

Received

SEP 09 2009

SK

ZENDER THURSTON P.S.
ATTORNEYS AT LAW

1700 D Street
Bellingham, WA 98225

P 360 647 1500

Whatcom County PDS

zenderthurston.com

TO: Whatcom County Planning Commission and Whatcom County Council
FROM: Robert A. Carmichael and Simi Jain, Zender Thurston, P.S. attorneys for
the City of Lynden
DATE: September 9, 2009
SUBJECT: UGA Review Joint Hearing with County Council

Executive Summary:

This comment is in response to the Whatcom County Executive's Recommendation ("Executive's Recommendation") for urban growth areas in Whatcom County dated August 17, 2009. Lynden supports the Executive's Recommendation for non-residential land therefore this submission mainly addresses Lynden's disagreement with the Executive's Recommendation for residential population and land capacity for Lynden's urban growth area. As the Executive's Recommendation states, the county must justify in writing if no agreement is reached on Lynden's urban growth area. Exec. Rec. at 3.

Whatcom County is mandated, in consultation with cities, to provide areas sufficient to accommodate urban growth that is projected to occur in the succeeding twenty-year planning period. RCW 36.70A.110(2). In order to determine the size of urban growth areas ("UGAs") necessary to accommodate population growth projected for the next twenty years, Whatcom County (County) conducted a land capacity analysis. The County's land capacity analysis is used to determine whether the County's UGAs and permitted densities for the lands within its jurisdiction can accommodate the projected and allocated growth for the next twenty years.

This land capacity analysis demonstrated that the City of Lynden (Lynden) has insufficient residential land available in its UGA to accommodate Lynden's population forecast for 2029 or 2031. The County Executive recommends that Lynden's UGA for residential land be sized to accommodate a population of 16,159 without the urban reserve area for year 2029. The Executive's population projection is approximately 1900 people less than what Lynden projected for 2029. The Executive's recommendation is approximately 2900 people less than what Lynden projected for 2031. The Executive's recommendation for additional residential land in the UGA is 172 acres less than what Lynden projected it needs for 2029.

The Executive's recommendation with the urban reserve area for population is 17,116. This population allocation is still 1005 people less than what Lynden projected for 2029 and 1911 people less than what Lynden projected for 2031. Lynden's projections are based upon the Growth Management Council Committee's ("GMCC") recommended population forecast of 253,951. While the Executive states that his recommendations are based on the population projection by Berk and Associates (251,490), the Executive's recommendation only accounts for 245,973. Table 1, Exec

Rec. The County must show its work and explain how it decided upon the population forecast for Whatcom County and for Lynden.

Based on the existing record, it appears that the Executive first determined how much land he felt should be included in Lynden's UGA and then picked a population allocation that would fit the UGA. This approach is backwards and does not meet the requirements of RCW 36.70A.110. The required approach under the GMA (and the approach that Lynden used) is to first project the population for the next 20 years and then determine how much land is necessary to accommodate that projected population growth. It does not appear that the County has undertaken this task and it has certainly not "shown its work" as required.

In addition, in Lynden's case the Executive misapplied the concept of an "urban reserve area" by substituting it for a mandated urban growth area. An urban reserve area cannot be used to accommodate Lynden's projected growth for the next twenty years. Urban reserve areas are planning tools which may be used to accommodate growth *beyond* the required twenty year planning period. As the Executive's Recommendation states, these urban reserve areas are meant to include areas that appear to be suitable for future inclusion within the urban growth area. Exec. Rec. at 2.

