Update on Hirst v. Whatcom County Supreme Court Water Rights Decision

Impacts in Washington State & Legislative Efforts

Impacts of the Hirst Decision in Different Counties

Washington REALTORS® previously issued a Broker's Alert regarding Hirst v. Whatcom County, the State Supreme Court decision regarding how local governments must determine adequacy of water supply from single domestic wells for new development. The recommendations in that Broker's Alert remain in effect.

Local governments in Washington State are still reviewing the Hirst decision and deciding how it will impact building permit and subdivision decisions in each county. It is clear that there is not agreement among local governments or the Department of Ecology on the meaning of the Hirst decision, including whether or how the decision may apply in any particular county. **There will be differences among counties in terms of the interpretation and impact of the Hirst decision. REALTORS® should contact their respective local governments to understand how the decision will be interpreted and applied.**

Further, the application of the Hirst decision at the local government level will depend on whether Ecology has adopted an instream flow regulation in that area, and if so, the specific requirements of that rule. Ecology's rules vary significantly throughout the state. A recent guidance document from Ecology is attached, which provides further information and contact information for regional Ecology offices.

The Hirst decision is based on the Supreme Court's interpretation that the Growth Management Act (GMA) does not allow local governments to rely on Ecology's water resource regulations. Rather, the Court ruled that the GMA requires local governments to conduct an independent review of whether water is legally available, including whether senior (older) water rights would be impaired by new domestic wells. These senior water rights include Ecology's instream flow regulations, which have been adopted in some (but not all) parts of the state.

The GMA and instream flow issues raise a number of key questions regarding how the Hirst decision applies in different counties:

1. The Hirst decision is a GMA decision, so does it apply only in counties planning under the GMA, or does it also apply in non-GMA counties?

2. While a GMA case, the decision also interprets the requirements of the water availability provisions in the state building code and subdivision act (RCW 19.27.097 and RCW 58.17.110), which are not part of the GMA statute. These two provisions apply statewide, not solely in GMA-planning counties. So do these parts of the Hirst decision apply only in GMA counties or statewide?

3. The decision was based on preventing "impairment" of an Ecology-adopted instream flow regulation in Whatcom County. Does the decision apply only where there is an Ecology instream flow regulation, or does it also require impairment review of senior water rights in areas where there is no Ecology-adopted instream flow rule?

4. Some counties or parts of counties already have domestic well mitigation programs under county ordinance or Ecology regulations. In some parts of the state, Ecology regulations specifically establish a certain quantity of water as available for new domestic wells and so are different from the Ecology instream flow rule at issue in the Hirst case. Are these areas still subject to the Hirst decision?

Broker Compliance With Real Estate Agency Law, Chapter 18.86 RCW

Consistent with Chapter 18.86 RCW, brokers should advise their clients who are impacted by this issue to seek legal counsel. There may be a way for buyer to safely navigate the purchase of property dependent on utilization of a new well, but buyer should obtain that information from buyer's lawyer. Broker is not licensed to provide that information

Brokers can use this document to inform clients of the Hirst decision and ensure that clients acknowledge they have been advised to seek legal advice regarding water availability.

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Broker Signature   Client Signature