

WHATCOM COUNTY COUNCIL AGENDA BILL

NO. 2017 - 129

| CLEARANCES | Initial | Date | Date Received in Council Office | Agenda Date | Assigned to: |
|--------------------|----------------|-------------|--|--------------------|---------------------------|
| Originator: | Council | 4/10/2017 | | 4/18/2017 | Natural Resources Council |
| Division Head: | | | | | |
| Dept. Head: | | | | | |
| Prosecutor: | RME | 4/11/17 | | | |
| Purchasing/Budget: | | | | | |
| Executive: | | | | | |

TITLE OF DOCUMENT:

Resolution GMA counties rely Dept Ecology determine legal water availability

ATTACHMENTS:

Resolution

| | |
|--|---|
| SEPA review required? () Yes () NO | Should Clerk schedule a hearing ? () Yes () NO |
| SEPA review completed? () Yes () NO | Requested Date: |

SUMMARY STATEMENT OR LEGAL NOTICE LANGUAGE: (If this item is an ordinance or requires a public hearing, you must provide the language for use in the required public notice. Be specific and cite RCW or WCC as appropriate. Be clear in explaining the intent of the action.)

Resolution requesting the state legislature amend the growth management act to carify that counteis can rely on department of ecology guidance for determining legal water availability.

COMMITTEE ACTION:

COUNCIL ACTION:

Related County Contract #:

Related File Numbers:

Ordinance or Resolution Number:

Please Note: Once adopted and signed, ordinances and resolutions are available for viewing and printing on the County's website at: www.co.whatcom.wa.us/council.

April 18, 2017

PROPOSED BY: _____
INTRODUCTION DATE: APRIL 18, 2017

RESOLUTION NO. _____

**REQUESTING THE STATE LEGISLATURE AMEND THE GROWTH
MANAGEMENT ACT TO CLARIFY THAT COUNTIES CAN RELY ON
DEPARTMENT OF ECOLOGY GUIDANCE FOR DETERMINING LEGAL WATER
AVAILABILITY**

WHEREAS, in 2012, a group of citizens and environmental groups, known as Hirst et al, challenged the Whatcom County Comprehensive Plan as it related to residential development and permit-exempt groundwater withdrawals; and

WHEREAS, in 2013, the Growth Management Hearings Board ruled in favor of Hirst et al; and

WHEREAS, in 2013, Whatcom County appealed this ruling and the State Department of Ecology, Washington Association of Realtors, and Washington Association of Counties, and other groups, filed Amicus briefs in support of the County; and

WHEREAS, in 2015, the State Appeals Court overturned the Growth Management Hearings Board’s order and Hirst et al appealed to the State Supreme Court; and

WHEREAS, on October 6th, 2016 the Washington State Supreme Court issued its decision, now known as the *Hirst* ruling; and

WHEREAS, in response to the *Hirst* ruling, the Whatcom County Council adopted Ordinance 2016-048, which imposed an emergency 30-day moratorium on building permits for properties relying on permit-exempt groundwater withdrawals in areas affected by the *Hirst* ruling; and

WHEREAS, on December 6, 2016 the Whatcom County Council adopted Ordinance 2016-066, a three-month interim ordinance ending the emergency moratorium and amending Whatcom County Code consistent with the *Hirst* ruling, which has placed considerable restrictions on the issuance of building permits relying on permit-exempt groundwater withdrawals in affected areas of the County; and

WHEREAS, on March 7, 2017 the Whatcom County Council adopted Ordinance 2017-008, a six-week interim ordinance similar to the first; and

WHEREAS, under the interim ordinances, issuance of building permits

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1 relying on permit-exempt groundwater withdrawals in the affected areas has been
2 limited to those where the application was submitted prior to the *Hirst* ruling, and
3 those on lots in subdivisions where an approved groundwater source has been put
4 to beneficial use, lots that are part of a shared well agreement approved prior to
5 the *Hirst* ruling, and lots where another source of adequate water supply was
6 approved prior to the *Hirst* ruling; and
7

8 **WHEREAS**, the County's moratorium and subsequent interim ordinances act
9 as a temporary bridge to minimize legal risk to the County and property owners
10 until a permanent solution is reached; and
11

12 **WHEREAS**, Washington State lacks enabling legislation that protects
13 counties and property owners from legal risk and uncertainty about which actions
14 or decisions would or would not comply with state law following the *Hirst* ruling;
15 and
16

17 **WHEREAS**, the County does not wish to take legislative action that could
18 later cause property owners legal difficulties similar to those encountered by Skagit
19 County property owners who were issued building permits and were later found to
20 be lacking a legal water supply by a Supreme Court decision; and
21

22 **WHEREAS**, the County does not wish to take legislative action that places
23 the County in jeopardy of achieving compliance with the Growth Management
24 Hearings Board order, or is potentially inconsistent with future State legislative
25 action; and
26

27 **WHEREAS**, hundreds of property owners suddenly have been unable to
28 obtain building permits for properties they have lawfully subdivided, and even
29 begun infrastructure improvements on; and
30