The GMA requires that the 20 year population projection be accommodated in urban growth areas. RCW 36.70A.110. There is no provision for an "urban reserve area" in the GMA. The County is not required by the GMA to establish such urban reserve areas. Some counties have set aside urban reserve areas, but only as place holders for potential future growth beyond what is needed in urban growth areas for the 20 year planning period. Urban reserve areas are not substitutes for urban growth areas. Rather, the purpose of an urban reserve was articulated by the CPSGMHB when it held the "Act creates an *on-going* duty for Washington's communities to plan for future growth, including preservation of the flexibility to increase the UGA land supply at a date beyond the immediate twenty year planning horizon." *Gig Harbor, et al., v. Pierce County*, CPSGMHB Case No. 95-3-0016, Final Decision and Order at 41 (October 31, 1995). This is the purpose of the urban reserve.¹

The Planning Commission should recommend supporting Lynden's proposal as it is consistent with the GMA and accounts for the local condition in Lynden. Lynden urges the Planning Commission to recommend Lynden's proposed population forecast for 2029 and 2031 and an increase UGA for Lynden in the amount of 326 gross acres to accommodate its projected population for the next twenty years.

A. Executive Recommendation compared with Lynden's proposal

¹ In addition to being a misapplication of the urban reserve concept and an unlawful substitute for an urban growth area, the County's proposed Comprehensive Plan amendments do not provide the assurance necessary to promote flexibility and prevent leap frog urban growth. In Lynden, this proposed urban reserve area will be in an agricultural zone and the County will be forced to zone and plan appropriately for an agricultural rural area.

The Growth Management Act (GMA) requires that counties and cities include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding 20 year period. RCW 36.70A.110(2). Whatcom County Executive's (Executive) recommendation is that Whatcom County's ("County") growth projection recommended by Berk and Associates for 2029 should be 251,490 (GMCC's recommendation was 253,951). The Executive Recommendation indicates that the City of Lynden's (Lynden) Urban Growth Area (UGA) growth allocation is 4,546, a reserve allocation of 957 with a 2029 Total Population with reserve being 17,116. Table 2, Exec Rec. This recommendation for population allocation is approximately 1900 less than what Lynden has proposed for its 2029 UGA. Again, Lynden's population allocation is based upon the GMCC's recommendation.

Lynden's proposed UGA growth allocation for 2031 is 7,414 with a 2031 Total Population being 19,027. Table 2 Exec Rec. Lynden's proposed UGA growth allocation is 6,508 for 2029 with a 2029 Total Population being 18,121. Lynden City Council Res. 804, *Exhibit A hereto*. Lynden's percentage share of the population growth within the UGA is 8.3% without counting the reserve area. Table 3 Exec Rec. Lynden's percentage share of population growth if one counts the urban reserve area allocation is 8.7%. Table 3 Exec Rec. Lynden's proposed percentage share of growth is 11.8%. Table 3 Exec. Rec.; *See also* Section B herein. Whatcom County's Comprehensive Plan 2008, indicated that Lynden's growth would be a 10.7% increase. Table 3 Exec Rec; Berk & Associates Memo 01.13.09, *Exhibit B hereto*. If one calculates Lynden's proposed population percentage increase for 2031 (7,414) using the County's overall population projection for the County (54,973), Lynden would have a 13.5% increase. If one calculates Lynden's proposed population percentage increase for 2029 (6,508) using the County's overall population projection for the County, its share would be 11.8% increase. So essentially, the factor with the biggest impact on Lynden's numerical growth allocation is which total Whatcom County population estimate one uses for the calculation. With regards to employment, Lynden proposed a 10% increase or 8,391 for 2029 while the Executive proposes a 9.4% increase with a 2029 total being 7,947. Table 6, Exec Rec.

With regards to land acreage, the County is proposing 172 acre increase while Lynden is proposing 326 gross acre increase for 2029 and also for 2031. Lynden Planning Commission Res. 09-01, *Exhibit C hereto*; Lynden's Urban Growth Area: A proposal for Expansion, *Exhibit D hereto*. Lynden proposed an expansion of its UGA to the property lines midpoint between Double Ditch Road and Guide Meridian Road. Lynden Planning Commission Res. 09-01, *Exhibit C hereto*. This area is approximately 314 acres including Double Ditch Road. Lynden's Urban Growth Area: A proposal for Expansion, map, *Exhibit D hereto*. The Executive's recommendation that lands west of Double Ditch Road be placed into an Urban Growth Area Reserve violates the GMA when Lynden needs additional residential land within its UGA to accommodate its twenty year population forecast. The Executive does point out that Lynden did not request the highest possible growth, the results of the land capacity analysis show that they will not be able to accommodate that population within their boundary without modification in plans. Exec. Rec. at 23. It's not certain what the Executive means about "modification in plans". There is no requirement that Lynden modify any plans at this juncture. The Executive's recommendation specifically states that Lynden's proposal is supported by the Lynden's capital facility plans for water and sewer systems. Exec. Rec. at 16.

