

Methow Valley Citizens Council



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Okanogan County Board of County Commissioners
Attention: Laleña Johns, Clerk of the Board
123 5th Avenue North, Ste 150
Okanogan, WA 98840
Emailed to: ljohns@co.okanogan.wa.us

Re: Ordinance 2020-04

July 30, 2020

Dear Commissioners DeTro, Hover and Branch,

Since 1976 the Methow Valley Citizens Council (MVCC) has raised a strong community voice for protection of the Methow Valley's natural environment and rural character. The organization's long history lends a unique perspective on the intersection of land use planning and water availability in our valley, and we intend to participate constructively in all discussions related to these important matters.

We appreciate Ordinance 2020-04 and other interim measures that Okanogan County has adopted to better manage new water uses and address accelerated growth while preparing a revised Comprehensive Plan and zoning regulations.

As a successor to Ordinance 2019-11, Ordinance 2020-04 creates an additional exception allowing even more subdivision and building, exacerbating the legal uncertainty with which the county is grappling. We believe that because of the exceptions provided, the Ordinance fails to limit the risk to the County and property owners posed by continuing approval of land divisions and building permits without legally available water.

We believe that the ordinance must be amended to fully comply with the law and thus to reduce uncertainty for the County and for owners and potential buyers of many lots in the Valley. Adopting an interim measure consistent with the Methow Instream Flow Rule will allow the County and other interested parties time to obtain and analyze information, identify problems, and develop lasting solutions that protect the Methow Valley's future water supply and direct growth in ways consistent with the community's desires.

Our specific suggestions follow.

- A. The Ordinance should be amended to include a prohibition on issuing building permits using the two cubic feet per second (cfs) water reserves for lots resulting from subdivisions on or after March 28, 2002.**

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The Planning Enabling Act, RCW 36.70.692, provides that “county development regulations must ensure that proposed water uses are consistent with RCW 90.44.050 and with applicable rules,” including the Methow Instream Flow Rule, WAC 173-548-030. As you are aware, MVCC and Futurewise have been concerned for some time about the County’s practice of approving subdivisions in WRIA 48 using the Methow Rule’s two cfs water reserves.

The Methow Rule limits the two cfs reserves to single domestic and stock watering uses. WAC 173-548-030(2). As defined by the Washington Supreme Court in *State Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4, 10 (2002), single domestic use is use “by a single home,” and not use by several homes, a multiunit residence, or a subdivision, which are group uses. This interpretation is consistent with Ecology’s report on the Methow Rule, which defines “single domestic use” as “[w]ater used by a single household including up to one-half an acre lawn or garden irrigation.” Kris G. Kauffman, P.E. James R. Bucknell, *River Basin Program Series, No. 4 Water Resources Management Program Methow River Basin (Water Resources Inventory Area No. 48)* p. 23 (State of Washington, Department of Ecology Policy Development Section Water Resources Management Division Reprinted Nov. 1977).

In addition, RCW 58.17.060 and RCW 58.17.110 require that in deciding whether to approve a long or short subdivision or long or short plat, Okanogan County “shall determine ... [i]f appropriate provisions are made for, but not limited to, ... potable water supplies” RCW 58.17.110(4) also provides that

[i]f water supply is to be provided by a groundwater withdrawal exempt from permitting under RCW 90.44.050, the applicant's compliance with RCW 90.44.050 and with applicable rules adopted pursuant to chapters 90.22 and 90.54 RCW is sufficient in determining appropriate provisions for water supply for a subdivision, dedication, or short subdivision under this chapter.

Because Ordinance 2020-04 relieves certain short subdivisions from complying with the instream flow rules, any short subdivision approved under one of those exceptions violates RCW 58.17.060 and RCW 58.17.110.

Accordingly, to be compliant with state law, County regulations must provide that subdivisions and building permits on resulting parcels cannot be based on water from the reserves. Unfortunately, Ordinance 2020-04 restricts the use of the reserves only with respect to some land divisions, and does not address building permits on parcels created by past land divisions.

We understand that the BOCC did not include these lots because the appeal period for the subdivisions that created them has run. Therefore, the reasoning goes, these lots are now buildable. **While they may be legal lots, they do not have legally available water for building** unless they have an independent water supply, such as water delivered to a cistern from a legal source.

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The fact that the appeal period has run on a subdivision approval is irrelevant to whether or not the County may grant a building permit for a lot created by that subdivision. Granting a building permit is a new action. It is subject under state law to separate-- and equivalent -- requirements for legal and physical water availability as is the approval of a subdivision, and thus must comply with the Methow Rule. RCW 19.27.097(1)(a),(b). The fact that a subdivision that never had legally available water was approved without appeal does not somehow “create” legally available water for building permits issued on the resulting lots. A building permit for a resulting lot may be granted, but only if there is a legal water source other than the two cfs reserve.

Consequently, the ordinance as it stands maintains significant uncertainty for owners and potential buyers of these lots. A building permit for any of these lots, if based on the two cfs reserve, may be challenged for failure to assure legally available water. Even if the permit is not challenged, the permitted home will not be able to use the 2 cfs reserves as a water source, and its water may be subject to curtailment by a senior water right holder or when instream flows are not met.

