

## Okanogan County Commissioners

### Ordinance 2016 - 5

*An ordinance pertaining to land use decisions requiring the use of water from other than a certificated source.*

**WHEREAS:** Revised Code of Washington 36.70.330 requires the land use element of all comprehensive plans to ...protect the quality and quantity of groundwater..., and

**WHEREAS:** Revised Code of Washington 58.17.110 requires Counties, prior to approval of a plat, to determine if appropriate provisions are made for, but not limited to,... potable water supplies..., and

**WHEREAS:** Revised Code of Washington 19.27.097 requires Counties to determine that each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building, and

**WHEREAS:** The Washington State Supreme Court ruling in *Whatcom County, Hirst et al v. W. Wash. Growth Mgmt. Hr'gs Bd.*, No. 91475-3 (October 6, 2016) greatly amplifies the responsibility of Counties in determining that the quality and quantity of groundwater is protected and that applicants for land use permits demonstrate that any required water supply is both legally and physically available, and

**WHEREAS:** Revised Code of Washington 36.70.795 authorizes Counties to adopt interim land use controls, and

**WHEREAS:** The Okanogan Board of County Commissioners finds that the adoption of interim controls is necessary to bring Okanogan County land use controls into compliance with the requirements of *Whatcom County, Hirst et al v. W. Wash. Growth Mgmt. Hr'gs Bd.*, No. 91475-3 (October 6, 2016) and

**WHEREAS:** Revised Code of Washington requires a public hearing be conducted within 60 days of adoption of interim controls adopted without public hearing, **BE IT THEREFORE**

**ORDAINED:** The following interim controls are adopted:

**SECTION 1 Purpose:** On October 6, 2016, the Washington State Supreme Court imposed a duty on local governments to independently verify the presence of a lawful and a physical source of water for any land use project seeking to use water from an exempt well before any such permit may be approved by local government, and in so doing, the county is required to make an independent finding of availability and may not solely rely on indications from WDOE regulations and specifically WRIA regulations, in Okanogan County, WAC 173-548 (Methow River) and WAC 173- 549 (Okanogan River).

**SECTION 2 Applicability:** The provisions of this ordinance shall be applicable to all land use permits issued by the county, including but not limited to building permits (Chapter 19.57 RCW) and subdivisions (Chapter 58.17 RCW), and for any other permit, the source of water for which

is governed by RCW 90.44.050 concerning exempt wells, existing or new. All such permits are referred to hereunder as "Land Use Permits". The ordinance shall also apply to all pending applications for land use permits which have not been finally approved.

**SECTION 3 Application:** Upon application for a land use permit, the approving agency of the County shall notify the Planning Department, which shall schedule the matter for an open record hearing before the Okanogan County Hearing Examiner to determine, based on the record at the hearing, on the issue of lawful and physical availability of water.

**SECTION 4 Notice:** Notice of the hearing shall be sent to:

1. The applicant;
2. Adjoining land owners;
3. The holders of water right certificates in the reach potentially affected by the application

WDOE;

4. County Health Department; and

5. Published in the newspaper of record not less than 15 days prior to the hearing.

**SECTION 5 Participation:** Participation shall be limited to those parties who receive direct notice (Section 4, 1-4 above) and others who can establish a direct interest or adverse physical impact to water rights they may hold affected by the proposed withdrawal. This section modifies OCC 2.65.120(4).

**SECTION 6 Burden of Proof:** At the hearing, the project applicant shall have the burden of proof that the proposed project has lawful and physically available water sufficient to serve the project. For purposes of this proof:

- The applicant may not simply rely on WDOE regulations which may suggest water is available.
- Where the proposed well is in a land area where ground water hydraulically connected to a stream that is closed to certificated appropriation or consistently below minimum base flows established under Chapter 90.54 RCW, the applicant will have to show that the proposed application meets the tests set forth by the Courts and any applicable regulations for lawful water appropriation.
- Where water is available for certificated appropriation, water should also be available for exempt appropriation unless WDOE or any other interested party can demonstrate cause why the well should not be approved.

**SECTION 7 Proceedings:** This matter is directed to the County Hearing Examiner pursuant to OCC 2.65.070(11).

- Where more than one application is proposed for a given reach of a river, the examiner may consolidate such hearings to assure that the cumulative impact of such applications will not raise any issues as to availability.
- In the event of conflict, the first in time shall be given priority.
- Except as specifically provided in this ordinance, the rules and regulations governing the hearing examiner shall govern the proceedings.
- The examiner shall issue a written decision with findings and conclusions based on the record.
- Any appeal of the examiner decision will be an appeal of a land use decision pursuant to chapter 36.70C RCW where there is no administrative appeal of this decision.

**SECTION 8 Emergency:** The October 6, 2016, Washington State Supreme Court decision places a specific burden on the Board of County Commissioners with respect to the approval of land use permits noted above, which must be put into place immediately to assure that land use permits have lawful and physically available water under the terms of that decision. For this reason, an emergency exists and this ordinance shall become effective immediately upon approval of the Board of County Commissioners.

