October 6, 2017

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FINAL ORDER

SUBJECT: Department of Permitting and Environmental Review file no. **PLAT160002**

ECHO LAKE ESTATES
Preliminary Plat Application

Location: South side of SE 96th Street, east of Snoqualmie Parkway, Snoqualmie

Appellants: City of Snoqualmie; King County Public Hospital District No. 4 (d/b/a Snoqualmie Valley Hospital)
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INTRODUCTION

On September 29, 2016, we held a public hearing on a proposed six-lot subdivision, Echo Lake Estates. Bill Moffet testified for Puget Western Inc (Applicant). Kim Claussen and Pat Simmons testified for the Department of Permitting and Environmental Review (DPER). Two neighbors also appeared; Ron Meyers offered testimony and asked questions, while Joseph Amedson only noted that he was potentially interested in purchasing one of the lots and asked a question about distances.

On October 12, we issued a Report and Decision approving the preliminary plat, the same week our Court decided *Whatcom County v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016). The City of Snoqualmie (the City) and the King County Public Hospital District No. 4 d/b/a Snoqualmie Valley Hospital (the Hospital) (collectively Appellants) timely filed a motion for reconsideration on November 7.

The parties jointly requested several extensions to our initial briefing schedule while they attempted to resolve the case. Those settlement efforts stalled, and we received the briefs. On February 16, 2017, we issued a preliminary order listing several determinations to that point, including:

- rejecting Appellants' motion to reopen the record to admit new evidence, explaining that the factual record will remain as it closed on September 29, 2016;
- taking judicial notice of WAC 173-507-030;
- taking judicial notice of *Hirst*, even though the Court did not issue its mandate in *Hirst* until November 1, 2016, well after our October 12, 2016, decision; and
- rejecting Applicant's alternative argument that if *Hirst* requires current applicants to demonstrate legal water availability, we should bump that demonstration to the building permit application stage.

We closed by requesting briefings on several open topics. The parties then jointly sought and received several briefing extensions, while the legislature attempted to figure out a solution for *Hirst*. When the legislative session ended without a compromise, the parties submitted additional briefing. Along with our simultaneously-issued Amended Report and Decision, we now issue this final order.

EXHAUSTION AND STANDING

The threshold question is whether Appellants, who failed to participate at all in our hearing process, have standing and/or sufficiently exhausted their remedies such that they should be able to challenge our decision.

Our standard for reconsideration is:

> Before the expiration of the applicable appeal period…, a party may file with the examiner a motion requesting that the examiner reconsider a determination. A timely motion stays the timelines…until the examiner rules on the motion. The examiner may grant the motion if the person making the motion shows that the determination was based in whole or in part on erroneous information or failed to

> comply with existing laws, regulations or adopted policies or if an error of procedure occurred that prevented consideration of the interest of persons directly affected by the action.

KCC 20.22.220.A.2 (underscore added). Similarly, for appeals of an examiner decision to the Council, KCC 20.22.230.A (underscore added) states that.

> A person initiates an appeal to the council from an examiner recommendation or decision by filing an appeal statement with the clerk of the council and providing copies of the appeal statement to the examiner and to all parties.

On one reading, the standard for appealing to Council is *broader* than the standard for asking the examiner to reconsider a decision, leading to an absurd result; if anything, standing requirements become *stricter* as one moves up the proverbial ladder. We reiterate what we wrote in February: it would be foolish to interpret the breadth of our reconsideration standard as any narrower than the Council's standard in analyzing an appeal from our final decision. If one could file an appeal to Council, one should be able to file a motion for reconsideration to us beforehand to avoid the need for a costly appeal to Council. We read the standards *in pari materia*.

The Applicant and County assert that only a party could file a motion for reconsideration; because neither the City nor the Hospital filed a petition to intervene before our September 29, 2016, hearing, we should not consider their motion.[1] For an *appeal* to the examiner from a County decision, hearings are "public" in the sense that anyone may observe, but participation is limited to the parties (including those who previously and successfully petitioned to become a party) and the witnesses the parties call. However, where the case reaches us as an *application*, the line between parties and nonparties is not so strong. The application hearing itself is a true "public hearing": anyone can come and offer evidence or argument, whether a party calls her to the stand or not, and whether or not she previously requested intervenor status.[2] Applicant's and the County's position certainly has some merit.[3] But ultimately we reject their proposed standard as too harsh.

For example, neighbor Ron Meyers took the time to participate in our September 29 hearing and offer information and argument regarding water availability. We bend over backwards to allow the public ample participation in application hearings. Rather than—as some examiners do—limiting members of the public to a three minute statement, we typically allow much more, including allowing attendees to ask questions of agency or applicant witnesses, as Mr. Meyer did.[4] He acquitted himself well. If, prior to the expiration of the appeal deadline, Mr. Meyers had

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[1] Exam. R. X.B. There appears to be some confusion about "parties of record" and "parties." They are not the same. The "party of record" list Appellants refer to is our mailing list of who we send our notices and decisions to; in high-profile cases it might reach into the triple digits. "Parties," conversely, is a much more limited term defined in Exam. R. II.J.

[2] For a preliminary plat application, we have been appointed to entertain the ordinance and hold the public hearing in Council's stead. KCC 20.22.050; KCC 20.20.020.E.

[3] *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 660–61, 375 P.3d 681 (2016) (appellant had no standing to appeal, despite his earlier participation.)

[4] Our hearing thus offered much more opportunity for public participation than the hearing discussed in *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997), where individual citizens were permitted to speak for only three minutes. Our Rules make clear that while only parties have a right to cross examine

moved for reconsideration, he would have had standing and/or have exhausted his remedies, despite of his not having filed a motion to intervene before the hearing.[5] To interpret the rules to require someone like Mr. Meyers to initially file a petition for intervention in order to have a voice later would be anathema to the public participation that is the hallmark of our open hearings process. It might also lead to a stampede of petitions for intervention, as anyone concerned about an application and wanting to have any future say in the matter would need to fight to obtain party status. That has never been how we have interpreted our process, and we do not change our view now.

Appellants' interpretation—that any person, *whether or not* he or she participated in the public hearing (either live or by submitting written comments prior to the record closing), could file a motion for reconsideration or an appeal—would create even more absurd results. Anybody could wait like a snake in the grass to see how the public hearing turned out and what our decision was, and then file a motion for reconsideration or an appeal, asking for a "do over" to try to submit evidence and argument they should have submitted during the public hearing process. That would make a mockery of the entire essence of the public hearing process.

With those understandings in place, we consider first exhaustion and then standing.

