

WASHINGTON COURT OF APPEALS RULES THAT STATE GROWTH MANAGEMENT ACT DOES NOT REQUIRE INDEPENDENT COUNTY REGULATION OF EXEMPT WELLS

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*Whatcom County, et al. v. Western Washington Growth Management
Hearings Board*, 186 Wn. App. 32, 344 P.3d 1256 (2015)

In a published opinion issued February 23, 2015, Division I of the Washington Court of Appeals held that the Growth Management Act does not mandate independent county restrictions on the use of exempt wells for rural residences and subdivisions, apart from regulations promulgated by the Department of Ecology. The court reversed a ruling by the Growth Management Hearings Board that the rural element of Whatcom County's comprehensive plan was deficient because it allowed exempt wells wherever they are not prohibited under applicable Ecology regulations. The disappointed petitioners have petitioned the Washington Supreme Court for discretionary review, asserting that the Growth Management Act's directive to "protect rural character" overrides explicit groundwater permit exemptions in the Water Code and "single domestic" exemptions from minimum instream flows in Ecology's Nooksack Basin rule.

Background: the Growth Management Act

Since 1990, Washington's Growth Management Act, RCW chapter 36.70A ("GMA") has required many of Washington's 39 counties to adopt comprehensive plans and development regulations to implement those plans. The GMA requires local governments to apply a set of disparate and broadly-worded planning goals, including 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.” RCW 36.70A.020.

The GMA also identifies mandatory elements of a comprehensive plan. Counties are required to include a “rural element” with “measures that apply to rural development and protect the rural character” by, among other things, “protecting surface water and groundwater resources.” RCW 36.70A.070(5)(c)(iv). Local governments are required to review and revise their comprehensive plans and development regulations every seven years.

The Growth Management Hearings Board (“GMHB”) is a state-level administrative appeals board established to review claims that local comprehensive plans or development regulations are not consistent with the GMA. The GMHB’s review is limited to the record created by the local government in taking the challenged action. Local plans and regulations are presumed valid upon adoption, and the challenger has the burden of demonstrating lack of compliance with the GMA. In RCW 36.70A.3201, the Legislature has explicitly directed the GMHB to grant deference to counties in how they plan for growth, consistent with the requirements and goals of the GMA. However, despite the statutory presumption of validity, burden of proof, and required deference to local planning, in practice the GMHB readily finds local governments out of compliance with the GMA by determining that local plans and regulations are “clearly erroneous” in light of the Act’s goals and requirements.

Background: Ecology’s Nooksack Rule

Whatcom County is located in northwest Washington adjacent to the Canadian border. The county’s rural areas lie within the Nooksack River Basin, which is the subject of an instream resources protection program promulgated in 1985 by the Department of Ecology (WAC chapter 173-501) (the “Nooksack Rule”). The Nooksack Rule established minimum instream flows for numerous stream segments and closed some streams to further surface water appropriations.

Ecology's Nooksack Rule includes explicit exemptions for single domestic uses, including up to one-half acre of lawn and garden irrigation, except from Whatcom Creek. WAC 173-501-070(2). Additionally, the Nooksack Rule does not apply to groundwater withdrawals that are permit-exempt under RCW 90.44.050, which exempts from permit requirements any withdrawal of groundwater for single or group domestic uses in an amount not exceeding 5,000 gallons per day.

The GMHB Decision

In 2012, Whatcom County adopted Ordinance No. 2012-032, consisting of amendments to the rural element of its Comprehensive Plan and its development regulations, including specific measures to protect the quantity and quality of surface water and groundwater. County policies and regulations address the determination of water availability in the context of subdivision and building permit applications, as required by state law.

Applicants for building permits and subdivisions are required to provide evidence of an adequate water supply prior to approval. County ordinances set forth specific requirements where an applicant seeks to rely on water from an existing public water system, where an applicant proposes creation of a new public water system, and where an applicant proposes use of water from a private well. For a subdivision or building permit application relying on a private well, the County will approve the application only where the well "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."

Four citizens and a nonprofit organization filed an appeal with the GMHB, alleging that Whatcom County's 2012 plan failed to contain measures to protect rural character by protecting surface water and groundwater resources. The petitioners argued that it was insufficient to defer to Ecology's Nooksack Rule, which they consider inadequate to "solve the problem of proliferation of individual exempt wells" in the county.

The GMHB ruled in the petitioners' favor, concluding that Whatcom County had failed to adopt "measures to protect rural character" in its comprehensive plan because it does not require applicants for building permits or subdivisions to demonstrate that a proposed exempt well will not impair minimum instream flows set by rule in the Nooksack River basin. Although it acknowledged that Whatcom County has in place subdivision regulations that preclude applicants from circumventing state law restrictions on exempt wells, the GMHB concluded that the GMA nevertheless imposes a much more expansive duty to regulate water use.