This ordinance shall be considered an interim ordinance until replaced by a permanent ordinance codified as a part of the County code.

**SECTION 9 Savings Clause:** Should any part of this ordinance be declared unlawful for any reason, the remainder of the ordinance shall remain in full force and effect until replaced by an action of the Board of County Commissioners.

Dated at Okanogan, Washington this 8 day of November 2016.

**BOARD OF COUNTY COMMISSIONERS  
OKANOGAN, WASHINGTON**



ATTEST:

*Laleña Johns*  
Laleña Johns, Clerk of the Board

*Jim DeTro*  
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Jim DeTro, Chairman

*Ray Campbell*  
\_\_\_\_\_  
Ray Campbell, Member

*Shellah Kennedy*  
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Shellah Kennedy, Member

**BOARD OF OKANOGAN COUNTY COMMISSIONERS**

**FINDINGS AND CONCLUSIONS IN SUPPORT OF INTERIM EMERGENCY ORDINANCE \_\_\_\_\_**

1. Many developments in Okanogan County rely on exempt wells authorized under RCW 90.44.050 to provide the lawful water required by RCW 19.27.097 and RCW 58.17.110 among others before a building permit, plat or another land use permit may be approved.
2. On October 6, 2016, the Washington Supreme Court issued a decision in *Whatcom County, Hirst et al v. W. Wash. Growth Mgmt. Hr'gs Bd.*, No. 91475-3 (October 6, 2016) providing that Counties had the responsibility to independently determine the availability of a lawful and physically available source of water before such permits may be issued. Prior reliance of the County for example on presumption of availability due to WDOE's failure to make any report of no availability under WAC 173-548-060 for the Methow Reaches in which the agency explicitly states that 2 CFS surface water diversion is allowed for domestic and agricultural use is no longer allowed.
3. The *Hirst* decision makes reference to the Washington State Growth Management Act, Chapter 36.70A RCW as the case arose under that act and a decision of the Washington State Growth Management Hearings Board. Upon review, however, the County has determined that the decision also pertains to land use permits issued by Okanogan County, a non-GMA County for the following reasons:
  - a. The Planning Enabling Act under which the County plans contains language that "The land use element shall also provide for protection of the quality and quantity of groundwater used for public water supplies" RCW 36.70.330. The language is identical to the language in the Growth Management Act on which the Court relied.
  - b. The Court also relied on RCW 19.27.097 and RCW 58.17.100 which were adopted as part of GMA amendments, but which by their terms applied to all Counties and not simply to Counties required to fully plan under the Growth Management Act, Chapter 36.70A RCW.
4. To provide a proper record and opportunity for parties to be heard on this important issue, the County has determined, for an interim ordinance, to transfer the responsibility for making the decision on the legal availability of water from the Health Department to the County hearing examiner which has a set process in place for holding public hearings on contested land use matters and can efficiently process the requests and make the required record in support of its decision. The County Health Department shall be included as a party in all such proceedings and may testify as its interests' warrant. In addition, WDOE and affected certificated water rights holders shall be notified and asked to comment to assure a complete record.
5. Any final decision shall be based on the record and may be appealed as provided in RCW 36.70C.RCW (LUPA)
6. The Board of County Commissioners recognizes that the Decision of the Supreme Court will make the cost and time of secure exempt well permits more time consuming and expensive. This will have a direct effect on the cost and availability of new housing in rural areas. Further the consequences in some cases may be that exempt wells will not

- be allowed in reaches where WDOE has not formally closed basins to hydraulically connected appropriation, but where base flow minimums are routinely exceeded and exempt wells may well be prohibited.
7. The County will press WDOE for any guidance it may have on what constitutes a material exceedance warranting closure of a reach to any hydraulically connected new well and to update the allowances available in each of the affected WRAs.
  8. In the meantime, the Court's decision makes it all the more imperative that WDOE and WDFW not transfer water rights out of the County as they have done in the past or take any other actions where such action would jeopardize rights of future development in the County for domestic, commercial or agricultural use.
  9. Further, it is imperative that the holders of existing water rights, which may have excess water to their immediate needs, consider creation of trust water or water banks which may be used to hold water for those who may be required to purchase water from an existing water right holder before being allowed to proceed with construction in any basin in which adequate water for exempt wells cannot be identified.
  10. The ordinance adopted today is an interim ordinance so that the County may begin immediately to provide the type of record and written decision necessary to comply with the *Hirst* decision in approving any land use approvals seeking to use water from a new or existing exempt well.
  11. The Staff will schedule public hearings on the interim ordinance in accordance with state law and shall assist in proceedings with the examiner on this topic by providing any information the County may have to supplement the record and provide approvals where water is lawfully available.
  12. The Environmental review officer has examined the issue in light of the FEIS for the zoning ordinance and implementation of the Comprehensive Plan and has determined through an addendum to that FEIS that no additional environmental review or changes to the zoning ordinance are required where this official control provides the record and decision necessary to achieve the County goal and requirements to assure lawful water is available for all land use permits issued by the County.

Approved this 8<sup>th</sup> day of November 2016

Board of County commissioners signature block