

June 6, 2017

The Honorable Marc Boldt, Council Chair
Clark County Board of County Councilors
PO Box 5000
Vancouver, Washington 98666-5000

Dear Council Chair Boldt and Councilors Blom, Olson, and Stewart, and Quiring:

Subject: We recommend that Clark County adopt an improved version of the Planning Commission recommendations on CPZ 2017-00023 Comprehensive Growth Management Plan 2015-2035 response to GMHB decision.

Sent via email to: boardcom@clark.wa.gov

Thank you for the opportunity to comment on the Planning Commission recommendations on CPZ 2017-00023 to address some of the violations found by the Growth Management Hearings Board. We very much appreciate the County's adoption of the application moratorium for certain areas and the County's quick action to bring some of its comprehensive plan and development regulations into compliance with state law. We support many of the Planning Commission recommendations, but we do have concerns about the proposed agricultural and forestry zones and the rural comprehensive plan designations which are discussed below. We urge the Board of County Councilors to adopt the Planning Commission recommendation with our suggested improvements.

Futurewise works throughout Washington State to support land-use policies that encourage healthy, equitable, and opportunity-rich communities, and that protect our most valuable farmlands, forests and water resources. We have members across Washington State including Clark County.

Futurewise supports the following Planning Commission recommendations

- The adoption of three Rural comprehensive plan map designations, the R-5, R-10, and R-20 designations, each implemented with its own zone.
- That the list of allowed uses will be removed from the Urban Reserve (UR) zoning district and the allowed uses in this zone will be determined by the underlying zone.
- The repeal of the 80-acre Battle Ground urban growth area (UGA) expansion. We recommend that the land be given a lower density than the R-5 zone given the limited water available in the rural areas.

Futurewise recommends the following improvements to the Planning Commission recommendations

The noncompliant AG-10 and FR-20 zones must be brought into compliance with state law

The proposed AG-20 densities are too high

On remand, a county must bring its comprehensive plan and development regulations found to violate the Growth Management Act (GMA) into compliance with the GMA.¹ Readopting earlier non-GMA compliant provisions is not sufficient. The proposed repeal of the Agriculture 10 (AG-10) and Forest 20 (FR-20) zones and the proposed adoption of the proposed AG-20 and FR-40 zones will not comply with the GMA.

As the Board concluded in the Final Decision and Order in the comprehensive plan and development regulations update appeal AG-10 and FR-20 zones do not conserve agricultural land.² The AG-10 zone, the AG-20 zone, and the FR-20 zone have three problems. First, their densities are too high, leading to the subdivision of viable farm into smaller, less economically viable parcels. As the Board concluded the evidence showed “[l]ot sizing for agriculture at up to 40 acre densities merely causes rural sprawl.”³ The former AG-10 zone, now the proposed AG-20 zone, has many lots larger than 20 acres.⁴ These lots can be subdivided into lots too small to economically farm through subdivisions or cluster subdivisions.

The County’s BERK report documents that the AG-20 zone’s 20-acre minimum lot size and non-agricultural uses fail to conserve agricultural land of long-term commercial significance because it allows “non-productive rural uses.”⁵ “Given onsite development or other non-productive rural uses (e.g. dwellings, manicured lawns associated with dwellings, etc.) there is a greater area zoned AG and a lesser area inventoried by WSDA in agricultural use. WSDA inventoried acres make up between 15-27% of the AG 10 zone area [which was zoned AG-20

¹ *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 177–78, 979 P.2d 374, 382 (1999), as amended on denial of reconsideration (Sept. 22, 1999); RCW 36.70A.330(1).

² *Clark County Citizens United, Inc., Friends of Clark County and Futurewise v. Clark County*, Case No. 16-2-0005c, Final Decision and Order (March 23, 2017) at 46 – 52 of 101.

³ *Id.* at 52 of 101 citing IR 1418 at 019613-15 Arthur Nelson, *Preserving Prime Farmland in the Face of Urbanization: Lessons from Oregon* 58 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 467, 471 – 74 (1992) enclosed with this letter. The Journal of the American Planning Association is a peer-reviewed journal. Journal of the American Planning Association Aims and Scope webpage p. 3 of 6 enclosed with this letter.

⁴ Email from Christine Cook to David McDonald responding to a public records request (April 18, 2017) with spreadsheet of Agricultural parcels larger than 20 acres enclosed with this letter.'