Exhaustion

A crucial rationale for the doctrine of exhaustion is that it "provides a more efficient process." *Durland v. San Juan County*, 182 Wn. 2d 55, 68, 340 P.3d 191 (2014). With the parties arguing back and forth about whether to include or exclude factual submissions filed well after the hearing, the absence of the ability to the cross examine factual assertions as at our hearing, and briefing issues surrounding factual water availability and WAC 173-507-030 that could have been tackled as part of an orderly hearing process, allowing non-participants a second bite at the apple post-hearing shows how monstrously inefficient a process that does not require participation in the initial public hearing would be.

If for some reason either the Hospital or the City had been too busy or had a conflict on September 29, 2016, either could have submitted something in writing on or before September 29, as the hearing record the examiner may draw from expressly includes "[w]ritten comments the examiner receives prior to the record closing." Exam. R. X.B.5. Neither did. We have never interpreted our code to mean that one can completely fail to participate (either in person or in writing) in our hearing process and yet later try to weigh in, and we do not change our view now. Otherwise a "public hearing" is really just a "try to show up if it's convenient, or at least submit something in writing, but if even that's too much trouble, don't worry. Just wait in the wings. You'll get a second bite at the apple later."

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witnesses, so long as it does not "unduly burden proceedings," we may allow others to do so "to create a complete record and enhance public confidence." Exam. R. XII.E.3. We did so at our September 29, 2016, hearing.

[5] Because Mr. Meyers did not appeal or seek reconsideration during the initial appeal window, and because today's Amended Report and Recommendation is in no respects less favorable to him, and in fact is more favorable to him, he would not have standing or have exhausted his administrative remedies to challenge today's Amended Report and Decision. But he would have had standing and have exhausted his remedies if he had filed something on or before November 7, 2016.

Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 947 P.2d 1208 (1997), is on point. The Court reaffirmed that it has and will continue to "require issues to be first raised at the administrative level and encourage parties to fully participate in the administrative process." *Id.* at 869. Appellant there had "participated in all aspects of the administrative process and raised the appropriate project approval issues." *Id.* at 869–70. It had "opposed the…project through written correspondence to the city council and through testimony at the public hearings." *Id.* at 870.

The sticking point in *Mount Vernon* was not whether the would-be appellants had to participate in the public hearing at all, but "how much participation at a public hearing is required to exhaust an administrative remedy." *Id.* at 869. The Court reasoned that "[i]ndividual citizens did not have to raise technical, legal arguments with the specificity and to the satisfaction of a trained land use attorney during a public hearing," and held that appellant had sufficiently exhausted its administrative remedies. *Id.* at 870–71. Thus, in considering post-hearing standing in light of *Mount Vernon*, we would need to look flexibly at what *degree* of participation would allow a later challenge.[6]

So, for example, if Mr. Meyers had, prior to the November 7, 2016, expiration of the appeal window, filed a motion for reconsideration or appeal, we or the Council might have needed to allow him to raise new water-related arguments for why Echo Lake should not be approved. But that is not our scenario at all. Appellants were a no-show at the September 29 public hearing and did not even take the time to submit any written comments. Allowing them to raise a challenge after the record closed would violate the sensible way that our Court addresses such questions, namely that we interpret our code, as the Court did, to "encourage parties to fully participate in the administrative process." *Mount Vernon* at 869. *See also Ward v. Board of Co. Com'rs, Skagit Co.*, 86 Wn. App. 266, 271–72, 936 P.2d 42 (1997) (observing the "logic" of "sensibly" confining the category of those seeking review of an administrative decision "to those who participated in the administrative process to the extent allowed").

Appellants are correct that no judicial opinion involves KCC chapter 20.22 or the Examiner's Rules or any code with language identical to ours. Thus none are *directly* controlling. But the clear line of judicial reasoning is unbroken. Moreover, even if there were no published court decision addressing the issue, we are confident a superior court would not lightly craft a rule that if a court provided legally sufficient notice of its hearing—say on a class action certification or whether to approve or dissolve a consent decree—someone who declined to participate would later be allowed to complain about the result and essentially ask for a "do over." And, any such rule would need to apply to the City of Snoqualmie and *its* public hearings as well. If we are wrong, and if a court tells us we must adopt a more open-ended understanding of what our hearing process means, we will certainly abide by that new interpretation. But we will not *sua sponte* create our *own* end-run around the hearing process today.

[6] As described above, our hearing offered much more opportunity for public participation than the hearing discussed in *Mount Vernon*, where individual citizens were permitted to speak for only three minutes. The *Mt. Vernon* Court was thus more generous in its treatment of its particular appellants, distinguishing some of its earlier, stricter decisions as applying to cases where the would-be appellant had a more formal process available than simply being allowed to speak for three minutes. *Id.* Even applying the more lenient *Mt. Vernon* test, Appellants fail, but it is not even a clear that a more lenient test is even applicable here, given the much broader (than the hearing in *Mt. Vernon*) opportunities for input our process allowed.

So the general rule—which we apply until instructed otherwise—is that a person who fails to participate in a public hearing process cannot later challenge the results of that public hearing. The question now is whether the facts here dictate some sort of exception or carve out.

Obviously, there could have been an "error of procedure… that prevented consideration of the interests of the person directly affected by the action," an explicit ground for a motion for reconsideration or an appeal. KCC 20.22.220.A.2, .240.D.1. Appellants' brief and reference to our party of record list, which is really our mailing list, caused us to go back and look at our Notice of Hearing.[7] The City was actually on our mailing list for our September 15, 2016, notice of hearing; it received actual notice. The Hospital was not on our mailing list, but neither was Mr. Meyers; that is why the code requires applicants to post sandwich boards on a site and why DPER mails initial notices of application to those within a certain radius. Again, Appellants did not, in their mountain of briefings, alleged any procedural irregularities that prevented their participation.

Similarly, if Applicant's preliminary plat application or DPER's recommendation had the proposed plats' water source coming from *outside* the Raging River basin and then (after hearing the facts and argument) we approved the application, with a modification to require that water be pulled instead from the Raging River basin, a person who exercised due diligence would have had no reason to suspect that Echo Lake would impact her (alleged) Raging River Basin water rights, and thus would have a valid excuse to complain later. But that is decidedly not our scenario. Nothing changed, factually, with Echo Lake. The Applicant's SEPA checklist stated that water service would be provided by construction of a Group B well to serve all six parcels. The Applicant identified the site as in the Raging River basin.[8] That and Public Health's approval of the water system were in the file and open for discovery and review. Nothing changed in DPER's preliminary report to the examiner. And nothing changed with our decision—we approved what the Applicant had been proposing and DPER had been recommending all along. Unlike our hypothetical appellant, the real Appellants lack a sufficient excuse.

