

ORDINANCE NO. 17-1067

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF SPOKANE, WASHINGTON, AUTHORIZED BY CHAPTER 36.70A RCW, RCW 36.32.120(6) AND RCW 36.01.085, ESTABLISHING ELIGIBILITY AND PROCEDURES TO ACQUIRE MITIGATION WATER CERTIFICATES FROM THE SPOKANE COUNTY LITTLE SPOKANE WATER BANK IN CONJUNCTION WITH RESIDENTIAL BUILDING PERMITS FOR WATER RESOURCE INVENTORY AREA 55; ESTABLISHING PENALTIES IN CONJUNCTION THEREWITH; AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO.

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF SPOKANE COUNTY, WASHINGTON, as follows:

SECTION NO. 1: PURPOSE

The purpose of this Ordinance is to provide for and promote the health, safety and welfare of the general public and the environment in conjunction with implementation of the Washington State Supreme Court's decision in *Whatcom County v. Hirst*, 186 Wash 2d 648, 381 P. 3d 1 (2016) in the unincorporated area of Spokane County. This Ordinance is not intended to create or otherwise establish or designate any particular class or group of persons who will or should be specially protected or benefitted by its terms.

SECTION NO. 2: DEFINITIONS

The following words and terms as used herein shall be held and construed to have the following meanings:

- (1) "Publicly-operated Spokane County Little Spokane Water Bank" or "Little Spokane Water Bank" means that water bank used to provide mitigation sources to off-set consumptive water use and allow for new permit exempt and permitted uses of water within portions of WRIA 55.
- (2) "Residential Building Permit requiring mitigation" or "Mitigated Residential Building Permit" means a permit issued by the Spokane County Building and Planning Department for a building necessitating potable water which is located within portions of WRIA 55 and which relies on a permit exempt domestic use as provided for in RCW 90.44.050 as "another form sufficient to verify the existence of an adequate water supply" as required in RCW 19.27.097.
- (3) "Water Resource Inventory Area" or "WRIA" means the regional areas developed by the Department of Ecology to implement a comprehensive state water program as directed by the Water Resources Act of 1971 (chapter 90.54 RCW) and defined in chapter 173-500 WAC.
- (4) "Water Resource Inventory Area 55" or "WRIA 55" means that area identified in chapter 173-555 WAC.
- (5) "Mitigation Certificate" or "Residential Building Permit Mitigation Certificate" or "Stream Flow Mitigation Certificate" means a parcel specific legal document recognized by Washington State Department of Ecology and authorized by Spokane County Department of Building and Planning as evidence in the issuance of a Mitigated Residential Building Permit that the applicant has established a sufficient right to a designated quantity of water that for purposes of RCW 19.27.097 is senior to the base flow established under chapter 173-555 WAC.

- (6) “Approved Mitigation Area” or “Suitability Area” means that area defined in a Trust Water Agreement where Department of Ecology has authorized Spokane County to grant mitigation certificates.
- (7) “County” shall mean Director of Environmental Services or his or her designee unless otherwise specified.

SECTION NO. 3: ELIGIBILITY / APPLICATION

Applicants for a Mitigated Residential Building Permit may qualify to purchase a Mitigation Certificate if the following requirements are met:

1. The water source for the permit exempt domestic use is located within an Approved Mitigation Area in which the Little Spokane Water Bank can provide adequate water mitigation for the purpose of meeting the water availability requirements of RCW 19.27.097 for the issuance of a building permit; and

2. The parcel connected to the Mitigation Certificate is located outside of the retail service area of any public water purveyor, unless the purveyor informs the applicant and Spokane County Building and Planning Department in writing that the purveyor is unable to provide water to the applicant in a timely and reasonable manner; and

3. Applicants agree to sign a property covenant limiting domestic water use and associated noncommercial outdoor irrigation from a groundwater source exempt from permitting requirements of RCW 90.44.050 to the quantities designated on the Mitigation Certificate; and

4. Applicants agree to provide an avigation easement to be used by the County in the enforcement of this Ordinance.

Applicants must submit a Mitigation Certificate application, all applicable documentation, and all applicable fees (according to the Spokane County Building and Planning Department fee schedule) to Spokane County Environmental Services Department.

Applicants for a Mitigation Certificate on a parcel that is not wholly within an Approved Mitigation Area must use a well located within that portion of the parcel that is within an Approved Mitigation Area. The Applicant must provide the location of the withdrawal and associated well log at the time of application. If a well log is not available, the Applicant must sign an affidavit identifying the location of the well.

The County may, at its sole discretion, restrict the sale of Mitigation Certificates and or suspend the application process for a residential building permit in certain areas served by the Little Spokane Water Bank based on the number of mitigation certificates deemed locally available in an Approved Mitigation Area and the projected demands for mitigation certificates.