⁵ BERK Consulting, *Clark County Comprehensive Plan 2016 Update Planning for Growth 2015 – 2035: Clark County Agriculture and Forest Land Supplemental Mapping and Data Analysis – Issue Paper 9* p. 18 (June 23, 2016) accessed on May 31, 2017 at https://www.clark.wa.gov/sites/default/files/dept/files/community-planning/2016-update/Plan%20Adoption/Final%20documents-maps/Issue%20Paper_9_Supplemental%20Resource%20Land%20Info_2016_0623_CLEAN.pdf.

when the BERK report was written].”⁶ The BERK report also found based on the Census of Agriculture that “1.5% of the [Clark County] farms are large, representing 72% of the total commodity outputs. ... The loss of large farms corresponds to a loss in commodity totals. In 2007 dollars, the value of agriculture dropped from \$62.3 million in 1997 to \$52.7 million in 2007, and again to \$45.9 million in 2012.”⁷ Converting large farms to small farms and 20-acre estates with manicured lawns as the AG-20 zone allows will not conserve agricultural lands and encourage the agricultural economy as the GMA requires. One need only look at the Landwatch website⁸ and the applications that were filed for development on the upzoned AG 10 parcels between June 30, 2016 and the date of the county’s emergency ordinance to see that smaller lot sizes are much more likely to turn into homesites with large homes rather than remain in agricultural use.⁹

Futurewise and the Friends of Clark County willingly entered into a preliminary settlement agreement that provided for an immediate moratorium on the processing of development applications on Agriculture 10, Forest 20, and Rural parcels that had been modified in the 2016 planning process and found non-compliant by the Growth Management Hearings Board (Board) in return for the Friends of Clark County dismissing its judicial appeal of the Board’s order which the Friends have done. Futurewise’s legal analysis is that to come into full compliance with the Board’s decision, the County ultimately needs to set 40-acre minimum lot sizes for all Agriculture land in the County. Futurewise, and we are sure the Friends of Clark County, stand ready to continue with settlement negotiations that will hopefully resolve some

⁶ *Id.* at p. 18.

⁷ *Id.* at p. 6.

⁸ See http://www.landwatch.com/Washington_land_for_sale/Clark_County accessed on June 5, 2017.

⁹ Please see Clark County Public Record Request Response P006577-050417 selected pages of which are enclosed in two separate emails with the filenames: PreApp Docs AG-10 and FR-20 2016-2017 Part 1.pdf and PreApp Docs AG-10 and FR-20 2016-2017 Part 2.pdf. The pages from the public records request are for the following vested developments provided in the following order: PAC2016-000101 Deryavko Short Plat & PAC2017-00024 Deryavko Short Plat;
PAC2016-00115 Grace Meadow Cluster Subdivision;
PAC2016-00120 Bestul Short Plat & PAC2016-00148 Bestul Short Plat;
PAC2016-00130 Gaylords Short Plat;
PAC2016-00133 Staples Short Plat;
PAC2016-00139 Blueberry Acres Cluster Subdivision & PAC2017-00026 Blueberry Acres Cluster Subdivision;
PAC2016-00143 Mountain Estates & PAC2016-00169 Mountain Estates;
PAC2016-00150 Ridgeport Estates Cluster Subdivision;
PAC2017-00001 Bee Tree School Short Plat 1 & PAC2017-00034 Bee Tree School Short Plat 1;
PAC2017-00009 Seekins Short Plat & PAC2017-00033 Seekins Short Plat;
PAC2017-00010 Wells Short Plat;
PAC2017-00020 Ridgeport Estates Cluster Subdivision & PAC2017-00060 Ridgeport Estates Cluster Subdivision;
PAC2017-00043 Lawhead Short Plat & PAC2017-00082 Lawhead Short Plat;
PAC2017-00044 Defrees 249th Subdivision & PAC2017-00065 Defrees 249th Subdivision;
PAC2017-00052 King;
PAC2017-00054 Shanghaied Estates Cluster Subdivision;
PAC2017-00056 Cruanas Short Plat;
PAC2017-00064 Fellman;
PAC2017-00066 Hiivala Short Plat; and
PAC2017-00067 Roger Foley Short Plat.

or all issues without the need for further appeals.