The only excuse for their lack of participation Appellants raise is that *Hirst* presents changed circumstances. They argue it thus would have been "futile" for them to participate. "[E]xhaustion is excused if resort to administrative procedures would be futile." *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 74, 768 P.2d 462 (1989). We could certainly construct a hypothetical that would fit that bill. Suppose someone had timely submitted a motion asking us to reconsider our decision or an appeal asking the Council to overturn us with the following pitch:

> I was not sleeping on my rights, or at least not sleeping on my rights as I reasonably understood them before *Hirst*. I took the time to read the sandwich board, do my due diligence, and review the open public file. I saw that Applicant had made a sufficient showing of *factual* water availability, so I could not

[7] There appears to be some confusion about "parties of record" and "parties." The "Parties of Record" to which Appellants refer is our mailing list of who we send our notices and decisions to. This is a minor, six-unit development, but in large, high-profile cases the list might reach into the triple digits. "Parties," conversely, is a limited term defined in Exam. R. II.J.

[8] This case is not at all like *Lauer v. Pierce County*, 173 Wn.2d 242, 263, 267 P.3d 988 (2011), where the Court opened things up later because the applicants had knowingly misrepresented or omitted material facts in their application.

> legitimately challenge Echo Lake on that ground. I had read WAC 173-507-030 closing the Raging River basin, but saw that, unlike some other Ecology rules, WAC 173-507-030 did not apply to permit exempt wells, so I could not have challenged Echo Lake on that ground either.
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> Since I also draw my water from the Raging River basin, I was and am concerned that, if built out, Echo Lake will impair my water availability. But prior to *Hirst*, I thought—as the Examiner, Applicant, and DPER did—that a permit "exempt" well was just that, exempt from the need to show non-impairment. Thus it seemed futile for me to present—either in writing prior to September 29 or at the September 29 hearing itself—evidence of my pre-existing water rights and my concern that Echo Lake would "drink my milkshake."

That would have been a winning argument, excusing that hypothetical appellant's failure to exhaust her remedies, and providing ample ground (if she filed a motion for reconsideration) for us to reopen the record to allow her to submit her evidence of a senior water right, establish standing, and challenge whether the Applicant has shown legal water availability, or (if instead she filed an appeal to Council) for the Council to remand the case to us to allow her to do so.[9] Our actual Appellants, instead, have (post-hearing) vociferously argued two other prongs for denial.

First, Appellants have—consistently since November 7, 2016—attempted to belatedly attack the factual sufficiency of Applicant's water showing. Again, Appellants knew all along—or would have known, if they had looked at the file—that the Applicant was proposing (and DPER was recommending) to take water from the Raging River basin, and the standard at all times was then (as now) that a preliminary plat applicant had to show "appropriate provisions" for "potable water supplies." *Hirst* provides Appellants with an extra *argument* for asserting that the applicant had not shown such adequate provisions. But Appellants have, from the moment they filed their motion for reconsideration, challenged whether the Applicant made a sufficient showing of factual water availability. While it is futile now for them to raise such a challenge, it would not have been futile for them to do so on or before September 29, 2016.

Second, Appellants have also since November 7, 2016, consistently argued that WAC 173-507-030 requires denying Applicant's proposal. Yet WAC 173-507-030 describes the Raging River basin as having been closed since 1951, was filed in 1979, and has not been impacted by any agency filings since at least 2003. http://apps.leg.wa.gov/WAC/default.aspx?cite=173-507-030. Appellants thus had ample reason to participate in the hearing process to raise their WAC-based arguments on or before September 29, 2016, and no sufficient excuse to for their failure to do so. Appellants simply failed to exhaust their remedies.

Standing

As to standing, Division I recently summarized the Court's standing jurisprudence in land use cases: a petitioner must show that she would suffer injury in fact as a result of the land use decision, meaning the petitioner must allege a specific and perceptible harm; where the harm is a

[9] On an appeal, Council's "consideration of an appeal from…a decision…of the examiner shall be based on the record as presented to the examiner at the public hearing and upon written appeal statements based upon the record." KCC 20.22.240. So Council could not directly allow in new evidence.

threaten injury rather than an existing injury, she must also show the injury is more than conjectural or hypothetical but is immediate, concrete, and specific. *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 662, 375 P.3d 681 (2016) (internal and external citations omitted). Appellants are incorrect thus that *Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011), created a special rule that mere allegations of injury are sufficient to establish standing.

Knight, in fact, is highly instructive. There, the petitioner participated in the examiner's public hearing on the preliminary plat approval and argued that approval would harm petitioner's water rights. *Id.* at 975. After the examiner granted conditional preliminary plat approval, petitioner moved for reconsideration, and when the examiner denied this, appealed to the city council. *Id.* at 977. The council found that petitioner had not shown that she would actually suffer any specific and concrete injury as it related to potable water, and thus was not an aggrieved person. *Id.* at 977. Our Court reversed, finding that petitioner had standing, that she had shown sufficient prejudice. *Id.* at 982.

Again, the *Knight* petitioner had participated in the examiner proceeding and had entered evidence into the record about the distance from her property to the proposed subdivision, her senior water rights within the same aquifer, and evidence of a water deficit for several years (backed up by petitioner's expert witness's calculations and hydrogeologist's report). *Id.* at 982–83. Knight's allegations were based on ample facts Knight had submitted into the record prior to the record's close.

In contrast to *Knight*, Appellants seek to make those showings not in relation to what is in the record as it closed on September 29, 2016, but by submitting *new* facts, such as parcel viewer shots, well logs, assessor's office ownership records, water rights reports on examination, a 1986 treatise, an email, and factual declarations tying Appellants' location, well, and interests to the record. Had those been submitted while the record was opened, they likely would have been sufficient to establish standing. But with the evidential record closed, they come too late. Based on the record as it closed September 29, Appellants lack a sufficient showing of injury or harm.

Appellants' argument that if we determine that they lack standing we will be denying "the City and the Hospital any opportunity to challenge [Applicant's] lack of evidence of adequate water in the potential threat to the Hospital's water rights and the City's municipal system," App. 8/4/17 br. at 8, is misleading. Appellants *already had* that opportunity; that was what the September 29, 2016, hearing was for, as Mr. Meyers' participation illustrated. And if one or both appellant could not have made it to that day's hearing, either or both could have submitted written documentation prior to the record's close. They did not, forfeiting their opportunity to establish standing. There is no second bite at the apple.