If one of the County’s goals in adopting this ordinance was to reduce uncertainty for landowners, failure to prohibit the granting of building permits based on the reserve for lots created by subdivisions approved on or after March 28, 2002 seriously undermines that objective. It leads owners of homes built on those lots to believe they have legal uninterrupted water rights that they do not have.

Preliminary analysis of county data leads us to understand that an estimated 123 lots created since 2002, not including lots created by exempt segregation, have received building permits and built dwellings. There are approximately 235 lots created during the same time that are currently vacant. According to our analysis, the lots with dwellings are served with an interruptible water supply unless they used a water source that complied with the Methow Instream Flow rule. Wells that may be interrupted any time a water body falls below minimum flow requirements in an Ecology instream flow rule are not an adequate water support under RCW 19.27.097 and County Health Department Rules. *Fox v. Skagit Cty.*, 193 Wn. App. 254, 270, 372 P.3d 784, 792 (2016) *review denied Fox v. Skagit Cty.*, 187 Wn.2d 1002, 386 P.3d 1096 (2017); Okanogan County Board of Health Group B Public Water System Regulation Section 11.

The owners of 123 lots built homes with the assumption that their water supply was adequate per county regulations; an additional 235 property owners assume that they can legally drill wells and build on their lots. How does the county propose to correct this situation? Failing to acknowledge the dilemma will not make it go away.

- B. The exception provided in Ordinance 2019-11 “for those land divisions where an existing residence with an existing water supply can create one additional lot” is not compliant with the law.**

Under the *Campbell & Gwinn* decision, all land divisions are group uses, regardless of the presence of an existing residence. Ordinance 2020-4 clearly prohibits a landowner from, for example,

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subdividing an 80-acre property into four lots, if all four were dependent on the reserve, because that would be a “group use.” But under the two-house exception, an owner of 80 acres could end up with four 20-acre lots, with four homes, simply by first dividing the land into two 40-acre lots, each of which could then be divided into two 20-acre lots – all using the same “single domestic” water right! Allowing a landowner with one lot and one residence to divide their land into two lots with two residences, and use the single domestic reserve, is inconsistent with – and undermines -- the Ordinance’s prohibition against using the reserve for subdivisions.

We appreciate that the County may be trying to accommodate special circumstances, but this exception creates uncertainty for any property owner who makes use of it. Consequently, the ordinance should be amended by removing this exception.

C. The exception allowing for Exempt Segregations, condominiums and binding site plans is not compliant with the law.

This exclusion in Ordinance 2020-4 allows exempt segregations of four or fewer parcels, none of which are smaller than 20 acres (or one thirty-second of a section if the land is capable of description as a fraction of a section of land), condominiums, and binding site plans to be created and rely on the 2 CFS reserves as their potable water sources. OCC 16.04.070B, D, and F. However, as was documented above, none of these uses are single domestic uses as defined by Ecology’s report on the Methow Instream Flow Rule and the *Campbell & Gwinn* decision, so they are not entitled to rely on the reserves for their potable water supplies.

D. The County does not appear to have developed information about the number of lots affected by implementing Ordinance 2020-04 and its exceptions. Such information is necessary to analyze the impacts of, or educate the public about, the ordinance either as written or as amended to fully comply with the law.

MVCC has attempted to obtain information from the County to determine how many potential land use actions will be affected by, or are excluded from, Ordinance 2019-11 and its successor, Ordinance 2020-04. It does not appear the County has such information. For example, how many lots may be created in each reach of the Methow Watershed under the exception for a second lot created from a lot with a house already built? How many lots have been created with exempt segregations since 2002, and how many new lots are possible with continued allowance of these segregations under the exception provided in Ordinance 2020-04?

It is important to understand how this information relates to the analysis provided in the 2011 Aspect Consulting study, which showed that that even with no further subdivision, and limiting use for each home to 710 gallons per day, there is inadequate water in the reserve to supply the 1,092 undeveloped lots that existed in the Lower Methow Reach in 2011. How many additional lots have been created since then?

Without this information, the scope of the risk to property owners, and the scale of the problem that the county needs to address – which could be considerable -- is unknown. We believe that the

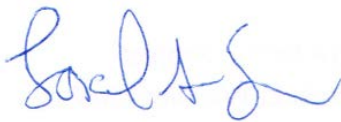
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County should gather and provide this information as part of the analysis of actions that may best ensure physically and legally available water for future development.

While the necessary information is being gathered and analyzed, and presented to the community for dialogue and problem-solving, we believe that a full moratorium on subdivisions and on building permits as outlined above is a more appropriate response.

We look forward to continued productive dialogue leading to lasting solutions that benefit the natural environment and rural character of the Methow Valley, its residents, visitors and future generations. Please address any questions about our views to Lorah Super, Program Director, at the address below.

Sincerely,



Lorah Super
MVCC Program Director
lorah@mvcitizens.org
(509)997-0888 ext.2

CC: Commissioners DeTro, Hover and Branch; Sage Park; Trevor Hutton; Alan Reichman; Shona Voelckers; Tim Trohimovich