

In its final decision and order, the Board concluded that it had jurisdiction to hear petitioners' claim pursuant to RCW 36.70A.020(10) and RCW 36.70A.070(5)(c)(iv) which direct the County in broad terms to protect the environment and groundwater resources. The Board acknowledged that Ecology has authority regarding exempt wells but concluded that the County violated GMA by allowing multiple subdivision applications for a single development.[49] The Board's Final Decision and Order states that "the County has authority over land use decisions and planning… controls its own waters, and is required by the GMA to protect water resources… Simply stating that [Ecology] exempts the well does not remove the responsibility of the County to protect water quality and quantity as required by the GMA."[50] Additionally, the Board rejected the County's reliance on its SEPA regulations, noting that "SEPA can supplement, but it cannot substitute for GMA regulations, which require measures to control rural development to protect water resources."[51]

Appeal of the Board's decision is pending before the Court of Appeals on direct review. While the appeal was pending in superior court and before direct review was granted, the superior court granted a motion to stay the effect of the Board's decision. In its stay order, the superior court

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[47] RCW 36.70A.020.

[48] RCW 36.70A.070(5).

[49] *Kittitas County Conservation, et al. v. Kittitas County*, EWGMHB Case No. 07-1-0015, Final Decision and Order (March 21, 2008) at 30-31.

[50] *Id*. at 30.

[51] *Id*.

observed, "[r]uling that Chapter 16.04 of the Kittitas County Code violates the GMA by allowing too many exempt wells appears to go beyond the authority of the review parameters of the Board. The Department of Ecology pursuant to Chapter 90.44 RCW regulates ground water, not a Growth Management Board."[52]

While the case has been pending on appeal, Ecology and Kittitas County each separately asked the Attorney General for an opinion addressing the question of a local government's authority to limit or review water rights issues.[53] Two of their questions related to whether and to what extent local jurisdictions have the authority or the obligation to impose limits on water usage. Recognizing that the issue was currently on appeal, the Attorney General's Opinion declined to reach the issue because of a long standing policy of declining to provide opinions on matters that are the subject of litigation.[54] Unlike the Attorney General's Office, the Washington Department of Commerce ("Commerce") appears to ready to weigh-in on the matter. As part of its significant rewrite of the GMA implementing regulations, Commerce has proposed a regulation stating that counties and cities "may limit the number, location and allowed uses of permit-exempt wells … by working with the department of ecology to appropriately limit wells, based on land use and public health laws."[55] In earlier drafts, Commerce stated that "Counties and cities may also restrict the number and locations of permit exempt wells to avoid conflicting land uses and threats to public health, under their planning and public health authorities."[56]

Kittitas County is not the only place where Ecology appears to have begun pushing local jurisdictions to take a more central role in reviewing an applicant's use of an exempt well to satisfy the requirement in RCW 58.17.110. In Snohomish County, Ecology appealed a county hearing examiner's subdivision approval on the grounds that the application did not make appropriate provision for potable water.[57] In that case the applicant had two proposed subdivisions, for which the applicant proposed to use two exempt well, one for each subdivision, to satisfy the water supply needs of the two developments. Ecology argued that the County should have denied the requested "rural cluster" subdivision approvals because they should have been considered cumulatively a single project entitled to one exempt groundwater withdrawal well exemption and that the two subdivisions using two separate exempt wells cumulatively exceeded the 5,000 gpd limitation in violation of *Campbell & Gwinn*. Ecology's position in this administrative appeal is less surprising than its active involvement in the case.

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[52] *Central Washington Home Builders v. EWGMHB*, (Kittitas County Superior Court No. 08-2-00195-7) (Memorandum Decision and Order of Stay, April 24, 2008).
[53] *See* AGO 2009 No. 6 at 15-16.

[54] AGO 2009 No. 6 at 15-16.
[55] Proposed WAC 365-196-825, WSR 09-15-173 (July 21, 2009).
[56] This language appeared in a pre-proposal draft of WAC 365-195-82. This draft is available from the Department of Commerce's website. http://www.commerce.wa.gov/site/1133/default.aspx, last visited November 2, 2009.
[57] *See*, *e.g.*, Decision of the Snohomish County Hearing Examiner Denying Petitions for Reconsideration, File No. 06 102828-000-00-SD (Oct 2, 2008). Ecology appealed the Snohomish County Hearing Examiner's approval of a preliminary plat for the Highlands Ranch South project to the Snohomish County Council. While the Hearing Examiner acknowledged the same applicant had submitted both preliminary plat applications contemporaneously, the Examiner indicated that the county code, state regulations and statutes did not give her the authority to evaluate whether the proposed groundwater withdrawals violate RCW 90.44.050. *Id.* The County Council affirmed on administrative appeal.

Ecology's appeal of the County's administrative decision suggests that Ecology seeks to have the County take a more active role in the review of a proposal to rely on an exempt well in the context of a preliminary plat approval.