In previous cases, it has been the *County* that has failed to submit the necessary evidence prior to the record closing, and we have been similarly unmoved by the County's request that we re-open the record. For example in *Hawes—V16006259*, County Animal Services sought removal for a vicious dog because the Hawes (allegedly) failed to comply with the requirements for keeping their vicious dog in the County, requirements that had been set by an earlier Notice of Violation and Order of Compliance (NVOC). However, Animal Services failed to introduce that NVOC into the record during our removal hearing. We thus granted the Hawes appeal, reasoning that Animal Services could not prove a failure to comply with requirements when those requirements were not in the record. After we issued our decision, Animal Services moved for reconsideration,

asking us to reopen the record to allow them to belatedly submit the NVOC. We declined, stating that:

> The basic rule is that evidence submitted after hearing close is not considered or included in the hearing record, unless the examiner uses his or her discretion to reopen the record. Ex. R. XI.C.2. One of the three explicit bases KCC 20.22.220.A.2 provides for a motion for reconsideration is an "error of procedure… that prevented consideration of the interest of persons directly affected by the action." Animal Services did not assert any error of procedure that prevented them from submitting the NVOC. Nor is this a case where, for example, some twist was presented at hearing where the losing party could afterward plead surprise and argue for augmenting the record, posthearing; Animal Services' theory was always that the 2015 NVOC had been violated.[10]

In *Hawes* the rationale for re-opening the record was even stronger, because the County had at least participated in the hearing process: they had simply forgotten to introduce the crucial document. Yet we rejected the County's entreaty. Here, Appellants did not even bother to participate.

We will not be reopening the record. And on the record as a closed on September 29, 2016, Appellants come nowhere close to establishing standing.

***SUA SPONTE* RECONSIDERATION**

Thus, Appellants lack standing and failed to exhaust their administrative remedies. Appellants' motion to reopen the record and/or to reconsider our decision is DENIED.

We do not, however, wrap up our involvement by simply allowing our October 12, 2016, approval of the Echo Lake preliminary plat to stand as-is. Appellants' timely motion did accomplish one very important thing: it effectively kept our decision from becoming final and unreviewable, as it would have if November 7 had come and gone with no activity. And, "[u]pon a timely request or *sua sponte*, an examiner may reconsider a determination based on the existing evidential record." Exam. R. XVI.A.1. Because *Hirst* occurred after the record closed and is a (potential) game-changer, we will analyze *Hirst* under the existing evidential record (i.e. the record as it closed September 29, 2016) and reconsider our October 12 decision.

Before turning to *Hirst*, we wrap up two other points on which we requested briefing.

First, under the "existing evidential record" that closed September 29—which does not include any of Appellants' later-filed factual assertions or documents they attempted to inject into the record—the Applicant proved by a preponderance of the evidence *factual* water availability sufficient to meet the requirement that a preliminary plat applicant show "appropriate provisions are made for…potable water supplies." KCC 20.22.180. *See also Knight v. City of Yelm*, 173 Wn.2d 325, 344, 267 P.3d 973 (2011) (describing the *preliminary* plat—as opposed to a *final*

[10] Available at http://www.kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/animal%20enforcement/2017/2017%20march/V16006259_Hawes_OrderOnMotionForReconsideration.ashx?la=en.

plat—inquiry as an applicant having to make a "threshold" showing). This is addressed further in our Amended Report and Recommendation.

Second, WAC 173-507-030 is a promulgated rule, and we can stay true to our "existing evidential record" while still reconsidering our October 2016 decision in light of this WAC, which states:

> [Ecology] having determined there are no waters available for further appropriation through the establishment of rights to use water consumptively, closes the following streams to further consumptive appropriation for the periods indicated. These closures confirm surface water source limitations previously established administratively under authority of chapter 90.03 RCW and RCW 75.20.050.

The WAC then goes on to list "SURFACE WATER CLOSURES," including Stream: Raging River, Tributary to Snoqualmie River; Date of Closure: 9/20/51; and Period of Closure: All year. Given that whatever the Raging River basin has been closed for, it has been closed for since 1951, and WAC 173-507-030 was filed in 1979 and has not been impacted by any agency filings since 2003, if it is applicable to the permit exempt wells at play for Echo Lake, it was applicable in October 2016, and thus our decision was an error. We thus reconsider our decision in light of this WAC.

The County argues that because the Raging River closure is only a "SURFACE WATER CLOSURE," this WAC only applies to surface waters, and is not applicable to groundwater withdrawals. Co. 8/4/17 Br. at 6–7. Appellants have the better argument here, that the surface water/groundwater analysis is more nuanced. WAC 173-507-040 states that in "future permitting actions" (presumably meaning after 1979) relating to groundwater withdrawals, the natural interrelationship of surface and groundwaters shall be fully considered in water allocation decisions." The surface/groundwater distinction is not so clear cut.

Instead, it is Applicants' who carry the day on this point. It is not the surface water/groundwater distinction but that WAC 173-507-030 (Snohomish) simply does not apply to permit-exempt wells at all. When Ecology wants to write a rule covering permit exempt wells for a particular basin it knows how to do so. *See, e.g.*, WAC 173-505-030(2) (Stillaguamish) ("appropriation" covers "groundwater withdrawals otherwise exempted from permit requirements"); WAC 173-517-100(2) (Quilcene-Snow Water) (closure applies to "permit-exempt withdrawals"); WAC 173-527-070 (Lewis) (basin closed to "new permit-exempt withdrawals"). While our Court recognizes that there is "some appeal to the idea that all of the rules should mean the same thing," it rejected the invitation to "search for a uniform meaning to rules that simply are not the same." *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 87, 11 P.3d 726 (2000). *Hirst* confirmed this, explaining that Ecology's Nooksack Rule (WAC 173–501) only closed one out of the 48 covered basins to permit-exempt appropriations. 186 Wn.2d at 676. *Hirst* did not say Whatcom County was wrong to interpret WAC 173-501 as inapplicable; for 47 of its basins *Hirst* said that the WAC *itself* that was not sufficiently protective.

In case there is any lingering doubt, as Appellants point out, Ecology's interpretation of its own regulations is entitled to great weight. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). As Appellants note, in November 2016 Ecology issued a

Focus on Water Availability.[11] In that document Ecology has some things to say about *Hirst*, discussed below. But as to WAC 173-507 itself, Ecology is clear that the "the rule [Instream Resources Protection Program rule (WAC 173-507)] adopted by Ecology for this watershed does not limit the use of permit-exempt wells" (emphasis added). While WAC 173-507 and a host of other WACs will likely (unless or perhaps even if the legislature enacts something) need to be amended to comply with *Hirst*, the current version of WAC 173-507-030 does not impact our case.

IF OR HOW DOES *HIRST* APPLY?