31 **WHEREAS**, residential water withdrawals from permit-exempt wells
32 represents a tiny fraction of total water consumption in Whatcom County; and
33

34 **WHEREAS**, while the *Hirst* ruling impacts 29 counties planning under GMA,
35 Whatcom County is the only defendant in this case and is therefore uniquely
36 vulnerable and subject to immediate review for Growth Management Act
37 compliance by the Growth Management Hearings Board and to potential subsequent
38 state sanctions, and
39

40 **WHEREAS**, half of Whatcom County's budget comes from state or federal
41 grants and programs, and
42

43 **WHEREAS**, the Whatcom County Council recognizes the precious value of
44 clean and plentiful potable water; and
45

46 **WHEREAS**, The Whatcom County Council will continue to engage all
47 stakeholders to collaborate on issues of water quality and water quantity; and
48

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1 **WHEREAS**, the Whatcom County Council recognizes the financial and
2 environmental impacts created by conversion of resource lands to low-density,
3 residential sprawl; and
4

5 **WHEREAS**, denying citizens the ability to use permit-exempt groundwater
6 withdrawals to provide for their homes and families is an inappropriate strategy for
7 preventing sprawl; and
8

9 **WHEREAS**, the County recognizes the need to adopt local regulations
10 consistent with state law to provide predictability and not put the County,
11 taxpayers, and property owners at further risk of additional lawsuits; and
12

13 **WHEREAS**, the employees of Whatcom County are working to respond to
14 the *Hirst* ruling and authorize appropriate development approvals consistent with
15 the ruling and other applicable water laws, without jeopardizing the further legal
16 liability and exposure of Whatcom County government, taxpayers, and property
17 owners; and
18

19 **WHEREAS**, the County continues to support long-term water resource
20 planning initiatives in coordination with the WRIA 1 Watershed Management Board,
21 the cities, the Water Utility Coordinating Committee (WUCC), the Public Utility
22 District #1 of Whatcom County (PUD), the Lummi Nation, the Birch Bay Water &
23 Sewer District, and the Ag Water Board and the individual watershed improvement
24 districts (WIDs); and
25

26 **WHEREAS**, Whatcom County, along with other stakeholders, initiated
27 cooperative watershed planning under the Watershed Planning Act (RCW 90.82) in
28 1999 which resulted in the preparation of the WRIA 1 Management Plan in 2005,
29 the WRIA 1 Detailed Implementation Plan in 2007, and the Lower Nooksack
30 Strategy in 2010. This process also included the preparation of numerous technical
31 studies including an instream flow study and the Lower Nooksack Water Budget
32 that provide the technical foundation for water planning. Whatcom County and
33 local tribes and other local partners are furthering that knowledge by developing a
34 groundwater model for the northern portion of the county which will better
35 characterize the interaction between groundwater and surface water and preparing
36 the WRIA 1 Ecosystem Recovery Plan to address water quantity, stream flow, and
37 habitat issues under the Puget Sound Partnership recovery management process;
38 and
39

40 **WHEREAS**, the County has worked with the WUCC to develop and adopt the
41 Coordinated Water System Plan Update in 2016 to identify municipal water rights
42 and strategies to improve delivery of public water supplies and the County is
43 currently working to identify and assign the Department of Ecology well log data
44 base to parcels by watershed sub-basin which is a critical first step to help identify
45 existing and future private (permit-exempt withdrawals) and public (Group A/B)
46 domestic water demand in affected basins; and
47

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1 **WHEREAS**, the PUD recently completed an assessment of agricultural water
2 rights in the county and is leading a multiple party Drought Contingency Plan effort
3 to identify long-term water supply needs and strategies to meet those needs; and
4

5 **WHEREAS**, the Lummi Nation recently initiated a study to identify potential
6 water supply and/or mitigation solutions to address long-term water supply needs
7 and mitigation options to help maintain adopted instream flows; and
8

9 **WHEREAS**, the Birch Bay Water & Sewer District is drilling several test wells
10 to conduct deep aquifer explorations in the county to identify possible new
11 groundwater supplies; and
12

13 **WHEREAS**, the Ag Water Board and the individual WIDs are working on their
14 individual comprehensive plans and obtained a grant to study model stream
15 augmentation on Bertrand Creek;
16

17 **WHEREAS**, the County Council supports further study to find suitable
18 mitigation options to address impairment of instream flows that may include: water
19 banking, fee-in-lieu mitigation payments, site-based consumptive use conservation
20 and water use efficiency strategies, stream and/or groundwater augmentation,
21 improved storage (winter flow capture) and improved cost-efficient delivery of
22 public water; and
23

24 **WHEREAS**, the County will continue to meet with the *Hirst* petitioners in
25 good faith settlement talks with the goal of identifying suitable mitigation strategies
26 for impacts to instream flows from domestic permit-exempt groundwater
27 withdrawals; and
28

29 **WHEREAS**, there have been productive meetings with the State Legislature,
30 support from the Washington State Association of Counties and other groups, and
31 meetings with local state legislators of both parties and of both chambers; and
32