The GMHB ruled that the standard for "determining legal availability of water" is not whether Ecology's rule would allow a new exempt well, and that "the County must deny a permit for a new building . . . unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows."

The GMHB also concluded that the County's rural element contained insufficient measures to protect water quality. The GMHB remanded the County's ordinance to the County, but declined the petitioners' request to invalidate the ordinance.

The Court of Appeals Decision

Whatcom County appealed the GMHB decision to the Court of Appeals, and the original petitioners cross-appealed the GMHB's refusal to invalidate the County's plan and regulations. The court held that the GMHB erroneously interpreted and applied the law in determining that the County's ordinance fails to comply with the GMA.

The court agreed with the GMHB's general conclusions that the GMA has requirements to "protect ground and surface water and ensure land uses are compatible for fish and wildlife," and that the rural element of a county comprehensive plan "must include measures governing rural development to protect water resources." The court explained that the issue is whether the

GMHB correctly concluded that Whatcom County’s ordinance fails to protect water availability and water quality as required by the GMA.

Water Availability

The court began its discussion of water availability by addressing the GMHB’s reliance on *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 256 P.3d 1193 (2011). The issue in *Kittitas County* was whether a county’s subdivision regulations failed to protect water resources because they “allow[ed] multiple subdivisions side-by-side, in common ownership, which then [could] use multiple exempt wells” – a practice commonly referred to as “daisy-chaining.” In that case, the Supreme Court interpreted the GMA’s mandate to protect water resources “to at least require that the County’s subdivision regulations conform to statutory requirements by not permitting subdivision applications that effectively evade compliance with water permitting requirements.”

As the GMHB recognized, Whatcom County’s regulations do not allow the “daisy-chaining” of plat applications that was the specific target of the *Kittitas County* decision. However, the GMHB went much farther, relying on the Supreme Court’s observation in *Kittitas County* that “the County must regulate to some extent to assure that land use is not inconsistent with available water resources” to reject Whatcom County’s incorporation of Ecology rules concerning water availability.

The court of appeals explained that county regulations “essentially provide that in determining the availability of water, the County seeks to meet the requirements of the GMA by following consistent Department of Ecology regulations regarding the availability of water.” The court held that the GMHB erroneously interpreted the law by concluding that the County “must make its own, separate determination of the availability of water in order to fulfil the requirements of the GMA.”

The court emphasized that in *Kittitas County*, the Supreme Court anticipated **consistent** local regulation by counties in land use planning to protect water resources, which “necessarily contemplates proper cooperation between

Ecology and counties” regarding protection of water resources. By incorporating Ecology regulations, Whatcom County provided for cooperation between its exercise of land use authority and Ecology’s management of water resources. The court of appeals warned that the GMHB’s approach allows for inconsistent conclusions between counties and Ecology about the availability of water, pointing out that the GMHB’s conclusions about water availability in the Nooksack Basin are directly contrary to Ecology’s interpretation of its own regulation.

Next, the court addressed the GMHB’s implicit determination that water is not available for permit-exempt groundwater withdrawals in the Nooksack Basin. The court held that, first, the GMHB erroneously interpreted and applied *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000), which addresses groundwater permitting and does not squarely address the protection of instream flows from permit-exempt wells. Second, the GMHB erroneously relied on the “legal principles” asserted in an Ecology letter addressing the provisions of an entirely different basin regulation, instead of addressing the specific provisions of the Nooksack Rule. Finally, the Board erroneously overlooked the specific exemptions and exclusions in the Nooksack Rule and required the County to impose restrictions on exempt wells that are inconsistent with Ecology’s interpretation of the rule. The court reversed the GMHB’s decision with respect to the issue of water availability.

Water Quality

With respect to the GMHB’s conclusions that the County had failed to protect water quality, the court held that the GMHB engaged in unlawful procedure by taking “official notice” of and relying on two documents outside the record, without giving the County an opportunity to contest the information in those documents. The court remanded this issue for reconsideration by the GMHB on a proper administrative record, additionally emphasizing the GMA duty to “protect” rather than “enhance” water quality as well as the GMA requirement that the GMHB apply a more deferential standard of review to the County’s actions.

Petition for Supreme Court review

On March 24, 2015, the petitioners who successfully challenged the County's ordinance before the GMHB requested discretionary review of this case by the Washington Supreme Court. As of this writing, the Washington Supreme Court has not announced whether it will accept discretionary review of the court of appeals' decision.

Conclusion and Implications

As the first appellate decision to address whether the GMA requirement to "protect water resources" imposes on counties an independent duty to evaluate impairment of water rights or instream flows when reviewing building permit or subdivision applications, *Whatcom County* is a significant addition to Washington's GMA jurisprudence. Unless the Supreme Court grants review and reverses the court of appeals, counties can proceed with their GMA planning efforts with assurance that they can fulfil their GMA duty to protect water resources by relying on relevant Ecology regulations on water resource management.