Introduction

The other issues in this case—whether Appellants have standing or a sufficient excuse for failing to exhaust their administered remedies, whether we should belatedly re-open the evidential record, whether under the existing record Applicant has shown (for preliminary plat purposes) sufficient factual water availability, and whether WAC 173-507-030 impacts our permit-exempt wells—have crystal-clear answers. Conversely, *Hirst* not only lacks crystal clarity, it is downright murky. Using a more legal analogy, we would reach our other rulings here even if we applied a strict, clear-and-convincing standard against the County and Applicant; conversely, it is challenging to find a reading of *Hirst* that passes even the most lenient preponderance-of-the-evidence standard. Anyone claiming absolute knowledge of how *Hirst* applies to current applications is either (a) unsuccessfully attempting to fool us or (b) fooling themselves. Nevertheless, we give it the old college try.

Nobody—including the Applicant or the County—claims that the County's current Comp Plan and implementing regulations are *Hirst*-compliant. Action 13 in the County's 2016 Comp Plan, addresses *Hirst* by name, interpreting it as requiring "the County to develop a system for review of water availability in King County, with a particular focus on future development that would use permit exempt wells as their source of potable water," starting with a Water Availability and Permitting Study carrying a July 1, 2018 deadline for final reporting, followed by implementation through amendments to the Comp Plan and development regulations.[12]

Either the legislature will have to overrule *Hirst*, the County will have to amend its Comp Plan and regulations to ensure future consistency with *Hirst*, or some combination of the two needs to happen (state legislature partially eases *Hirst* and County needs to conform its Comp Plan and regulations to comply with the new legislative enactment). The question is what happens in the interim.

There are three ways of looking at what *Hirst* means. First, *Hirst* requires only that the County craft a *Hirst*-compliant system for future applications—i.e. even if someone filed an application tomorrow, that application would still be analyzed under the current Comp Plan and regulations. Second, *Hirst* applies immediately (*i.e.* even before the Comp Plan or regulations are updated) to any applications not vested prior to *Hirst*. And third, *Hirst* applies to any decision anyone in the County (including the examiner) has to make, regardless of whether the application vested to the requirements in place at the time a completed application was submitted (here, March 2016).

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[11] See https://fortress.wa.gov/ecy/publications/documents/1111012.pdf (rev. Nov. 2016),
[12] Available at http://kingcounty.gov/~/media/Council/documents/CompPlan/2016/FullCouncil/adoptedplan/Attachment_A-KingCountyComprehensivePlan-120516.ashx?la=en at 12-20.

Appellants' citation to *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 208 P.3d 1092 (2009), with its holding that its decisions are retrospective as well as perspective, is helpful and would win if the County were arguing that *Hirst* could not retroactively be applied to mean that the County's previously-adopted Comp Plan is noncompliant. But it still begs the question of what *Hirst* was trying to say, either, essentially "counties need to amend their Comp Plans and regulations to set up an orderly process by which each county ensures that future applications seeking to employ permit exempt wells will meet our standard," or "starting on October 6, 2016, counties need to apply our standard to all new applications, despite the absence of such plans or regulations," or "starting on October 6, 2016 applications, even if a *pending* application vested under the rules and regulations in place at the time of application, counties need to apply our analysis to its current review." *Lunsford* and its ilk offers no window into what *Hirst* was trying to say.

Agency Understandings

Ecology and DPER conceivably do. While we strike Appellants' extra-record submittals and will not add to the evidential record, we take official notice of two documents Appellants note: Ecology's *Focus on Water Availability* discussed above and DPER's *Special Notice Private "Exempt" Wells.*[13] These are not documents that anyone could have been entered into the record by September 29, 2016, because they did not then exist. And while the Applicant is correct that neither of these quite fits the public regulation, rule or adopted policy of a public agency we may take official notice of, Exam. R. XIII.B.1.a, they are also not really an improper entry into the "evidential record." Each is a published, public *legal interpretation* of how each public agency understands *Hirst*.

We do not grant substantial weight (or otherwise accord deference) to what either of those entities thinks *Hirst* means. We do not accord DPER any deference, and while Ecology's interpretation of its *own regulations* is entitled to great weight, Ecology's interpretation of a *court decision* is not, at least not until Ecology promulgates a new or amended public rule in response. Exam. R. XV.F. Nevertheless, we will still mine DPER's and Ecology's expressions on *Hirst* for any useful clues, as the parties already have in their briefing.

Ecology explicitly discusses *Hirst* (albeit as the "recent decision [by] the Washington State Supreme Court," not by referencing *Hirst* by name) in its *Focus on Water Availability*. *Id.* at 2. The document is clear in its next sentence that the "rule adopted by Ecology for this [Snohomish River] watershed does not limit the use of permit exempt wells, as discussed above. *Id.* at 3. But the sentence after that states that "Counties may not issue permits for projects that will rely on a permit-exempt well, unless it (sic) determines that the water use will not impact instream flows or closed water bodies." *Id.* at 3. Ecology thus seems to think that *Hirst* applies to current applications. That is only a data point, but a data point nonetheless.

Conversely, it is not at all clear reading DPER's Notice what exactly DPER thinks *Hirst* means. One part of the Notice describes *Hirst* as meaning that "development permit applications that propose to use a private well water supply (in a basin that is closed or partially closed to surface water withdrawals by the Department of Ecology) must demonstrate that groundwater

[13] See https://fortress.wa.gov/ecy/publications/documents/1111012.pdf (rev. Nov. 2016), & http://www.kingcounty.gov/~/media/depts/permitting-environmental-review/fire-marshal/Media%20folder/RICKETTSDPERSpecialNoticeExemptWells003PDF.ashx?la=en (Dec. 2016)

withdrawal will not impair a senior water right," and states that "[*Hirst*] applies to 'permit-exempt' wells"; these sound like DPER is treating *Hirst* as applicable to current applications. But then the Notice sounds even more committal in the *other* direction:

> Because the Growth Management Hearings Board did not invalidate the County's development regulations (and the Supreme Court declined to reverse the Board's decision on that issue), King County DPER will continue to take in building permit applications, subdivision applications, and other development permit applications in the interim.

The rest of the Notice is noncommittal, starting with the pronouncement that landowners "ability to develop property when relying on private ('exempt') wells as the water source *may* be limited by a recent court decision," and returning with the warning that "King County does not make any warranties regarding water rights for proposed development." The Notice is best summed up with the true and thoroughly equivocal (as to the current application of *Hirst*) statement that, "King County government is *assessing* the ramifications of this case on issuance of building permits, subdivisions, and other development permits that utilize exempt wells."