B. Historical Support for Lynden's Proposal

Lynden's proposal is a result of over a year of active participation with Whatcom County. Lynden, as a small city in the County, entered into an interlocal agreement with the County whereby it agreed to attend monthly meetings with the County, provide the County with information and helped fund the County's UGA review. This Interlocal Agreement (Whatcom County Contract No. 200811012) was approved November 17, 2008 by the Lynden City Council during its regular meeting and executed by Mayor Louws on December 16, 2008. Whatcom County established the Growth Management Coordinating Council (GMCC) consisting of elected officials from each jurisdiction and the Technical Advisory Group (Planning Directors from each jurisdiction). Berk and Associates, the County's consultants, advised a two phased approach for population forecasting. Phase I was designed to be a mathematical allocation of population and employment growth based largely on historic trends. Berk & Associates Memo 01.13.09, *Exhibit B hereto*. Phase II would use Phase I allocations as a starting point but would open up the allocation process for discussion and negotiation amongst the affected jurisdictions. *Id.* Lynden's proposal is a result of its work in Phase II.

The GMCC proposed a land capacity methodology to the County Council for its approval in December 9, 2008. Lynden Executive Summary for Action 12.15.08, *Exhibit E hereto*; See also GMCC methodology 11.26.08, *Exhibit F hereto*. During the Joint Session between the County Council and the County Planning Commission, David Stalheim, County Planning Director stated that the County stipulated that the UGA review will be for a 20 year period which would be to the year 2029 if completed this year. Joint County Council and County Planning Commission meeting, 02.17.09. The County plans to utilize a different growth forecast for its 2011 Comprehensive Plan update process. *Id.* The County requested that Lynden provide a 2029/2031 population number to their planning Department by March 25, 2009. Executive Summary for Discussion, 03.12.09, *Exhibit G hereto*. Lynden's average annual growth rate from 1980 to 2008 was 3.82%. Lynden's average 5 year growth rate from 1980 to 2005 was 17.3% - peaking in 1995 and declining into 2008. Lynden's average 10 year growth rate from 1970 to 2000 was 19.8% - with the highest rate of growth between 1990-2000. Whatcom 2031 Powerpoint presentation re Lynden's Urban Growth, *Exhibit H hereto*; City of Lynden Council and Planning Commission Joint Meeting Minutes 03.12.09, *Exhibit I hereto*. Lynden used a range of 11% to 12.5% growth rate instead of the upper historical range of 17% percent as the growth rate from 1985 to 2008 was slower in the past five (5) years and ten (10) years. Lynden's UGA: A Proposal for Expansion at 2, *Exhibit D hereto*. This range is also based on Lynden's capacity for water and waste water treatment plants. *Id.* Lynden submitted its population projection to the County as requested via a memo to Stalheim dated 03.31.09. In said memo, Lynden indicates that the projections are 18,121 for 2029 and 19,027 for 2031. Memo Harksell to Stalheim 033109, *Exhibit J hereto*. Lynden proposed to retain its non-residential urban growth area. *Id.* Further, Lynden reserved its rights to propose its residential urban growth area until an extension is granted. *Id.* Lynden did recognize however that the Land Capacity Analysis showed a deficit of residential land supply. *Id.*