The AG-20 and FR-40 zones allow non-agricultural uses in violation of the GMA

The second problem with the AG-10 zone and the proposed AG-20 and FR-40 zones is the zones allow non-agricultural and non-forestry uses in violation of the GMA in Table 40.210.010-1, Uses. In the *Soccer Fields* decision the State of Washington Supreme Court held that “[i]n order to constitute an innovative zoning technique [authorized by RCW 36.70A.177] consistent with the overall meaning of the Act, a development regulation must satisfy the Act’s mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry.”¹⁰ Outdoor recreational facilities failed this test and cannot be allowed on agricultural lands because they will remove “designated agricultural land from its availability for agricultural production.”¹¹

In the *Lewis County* decision, the Washington State Supreme Court built on the *Soccer Fields* decision and again upheld a Growth Management Hearings Board decision that the “County’s ordinance allowing residential subdivisions and other non-farm uses within designated agricultural lands undermined the GMA conservation requirement.”¹² In addition to residential subdivisions, the illegal uses were public facilities; public and semipublic buildings, structures, and uses; and schools, shops, and airports.¹³

In the *Kittitas County* decision, the state Supreme Court again upheld a Growth Management Hearings Board decision finding that a variety of conditional uses allowed on agricultural lands of long-term commercial significance violated the GMA. The conditional uses violated the GMA because “the County has no protections in place to protect agricultural land from harmful conditional uses.”¹⁴ The conditional uses that violated the GMA included “kennels, day care centers, community clubhouses, governmental uses essential to residential neighborhoods, and schools with no limiting criteria or standards.”¹⁵

The new AG-20 and FR-40 zones allow non-agricultural and non-forestry uses such as residential subdivisions, guest houses, commercial kennels, public recreation and public parks, regional recreational facilities, private recreation facilities, country clubs and golf courses (in the AG-20 zone), event facilities, public and private elementary and middle schools serving a student population primarily outside of urban growth boundaries, government facilities, sawmills, oil and gas processing facilities, solid waste disposal sites, and new cemeteries and mausoleums, crematoria, columbaria, and mortuaries.¹⁶ Governmental facilities and schools

¹⁰ *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (Soccer Fields)*, 142 Wn.2d 543, 560, 14 P.3d 133, 142 (2000).

¹¹ *Soccer Fields*, 142 Wn.2d at 562, 14 P.3d at 143.

¹² *Lewis Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 509, 139 P.3d 1096, 1106 (2006).

¹³ *Lewis Cty.*, 157 Wn.2d at 507, 526 – 27; 139 P.3d at 1105, 1114 – 15.

¹⁴ *Kittitas Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 172, 256 P.3d 1193, 1206 (2011).

¹⁵ *Kittitas County Conservation v. Kittitas County*, EWGMHB Case No. 07-1-0015, Final Decision Order (March 21, 2008), at 21.

¹⁶ Proposed Table 40.210.010-1 Uses.

have been built on agricultural land converting this land to nonagricultural uses.¹⁷ Allowing these uses in the new AG-20 and FR-40 zones violates the GMA.

To address these GMA violations, we recommend that the Clark County Gorge Large-Scale Agriculture 40 (GLSA-40) comprehensive plan designation and zone be applied to the land currently zoned AG-10. This zone addresses both problems with the AG-10 zone. We also recommend that the non-forestry uses identified above be removed from the FR-40 zone.

The County should provide better protection for farm and forest land from nearby incompatible uses

The third problem with the AG-10, Ag-20, and FR-40 is the lack of adequate protections for agricultural and forest lands. The State of Washington Supreme Court has held that counties and cities are “required to assure the conservation of agricultural lands and to assure that the use of adjacent lands does not interfere with their continued use for the production of food or agricultural products.”¹⁸ These requirements also apply to forest land of long-term commercial significance.¹⁹ Clark County’s comprehensive plan and development regulations contain few measures to protect agricultural and forest land from adjacent incompatible uses. We recommend that buffers be required for non-agricultural and non-forestry uses adjacent to agricultural and forest land and the cluster subdivisions provide buffers and be “limited to lands with poor soils or otherwise not suitable for agricultural purposes” as the GMA requires.²⁰

The County must address the GMA violations that result from vested or contingently vested development in the former AG-10 and FR-20 zones

RCW 36.70A.330(1) and (2) provide in relevant part that:

(1) After the time set for complying with the requirements of this chapter under RCW 36.70A.300(3)(b) has expired, or at an earlier time upon the motion of a county or city subject to a determination of invalidity under RCW 36.70A.300, the board shall set a hearing for the purpose of determining whether the state agency, county, or city is in compliance with the requirements of this chapter.