Resolution of this question may have significant consequences. If a local government has an obligation to review the legality of a proposal to use an exempt well as a part of its subdivision approval authority, the jurisdiction's decision on the issue may be part of a "final land use decision" that must be appealed under the LUPA within 21 days of the issuance of the decision. Under this interpretation, would Ecology failure to appeal the jurisdiction's conclusion on the issue under LUPA preclude further challenge by Ecology through its authority to enforce the Groundwater Code?[58] Indeed, this argument has been raised in motions to dismiss in another significant water law case pending in superior court, though no decision has been made.[59]

At the very least, these cases and administrative actions show that there is increasing pressure on local jurisdictions to play a more active role in the review of plans to provide water to development. The lack of clear guidance and delineation of authority from the Legislature complicates the matter. Local jurisdictions and developers should be prepared for this heightened scrutiny of water issues during the review of development applications..

C. To What Degree Can State Law Provide Certainty and Flexibility for Municipal Water Rights to Facilitate GMA Land Use Planning?

A case pending before the Supreme Court addresses the availability of water from public water systems. While not directly tied to any of the previously discussed statutory provisions requiring consideration of water supply in land use processes, the case is nevertheless significant to land use practitioners for two reasons. First, the case affects the water rights of the public water systems from which many development projects obtain water. Second,land use planning of local jurisdictions relies on the availability of water from these public water systems.

In *Lummi Indian Nation v. State of Washington,*[60] the King County Superior Court, in a decision with state-wide significance, declared three provisions of the 2003 Municipal Water Law ("MWL") facially unconstitutional.

The superior court struck as unconstitutional the MWL provision stating that certificates issued on the basis of system capacity (so-called "pumps and pipes" certificates) held by municipal water

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[58] *See, e.g., Samuel's Furniture, Inc. v. Dept. of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002); *Twin Bridge Marine Park, L.L.C. v. Dept. of Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008).

[59] *Five Corners Family Farmers, et al., v. Dept. of Ecology and Easterday Ranches*, Franklin County Superior Court No. 09-2-51185-6. This case involves the interpretation of the stock-watering exemption from groundwater permitting under RCW 90.44.050. On October 26, 2009, Defendant Easterday Ranches has filed a motion to dismiss under LUPA. Because the county in which the ranch will be located issued a conditional use permit that addressed reliance on the stockwater exemption, Easterday Ranches argues that the plaintiffs are precluded from seeking relief because they failed to appeal the permit under LUPA.

[60] *Lummi Indian Tribe v. State of Washington* (No. 06-2-40103-4 SEA) (Order, June 11, 2008).

suppliers are "rights in good standing."[61] Historically, Ecology had often issued pumps and pipes certificates to public water systems to serve future growth. The court also struck the MWL's broad definitions of "municipal water supplier" and "municipal water supply purposes." [62] The definitions include water rights that serve in excess of a threshold number of residential connections and water rights held by traditionally municipal entities. The terms are central to the statute, defining the water rights that are subject to the MWL.

The superior court held that the three provisions violate the separation of powers doctrine because they retroactively contravene the Supreme Court's decision in *Department of Ecology v. Theodoratus*.[63] *Theodoratus* addressed an extension of time to perfect a permit issued to a private residential water system. The superior court held that the pumps and pipes provision and the definitions of the MWL were inconsistent with the Supreme Court's constructions of the Surface Water Code in *Theodoratus,*[64] such that the three provisions were unconstitutional.

On appeal, the Supreme Court granted direct review.[65] The outcome may impact the quantity of water available to certain public water systems. This may in turn impact project approval decisions of local jurisdictions under RCW 58.17.110 and RCW 19.27.097 that were based on the ability of those public water systems to provide water. Similarly, it may impact land use planning of those jurisdictions that were also based on the ability of those public water systems to provide water. For example, under the GMA, boundaries of Urban Growth Areas are premised on the capacity to provide urban services, including water, within those boundaries during the 20 year planning horizon. RCW 36.70A.110. If those assumptions of quantities available to municipal utilities change as a result of the decision, it may therefore also affect the factual support for those UGA boundaries. Oral argument has been scheduled for January 12, 2009.

IV. Conclusion.

With increasing frequency, courts are being asked to explore the intersection of land use and water resources law and resolve fundamental questions related to local government jurisdiction over what has historically been in Ecology's realm. The scarcity of our water resources in conjunction with growth pressures will continue to force these questions to the fore.

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[61] RCW 90.03.330(3).

[62] RCW 90.03.015(3), (4).

[63] *Dep't of Ecology v. Theodoratus,* 135 Wash.2d 582, 957 P.2d 1241 (1998).

[64] The Supreme Court in *Theodoratus* noted that the private residential water system in the case was not a "municipality." 135 Wn.2d at 594. The Court also noted that Ecology's policy of issuing pumps and pipes certificates was invalid. 135 Wn.2d at 598. However, the Court expressly declined to address issues pertaining to municipal water suppliers in the context of that case. 135 Wn.2d at 594.

[65] *Lummi Indian Nation et al. v. State of Washington*, No. 81809-6 (Wash.)

represents the Washington Water Utilities Council in Lummi Indian Nation v. State of Washington*. Additionally, GordonDerr represents JZ Knight in* JZ Knight v. City of Yelm.