The County's DEIS indicates it was prepared for the County's 10-Year UGA and was issued on May 8, 2009. However, it is labeled Whatcom 2031. The DEIS was prepared according to the scope for the EIS set forth in February 2009. Minutes Special Joint County Council and Planning Commission meeting 02.17.09. Therefore, the DEIS was not prepared based on Lynden's population projection submitted by Lynden to the County Planning Department in March 2009. The DEIS demonstrates that any of the proposed alternatives with a range of future population for Lynden from 16,318 to 20,193 results in a deficit in land supply. DEIS Table 2-2. The DEIS also indicates that Lynden has a residential land net deficit under any of the proposed alternatives. See Table 2-7, DEIS. Under the no action alternative, Lynden has a deficit of 73 acres; under the no action trends alternative, Lynden has a deficit of 141 acres; under Action Alternative X, Lynden has deficit of 270 acres; and finally, under Action Alternative Y, Lynden has a deficit of 351 acres. *Id.* The Executive's proposal for residential land is less than the acreage estimated for Alternative X or Alternative Y in the DEIS. DEIS table 2-7. It is clear that the Executive's recommendation will not accommodate Lynden's proposed population growth under Alternatives X or Y.

The GMCC presented their final recommendation to the Council on July 1, 2009. GMCC UGA Review Recommendations. This recommendation was presented after the DEIS was issued in May 2009. Table 3 of the GMCC Recommendation indicates that the GMCC recommended that Lynden's population allocation for 2031 is 7,414 or 19,027 or 11.8%. Table 3 Exec Rec, GMCC UGA Review Recommendations. Furthermore, the employment allocation for Lynden also recommended by the GMCC is 4,747 or 9,465 or 10%.

In July 14, 2009, Stalheim informed the County Council of three (3) options for review and consideration. Memo from PDC to Council 07.14.09. During the Whatcom County Planning Committee meeting, PDC planner Craven requested that the Committee recommend one of the proposed options for the FEIS. County Council Planning Committee Meeting Minutes 07.21.09, *Exhibit K hereto*. It was during this meeting that the Committee suggested that the County Executive direct Planning about which choice to work on. *Id.* During this meeting, Stalheim indicated:

Stalheim stated the allocation requests would be the same. The urban growth area would be smaller, but an urban reserve would mimic the jurisdictions' requests. In the next two years, the cities would show the work they've done on the capital facilities and services plans, if necessary, and the County would amend its plan to include the urban reserve in the urban growth area.

This statement suggests that the County is using the urban reserve zoning as a place holder for possible future inclusion in the UGA. Also, Stalheim states that the allocation requests would be the same with the urban reserve area. There is no such provision for an urban reserve area in the GMA. That is, the County is not required by the GMA to establish said areas. Urban reserve areas are not substitutes for urban growth areas. The CPSGMHB has held the "Act creates an *on-going* duty for Washington's communities to plan for future growth, including preservation of the flexibility to increase the UGA land supply at a date beyond the immediate twenty year planning horizon. *Gig Harbor, et al., v. Pierce County*, CPSGMHB Case No. 95-3-0016, Final Decision and Order at 41 (October 31, 1995). The County's urban reserve areas will hamper the County's flexibility to

include these areas in the UGA in the future as it is much more difficult to have urban densities once rural densities are established.

C. Why the Planning Commission should support Lynden's proposal

The Planning Commission should recommend supporting Lynden's proposal as it is GMA compliant and accounts for the local condition in Lynden. Lynden is in the best position to account for its historical growth and future growth and the factors affecting its community. Lynden's proposal is within the range of alternatives suggested by the County's DEIS. Furthermore, Lynden's proposal is consistent with its capital facilities planning. The County Planning Director, Stalheim's suggestion that the urban reserve areas and proposed UGAs should reflect the cities' proposals is not true in Lynden's case. As stated above, Stalheim suggested that the proposed urban reserve areas plus the proposed urban growth areas would reflect the cities' proposals. In Lynden's case, the urban reserve area plus the proposed urban growth area is less than what Lynden proposed.

Lynden's achieved density reflects its efforts to utilize its urban areas their fullest. Urban density in Lynden has increased. Lynden's achieved density when it adopted its first comprehensive plan in 1993 was just over two units per acre. At that time more than 77% of the residentially zoned land in the city limits was zoned at a density of 4 units per acre. Today, Lynden's achieved density is 5.3 per acre with 64% of land of the residentially zoned land zoned at four units per acre. Clearly Lynden has worked to increase its zoning density on fewer acres. Lynden's UGA Proposal for Expansion at 4, *Exhibit D hereto*. The County's general criteria set forth in its Comprehensive Plan Amendments for transferring properties from an urban reserve area to an urban growth area are presently satisfied by Lynden. Comp Plan Amendment p. 2-71. The only criteria not met by Lynden is the requirement of an interlocal agreement per criterion number 4. *Id.* An interlocal agreement is dependent upon the County's cooperation.

