



Christine O. Gregoire

ATTORNEY GENERAL OF WASHINGTON

Ecology Division

629 Woodland Square Loop SE 4th Floor • Lacey WA 98503
Mailing Address: PO Box 40117 • Olympia WA 98504-0117

December 11, 1996

Dear

I received your letter of November 4, 1996, in reference to Multiple Group B Systems in Long Plats. I appreciate you informing me of the County's position. Although your letter does not ask for a response, I believe the issue warrants further discussion.

The appropriation of water under the permit exemptions set forth in RCW 90.44.050 raises several questions about the state and local government's responsibilities. Under the Growth Management Act the county must determine that there is a safe and potable water supply before approving any subdivision or building permit. RCW 58.17.110, 19.27.097. While a water permit is evidence of an available water supply for obtaining a building permit, the County must make an independent determination as to whether that water will be available to provide a safe and potable water supply. See AGO 1992, No. 17. This is a County decision and cannot be determined simply by whether or not the State requires a water permit. See WAC 365-195-825(5)(b). In other words, the decision as to whether a water permit is required for a particular appropriation should not, I believe, be the standard for the County's determination as to whether a safe and potable water supply is available for a particular applicant's subdivision or building.

The County should analyze whether water is available with reference to the standards for water availability provided in the water code. WAC 365-195-825(5)(c); AGO 1992, No. 17. If water cannot physically be withdrawn in a quantity to provide a safe and potable water supply, or if information is available which shows that the withdrawal will likely impair or be detrimental to other water rights, the County should deny the subdivision or building application. See generally RCW 90.03.290, 90.44.060. If information shows the existence of hydraulic continuity between the groundwater source and surface waters, the instream flows must also be recognized and protected. RCW 90.03.345, 90.44.020(3), .030.



ATTORNEY GENERAL OF WASHINGTON

Page 2
December 11, 1996

In reference to Ecology's statements related to the exemption under RCW 90.44.050, I believe it is important to understand that Ecology does not have administrative duties related to reviewing proposed withdrawals that fall within the exemption. Ecology's analysis of one's decision to use water under the exemption is advisory only and properly describes the risks associated with interpreting the exemption too broadly. Ecology's statement should not, however, be interpreted to circumvent the requirements of the permit process.

Since 1945, appropriations of ground water have been administered and regulated pursuant to the groundwater code. Ch. 90.44. The intent in passing the code was to create the permitting process that has applied to surface water appropriations since 1917. See Ch. 90.03 RCW. The exemption in RCW 90.44.050 is a limited exception to these general permitting laws. As an exception it should be narrowly construed. Any doubt in construing the exceptions or provisos to general terms of the statute must be resolved in favor of the general terms. See State v. Wright, 84 Wn.2d 645, 529 P.2d 453 (1974).

I believe the purpose of the exemption is to authorize a de minimis withdrawal of water for specific uses, such that the withdrawal would not warrant the scrutiny necessary for issuing permits under RCW 90.44.060 and 90.03.290. The exemption does not apply to an individual well, but for "withdrawals" for limited uses. The term "withdrawal" is not a term limited to or defined by a point of diversion or the mere construction of a single well. The code recognizes that multiple wells may be authorized for any one proposed withdrawal. RCW 90.44.060. The code also recognizes that the permit process applies to a "development" and a "project", and is not necessarily based on the number of wells or points of withdrawal. RCW 90.03.290, 320. It follows that the exemption, as stated in the statute, is for a "small withdrawal", irrespective of the number of wells one may decide to construct. The Legislature recognized the limited nature of exemption in the 1967 Water Rights Registration Act, wherein "claimants for any such minimal uses" were allowed to register their rights on short claim forms. RCW 90.14.051(8).

Based on the foregoing, I believe appropriations for multiple small public water supply systems in a long plat development requiring in total more than 5,000 gpd must apply for a permit. By not seeking a water permit, a development is taking a great risk that it's use of water will be regulated because it's diversion and use is determined illegal.

ATTORNEY GENERAL OF WASHINGTON

Page 3
December 11, 1996

This letter provides you with my opinion on this issue. I am not speaking for or providing an opinion of the Department of Ecology or the Attorney General. Please call me if you have any questions or if you wish to discuss this further.

Very truly yours,

*Tom McDonald*₃₄

THOMAS McDONALD
Assistant Attorney General
(360) 459-6162

PTM:mab
cc: Carol Fleskes