A Mitigation Certificate granted through the Little Spokane Water Bank addresses the legal water availability only relative to curtailment under the instream flow rule (chapter 173-555 WAC). The applicant is still required to meet physical availability requirements of the Spokane Regional Health District for domestic water use and Spokane County setback requirements from existing wells that have an established domestic or beneficial use

Upon issuance of the Mitigation Certificate, the County will record at the Spokane County Auditor's Recording Office the Mitigation Certificate and any applicable agreements on the title record related to the parcel associated with the Mitigated Residential Building Permit and the Mitigation Certificate.

Mitigation Certificates are not transferable to other parcels unless development on the original parcel is subsequently determined to be infeasible and County approval for the transfer is obtained.

A Mitigation Certificate will be valid for a period of two (2) years from the date of issuance if the Mitigation Certificate holder has not obtained a Mitigated Residential Building Permit or three (3) years if a written request for a one (1) year extension is submitted to the County and approved for good cause prior to the running of the two (2) year period. If during the applicable two (2) year or three (3) year period, the Mitigation Certificate holder obtains a Mitigated Residential Building Permit, the Mitigation Certificate continues to be valid while the Mitigated Residential Building Permit remains in an active status. If a Mitigation Certificate holder obtains a Mitigated Residential Building Permit and a Certificate of Occupancy is granted the Mitigation Certificate becomes invalid only if the residence is abandoned or remains uninhabitable for five (5) continuous years. Upon Mitigation Certificate invalidation the County will automatically refund the Mitigation Certificate cost paid by the Mitigation Certificate holder less all administrative costs, the Certificate will be returned to the Little Spokane Water Bank, and the invalidation will be documented on the property title by the Department of Environmental Services.

SECTION NO. 4: WATER USAGE PACKAGES

The County is offering two mitigation packages to applicants for Mitigated Residential Building Permits. An applicant in conjunction with a mitigation certificate application shall designate one of the following Mitigation Packages:

Mitigation Package A: Consists of indoor domestic use at one single family residence only and outdoor irrigation of up to 2,000 square feet of irrigated landscaping or garden.

Mitigation Package B: Consists of indoor domestic use at one single family residence only and outdoor irrigation of up to 6,000 square feet of irrigated landscaping or garden.

The County may, at its sole discretion, offer a subset of the above mitigation packages in certain areas served by the Little Spokane Water Bank based on the number of mitigation certificates deemed locally available and projected demands for mitigation certificates.

The County may, at its sole discretion, based on the number of mitigation certificates deemed locally available and projected demands for mitigation certificates, allow Mitigation Certificate holders within certain areas served by the Little Spokane Water Bank to make application later for a certificate upgrade to a higher Mitigation Package to increase the irrigated area. The County retains the sole right to approve or deny a Mitigation Package upgrade.

SECTION NO. 5: MONITORING AND ENFORCEMENT

The Mitigation Certificate holder is responsible for self-monitoring water usage. The County is required under the Trust Water Agreements held in the Little Spokane Water Bank to submit periodic reports to Department of Ecology on water usage and may utilize aerial photo review, site inspections, and other means to determine water usage and compliance with water use allocations allowed by the Mitigation

Certificate. An aerial photo depicting water usage in excess of the amount authorized when accompanied by supporting affidavit shall create a rebuttable presumption of a Mitigation Certificate violation.

SECTION NO. 6: ENFORCMENT POWER

The County Director of Environmental Services or his/her designee is authorized to take such lawful action as may be required to enforce the provision of this Ordinance, including but not limited to the Mitigation Certificate and/or the property covenant requiring compliance with the terms of the Mitigation Certificate, through the imposition of civil penalties, referrals for criminal charges, or other actions provided by law. The Mitigation Certificate shall identify a Mitigation Package provided for in Section No. 4.

SECTION NO. 7: NOTICE OF VIOLATION CIVIL MONETARY PENALTY

Except as noted in Section No. 10 of this Ordinance, any person, firm or corporation who owns, controls, or is in possession of the residence connected to the Mitigation Certificate and that through *negligence* violates or fails to comply with any of the provisions of this Ordinance, including but not limited to the Mitigation Certificate, shall be deemed to have committed a civil violation subject to the following monetary penalties.

The civil penalty for the first civil violation will be assessed at the rate of \$500.00. Second, third and subsequent but separate violations of a like nature, are repeat violations. Penalties for second civil violations shall be assessed at two times (2X) the initial assessment rate or \$1,000.00. Penalties for third and subsequent civil violations shall be assessed at three times (3X) the initial assessment rate or \$1,500.00. Each and every day or portion thereof during which the violation continues to exist after service of a Notice of Violation, shall be deemed a continuing violation for purposes of this Ordinance and cumulative civil penalties may be assessed at the rate of \$500.00 per day.

This section does not exempt an offender from any other suit, prosecution or penalty otherwise provided by law.

SECTION NO. 8: NOTICE OF CIVIL VIOLATION – DETERMINATION FINAL UNLESS APPEALED – SERVICE

If the Spokane County Director of Environmental Services or his/her designee determines through investigation, inspection, or other means that a person, firm or corporation has violated any provision of this Ordinance, including but not limited to the Mitigation Certificate, he or she may issue a Notice of Violation. The Notice of Violation represents a determination that a civil violation has been committed. The determination is final unless appealed.

