

**WHATCOM COUNTY**

Planning & Development Services  
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**Mark Personius, AICP**  
Director

**MEMORANDUM**

TO: PDS and Health Staff

FROM: Mark Personius, Director, Planning and Development Services *MP*  
Regina Delahunt, Director, Health Department *RD*

THROUGH: Karen Frakes, Assistant Chief Civil Deputy Prosecuting Attorney *KMF*

DATE: March 20, 2018

RE: Policy Regarding ESSB 6091 and Ord 2018-001 and Ord 2018-005

On January 19, 2018, Governor Inslee signed ESSB 6091, which became effective immediately. The new state law addressed the Washington State Supreme Court ruling in the case of Whatcom County v. Hirst, issued on October 6, 2016. Whatcom County passed an emergency interim ordinance (ORD 2018-001) enacting the provisions of ESSB 6091 for those areas subject to the Hirst decision and passed interim ordinance (ORD 2018-005) on February 20, 2018.

Both of the County’s adopted ordinances included similar language to allow approval of building and development permits utilizing a withdrawal from a permit-exempt well in WRIA 1 subject to the following:

- Withdrawals for domestic uses from a permit-exempt well will be limited to no more than an average annual withdrawal of 3,000 gallons per day per connection,
- A covenant and agreement, provided and signed by the County and the applicant, shall be recorded by the applicant, and
- A \$500.00 fee will be charged at the time of issuance of the building permit.

Non-residential uses that require potable water will be limited to 3,000 gallons per day per connection, the agreement and fees. If the non-residential uses will utilize water for non-domestic type use (industrial, agricultural, etc.), there will be no restrictions on withdrawal and the applicant can utilize up to 5,000 gallons per day.

Water Availability Forms (WAFs) will be required at the time of building permit submittal. The WAF will indicate when the permit-exempt well was constructed and if restrictions, fees and a notice on title will be required as conditions of approval. Through the pre-screen process, PDS will require compliance with conditions of the

WAF for submittal of a building permit. No restrictions, fees or notices will be applied to withdrawals from a permit-exempt well that was drilled and constructed pursuant to RCW 18.104 prior to January 19, 2018.

The following table details when restrictions, fees and notices will be applied to building permits:

| <b>Building and Land Use Permits</b>                             |  |  |
|--|--|--|
| <b>Project Permit</b>  | <b>Well constructed <u>before</u> January 19, 2018<sup>1</sup></b> | <b>Well constructed <u>after</u> January 19, 2018<sup>2</sup></b>  |
| Building Permit (new SFR)  | 5,000 gpd, no restriction  | 3,000 average annual gpd restriction, Record covenant and agreement, and pay \$500.00 at time of building permit submittal |
| Building Permits (new and/or expanded uses) requiring a new well | 5,000 gpd, no restriction  | 3,000 average annual gpd restriction, Record covenant and agreement, and pay \$500.00 at time of building permit submittal |
| Building Permits (require replacement well)                      | 5,000 gpd, no restriction  | 3,000 average annual gpd restriction, Record covenant and agreement, and pay \$500.00 at time of building permit submittal |
| Land Use Permits (conditional use, administrative use)           | 5,000 gpd, no restriction, disclaimer condition                    | 3,000 average annual gpd restriction, Disclaimer condition   |

Pursuant to Washington State Department of Ecology guidance, subdivisions utilizing permit-exempt wells are not subject to fees or restrictions noted above; however, the subsequent building permits may be restricted depending upon well construction date. If a subdivision has been granted preliminary approval, the application will be allowed to gain final approval with no restrictions and no notice will be required on the mylar, regardless of well construction date.

If a subdivision has not received preliminary approval, and will be utilizing a permit-exempt well, there will be no restriction on withdrawal for the plat; however, a note will be included on the mylar as notice to potential owners that restrictions may be applied at the time of building permit. The note will be specific as to date of construction and will include disclaimer language regarding possible restrictions for withdrawals per connection.

<sup>1</sup> Existing wells that were constructed in accordance with RCW 18.104 prior to January 19, 2018

<sup>2</sup> Wells constructed in accordance with RCW 18.104 after January 19, 2018

The following table details what will be required for subdivisions:

| <b>Subdivisions</b>  |  |   |
|--|--|---|
| <b>Project Permit</b>  | <b>Well constructed <u>before</u><br/>January 19, 2018<sup>3</sup></b> | <b>Well constructed <u>after</u><br/>January 19, 2018<sup>4</sup></b> |
| Short Subdivision, preliminary approval granted prior to 1/19/2018 | 5,000 gpd, no restriction  | 5,000 gpd, no restriction   |
| Short Subdivision, no preliminary approval                         | 5,000 gpd, no restriction, disclaimer note on plat                     | Plat note   |
| Long Subdivision, preliminary approval granted prior to 1/19/2018  | 5,000 gpd, no restriction  | 5,000 gpd, no restriction   |
| Long Subdivision, no preliminary approval                          | 5,000 gpd, no restriction, disclaimer note on plat                     | Plat note   |
| Short Subdivision, preliminary approval granted prior to 1/19/2018 | 5,000 gpd, no restriction  | 5,000 gpd, no restriction   |

Depending upon the table, plat notes may be required on the face of the plat. The following are examples that may be used depending upon well construction date. Plat notes may need to be altered for specific circumstances.