The Executive's recommendation is far from what Lynden needs to accommodate its projected growth as required by the GMA. The Executive's recommendation is slightly less than the no action trends alternative in the DEIS. The No Action Trends Alternative assumes future growth that matches the historic pattern of urban and rural growth. DEIS 1-4.

Expansion of Lynden's UGA by the area proposed by Lynden will allow the City to perform road and ditch improvements to Benson and Double Ditch roads, adding 326 gross acres/246 net acres. Lynden Planning Commission Res. 09-01, 05.07.09, *Exhibit C hereto*. These improvements will help alleviate the massive flooding. While Lynden's proposal involves the removal of agricultural land from a rural designation to an urban designation, the agricultural land slated for removal is not prime agricultural land. This land has a seasonal high water table and becomes adequate for crop production once the drainage system is adequate. Soil 45 and 62, Soil Survey of Whatcom County Area, Washington done by the USDA in cooperation with the Washington State Department of Natural Resources, *Exhibit L hereto*. See also letter to Executive from Ebe Farms LLC dated 08.17.09, *Exhibit M hereto*. Lynden's policies for annexation are among the strictest in the state, requiring the City to fall below a certain land supply within the city limits before annexing

additional lands. These policies also require that the City annex land for residential development that is zoned for development by Whatcom County before agricultural lands are annexed. Lynden's UGA Proposal for Expansion at 5, *Exhibit D hereto*.

Without a more realistic population projection for the next 20 years, Lynden's utility plans will also be greatly affected. Lynden adopted a water system plan (2009) and sewer system plan (2007) based upon the County's current Comprehensive Plan and last population projections conducted by the County to 2022. These plans resulted in Lynden's investment into its utility infrastructure designed to serve the area proposed by Lynden for inclusion in its UGA. The effect of the Executive's Recommendation to subtract the land area west of Double Ditch Road from Lynden's proposal, would result in a loss in revenue of approximately \$5.6 million dollars in capital facilities revenue which the City needs to pay for the facilities.

For sanitary sewer, over the past 5 years, the City of Lynden has invested approximately \$7,403,000 in capital improvements based on population projections consistent with past Whatcom County Comprehensive Plans and population allocations. The impact of decreasing the projected population and withholding land supply to support that population is that rate payers, rather than new home construction and developers will bear the burden of paying a higher proportion of those costs. Preliminary estimates show that the average, single family equivalent, household will pay an additional \$1,100 in utility rates over the planning period.² This is in addition to any other rate increases needed to adjust for the rising cost of operation. Under the County's County Wide Planning Policies, "The size and location of Urban Growth Areas shall be consistent with adopted local policies and with the capital facilities plans." Appendix C, County Comprehensive Plan, County Wide Planning Policies, Policy C-2, p.C-4.

Urban Reserve Areas are not the same as Urban Growth Areas. While Lynden recognizes that this planning tool has been used by other Washington jurisdictions, (such as Clark County) this cannot be seen as a substitute for UGAs. In *Achen et al. v Clark County* the WWGMHB stated,

While an urban growth boundary does not have to be cast in concrete, it must have liberal applications of superglue. The County must make a choice on remand between the use of a market factor in the vacant lands analysis and the use of urban reserve areas. The County's concept of incremental movement of the urban growth boundary to always have a 20-year planning horizon is not in compliance with the GMA. To a large extent, the reason for that noncompliance is because of the lack of standards for moving the boundary into the URA and the lack of strong DRs from the County and/or the affected city to implement tiering and infill.