1. The Notice of Violation shall include the following:
 - (i) The name and address of the person, firm or corporation who owns, controls, or is in possession of the residence connected to the Mitigation Certificate related to the determination of violation of this Ordinance.
 - (ii) The Spokane County Assessor Parcel Number of the property which the person, firm or corporation identified in (i) owns, controls, or has possession.
 - (iii) The Little Spokane Water Bank Mitigation Certificate Number associated with the Parcel Number identified in (ii).

- (iv) A brief description of the violation.
- (v) A statement assessing a civil penalty as provided for in Section No. 7 for each violation that must be paid to the county within 21-days from the date of issuance.
- (vi) A statement that each and every day or portion thereof the violation continues is a violation and subjects the offender to cumulative penalty assessment of \$500.00 per day.
- (vii) A statement advising that if any civil penalty is not timely paid, the matter will be referred to a collection company.
- (viii) A statement advising that third (3rd) and subsequent issues of Notice of Civil Violation of any provision constituting a civil violation of the Mitigation Certificate involving unauthorized water usage within a five-year-period preceding the issuance of the Notice of Civil Violation are punishable as misdemeanors and subject to criminal prosecution.
- (ix) A statement advising:
 - (a) That the Notice of Violation may be administratively appealed to the Spokane County hearing examiner within fourteen (14) calendar days following service of the Notice of Violation, such appeals shall be pursuant to the provisions of chapter 1.46 of the Spokane County Code.
 - (b) That cumulative per diem civil penalties will not accrue during the pendency of such appeal.
 - (c) That the failure to file a timely and complete appeal will constitute a waiver of all rights to an administrative appeal under the Spokane County Code and a failure to exhaust administrative remedies.

The Notice of Violation must be served on the person, firm or corporation in violation either personally or by mailing a copy of the Notice of Violation by certified mail, postage prepaid, return receipt requested, to the person, firm or corporation at his/its last known address. Proof of personal service of the notice must be made at the time of service by a written declaration under penalty of perjury executed by the person effecting service, declaring time, date and manner in which service was made. Any notice or determination mailed pursuant to this section shall be deemed received by the party to whom it is addressed on the third (3rd) day after it is placed in the mail, as set forth by declaration of the sender.

The person, firm or corporation served with a Notice of Violation may appeal to the hearing examiner within 14-days of service. Appeals must be filed and processed in accordance with the provisions of chapter 1.46 of the Spokane County Code. At the appeal, the Spokane County Director of Environmental Services or his/her designee will have the burden of proving the violation by a preponderance of the evidence. The decision of the hearing examiner on any appeal will be final and conclusive. An aggrieved party may seek judicial review in the Spokane County Superior Court within 21 calendar days of the issuance of the examiner's final decision.

SECTION NO. 10: VIOLATIONS CRIMINAL – PENALTIES

Failure to perform any act required or performance of any act prohibited by this Ordinance, a Mitigation Certificate, and or a property covenant requiring compliance with the terms of the Mitigation Certificate is

designated a civil violation under Section No. 7, except the following violations are criminal – classification misdemeanor:

- (1) The intentional violation of any provisions of this Ordinance including but not limited to the Mitigation Certificate.
- (2) The third or subsequent separate violation of any provisions of a Mitigation Certificate constituting a civil violation of this Ordinance within a five (5) year period calculated from when the first Notice of Violation was issued, regardless of whether the civil violations have been fully adjudicated and deemed committed, *provided*, that a finding by the court that the prior civil violation was not committed shall render the prior violation not countable toward the third or subsequent violation.

Commission of a misdemeanor identified in this Ordinance is punishable by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days or a fine in an amount fixed by the court of not more than one thousand dollars, or both imprisonment and fine. The probationary period shall be up to one-year and may impose such crime related conditions warranted.

This section does not exempt an offender from any other suit, prosecution or penalty otherwise provided by law.

SECTION NO. 11: COMPLIANCE WITH OTHER LAWS

In addition to complying with the provisions of this Ordinance, an application for or holder of a mitigation certificate shall comply will all other applicable federal, state and local laws, ordinances and regulations.

SECTION NO. 12: REMEDIES NOT EXCLUSIVE

The remedies for violations of this Ordinance are not exclusive.

SECTION NO. 13: ORDINANCE CONTROLS

All ordinances and sections of the Spokane County Code in conflict with this Ordinance are, to the extent of the conflict, superseded and unless adopted subsequent to this Ordinance and contain specific language superseding provisions herein.

SECTION NO. 14: SEVERABILITY

If any part or provision of this Ordinance, or its application to any person, firm, or corporation, or circumstance is held invalid, it is the intent of the Board of County Commissioners of Spokane County that the remainder of this Ordinance or its application of the provisions to other persons, firms, corporations, or circumstances is not affected.

SECTION NO. 15: SHORT TITLE

This Ordinance shall be known as the Stream Flow Mitigation Certificate Ordinance and may be cited as such.

SECTION NO. 16: EFFECTIVE DATE

This Ordinance is effective upon adoption.