**Short Subdivision/Long Subdivision with well constructed prior to January 19, 2018**

THIS SUBDIVISION IS LOCATED IN AN AREA THAT IS GOVERNED BY CHAPTER 173-501 WAC AND IN WHICH INSTREAM FLOWS ARE NOT MET AND/OR ARE SUBJECT TO CLOSURE. IN COMPLIANCE WITH ESSB 6091 AND RCW 58.17, THE COUNTY HAS DETERMINED ADEQUATE POTABLE WATER IS AVAILABLE FOR THIS SUBDIVISION ON THE BASIS OF EVIDENCE SUPPLIED BY THE APPLICANT. THE SUBDIVISION HAS BEEN APPROVED UTILIZING A PERMIT-EXEMPT WELL CONSTRUCTED IN ACCORDANCE WITH RCW 18.104 AND DRILLED PRIOR TO JANUARY 19, 2018. THE COUNTY'S ISSUANCE OF THIS SUBDIVISION APPROVAL SHOULD NOT BE RELIED UPON BY THE APPLICANT OR ANY SUCCESSOR IN INTEREST AS AN ASSURANCE, WARRANTY OR GUARANTEE OF THE FUTURE AVAILABILITY OF WATER TO SERVE THE SUBDIVISION.

**Short Subdivision/Long Subdivision with well constructed after January 19, 2018**

THIS SUBDIVISION IS LOCATED IN AN AREA THAT IS GOVERNED BY CHAPTER 173-501 WAC AND IN WHICH INSTREAM FLOWS ARE NOT MET AND/OR ARE SUBJECT TO CLOSURE. IN COMPLIANCE WITH ESSB 6091 AND RCW 58.17, THE COUNTY HAS DETERMINED ADEQUATE POTABLE WATER IS AVAILABLE FOR THIS SUBDIVISION ON THE BASIS OF EVIDENCE SUPPLIED BY THE APPLICANT. THE SUBDIVISION HAS BEEN APPROVED UTILIZING A PERMIT-EXEMPT WELL CONSTRUCTED IN ACCORDANCE WITH RCW 18.104 AND DRILLED AFTER JANUARY 19, 2018. CONSISTENT WITH ESSB 6091 AND WHATCOM COUNTY ORDINANCE 2018-005, RESTRICTIONS ON WITHDRAWAL MAY BE APPLIED AT THE TIME OF BUILDING PERMIT ISSUANCE. THE COUNTY'S ISSUANCE OF THIS SUBDIVISION APPROVAL SHOULD NOT BE RELIED UPON BY THE APPLICANT

<sup>3</sup> Existing wells that were constructed in accordance with RCW 18.104 prior to January 19, 2018

<sup>4</sup> Wells constructed in accordance with RCW 18.104 after January 19, 2018

OR ANY SUCCESSOR IN INTEREST AS AN ASSURANCE, WARRANTY OR GUARANTEE OF THE FUTURE AVAILABILITY OF WATER TO SERVE THE SUBDIVISION.

Record & Return to:

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**COVENANT AND AGREEMENT  
PERMIT EXEMPT WELL RESTRICTION**

GRANTOR: \_\_\_\_\_

GRANTEE: Whatcom County

**COVENANT:**

I/We \_\_\_\_\_, am/are owner(s) in fee of the following described real property. For and in consideration of being granted or issued the following Whatcom County permit(s) approvals: \_\_\_\_\_, and as required by RCW 19.27.097, Washington State Engrossed Substitute Senate Bill 6091 and Whatcom County Code, hereby enter into the following agreement to restrict the withdrawal of water from a permit exempt well as defined by RCW 90.44.050 and as detailed in the Statement of Acknowledgement, below:

**PROPERTY:**

ASSESSOR'S PARCEL NUMBER(s): \_\_\_\_\_

ADDRESS: \_\_\_\_\_

LEGAL DESCRIPTION: \_\_\_\_\_

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**STATEMENT OF ACKNOWLEDGEMENT:**

I/We, the undersigned owner(s) of the above described property do hereby acknowledge and agree that domestic water use at this property is subject to a water use limitation of a

maximum annual average withdrawal of three thousand gallons per day, per connection, subject to the five thousand gallon per day limit in RCW 90.44.050.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Signature of Property Owner: \_\_\_\_\_

\_\_\_\_\_  
Printed name of Whatcom County Official

\_\_\_\_\_  
Signature of Whatcom County Official

I certify that I know or have satisfactory evidence that \_\_\_\_\_  
\_\_\_\_\_ is/are the person(s) who appeared before me, and said person(s) acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in this instrument.

Dated \_\_\_\_\_

Notary Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Residing at: \_\_\_\_\_

My appointment expires: \_\_\_\_/\_\_\_\_/\_\_\_\_