

## RECENT WATER RIGHTS COURT DECISION

October 19, 2016

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**REALTORS<sup>®</sup> and their clients should be aware of a recent State Supreme Court decision that will have a significant impact on the ability of landowners to use new private wells for residential development.**

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Under this new decision, single private wells for new homes may be denied by local governments for causing impacts to instream flow levels adopted by the Department of Ecology. Whether or not a property has legal water supply is a legal determination – REALTORS<sup>®</sup> should not give legal advice regarding whether an undeveloped parcel has adequate water supply.

The decision may be subject to different interpretations by different counties, so it is too soon to tell exactly how the decision will impact building permit applications relying on new private wells for water supply. The decision is likely to have the greatest impact on counties in Western Washington due the type of rules adopted by Department of Ecology in many Western Washington counties.

The question of whether a proposed water source meets the legal availability requirement in RCW 19.27.097 is a legal question. REALTORS<sup>®</sup> should ensure that their clients receive qualified advice on these issues. Advise your client, in writing, to seek the advice of a water specialist (lawyer, hydrogeologist, etc.) Second, appropriate vacant land forms should be used to explicitly allocate the duty to investigate legal adequacy of water supply for the property. The statewide purchase agreement advises buyers to insure adequate water supply to the property and Form 22L&A includes contingency language related to confirming water supply.

### **Background on the Decision:**

In *Whatcom County v. Western Washington Growth Management Hearings Board*, No. 91475-3, the Supreme Court ruled that Whatcom County's GMA Comprehensive Plan and development regulations violated the GMA by failing to ensure that new private wells did not impair the Nooksack River Instream Flow regulation adopted by the State Department of Ecology.

The Court further ordered that to meet the legal water availability requirement in the state building code at RCW 19.27.097, local governments must review proposed new private wells for impairment of senior water rights and instream flows. This decision reversed the earlier decision of the Court of Appeals, which held that local government review of water availability must ensure consistency with Department of Ecology regulations – but that local governments are not obligated to exceed the requirements of state regulations. The decision does not affect wells that are currently in use by existing homes, but likely affects wells that have been drilled but not yet reviewed under RCW 19.27.097.

In the case of the Nooksack Basin Instream Flow Rule (WAC Chapter 173-501), the actual flow levels often do not meet the “minimum flow” level set by the Ecology regulation. However, the instream flow regulation specifically exempts new single domestic

wells from any review by the County or State. The exemption in Ecology's Nooksack regulation is consistent with state law, as RCW 90.44.050 exempts new small domestic wells from permit review and thus no impairment review is required.

The Supreme Court's decision makes all new private wells subject to impairment review and directs counties to conduct this review. Washington REALTORS® strongly disagrees with this decision, as it is directly contrary to the state's water code, Ecology's regulations, and the requirements of the Growth Management Act. REALTORS®, along with the Building Industry Association of Washington and Washington Farm Bureau, filed an amicus brief in this case supporting Whatcom County, and arguing that state law requires local regulation of water supply to be consistent with – but not exceed – state laws and regulations.

Even though the case originated in Whatcom County, it is likely to impact other counties as the Court's pronouncements regarding the obligation of local governments to review impairment of instream flows do not appear limited to Whatcom County. The regulatory structure in place in Whatcom County is similar to the structure in many other Western Washington counties, and those counties are likely implicated by the decision. While there will be a strong legislative response against the Court's decision, it could take months or years for this decision to be modified or clarified by the Legislature or further litigation.

The Department of Ecology and counties throughout Washington State are currently reviewing the decision to determine what type of water review process will be adopted at the county level to comply with the decision until it can be modified.