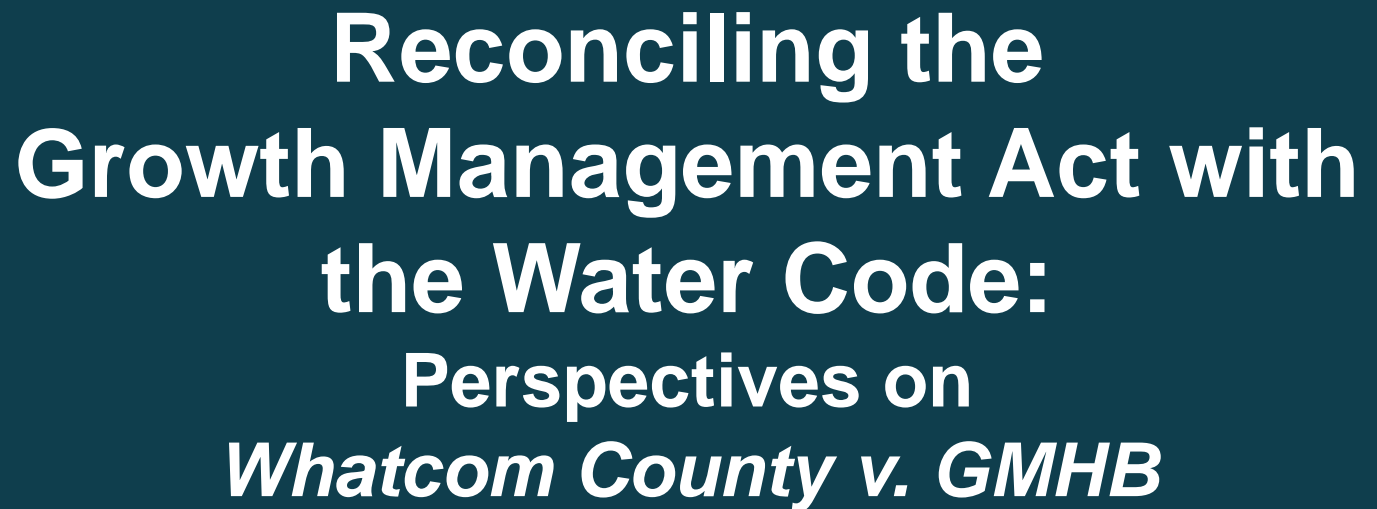
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**Reconciling the  
Growth Management Act with  
the Water Code:  
Perspectives on  
*Whatcom County v. GMHB***

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**Tadas Kisielius**

**October 26, 2016**

# Overview

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- Background
  - Relevant Statutes: Land Use and the Water Code
  - *Kittitas County v. EWGMHB*,  
172 Wn.2d 144, 256 P.3d 1193 (2011)
- *Whatcom County v. Growth Management Hearings Board (a.k.a. “Hirst”)*
  - Case Summary
  - New Issues and Lingering Questions

# Background

## Reconciling Growth Management and Water Resources

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Water resources and land use/development are connected:

“Growth and prosperity have significantly increased the competition for this limited resource.”

- RCW 90.54.090.

# Background

## Reconciling Growth Management and Water Resources

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Water Code coordinates with land use regulatory efforts:

- RCW 90.54.090: Local jurisdictions “shall whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter” of the water code.
- RCW 90.54.130: “The department of ecology may recommend land use management policy modifications it finds appropriate for the further protection of ground and surface water resources in this state.”

# Background

## Reconciling Growth Management and Water Resources

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Growth Management Act, RCW 36.70A, incorporates water considerations into long range planning:

- RCW 36.70A.020. Planning goals. “Protect and enhance the state’s high quality of life, including . . . availability of water.”
- RCW 36.70A.070. Comprehensive Plans “shall provide for protection of the quality and quantity of groundwater used for public water supplies.”

# Background

## Reconciling Growth Management and Water Resources

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Growth Management Act, RCW 36.70A, incorporates water considerations into long range planning (cont.):

- Rural area planning:
  - Development regulations in the rural areas protect “rural character,” including protecting “surface and groundwater resources.” RCW 36.70A.070(5)
  - “Rural character” is defined as development that is consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas. RCW 36.70A.030

# Background

## Reconciling Growth Management and Water Resources

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Land use statutes seek to ensure sufficient water for development proposal:

- Subdivision Statute – RCW 58.17.110, .150

“Appropriate provisions” must be made for potable water supplies

- Building Permit – RCW 19.27.097

Prior to issuance of building permit, applicant must provide “evidence of an adequate water supply”

- SEPA, RCW 43.21C

# Background

## Reconciling Growth Management and Water Resources

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*Kittitas County v. EWGMHB,*  
172 Wn.2d 144, 256 P.3d 1193 (2011)

- Does the failure to adopt regulations requiring a subdivision applicant to disclose property in common ownership (because of concerns regarding multiple exempt wells) violate the GMA?
- Does the County have the obligation (or authority) to adopt development regulations that require evaluation of legal availability of water for a development project?