² The City's 2008 Water Comprehensive Plan is also based on a 20-year population projection consistent with past Whatcom County plans. The City is currently reviewing construction options for improvement of the water treatment plant to meet current and future demand. The construction estimate for a new treatment plant, meeting all current state and federal requirements is \$22,000,000 with a portion of the project being funded through grants and loans. The time to build appropriate capacity is now, while there is funding available for the project, rather than later, when funding will be scarce for the upgrade of a "new" plant.

Achen, et. al., v Clark County, et. al., WWGMHB Case No. 95-2-0067, Final Decision and Order (09.20.95).

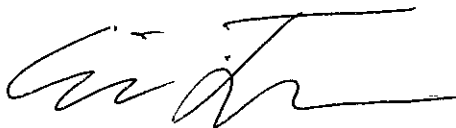
Lynden needs more land in its UGA to accommodate its population for the next twenty years and there is no guarantee, without agreement from the County, that Lynden's UGA will be expanded to include the proposed urban reserve area. The County's proposed Comprehensive Plan Amendment related to urban reserve areas are not mandates. There is no security in a policy which indicates that:

Properties in these areas should generally have land use designations of no more than one unit per ten acres, and uses such as agriculture, forestry, conservation, and low density residential development, may be encouraged provided that the continuation of such uses may not be a basis for preventing future expansion of the Urban Growth Area to the Urban Growth Area Reserve. ... Expansion of urban growth into the Reserve area may occur if criteria are met.

Amendment to Comprehensive Plan at p. 2-71.

If the County's goal is to reduce density in the rural area and direct population in the urban area, then it is logical to have a greater UGA for Lynden. The Executive's Recommendation does not comply with the County's own County Wide Planning Policies. For instance, "The county shall discourage urban level development outside Urban Growth Areas and outside of areas currently characterized by a development threshold greater than a rural development density". Appendix C, County Comprehensive Plan, County Wide Planning Policies, Policy B-2, p.C-3. Essentially, what the Executive's recommendation has done signifies that there will most certainly be significant growth in the rural areas surrounding Lynden as its UGA is presently inadequate. Furthermore, the Executive's Recommendation is inconsistent with the GMA goal pertaining to urban growth to wit: "Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner." RCW 36.70A.020(1).

Thank you for your consideration,



Bob Carmichael
Simi Jain

Exhibits to
Memo re UGA Review Joint Hearing with County Council
From Robert A. Carmichael and Simi Jain, Zender Thurston, P.S.
attorneys for the City of Lynden

Exhibit	Description	Date
A	Lynden City Council Resolution No. 804	April 6, 2009
B	Memorandum to Whatcom County Comprehensive Planning Team from Kapena Pflum and Brett Sheckler, Berk & Associates, re Phase 1 Allocations of 2031 Growth to Planning Areas	January 13, 2009
C	City of Lynden Planning Commission Resolution 09-01, recommendation for approval of Residential Expansion of the UGA	May 7, 2009
D	Lynden's Urban Growth Area: A proposal for expansion, Preliminary Draft	May 5, 2009
E	Excerpt from Lynden Executive Summary for Action	December 15, 2008
F	Memorandum to Growth Management Coordinating Council, from Whatcom County Planning Directors, re Recommendation regarding Land Capacity and Demand Methodologies and Population and Employment Allocation Methodologies	November 26, 2008
G	City of Lynden, Executive Summary for Discussion re Joint Work Session on Population and Urban Growth Areas	March 12, 2009
H	"Whatcom 2031: Lynden's Urban Growth" <i>Powerpoint presentation</i>	March 2009
I	City of Lynden Council and Planning Commission Joint Meeting Minutes	March 12, 2009
J	Memorandum to David Stalheim, Director, Whatcom County Planning, from Amy Harksell, City of Lynden Planning Director	March 31, 2009
K	Minutes, Whatcom County Council Planning and Development Committee	July 21, 2009
L	<i>Excerpt from</i> Soil Survey of Whatcom County Area, Washington, by Soil Conservation Services, US Department of Agriculture	May 1992
M	Letter to Whatcom County Executive from Greg Ebe, Ebe Farms LLC (and other signatories), requesting that the Executive concur with and support Lynden's request	August 17, 2009