We are not taking a jab at DPER. DPER faces the same damned if you do, damned if you don't scenario that we do. If DPER approves a building permit (or if we approve a preliminary plat application) relying on permit exempt wells, based on the plans and regulations in place on the date of complete application, a court may say, "What part of *Hirst*'s local governments must determine that 'applicants for building permits or subdivision developments have demonstrated that an adequate water supply is legally available before authorizing approval' did you not understand?" Similarly, if DPER or we evaluate a building permit or subdivision under a standard that requires an applicant to show legal water availability even for a permit-exempt well, despite neither the Comp Plan nor the current regulations requiring this, a court may say, "What part of our unbroken chain of vesting jurisprudence, the state subdivision/building code statutes, and your own code (which has never been declared invalid) did you not understand, and what made you think you could override a building/subdivision applicant's entitlement to have her completed application processed under the plans and regulations in place at the time of her application?"

We would summarize the DPER memo as, "Things are in flux. We're not exactly sure what's going on. If we don't, then no applicants can have any certainty related to permit-exempt wells. So everyone is on notice and has received fair warning that changes are a foot." We have no quibble with how DPER phrased their bulletin. Nor do we take much from it.

Hirst Text

Passages from the majority opinion imply that the majority intends its ruling to apply to current subdivision or building permit applications, including our current analysis of Echo Lake. *Id.* at 674 (applicant must "produce proof that waters both legally available and actually available") ("counties must receive sufficient evidence of an adequate water supply from applicants for building permits or subdivisions before the County may authorize development"); 675 ("Through these [building and subdivision] statutes, the GMA requires counties to assure that water is both factually and legally available"); 684 (GMA requires "local governments to determine that applicants for building permits or subdivision developments have demonstrated

that an adequate water supply is legally available before authorizing approval"); 685–86 (RCW 58.17.110 assigns to a county reviewing a permit application involving permit-exempt wells and exempt-use applications the task of reviewing for impairment of existing rights); and 687 (under RCW 58.17.110, each water use appropriation requires a fact-specific determination, and the County may not fail to ask "whether there is water that is legally available"). While there is more discussion in the case about building permits, no less than ten times did the majority raise RCW 58.17.110, a pre-existing code.

Justice Stephens' dissent seems to read the majority opinion in this way: "The practical result of this holding is to stop counties from granting building permits that rely on permit-exempt wells." 186 Wn.2d at 700. "The majority fails to acknowledge the astronomical task it assigns to individual applicants." *Id*. at 711. The "majority's conclusion that RCW 19.27.097 requires individual applicants to show no impairment will effectively halt local departments from granting building permits." *Id.* at 713. Justice Stephens did not say "will stop" or "will assign" or "will require"; she interpreted the majority as adding a burden on individual applicants in the present tense. Although Justice Stephens phrased her dissent in terms of building permit applications, where such burdens are even worse than for subdivision applicants—individual lot owners having no chance to amortize such costs over multiple lots—the majority lumped RCW 19.27.097's standard in with RCW 58.17.110's standard regarding potable water.

Yet the majority couched its holdings in terms of planning. *Id.* at 660 ("GMA requires counties to consider and address water resource issues in land use planning"); at 661 (counties required "to plan for the protection of water resources"); 672 (local governments required "to adopt a comprehensive plan and development regulations consistent with the comprehensive plan" which "requires planning to protect surface and groundwater resources"); 673 (section heading entitled "The GMA requires counties to have a comprehensive plan that protects surface and groundwater resources"); 673 (counties must "ensure that their development regulations and comprehensive plans comply with the GMA"); and (GMA requires counties to "consider and address water resource issues in land use planning"); 676 (county's existing comprehensive plan fails to "require the County to make a determination of water availability"). And most importantly, the majority framed its holding as, "We hold that the County's comprehensive plan does not protect water availability because it allows permit-exempt appropriations to impede minimum flows." *Id.* at 668; *see also id.* at 658.

The Chief Justice's *Hirst* concurring opinion backs this view, that the majority opinion should not be "read to… shift the burden on the permit applicants," and that instead the majority's opinion is limited to the planning process and to requiring counties to first amend their comprehensive plans and ordinances before they apply the majority's standard to individual applicants. *Hirst*, 186 Wn.2d at 696–700 (Madsen, C.J., concurring). She clarifies that state "statutes do not expect the burden to fall on individual applicants where the County has failed to meet its initial burden of determining water availability through its comprehensive planning and development regulations." *Id.* at 699. In fact, "the burden to provide evidence of water falls on individual applicants only where the State and the counties have first fulfilled their statutory duties of ensuring that water is available." *Id.* at 699.

Hirst Analysis

The *Hirst* majority certainly did no one any favors. With a single sentence, it could have quelled the dissent's fervor and soothed the concurrence's fears by stating the burden would first be on the government, not on applicants, to come up with a solution. Or it could have said the opposite—who said life is fair, burdens are burdens, etc. Instead it did neither. So what to make of a majority opinion, when the other four justices could not even agree what the decision means (let alone whether it was correct or not)?

We start with the vested rights doctrine, though not as a potential trump card. First, the vested rights doctrine applies to administrative or legislative, not judicial, changes. Second, on one reading of *Hirst*, even if a new application proposing a permit-exempt well source was submitted tomorrow, because the County's plans and regulations have not yet been amended in light of *Hirst*, that application would also need to be decided under the County's current plans and regulations, even though that application came in well after *Hirst*.

Yet the vesting concept provides some context. Even if we were authorized—and we are not—to place a moratorium on DPER accepting any future applications involving permit exempt wells until the County can come up with plans and regulations that adequately protect water, that would still not give us authority to change the regulations that apply to previously vested applications. We do not lightly assume that a court in a state with such strong vested rights protections for subdivision and building permit applicants intended to make a sea change in the rules applicable to pending subdivision and building applications when the court did not unequivocally say that this is what it intended. The majority certainly had the *authority* to do so, but we do not lightly assume that the majority meant, *sub silentio*, to require local decision-makers to apply *Hirst*'s prescriptions to vested applications.

And our vested rights code is even stronger than the state's. The courts have somewhat scaled back the vested rights doctrine. *See, e.g., Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 198–199, 334 P.3d 1143, 1146–47 (2014). The King County Code is broader: for almost any Type 1, 2, or 3 land use decisions, the application "shall be considered under the zoning and other land use control ordinances in effect on the date a complete application is filed." KCC 20.20.070.A. Vested nights are not controlling here, but they are instructive.

More importantly, the majority only sustained a finding of *noncompliance*, rejecting appellant's request to declare the pre-existing Whatcom County policies and regulations *invalid*. A holding of *noncompliance* is inconsistent with a ruling that Whatcom County, much less King County, should do anything other than apply its current plans and regulations to completed applications until such time as the county can enact new, *Hirst*-compliant plans and regulations.