(2) The board shall conduct a hearing and issue a finding of compliance or noncompliance with the requirements of this chapter and with any compliance schedule established by the board in its final order.

¹⁷ Clark County Aerial and Account Summary for Parcel No. 209699000; Clark County Aerial and Account Summary for Parcel No. 191919000.

¹⁸ *King County v. Central Puget Sound Growth Management Hearings Bd. (Soccer Fields)*, 142 Wn.2d 543, 556, 14 P.3d 133, 140 (2000) emphasis in original.

¹⁹ RCW 36.70A.060(1)(a).

²⁰ RCW 36.70A.177(1).

RCW 36.70A.330 requires Clark County to comply with the requirements of the GMA. In interpreting a similar provision, the State of Washington Court of Appeals held that:

¶ 26 In addition, a close reading of RCW 36.70A.320(4) does not support the County's interpretation that the Board merely had to find that resolution 7-0077 was itself in compliance with the GMA. The plain language of RCW 36.70A.320(4) states that the question is not whether the action to remedy the invalidity itself complies with the GMA, but whether the remedial action in response to the invalidity finding "will no longer substantially interfere" with the GMA. This language implies that the Board's analysis should not be confined strictly to the remedial action but that the Board should review the extent to which development that vested under the flawed UGA expansion interferes with GMA goals and should condition its finding of compliance on measures that will remedy that interference.²¹

Like RCW 36.70A.320(4), RCW 36.70A.330(1) requires the county to be "in compliance with the requirements of this chapter," the GMA. Like RCW 36.70A.320(4), RCW 36.70A.330(1) requires the county review the extent to which development that vested under the flawed AG-10 and FR-20 zones violates the GMA. Clark County must take steps to bring the "contingently vested" and vested developments into compliance with the requirements of the GMA including the requirements to conserve agricultural and forest land of long-term commercial significance.²²

One way of addressing these problems would be for Clark County to adopt a transfer of development rights (TDR) program. Areas within the Clark County Urban Growth Areas (UGAs) should be made receiving zones, areas where transferred development rights can be used. The vested developments and other agriculturally zoned properties should be sending zones from which development rights can be transferred.

Well-designed TDR programs can be quite successful. Between 1997 and June 30, 2014, \$24.4 million of transferable development rights have been sold through the Redmond, Washington TDR program.²³ King County's TDR program has also been very successful. A web based map showing sending and receiving sites is available at (last accessed on May 30, 2017): <http://www.kingcounty.gov/environment/stewardship/sustainable-building/transfer-development-rights/tdr-map-viewer.aspx>

King County staff have characterized the market for TDRs in King County as very active right now and, in their view, developers can buy TDRs cheaply compared to the additional

²¹ *Miotke v. Spokane Cty.*, 181 Wn. App. 369, 382, 325 P.3d 434, 441 (2014), *review denied*, 181 Wn.2d 1010, 335 P.3d 941 (2014). The *Miotke* decision was decided by Division II of the court of appeals, the same division in which Clark County is located.

²² Email from Christine Cook to David McDonald responding to a public records request (April 18, 2017) with spreadsheet of projects that contingently vested either because of preapplication conferences or a plat application. See also the documents referenced in footnote 9 above.

²³ City of Redmond, Washington, *TDR Transaction History as of June 30, 2014* p. *3 accessed on May 30, 2017 at: <https://www.redmond.gov/common/pages/UserFile.aspx?fileId=5772>

development capacity that can be acquired using TDRs. These transfers have been used to create more lots in subdivisions and additional multi-family and office building space.

King County has not expanded its urban growth area (UGA) much, but when the county has expanded the UGA they used a mechanism similar to TDRs. Both Pierce County and Snohomish County require TDRs for urban growth area expansions, although Snohomish County voted last year to exempt single-family dwellings from that requirement which we do not recommend.

In 2016, Pierce County completed its first transfer of development rights from farmland in unincorporated Pierce County to the City of Tacoma to allow a larger multi-family building.²⁴ The developer stated that the additional capacity of the development will be profitable even with the need to acquire TDRs and that the developer would undertake TDR projects in the future.