# Background

## Reconciling Growth Management and Water Resources

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*Kittitas County v. EWGMHB*,  
172 Wn.2d 144, 256 P.3d 1193 (2011)

Supreme Court holds that the County is not preempted or precluded from adopting regulations to protect water resources:

- “While [the water code] preempts the County from separately *appropriating* groundwaters, it does not prevent the County from protecting public groundwaters from detrimental land uses. Nothing in the text of chapter 90.44 RCW expressly preempts consistent local regulation...

In fact, several relevant statutes indicate that the County *must* regulate to some extent to assure that land use is not inconsistent with available water resources...We conclude that the County is not precluded and, in fact, is required to plan for the protection of water resources in its land use planning..”

# Background

## Reconciling Growth Management and Water Resources

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*Kittitas County v. EWGMHB,*  
172 Wn.2d 144, 256 P.3d 1193 (2011)

The Court concludes with an explanation of what level of review of water availability is required of local jurisdictions (that is subject to competing interpretations):

- “While Ecology is responsible for appropriation of groundwater by permit under RCW 90.44.050, the County is responsible for land use decisions that affect groundwater resources, including subdivision, at least to the extent required by law.”
- “To interpret the County’s role under RCW 58.17.110 to only require the County to assure water is physically underground effectively allows the County to condone the evasion of our state’s water permitting laws.”

# *Whatcom County v. GMHB*

## Case Summary

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Case explores local government's GMA obligation to protect water availability when there is a governing instream flow rule:

- County regulations allow subdivisions and building permits to rely on exempt withdrawals so long as the project is not within an area that Ecology has determined by rule that water for development does not exist.
- Petitioners challenged based on evidence that minimum flows are not met.
- Core of dispute is over operation of instream flow rule: does the rule legally preclude new permit exempt withdrawals and does the GMA require the County to conduct a pre-approval impairment analysis.

# *Whatcom County v. GMHB*

## Case Summary

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Growth Board determines measures do not comply with GMA:

- Board agrees with the County that its regulations “do not allow the ‘daisy-chaining’ of plat applications that was the specific target of the Supreme Court’s finding of noncompliance in the *Kittitas* case.”
- However, according to the Board, the County's relevant measure "falls short of the *Postema* standard, as it does not protect instream flows from impairment by groundwater withdrawals.”

Court of Appeals reverses the Board:

- Court concludes that County’s cooperative approach with Ecology’s instream flow rules is sufficient to comply with the GMA requirements to protect water quantity and is a cooperative approach of the type contemplated by the Supreme Court’s *Kittitas* decision
- Court also agrees with Ecology that "the Nooksack Rule, in its present form, does not govern permit-exempt groundwater use."

# *Whatcom County v. GMHB*

## Case Summary

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In a split decision, the Supreme Court Reverses the Court of Appeals and affirms Board's decision:

- “The GMA places an independent responsibility to ensure water availability on counties, not on Ecology.”
- “We hold that the County’s comprehensive plan does not protect water availability because it allows permit-exempt appropriations to impede minimum flows.”
- Allowing permit-exempt withdrawals in the basin “conflicts with the requirement placed on counties to protect water availability under the GMA, as well as our holding in *Postema*.”

# *Whatcom County v. GMHB*

## Case Summary

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Court rejects County's reliance on Ecology's interpretation of 1985 instream flow rule:

- According to the court, assumptions about the relationship between groundwater and surface water underlying the 1985 rule are outdated - “we now recognize that groundwater withdrawals can have significant impacts on surface water flows, and Ecology must consider this effect when issuing permits for groundwater appropriation.”
- “We hold that the same standard applies to counties when issuing building permits and subdivision approvals.”

# *Whatcom County v. GMHB*

## Case Summary

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Court holds that the GMA imposes an obligation on counties to conduct a pre-approval impairment analysis of permit-exempt withdrawals, even though the water code expressly exempts those withdrawals from that part of the Ecology permitting process:

- “...the rule in Washington is that groundwater appropriations cannot impede minimum flows. It would be incongruous to limit *Postema* to the holding that Ecology must consider the effect of groundwater appropriations on minimum flows when issuing permits but that the county does not need to consider these same impacts when issuing building permits.”
- Even though Ecology does not engage in pre-approval impairment analysis for permit-exempt withdraws, “the GMA explicitly assigns that task to local governments.”

# *Whatcom County v. GMHB*

## Case Summary

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### Dissent:

- Offers a different interpretation of the plain language of the statute and the operation of the instream flow rule -
  - The statute “does not require counties to modify their growth management ordinances to deviate from the Department of Ecology’s determination of whether water is available for use in a particular basin. Nor does it require applicants to undertake the burden of showing that the use of a permit-exempt well will not impair senior water rights.”
- Emphasizes the practical consequences of the majority’s ruling:
  - “The effect of the majority’s holding is to require individual building permit applicants to commission a hydrogeological study to show that their very small withdrawal does not impair senior water rights, and then have the local building department evaluate the adequacy of that scientific data.”



# *Whatcom County v. GMHB*

## Observations

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- Implications on Counties – implementation challenges.
- Next round of litigation: appeals of regulations (GMHB), project applications (LUPA), or both?
- Who bears the cost of pre-approval impairment review of exempt wells?
- Implication on Ecology's management of water resources, if any?