The Court recently highlighted the distinction under GMA of finding a county's Comp Plan and regulations *noncompliant* versus a more severe finding that the continued operation of the county's plans and regulations would substantially interfere with goals of the GMA and were thus *invalid*. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 174–75, 322 P. 3d 1219 (2014). Although the *Woodway* majority reached the disputed conclusion that even a finding of

invalidity does not extinguish rights vested under state or local law, there was no dispute that following a finding of *noncompliance* the county's plans and regulations remain valid during the remand period.[14]

Moreover, the majority's discussion about the building and subdivision codes and their requirements that the county assure such applicants show legal water availability was in the context of rejecting Whatcom County's argument that it could "delegate" to Ecology the task of ensuring water compliance, and that Whatcom County did not have an independent duty to itself ensure this, as opposed to Hirst's argument that the County had the burden of protecting the availability of water and that the county's "comprehensive plan must itself protect the availability of water resources." *Id.* at 661, 665. The majority's holding is that counties have "an independent responsibility to ensure water availability," and that Whatcom County's "comprehensive plan does not satisfy the GMA requirement to protect water availability." *Id.* at 665, 666.

The majority did not say that, in interpreting their *current* building and subdivision codes, counties had to (or even were allowed to) hold an applicant to a standard the applicant was not—as of the time she submitted a completed application—required to meet. The majority explained the "burden on counties to take action" in terms of their comprehensive plans, not in terms of applying their current regulations. *Id.* at 673. The majority did not say that Whatcom County was misinterpreting its regulations or should apply a new interpretation; instead the majority found that the "County's rules for proving permit-exempt applications authorize groundwater appropriations in otherwise closed basins." *Id.* at 678. The regulations themselves, not the County's interpretation of them, was the problem.

Counsel have done an admiral job analyzing *Hirst* and its applicability to Applicant's preliminary plat application. Ultimately, we find the Applicant's and County's position the slightly more persuasive. Yet our interpretation of *Hirst* is less important than our answer on other issues in dispute for two reasons. First, while we get deference on the construction of *local* laws[15] such as KCC chapter 20.22, County subdivision codes, or the Examiner's Rules, the courts will likely pay little heed to what *we* think *Hirst* means whenever they reach the merits, as they will likely do in some future case. And second, as we discussed below, we reach the same decision on Echo Lake *regardless* of which way the courts ultimately interpret *Hirst*; thus our interpretation of *Hirst* in Applicant's and the County's favor is largely a distinction without a difference.

NEXT STEPS

Justice Stephens' dissent warns that "[d]eterminations of water availability are complex and costly." 186 Wn.2d at 711. She criticizes the majority for failing to "acknowledge the astronomical task it assigns to individual applicants." *Id.* at 711. She cites one example where compiling the hydrological data and crafting the model would cost approximately $300,000 and require two years. *Id.* at 712. She castigates the majority for pushing "a massive, and likely insurmountable, burden onto individuals applying for a building permit." *Id.* at 713. She cites *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000), which we note

[14] *Id.* at 175; *id.* at 186 (Johnson, J., dissenting) (a finding of a plan's or regulation's *invalidity* should override reliance on the vested rights doctrine).
[15] RCW 36.70C.130(1)(b).

consumed 67 pages of Washington Reports and illustrates the awful complexity surrounding groundwater withdrawals.

In several occasions in the main text and its footnotes, *Hirst*'s majority takes exception with various parts of the dissent, but never once does the majority defend itself on this point, never once says the dissent is overestimating the burden on applicants. The majority neither assures would-be applicants that counties will first enact a comprehensive system before such (ameliorated) burdens will fall on applicants, or bites the bullet and says, as the Division II majority candidly admitted in *Fox v. Skagit County*, 193 Wn. App. 254, 372 P.3d 784 (2016), "there are hardships attendant to *any* water right with a later priority date and too little water available to satisfy all rights," i.e., "tough luck, pal."[16]

In fact, the dearth of any such discussion in the *Hirst* majority opinion is yet one more reason to interpret it as not completely upsetting the apple cart by requiring governments to hammer existing applicants with new burdens prior to comprehensive legislative amendments. The *Hirst* majority's author is one of the most thorough and thoughtful members of a stellar bench. For example, in a recent water rights case, *Foster v. Washington State Dept. of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015), Justice Wiggins' dissent was twice as long and (to us at least) better reasoned than that majority's decision. Justice Wiggins showed an empathetic appreciation for the careful balancing, study, and refinements the state and local agencies had put into their water -related approach there. 184 Wn.2d at 488. We find it much easier to believe that Justice Wiggins included no such equivalent analysis in his *Hirst* majority opinion because he wrote it as only a planning-first, forward-looking decision, than to believe the alternative, that Justice Wiggins meant his opinion to apply to current applicants in a draconian manner and yet forgot to clearly say this and did not notice or care about the ramifications of such an abrupt sea change. Having read many Justice Wiggins opinions, we find the former view significantly more in line with past behavior.

But even assuming the worst, that the majority was sticking its head in the sand, we will not plunge our head into the same hole. We cannot predict what the legislature will come up with or what the County will do, but it would be unconscionable for us to approve a subdivision that allowed lots to be platted and sold where a hapless purchaser/applicant could be told, "Actually, you need to show legal water availability, which may cost you more to do than your lot is worth. Sorry."

If we had decided that *Hirst* applies to even pending applications, we would approve the preliminary plat, but with the added condition that the Applicant must show, prior to final plat approval, legal water availability. Similarly, although we decide today that *Hirst* applies first to the County to craft a *Hirst*-compliant comprehensive system, we still approve the preliminary plat with the same added condition that prior to final plat approval, the applicant shall establish, to DPER's satisfaction, not only the physical water requirements set forth in Public Health's September 28, 2015, approval (Exhibit 13), but such legal water availability as DPER will consider sufficient to support building permit applications for the Echo Lake lots Thus, under our Amended Report and Recommendation, an individual Echo Lake lot purchaser—like

[16] *Fox* involved permit exempt wells, but in a basin controlled by a WAC that "expressly indicates that it governs permit-exempt uses of water." *Id.* at 275 (citations omitted). *Fox* was thus tackling a legally different scenario than a permit-exempt well covered by our WAC 173–507.