Size the R-5, R-10, and R-20 comprehensive plan designations consistent with available water resources as the GMA requires

While Futurewise supports the adoption of three Rural comprehensive plan designations, the amount of land in the proposed R-5, R-10, and R-20 designations should be consistent with available water resources. Futurewise emphasized this concern in our comments during the 2016 Comprehensive Plan update.²⁵ The Washington State Department of Ecology (Ecology) has determined that “[t]here is limited water available for new uses in [Water Resource Inventory Area] WRIA 27,” the Lewis River Watershed, and “much of the water in the Lewis River Watershed has already been spoken for.”²⁶ The situation is the same in the Salmon-Washougal Watershed, WRIA 28. “There is limited water available for new uses ...” and “much of the water in this watershed has already been spoken for.”²⁷ In fact, water is in such short supply that there is already evidence that the overdevelopment of rural lands has caused wells to run dry.²⁸

When Ecology adopted the instream flow rules for WRIs 27 and 28, Ecology established reserves for future domestic uses.²⁹ The reserves in Clark County can serve another 4,859 new

²⁴ See the City of Tacoma and Pierce County, *Transfer of Development Rights: The History in the Making Celebration* postcard enclosed with this letter.

²⁵ See for example Futurewise’s letter to Clark County Community Planning Comments on the Draft Supplemental Environmental Impact Statement for the Clark County 2016 Comprehensive Growth Management Plan Update (August 2015) pp. 7 – 9 (Sept. 10, 2015) and

²⁶ Washington State Department of Ecology Water Resources Program, *Focus on Water Availability Lewis River Watershed, WRIA 27* p. 1 (Publication Number: 11-11-031 August 2012) accessed on May 30, 2017 at: <https://fortress.wa.gov/ecy/publications/summarypages/1111031.html>

²⁷ Washington State Department of Ecology Water Resources Program, *Focus on Water Availability Salmon-Washougal Watershed, WRIA 28* p. 1 (Publication Number: 11-11-032 August 2012) accessed on May 30, 2017 at: <https://fortress.wa.gov/ecy/publications/summarypages/1111032.html>

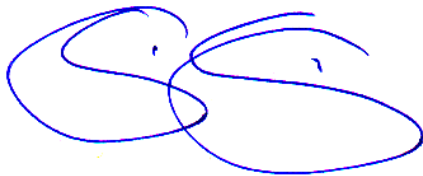
²⁸ Val Alexander Letter to Clark County p. *1 (May 24, 2016).

²⁹ Washington State Department of Ecology Water Resources Program, *Focus on Water Availability Lewis River Watershed, WRIA 27* p. 1 (Publication Number: 11-11-031 August 2012); Washington State Department of

households or occupied housing units.³⁰ However, Clark County had 5,042 existing vacant lots in the rural areas and on resource lands as of 2014.³¹ Clark County Utilities prepared a map identifying potential water sources for tax lots outside the urban growth areas. That map identified 6,175 vacant lots outside of urban growth areas and not adjacent to public water mains.³² So the County already has more lots than can be supported by the surface and ground water resources available in the rural areas and on resource lands. This counsels for ultimately including most of the rural area in the R-20 comprehensive plan designation and zone and relatively less of the rural areas in the R-5 and R-10 designations and zones. This is needed to comply with the GMA requirements to protect surface and ground water in RCW 36.70A.070(1) and (7).

Thank you for considering our comments. If you require additional information, please contact me at telephone 206-343-0681 Ext. 118 and email tim@futurewise.org

Very Truly Yours,



Tim Trohimovich, AICP
Director of Planning & Law

cc: Dr. Oliver Orjiako, Community Planning Director via email
oliver.orjiako@clark.wa.gov
Mr. Gordy Euler, Clark County Community Planning via email:
gordon.euler@clark.wa.gov
Ms. Christine Cook, Clark County Prosecutor's Office - Civil Division via email:
Christine.Cook@clark.wa.gov

Ecology Water Resources Program, *Focus on Water Availability Salmon-Washougal Watershed*, WRIA 28 p. 2 (Publication Number: 11-11-032 August 2012).

³⁰ "WRIA 27-28 Reservations ESTIMATES w Totals for Clark County by Category" enclosed with this letter.

³¹ *Clark County Buildable Lands Report* p. 13 (June 2015) accessed on May 30, 2017 at:
<https://www.clark.wa.gov/sites/default/files/2015BUILDABLELANDSREPORT.pdf>

³² Clark County Public Utilities, *Water Sources for Tax Lots Outside UGAs* accessed on May 30, 2017 at:
<https://www.clark.wa.gov/sites/default/files/dept/files/community-planning/2016-update/Plan%20Adoption/07%20Water%20Sources%20for%20Taxlots%20Outside%20UGA.pdf>