33 **WHEREAS**, state legislative action is needed so that the County can adopt
34 permanent water availability regulations that restore certainty for property owners
35 and remove the severe restrictions necessitated by the *Hirst* ruling.
36

37 **NOW, THEREFORE, BE IT RESOLVED** that the Whatcom County Council
38 requests the State Legislature's urgent attention to this matter, and strongly
39 recommends amendments to the Growth Management Act that would resolve the
40 uncertainty created by the *Hirst* decision while adequately protecting instream
41 flows. The County is supportive of legislation that would:

- 42 • Allow counties to rely on state-adopted instream flow rules to determine
43 legal water availability
- 44 • Establish a Department of Ecology mitigation program for permit-exempt
45 wells in closed basins – with a fee-in-lieu mitigation payment option for
46 affected permit applicants, which would allow permits to proceed while state
 and counties provide for the actual instream flow mitigation

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- 1 • Allow counties to condition local permits to limit daily use of state permit
- 2 exempt groundwater withdrawals to less than 5,000 gallons per day
- 3 • Allow use of unexercised municipal water rights for mitigation purposes
- 4 • Allow for an "out-of-kind" instream flow impairment mitigation option that
- 5 provides an overall net ecological benefit
- 6 • Provide financial assistance for developing public rural water supplies,
- 7 mitigation projects and/or water banks.

8
9

10 **APPROVED this ____ day of _____, 2017.**

11
12
13
14 **ATTEST:**

**WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON**

15
16 _____
17 Dana Brown-Davis, Clerk of the Council

15
16 _____
17 Barry Buchanan, Council Chair

18
19
20 **APPROVED AS TO FORM:**

21 
22 _____
23 Civil Deputy Prosecutor

CLERK OF THE COUNCIL
 Dana Brown-Davis, C.M.C.
 COUNTY COURTHOUSE
 311 Grand Avenue, Suite #105
 Bellingham, WA 98225-4038
 (360) 778-5010



COUNCILMEMBERS
 Barbara Brenner
 Rud Browne
 Barry Buchanan
 Todd Donovan
 Ken Mann
 Satpal Sidhu
 Carl Weimer

WHATCOM COUNTY COUNCIL

April 11, 2017

To: All Interested Parties

From: Whatcom County Council

Re: Impact of Hirst on Subdivision and Building Permits Relying on Permit Exempt Withdrawal

The County's interim ordinance seeks to comply with the Supreme Court's Hirst decision and the GMA, while allowing the legislative session to finish. County staff will continue to evaluate each pending land use permit decision that relies on a permit exempt groundwater withdrawal on a case-by-case basis to identify the particulars of every situation's unique characteristics for compliance with the new legal water reality brought on by the Hirst decision. In general, there is more flexibility for property owners in situations where a domestic groundwater withdrawal has already been put to beneficial use than for situations in which a brand "new" withdrawal is required. New groundwater withdrawals needed for new development are subject to the requirements of the interim ordinance. However, some new developments may have the ability to utilize an "existing" (pre-Hirst) approved withdrawal that qualifies as a legal water supply for permitting purposes. A condition will be placed on approved permits informing applicants that the water supply may be subject to future curtailment or restrictions on availability that could impact its reliability for the intended use. The tables below provide staff a general legal framework to consider when analyzing specific permit scenarios:

| | | |
|--------------|--|---|
| Sub-Division | Complete subdivision application filed after <i>Hirst</i> , relying on new withdrawal | Evidence of legal availability required per interim ordinance. |
| | Complete subdivision application filed prior to <i>Hirst</i> , relying on new withdrawal, but no decision yet. | Evidence of legal availability required per interim ordinance. |
| | Preliminary subdivision approval prior to <i>Hirst</i> , relying on a new withdrawal, but no Final Plat approval | Qualified approval of final plat if consistent with preliminary. Approval will include condition that the proposed use of water may not be adequate under current law to support building permit application pursuant to RCW 19.27.097. |

| | | |
|---|--|--|
| Building Permit (SFR) for undeveloped lot | Complete building permit application filed after <i>Hirst</i> , relying on new withdrawal | Evidence of legal availability required per interim ordinance. |
| | Complete building permit application filed prior to <i>Hirst</i> , relying on new withdrawal | Approve application. |
| | Development that will rely on an existing permit-exempt withdrawal that currently serves other developed lots in a subdivision | Legal availability may be approved based on analysis of existing withdrawal and site specific factors. |
| | Complete building permit application relying on existing withdrawal through shared well with neighboring parcel | Legal availability may be approved based on analysis of existing withdrawal and site specific factors. |

These tables are not intended to provide a definitive answer for individual permit scenarios. It is difficult to codify qualifying circumstances due to the wide range of issues and unique aspects of each particular situation that affect a potential permit decision. The Health Department and PDS are working with individual applicants and interested property owners to define their particular situations and the options available to them. We encourage individuals to contact County staff with their specific questions and issues about their property.