Mr. Amedson, who came to our hearing interested in purchasing a lot—will not face the burdens the dissent articulated, the concurrence agreed with, and the majority offered nothing to rebut.[17] Although the Applicant's and County's primary argument is that *Hirst* does not apply to Echo Lake, each states that, in the alternative, we can approve today's preliminary plat with the condition that Applicant demonstrates legal water availability prior to final plat approval. Applicant 8/4/17 br. at 9; Co. 8/4/17 br. at 15. So it is not the Applicant or County taking exception to our approach. Rather it is *Appellants* that counter that we cannot peg the showing of legal water availability to the final plat stage. That is actually not true.

Our Court has explicitly ratified an examiner granting conditional approval of a preliminary plat with an outstanding water rights question, so long as "all requirements must be satisfied and confirmed in writing before *final* plat approval." *Knight v. City of Yelm*, 173 Wn.2d 325, 345, 267 P.3d 973 (2011) (italics added).[18] Even in the absence of *Knight*, one gets to the same point by walking through the County code. KCC 20.22.180 requires a preliminary plat to show "appropriate provisions are made for…potable water supplies," without further defining what counts as "appropriate" for preliminary plat—(as opposed to final plat)—purposes. KCC 20.20.040.A.4 does: for development proposals like a *preliminary* plat which require a source of potable water, an applicant must provide "documentation of an approved well by the Seattle-King County department of public health," something the Applicant has already provided here.[19] Instead, it is at the *final* plat stage that "[p]roof of…water availability, *including any required water rights*, shall be submitted…before recording." KCC 19A.16.030.F (emphasis added).

The line between what we require at the *preliminary* plat stage, which is an "approximate" exercise, versus the *final* plat stage, which requires "all elements and requirements," is often not a precise science. KCC 19A.04.260 & .250. *See also Knight v. City of Yelm*, 173 Wn.2d 325, 344, 267 P.3d 973 (2011) (describing the *preliminary* plat—as opposed to a *final* plat—inquiry as a "threshold" showing). But if there were ever a time to save something for the final plat approval stage, this is this case.

As article after article out of Olympia stated, solving *Hirst*'s unraveling of water management authority in Washington was so important that the Senate majority refused to take up the capital budget until a fix for *Hirst* was found; as no compromise on *Hirst* was found, the legislature closed without a $4 billion capital budget.[20] We will eat our hat if the next legislature also closes

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[17] Ultimately, the same distinction-without-a-difference applies to whether Appellants have standing to challenge Echo Lake on the basis of *Hirst* and/or their failure to exhaust their administrative remedies as it relates to *Hirst* is excused. If we had found their lack of participation excused, and re-opened the record to allow them to establishing standing related to *legal* water availability, we would still reach the same approve-the-preliminary-plat-but-with-the-added-condition-that-the-Applicant-must-show-prior-to-final-plat-approval-legal-water-availability decision as we do today.

[18] In *Knight*, the Court affirmed the superior court's requirement that Knight have "an opportunity to challenge the City's evidence of water provisions before final plat approval." *Id.* at 344 & n.12. Knight, however, participated in the examiner's public hearing on the preliminary plat approval and argued (and provided extensive evidentiary support for her position) that approval would harm her water rights; the Court found Knight had standing. *Id.* at 328–29, 342–43. Conversely, our Appellants did not participate in the hearing process and do not have standing. They do not magically gain standing at a subsequent stage. We do not create a special process for them to weigh in later.

[19] Public Health's preliminary approval, received February 16, 2016, is Exhibit 10 in our record.

[20] Just to make sure we use appropriate language, we borrow the language from an Association of Washington Cities email that Appellants tried to insert into the record. We do not take particular notice of that letter, as a brief web search shows numerous articles confirming the essential political positioning, even if the precise description is slightly different.

without some *Hirst*–related enactment. Yet we possess no special tea leaves for predicting what the precise legislative fix will be, nor what will arise from the County's planning process. Thus, any specific condition we place now is almost guaranteed to be obsolete in a matter of months. The important thing is that we put a condition that *whatever* requirements wind up applying to permit-exempt well applicants, Echo Lake meets this before final plat approval, to avoid the unconscionable scenario of the burden of a required showing of legal water availability the dissent warns of being passed on to hapless individual purchasers.

CONCLUSION

If prior to or on September 29, 2016, Appellants had spent even a tiny fraction of the time they have spent *since* then trying to challenge Echo Lake, they would have been leagues further ahead. Yet, Appellants' November 7, 2016, motion for reconsideration served a very useful purpose, keeping our October 12, 2016, decision from becoming final and unchallengeable. Although Appellants do not have standing nor did they exhaust their remedies, their filing prodded us to reconsider our decision. Our attached re-approval of the Echo Lake preliminary plat adds the condition that prior to final plat approval and creation of any actual building lots, the Applicant will need to show prior to final plat approval, not only the *physical* water requirements set forth in Public Health's September 28, 2015, approval (Exhibit 13), but such *legal* water availability as DPER will consider sufficient to support building permit applications for the Echo Lake lots.

This should wrap it up. The Applicant and to a lesser extent the County could conceivably appeal this decision, because our Amended Report and Decision is materially less advantageous to them. But they have both already agreed, at least in principle,[21] with today's outcome. Mr. Meyers could have challenged our initial decision prior to November 7, 2016, but today's Amended Report and Decision is in no sense less advantageous to him and in a very real sense is more advantageous to him, so he too cannot seek further review. And Appellants failed to exhaust their administrative remedies and lack standing, so they cannot seek further review either.

There will be another application recommendation for some other development where Appellants can timely raise their concerns over how the County is handling water issues, likely a development involving more than six home sites—Echo Lake being the tiniest preliminary plat application we have ever been involved with. In a future case we will again give Appellants another opportunity to present their facts and argument during the actual hearing process. And by code, examiner decisions do not establish precedent, KCC 20.22.290, so either appellant would be free to offer the same arguments again, albeit in a timely fashion. But there is no second bite at the Echo Lake apple.

[21] If either the Applicant or the County has a concern with the precise language we used to craft this new condition 17—"Prior to final plat approval, the applicant shall establish, to DPER's satisfaction, not only the *physical* water requirements set forth in Public Health's September 28, 2015, approval (Exhibit 13), but such *legal* water availability as DPER will consider sufficient to support building permit applications for the Echo Lake lots"—both have standing and have exhausted their administrative remedies, so either is free to file a motion for reconsideration with proposed amendatory language.

ORDER

Appellants' motion for reconsideration and motion to reopen the closed record are DENIED. Appellants both lack standing and failed to exhaust their administrative remedies.

We *sua sponte* RECONSIDER our October 12, 2016, Report and Recommendation. Attached to this Order is an Amended Report and Recommendation.

DATED October 6, 2017.

David Spohr
Hearing Examiner

DS/ed